UK: Employment Update

This edition of Employment Update considers two Court of Appeal decisions that explore when the courts can rewrite restrictive covenants that are toothless and whether an employer can increase a disciplinary sanction at the appeal stage. Whether obesity is a free-standing condition requiring protection from discrimination and whether correspondence from an HR consultant can contractually bind an employer in relation to its employees are questions considered in two further cases covered in this Update.

Key issues

- HR Consultant's grievance response letter capable of contractually binding an employer
- Obesity can amount to a disability requiring reasonable adjustments
- The Judicial Blue Pencil cannot rewrite poorly drafted restrictive covenants
- Disciplinary procedure: employer not permitted to increase sanction on appeal

HR Consultant's grievance response letter capable of contractually binding an employer

Employers may make use of third parties such as HR consultants or lawyers to deal with grievance and disciplinary issues on their behalf. A recent decision of the President of the Employment Appeal Tribunal (EAT) clarifies that, in some circumstances, a third party's correspondence with the employer's employees can give rise to a binding contract rendering it extremely important to ensure that the information given to the third party is correct. The decision also illustrates that a binding contract can be created without the need for express employee consent.

Following a grading review by their employer, the Claimants appealed their grading and pay level, however, the outcome of that appeal was never communicated to them. As a consequence they raised a grievance complaining that they had never been told the outcome of the pay/grading appeal decision.

The employer appointed an HR Consultant to deal with the grievance. The HR Consultant sent a letter to the Claimants incorrectly informing them that they were previously on grade 4 and had now been promoted to grade 5. In reality, they were previously on grade 3 and had only been promoted to grade 4. The incorrect statement was also affirmed by an HR officer in the council 3 months after. The Claimants worked on in the expectation that they would be paid according to this new grading. When that pay failed to materialise they brought an unlawful deduction from wages claim.

The employees argued that the HR Consultant's letter meant they were entitled to be paid at a grade 5 level. The employer disputed this on two grounds; first it argued that the HR Consultant's letter had no contractual effect because it had been written in response to a grievance and the Consultant had no actual or ostensible authority to make decisions as to pay and grading; secondly it argued that the letter was mistaken, it had never been the intention to re-grade the employees to grade 5 and the employees must have realised it was a mistake so no binding contract could have been created.

The EAT held that the letter was capable of having contractual effect. The complaint made by the Claimants was made to the employer, not the HR Consultant in any personal capacity. The employer arranged for the HR Consultant to give an answer on its behalf. The answer was therefore given by someone held out by the employer as providing an authoritative answer to the employees' query. Although the HR Consultant was not authorised to decide pay, the HR Consultant was authorised to communicate what others had decided. The key determinant is whether a communication is intended to set out what is being offered and is from someone suggested by the employer as authorised to make that communication, when viewed objectively. The EAT gave an example of a letter written by a manager's secretary on headed notepaper recording an offer being made, as being a binding offer.

The EAT rejected the suggestion that the employees had to indicate their acceptance of the new grading in order for a binding contract to arise. It considered that it would be completely artificial to suggest that if a pay rise is offered to an employee they will be bound to accept the pre-pay rise rate of pay unless and until the employee signifies formal acceptance of the new pay rate. By analogy, where an employer announces the amount of an employee's bonus award arguably no formal acceptance of the sum in question is required.

The EAT accepted that in cases where a pay rise goes hand in hand with new duties then something more than passive acceptance might be required.

Having regard to the employer's argument that there could be no binding contract because the employees must have known there was a mistake, the EAT accepted that if the employees recognised or ought to have recognised the HR Consultant's letter was a mistake there could be no binding contract. If, however, that was not the case and it was a unilateral mistake by the employer, a binding contract would be formed. The case was sent back to the Tribunal to consider this issue.

[Hershaw and others v Sheffield City Council]

Disciplinary procedure: employer not permitted to increase sanction on appeal

If an employee is subject to disciplinary proceedings, is an employer entitled to increase any disciplinary sanction imposed if the employee exercises a right to appeal? This was the question considered by the Court of Appeal.

M had received a final written warning from her employer following a finding of misconduct. M appealed the disciplinary decision; however, the appeal panel upheld the findings of misconduct. The appeal panel then reconvened the appeal hearing to consider the appropriate sanction. The disciplinary procedures were incorporated into M's employment contract. Before the appeal panel reached its decision M attempted to withdraw her appeal and commenced proceedings for an injunction to prevent the employer from reconvening the hearing to consider sanctions.

The Court of Appeal held that the right to appeal is provided for an employee's benefit or protection. Unless the contractual disciplinary procedure expressly provided that a sanction could be increased upon appeal, the employer will have no right to do so. The Court held that the statement in the ACAS Guide to Disciplinary Procedures that a sanction cannot be increased on appeal was relevant, particularly because the employer's disciplinary code referred to the ACAS Guide. Another factor influencing the Court's decision was the fact that there was no further right of appeal. Accordingly, if the sanction was increased from a written warning to a dismissal at the appeal hearing M could not, in any way, appeal this more serious sanction. M would therefore be deprived of protection against capricious action by the employer.

In this case, the disciplinary procedure was incorporated into the employment contract itself, providing the employee with the platform to seek an injunction to prevent the employer acting in breach of contract. In cases where an employer operates a non contractual disciplinary procedure, if a disciplinary sanction is increased on appeal this could, depending on the factual matrix, give rise to a claim of breach of the implied term of trust and confidence and/or unfair dismissal. If such flexibility is needed, express reference to the

potential for increasing the sanction and a further right to appeal should be incorporated into the disciplinary procedure.

[McMillan v Airedale NHS Foundation Trust]

Obesity can amount to a disability requiring reasonable adjustments

At least 23.1% of the adult population in the UK is classed as obese, that is having a Body Mass Index (BMI) of 30 or over. As such, it is an important question for employers whether obesity in itself is classed as a disability giving rise to an obligation to make reasonable adjustments in appropriate circumstances. The Advocate General (AG) at the ECJ has recently given his opinion on this question.

A man who had a BMI of 54 was dismissed by his employer; he claimed this was because of his obesity and brought a claim of disability discrimination. The AG considered two questions: (i) whether obesity is a self standing ground of discrimination; and (ii) whether obesity is always or can be a form of disability for the purposes of the European Directive prohibiting disability discrimination?

The AG considered that there is no general principle of EU law prohibiting employers from discriminating on grounds of obesity; i.e. it is not a freestanding protected characteristic.

The AG did however conclude that obesity of a certain severity could amount to a disability. Reviewing the case law, the AG reiterated that for an illness to be classed as a disability it has to hinder that person's full and effective participation in professional life, in general, on an equal basis with other workers. The disability does not have to make it impossible for the employee to carry out the work, it merely has to make it more difficult. The AG also considered that it was irrelevant whether a person's obesity is self inflicted in deciding whether to class it as a disability.

The AG's opinion is not surprising and it is likely, but not inevitable, that the ECJ will reach the same conclusion. In practice, employers with morbidly obese employees do need to consider whether any conditions arising from their obesity, for example coronary heart disease or depression, are themselves disabilities for the purposes of the Equality Act 2010.

[Karsten Kaltoft v Kommunernes Landsforening]

The 'Judicial Blue Pencil' cannot rewrite poorly drafted restrictive covenants

It is not uncommon for employment contracts to contain post termination restrictive covenants prohibiting an employee from all/or some of the following: soliciting former colleagues and/or clients and customers; interfering with suppliers, dealing with former customers and clients; setting up in competition; using confidential information and so on.

In terms of enforcing such covenants, the starting point is that the courts will treat them as void and unenforceable as an unlawful restraint of trade unless the party seeking to enforce can demonstrate that the covenant goes no further than is necessary to protect a legitimate interest. The court will consider the reasonableness of a post termination restrictive covenant as at the date it was entered into and not as at the date the employer is seeking to enforce it.

In certain cases, the court may be prepared to 'blue pencil' a clause in order to severe an unreasonably wide provision if it is possible to do so without altering the remainder of the provision which must continue to make sense and not be unreasonably wide.

A recent decision of the Court of Appeal illustrates the care needed when drafting a covenant to ensure it will provide the necessary protection and the limitations on when the courts will use their blue pencil.

In the case in question, the non compete covenant in H's employment contract, in essence, provided that he could not work for any company if the work was "in connection with any products in, or on, which he...was

involved whilst employed....". During the course of his employment H had only been involved with two products which were provided exclusively by his employer, P. No other company provided those products. This meant that the clause was pointless, if no other company provided those products H could go and work for anyone; it provided P with no protection.

P applied for an injunction to enforce the non-compete covenant. The High Court considered that something had gone wrong with the drafting of the covenant and wielded its blue pencil to add wording to the covenant that would produce a commercially sensible result and provide the protection that P intended to secure.

On appeal the Court of Appeal held that this was wrong. In its view the wording of the covenant was clear and indeed had no commercial effect leaving P with a toothless restrictive covenant and no protection. However, it considered that it was a case where the draftsman had simply not thought through the extent to which the restriction would achieve any practical benefit to P when H left its employment. P had made its bed and therefore had to lie upon it; it was not for the court to rewrite it.

Contacts

Chris Goodwill
Partner

Imogen Clark
Partner

Mike Crossan
Partner

Alistair Woodland
Partner

Tania Stevenson
Senior Professional Support Lawyer

T: +44 (0) 20 7006 1000
F: +44 (0) 20 7006 5555

To email one of the above please use:
firstname.lastname@cliffordchance.com

When drafting restrictive covenants consider:
1. What the covenant is intended to protect – e.g. customer contacts, commercial information etc?
2. Whether the nature of the employee's role is going to put him in a position where he could damage those interests on his departure?
3. What period of restriction is needed to protect that interest?
4. Whether the geographical scope bears any resemblance to the area/market place the employee will be working in?

[Prophet Plc v Huggett]