UK: Employment Update

In this update we review the proposed extension to the parental leave regime, an EAT decision on what type of disability discrimination claims arise on ill-health terminations and a second EAT decision confirming that employers may defend a breach of contract claim by arguing sums owed to them can be set-off against the sums claimed from them. Finally we consider some of the principles emerging from the Court of Appeal in a case where an employer obtained a declaration that an employment contract had not terminated in circumstances where the employee failed to give notice in accordance with the contract.

Key issues

- Parental Leave: extension of regime
- Disability discrimination: ill health dismissals
- Shared Parental Leave
- Set-off defence is available in the Employment Tribunal
- Termination on short notice: employer is entitled to treat the contract as continuing

Parental Leave: extension of regime

At present employees with one year's continuous service are entitled to 18 weeks' unpaid parental leave in respect of children under the age of five. Employees of disabled children are entitled to take this leave entitlement up to their child's 18th birthday. As part of its Modern Workplace Consultation, the Government proposed extending the period during which unpaid parental leave can be taken by eligible employees up to the child's 18th birthday. Since that Consultation there has been relative "radio silence" in relation to when this change will be implemented. The Government has now published draft regulations that are intended to come into force on 5th April 2015 implementing these proposals.

The draft regulations are, however, silent on whether there are any transitional arrangements that will apply to employees whose children are over the age of five but under the age of 18. Will such employees who have not used up their entire 18 week parental leave entitlement be able to use up the balance of any untaken leave in relation to such children? Alternatively, is the new extended regime intended only to apply to employees whose children are currently under the age of five? On the face of the draft regulations it would appear that employees with the requisite service who have not taken 18 weeks of parental leave will be able to take the balance until their child's 18th birthday. This may give rise to evidential issues in the case of employees who have changed employment.

[*The Maternity and Parental Leave etc (amendment) Regulations 2014*]

Disability discrimination: ill health dismissals

The Employment Appeal Tribunal (EAT) has recently given guidance to parties and employment tribunals on the type of disability discrimination claim that may be brought by a disabled claimant who is dismissed as a result of ill health absence.

C suffered from a condition that qualified as a disability for the purposes of the Equality Act 2010 (the Act). C's employer, GD, made adjustments to his working conditions to provide for extra breaks and time off for his medical conditions. In spite of these adjustments, C had significant periods of absence totalling 41 and a half weeks in three years. The majority of the absences were related to C's disability; however, some absences

were attributable to conditions that were not disabilities for the purposes of the Act. As a result of this extended period of absence, C was issued with a final written warning, effective for 24 months. Following this written warning, C had two further periods of absence due to his disability. These were relatively short and GD didn't take any action in relation to them. However, C then sustained a shoulder injury and was off work for a further period of three months before returning to work. An occupational health report indicated that whilst the shoulder injury would only last a few months (and was not a disability) the disability was a lifelong problem and C's attendance at work was likely to mirror his previous attendance. A formal sickness hearing was held and C was dismissed.

C brought a claim of disability discrimination on the grounds that GD had failed to make a reasonable adjustment. The Employment Tribunal held that GD had applied a provision, criterion or practice (PCP) of requiring consistent attendance and that C had been placed at a substantial disadvantage compared to non disabled persons because of that requirement. The majority then went on to find that the steps that GD should have taken to avoid that disadvantage would have been to disregard the final written warning.

The EAT was of the view that the case law demonstrated that it is difficult to analyse a claim relating to dismissal for poor attendance as a claim of a failure to make a reasonable adjustment. It went on to state that parties should consider whether the duty to make a reasonable adjustment is really in play or whether in fact the claim is one of discrimination arising out of disability. The Act prohibits unfavourable treatment because of something arising in consequence of disability unless the treatment is a proportionate means of achieving a legitimate aim. In this case discrimination arising out of disability was not pleaded. The EAT, however, considered that it would have been a more appropriate claim, the unfavourable treatment being the dismissal arising in consequence of the disability absence. That said, the EAT, commented that even if a claim of discrimination arising from disability had been brought it would have been doomed to failure. This was because even though C was likely to have been able to establish that the dismissal and the written warning were unfavourable treatment, it would have been legitimate for GD to aim for consistent attendance at work and the carefully considered final written warning was a proportionate means of achieving that legitimate aim.

Having regard to the actual claim that C brought, the failure to make a reasonable adjustment, the EAT considered that the Tribunal had been mistaken in its analysis. The majority had held that it was a reasonable step to disregard the final written warning. The EAT, however, did not consider that disregarding the warning was in fact a "step at all". In addition, it was also of the view that the fact that GD had not dismissed C for two relatively short periods of absence following the final written warning did not provide a basis for saying that disregarding the final written warning was a step which was reasonable for GD to take. It considered that it would be remarkable and regrettable if an employer by showing leniency to a disabled person in respect of some short period of absence late in an absence management procedure then became required by law to disregard all disability related absence prior to that time whatever the impact on the business of doing so. The Act only requires an employer to take such steps that are reasonable to avoid the disadvantage to the disabled employee. Disregarding the warning was plainly not a reasonable step.

In the EAT's view this was a case not about taking practical steps to prevent disadvantage to a disabled employee (i.e. a reasonable adjustment case) but in fact a case about the extent to which an employer was required to make allowances for a person's disability. In the future it is likely that where an individual is dismissed because of ill health absence arising from disability that any claim will be framed as both a failure to make a reasonable adjustment discrimination claim and a claim of discrimination arising from disability. It is clear that an employer will not be required to retain an employee indefinitely where he or she is absent for extended periods on ill health grounds due to a disability. However, before such an employee is dismissed the employer must explore the extent to which any adjustments can be made to reduce the ill health absence and what the prognosis for absence is going forward.

[*General Dynamics Information Technology Limited v Carranza]*

Shared Parental Leave

ACAS have produced a good practice guide for employers and employees on the new shared parental leave regime that comes into effect in relation to children born or placed for adoption on/after 6 April 2015.

The ACAS guide can be found here.

BIS Technical Guide to Shared Parental Leave and Pay can be found here.

It is also understood that BIS may be producing a single form for use by employees wishing to take shared parental leave that will combine the various different notification obligations (i.e. the Curtailment Notice, the Entitlement Notice, the Period of Leave Notice and the Shared Parental Leave Pay Notice). The timeframe for publication of this form is not yet known.

Breach of contract claims in the Employment Tribunal: set-off defence is available to employer

Breach of contract claims may be brought by a claimant in the Employment Tribunal if the claim relates to a breach of contract that arises, or is outstanding, on termination of employment. An employer may only bring a breach of contract claim in the Tribunal if the claimant has already brought a breach of contract claim; there is no freestanding right for an employer to bring such a claim. An employer has 28 days from the date of receipt of the ET1 making the breach of contract claim in which to bring a claim and will have to pay a counterclaim fee of £160.

A recent EAT decision highlights that in certain circumstances it may not be necessary for an employer to bring a breach of contract claim; instead a defence of "set-off" may be available against a claimant's breach of contract claim.

'Set-off' is a pleading by way of defence to the whole or part of a claim. The party is acknowledging the claimant's demand but is making a demand of a quantified sum of its own to reduce or extinguish the amount claimed by the claimant.

R was dismissed by H due to a poor attendance record. He brought a number of claims including a breach of contract claim relating to loss of pension rights during his notice period. H brought a breach of contract counterclaim in relation to wages it had overpaid R. The amount overpaid exceeded the amount that R was claiming in relation to his pension rights. The Tribunal held that H's contract counterclaim was out of time and refused permission to extend time. However, it allowed H to use the overpayment as a set-off defence against the pension rights claim.

The EAT upheld this approach finding that an employment tribunal does have jurisdiction to consider a set-off defence against an individual's breach of contract claim. Employers have a choice of bringing a breach of contract counterclaim or in the alternative they can defend a claim on the basis of set-off of a debt.

Although a factual scenario such as this is unlikely to arise often, it is helpful to know that employers can resist a breach of contract claim in the Employment Tribunal by way of set-off and need not pursue a separate breach of contract claim particularly if, as in this case, the time limit for lodging such a claim was missed. Clearly the utility of such a set-off defence will depend on whether the amount claimed by way of set-off exceeds the value of the claimant's breach of contract claim, and, on the strength of the claimant's claim in the first place. If the claimant's case fails, there will be nothing from which a set-off can be made.

[Ridge v HM Land Registry]

Termination on short notice: employer is entitled to treat the contract as continuing

A recent Court of Appeal decision has explored the extent to which an employer can hold an employee to their notice period. M worked for S. His contract required him to give 12 months' notice of termination and gave S the option of putting M on garden leave if notice was served by either party, or, if M attempted to terminate in breach of contract. This was exactly what happened; M signed an employment contract with a competitor, advised S that he was leaving straight away; he then left the office and never came back to work.

S asked M to return to work to agree a termination plan but M declined to do so, so S stopped paying his salary and bonus. S wrote to M reminding him of his notice obligation and clarified that it did not accept his purported resignation as it was in breach of his contract. In subsequent correspondence M was again invited to return to work but only for a truncated notice period of six months.

S obtained a High Court declaration that M's contract had not been terminated and that he was accordingly bound by the contractual duty of fidelity and could not accept employment until the end of the truncated notice period. Injunctions were also granted to enforce M's non-solicit and non-compete restrictive covenants. The High Court rejected an argument that S had breached M's contract because it had failed to pay his salary and bonus. It held that the entitlement to be paid was conditional on an employee being ready and willing to work and M had made it patently clear he was not. The Court of Appeal upheld the High Court's decision. Although each case is invariably fact specific a number of principles can be extracted:

- When a party to an employment contract acts in repudiatory breach, e.g., by failing to give notice, the other party is not obliged to accept the breach. It may instead waive the breach and affirm the employment contract. In this case M had attempted to terminate the employment without notice S, however, waived that breach and affirmed the employment contract.

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

- If an employer exercises its contractual discretion to put an employee on garden leave in most cases it will have to pay the employee during the garden leave. An employer is not however, obliged to exercise its option to put an employee on garden leave. In this case S did not exercise its right to put M on garden leave; instead it required M to attend work. As the court observed in many cases this will not be a safe option for the employer who may wish to remove or minimise the employee's access to, and contact with, confidential information and client contacts, particularly where the employee is leaving to join a competitor.

- The courts will not grant an injunction which has the effect off compelling an employee to continue to work for the employer; i.e. to perform positive obligations under the contract. In this case only the negative obligations were enforced e.g. the restrictions against working for a competitor.

- If an employee chooses not to attend work, an employer is entitled to withhold pay and this will not amount to a repudiatory breach of contract on the part of the employer. Pay is conditional upon an employee being ready, willing and able to work; in this case M has clearly demonstrated that he was not.

[Sunrise Brokers LRP v Rodgers]