CLIFFORD
CHANCE

Newsletter January 2017

UK: Employment Update

Welcome to the first Employment Update of 2017 in which we consider a medley of topics ranging from when, and how, relocation clauses can be invoked in the context of a redundancy exercise, a call for evidence on corporate liability for economic crimes and whether an employee who is off long term with stress is invariably disabled.

A long period off work with stress is not conclusive that an employee is disabled

Frustratingly it is not uncommon for employees who have raised a grievance to go off sick with "stress" when they are unhappy with the grievance decision or the way in which it is being handled. Also not uncommon is for an employee to raise a grievance shortly before, or after, a disciplinary procedure is instigated.

Does the fact that an employee is signed off with "stress" for a long period of time automatically render them disabled for the purposes of the Equality Act 2010 (EqA), possibly necessitating adjustments to disciplinary and grievance procedures? The Employment Appeal Tribunal (EAT) has provided some useful guidance on this issue.

In broad terms, an individual has a disability if they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out "normal day-to-day activities". Day-to-day activities include activities relevant to participation in professional life, extending beyond those occurring outside the workplace.

In the case in question, D was signed-off work for several months with various sick notes citing "work-related stress" and "stress". The medical reports stated that from a medical perspective, D could return to work as soon as possible but that there were "… *outstanding management (non-medical) issues at the workplace which are causing stress*". A further certificate stated that "*the patient feels the behaviour of certain individuals* [*is*] *what is stopping him from returning to work at the school and causing him stress*".

The EAT upheld the Employment Tribunal's decision that D was not disabled for the purposes of the EqA. Referring to earlier case law, it reaffirmed that there is a distinction between a mental condition such as "clinical depression", (which is unquestionably an impairment for the purposes of the EqA), and a state of affairs which is not a mental condition at all but simply a reaction to adverse circumstances such as problems at work or adverse life events.

The EAT acknowledged that work-related issues can result in real mental impairment for many individuals, especially those who are susceptible to anxiety and depression. However, it went on to observe that some employees can have a reaction to circumstances they perceive as adverse that becomes entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work but in other respects suffers no or little

Key issues

- A long period off work with stress is not conclusive that an employee is disabled
- Corporate liability for economic crime: a call for evidence
- Redundancy and relocation clauses: what is permissible?
- New Year: New rates

apparent adverse effect on normal day-to-day activities. The EAT felt that doctors may be more likely to refer to the presentation of such an entrenched position as "stress" rather than anxiety or depression.

The EAT held that in such a case an Employment Tribunal is not bound to find that there is a mental impairment because of unhappiness with a decision of a colleague, a tendency to nurse grievances, or a refusal to compromise such behaviours are not in themselves mental impairments; they may simply reflect a person's character or personality.

The EAT provided guidance on how a Tribunal should approach the assessment of whether a claimant has a mental impairment. The Tribunal will of course have to consider any medical evidence, but must scrutinise all the evidence to identify whether there is any evidence of a condition that has an adverse effect on the ability to carry out day-to-day activities over and above a simple unwillingness to return to work, until an issue is resolved to the employee's satisfaction.

On the facts, D's stress was largely a result of his unhappiness about what he perceived to have been unfair treatment of him. There was little or no evidence that his stress had any effect on his ability to carry out normal activities. The EAT held that the Tribunal was not bound to find that D had a disability because he had been certified unfit for work by reason of stress for a long period.

From a practical perspective, where employers are faced with employees signed-off with stress against a background of an internal grievance or dispute, thought does need to be given to whether the individual has a condition that qualifies as a disability. If the individual is known to have suffered from anxiety or depression previously, there is clearly a greater risk that the individual is not simply adopting an "entrenched" position.

In some circumstances it may be useful to ask for a medical report from occupational health or an examining doctor to expressly consider whether it is non-medical/management issues (stubborn intransigence) giving rise to the situation and to assess whether the employee should be fit to return to work absent this.

[Herry v Dudley Metropolitan Borough Council & Another]

Corporate liability for economic crime: a call for evidence

The Ministry of Justice has launched a call for evidence aimed at exploring the extent to which there is a case for changing the law in relation to corporate criminal liability for common serious economic crime offences including conspiracy to defraud, false accounting, money laundering and certain fraud offences.

The Government's concern is that as the law currently stands, it is arguably difficult to successfully prosecute large modern multinational corporations for economic crimes because they often have complex management structures. This means that it is difficult to demonstrate that the "directing mind" of the company knew about the offending activity or actively condoned or played a part in the offending.

The paper seeks views on whether this perception is borne out in practice and on the options for reforming the law, should the Government consider it necessary to do so. The Government's preferred reform option is to introduce a regime similar to that contained in the Bribery Act 2010: introducing a new "failure to prevent offence". The focus of this offence would be the failure to prevent the commission of offences by employees, agents and representatives of the company linked to the furtherance of the company's business objectives. Two variations of this model are mooted: one where the company will be strictly liable for such a failure if an economic crime is committed by its employees, agents etc. unless it can demonstrate that it had adequate procedures in place to prevent the employees (etc.) from committing the economic offence. The second option places the onus on the prosecution to demonstrate that the company did not have adequate procedures in place rather than placing the burden of proof on the company to do so.

Other options explored (albeit with less enthusiasm) include amending the law to broaden the scope of who is considered to be the "directing mind" of the company and introducing a strict vicarious liability offence, whereby the company will be guilty of the economic offence itself by virtue of the liability of its employees, representatives or agents for the economic offence.

The paper recognises that where a company is within the scope of the current senior managers and certified persons regime ("the Accountability Regime") (and for those companies that will fall within the extended Accountability Regime expected to come into effect in 2018), there is the potential for friction. The risk of increased likelihood of criminal

investigations under the corporate criminal liability regime could reduce the willingness of such firms to cooperate with the regulators, accept regulatory failings or institute remedial failings. In addition, if "the failure to prevent" option is pursued, the interrelationship between the adequacies of economic crime prevention procedures and the requirements of the Accountability Regime(s) will have to be scrutinised and measures put in place to ensure that Accountability Regime firms are not able to play the regulatory regime against the corporate criminal liability regime.

It remains to be seen what, if any, revisions will be made to extend the scope for corporate liability for economic crime. In practice, companies may wish to consider their existing policies and practices, staff training and contractual provisions to identify whether there are already obvious areas for improvement.

The call for evidence closes on 24 March. It can be found here.

Redundancy and relocation clauses: what is permissible?

In circumstances where an employer faces a redundancy situation because it is closing a particular workplace, it may be able to avoid making employees redundant if it can rely on a contractual mobility clause and instruct the employee to relocate to another of the employer's operations.

If an employer proposes to limit redundancies in this way it needs to be mindful that it cannot "ride two ponies": It cannot embark on the redundancy exercise and offer the new location as suitable alternative employment and, where such an offer is refused, then seek to invoke the mobility clause. Rather, the employer has to elect from the outset to exclude the employee(s) from the redundancy exercise and proceed on the basis that they will be instructed to relocate in accordance with the terms of the contract. If the employee refuses to comply with the relocation instruction that, can in principle, provide a fair ground for dismissal.

The EAT recently considered the fairness of dismissals in such a redundancy/relocation scenario. The employer was closing down the workplace in which X and Y worked. They were both very long serving employees with mobility clauses in their contracts that stated: "…*the company may require you to work at a different location including any new office location of the company either in the UK or overseas either on a temporary or permanent basis..."*

The employer, in reliance on this clause, instructed both employees that they were to relocate to its second site. This would give rise to an additional 20 to 30 hours of commuting time each week for X and Y. X lived close to the closing workplace and did not have a car, Y too lived close to the workplace and had done so for his whole life and was only a year away from retirement and did not want to spend the last year at work subject to the stress of a considerably extended commute.

The employees were given two months' notice of the relocation and the employer proposed various measures to assist employees with the relocation. These included a contribution towards additional travel costs for a six month period and a reduction in core working hours to allow employees with longer journeys to finish earlier to assist with the M25 traffic. X and Y both refused to relocate; each argued that the relocation clause was unenforceable and that he was redundant. They were both summarily dismissed for misconduct for refusing to comply with a lawful instruction (to relocate).

The EAT held that X and Y had not been dismissed by reason of redundancy; the employer had dismissed them for misconduct. For such a misconduct dismissal to be fair, three conditions had to be satisfied: (i) the instruction to relocate had to be lawful (i.e. was the mobility clause relied upon contractual?); (ii) the employer had to have acted reasonably in giving that instruction; and (iii) the employee had to have acted unreasonably in refusing to comply with the relocation instruction.

The EAT upheld the Tribunal's decision that the dismissals were unfair: the instruction to relocate was not lawful as the mobility clause did not have contractual effect. The relocation clause lacked certainty because it was drafted too widely; it suggested that the employee was agreeing to work anywhere in the UK or overseas. In addition, the instruction to relocate was unreasonable in light of the considerably extended commute, the fact X did not have a car and that Y had worked close to his home town for 25 years and was due to retire a year later. Finally, it was reasonable for both employees to refuse to comply with the relocation instruction.

Although the principles explored in this case are not new, the decision is a useful reminder that:

- Relocation clauses must not be too widely drafted as they risk being void for lack of

certainty. An audit of existing relocation clauses may be advisable to assess whether they can be relied upon;

- The mere existence of a contractual relocation clause will not mean that it is automatically fair to dismiss an employee who refuses to comply with an instruction to relocate;

- An employer has to act reasonably when invoking a relocation clause. For example, providing sufficiently long notice of the relocation, possibly providing some sort of transitional financial assistance. Of course in this case, such assistance from the employer could not remedy the fact that the relocation clause itself was too wide to be enforceable;

- When embarking upon a redundancy exercise, consideration should be given to whether relocation clauses can be relied upon to avoid making employees redundant.

[Brown & Root (UK) Ltd v Fitton]

New Year: New rates

2017 Statutory maternity, paternity, shared parental leave and sick pay rates

	2016	2017
Standard rate maternity/adoption /paternity/shared parental leave pay	£139.58	£140.98
Statutory sick pay	££88.45	£89.35

National Minimum Wage

Type of payment	1 October 2016	1April 2017
National Living Wage: Workers aged 25+	£7.20/ hour	£7.50/hour
National minimum wage: workers aged 21 to 25	£6.95/hour	£7.05/hour
Development Rate: workers aged 18-20	£5.55/hour	£5.60/hour
Young worker rate: workers aged 16-17	£4/hour	£4.05/hour
Apprentices	£3.40/hour	£3.50/hour

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