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UK: Employment Update

This edition of Employment Update looks at two cases which examine the necessary ingredients for an employer to be contractually bound by a promise to its employees. We also report on the latest case law development in relation to post-termination victimisation claims and a useful case exploring the approach the Tribunals should adopt when considering whether they have the jurisdiction to hear unfair dismissal claims brought by ex-pat employees. Finally we examine HMRC's proposals to address disguised employment in LLPs.

Key issues

- Townhall bonus promise was contractually binding
- MD had apparent authority to agree termination payment
- Post termination victimisation – are ex-employees protected?
- Overseas employees: when does a Tribunal have jurisdiction to hear unfair dismissal claims?
- HMRC proposals to address disguised employment in LLPs

Townhall bonus promise was contractually binding

The Court of Appeal's decision in the long running bonus case involving former Dresdner Bank (DB) employees illustrates the importance of not making unilateral promises to employees if there is no intention to be bound by them.

DB was in serious financial difficulties and one proposed solution was the sale of some of its operations. Invariably staff got "wind" of this possibility leading to widespread uncertainty about their future.

DB was then placed on the FSA's watch list because of the risks posed by the proposed restructuring. One of the risks identified by the FSA was that a significant number of key staff could leave or become disaffected. DB was advised that it would not be taken off the FSA "watch list" until plans to mitigate the risk were in place.

In order to reduce the risk of staff defections DB considered that a retention program was appropriate. Accordingly, a cash bonus pool of 400 million Euros was created. DB's CEO then held what was referred to as a "town hall meeting" which was simultaneously broadcast on the company's intranet around the world. During that announcement it was declared that a guaranteed minimum bonus pool of 400 million Euros had been created and whilst it did not give rise to individual guarantees the pool would be allocated on a discretionary basis by reference to performance.

Amongst other matters, the Court of Appeal was asked to consider whether the announcement made at this town hall meeting created a binding obligation to pay bonuses. It concluded that the town hall announcement in relation to the bonus pool did amount to an intention to create legal obligations. It was a promise made by the CEO and was part of an important strategy to retain staff, the nature of the promise was to assure staff that the bonus pool was guaranteed "come what may" and it related to the most fundamental obligation under the employment contract, pay.

The Court rejected the contention that the lack of certainty about the amount of bonus any one individual could receive meant there could be no legally binding contract. It considered that the announcement made it clear that the bonus fund would be dealt with "in the usual way" and that was sufficiently clear. A surprising conclusion perhaps?

The argument that the employees had provided no consideration for the contractual promise was also rejected because the Court considered that the claimants had given consideration by remaining with the bank and the bonus pool had influenced that decision.

The Court also explored whether it was necessary for the employees to expressly accept the contractual offer in order to give rise to a binding contract. Traditionally a contract cannot be formed in the absence of offer and acceptance, however, the Court considered that it was plain that DB had dispensed with the need for any response to the bonus offer. It was a promise without any disadvantage of any kind to the employees. Nobody hearing the bonus announcement would have considered that an employee would only benefit from the bonus pool if they positively accepted the offer.

The Court accordingly held that there was a binding contractual obligation to pay bonuses in the usual way to the limit of the guaranteed fund.

Although the facts of this case were relatively unusual it illustrates the importance of the need to exercise caution when giving assurances to employees in relation to, for example, pay rises, bonus and promotion prospects where the "assurer" is not necessarily in the position to make good on any promise.

One of the issues explored by the Court were the provisions in the contracts of employment that gave the employer the power to unilaterally vary the contract of employment. The wording was arguably unclear as to whether a unilateral variation could only be made by a member of HR in writing or whether in certain cases a unilateral amendment could be achieved by means of notifying the affected employees of the change via notice boards or the company intranet. Where an employer does wish to retain a unilateral right to vary a contract it is important to ensure that the mechanism by which a variation is achieved is clear and that the nature of the terms that may be amended is also clarified as any ambiguity will be construed against the employer.

[Dresdner Kleinwort Ltd and Commerzbank AG v Attrill]

MD had apparent authority to agree termination payment

Another recent decision illustrates how an employer can become contractually bound as a consequence of the actions of an employee who has apparent authority to give a contractual commitment when in fact no such actual authority existed.

B entered into a service agreement with Blackburn Rovers FC. The terms of the contract were agreed between B and S who was Managing Director of the football club. The contract included an early termination clause providing for the salary for the balance of the fixed term contract to be paid by way of liquidated damages if the contract was terminated early.

Blackburn Rovers argued that S did not have actual authority to enter in the contract with B other than on the basis that it was terminable on 12 months' notice, with early termination compensation capped at 12 months' salary.

B's employment was terminated early and he sued for payment of the balance of the fixed term.

The Court held that the fact that S did not have actual authority from the Club's owners to conclude the service agreement on the terms he did was immaterial to B's claim for compensation. The only issue in relation to B's compensation claim was whether S had the usual authority to enter into the service agreement on behalf of Blackburn FC by reason of his appointment as MD. If the club could not demonstrate a realistically arguable case that S didn't have such authority then it had no defence to the claim.

In practice there will be a number of people within an organisation who will have apparent authority to reach agreements on behalf of the employer including HR and senior managers. Care must be exercised to ensure that where a promise is made it is one that the promisor has authority to make. If there is no authority to bind the employer but there is no reason for the recipient of the promise to be aware that that is the case then the employer will be bound by the promise made by its agent.

[Berg v Blackburn Rovers FC]

Post termination victimisation – are ex-employees protected?

In our April briefing we reported on the Employment Appeal Tribunal (EAT) decision in *Rowstock Ltd v Jessemey* which held that on a literal reading of the Equality Act 2010 former employees are not provided with protection against victimisation that occurs after their employment has ended as a consequence of a "glitch" in the drafting of the Equality Act.

Subsequently, a differently constituted EAT, presided over by the President, has held to the contrary. The EAT's recent decision is that the wording of the Equality Act could be construed in such a way as to provide protection for claimants subject to acts of victimisation after their employment has ended because they have brought or assisted others in bringing discrimination proceedings under the Equality Act. Its view was that the parliamentary draftsman must have been aware of European case law which has upheld the right to be protected from post-termination victimisation.

There are now competing decisions at the EAT level on whether an individual may bring a claim for post-termination victimisation. *Jessemey* is being appealed to the Court of Appeal, however, until such time as the Court of Appeal reaches its decision employers would be advised to proceed on the basis that detrimental treatment of former employees that is connected with any claim of discrimination that they may have brought or any assistance that they are providing to others in relation to their own discrimination claims is likely to be actionable.

[Onu v Akwiwu]

Overseas employees: when does a Tribunal have jurisdiction to hear unfair dismissal claims?

The law on the issue of whether an employee who works overseas is entitled to bring an unfair dismissal claim before the English Employment Tribunal continues to evolve. The EAT has recently provided further guidance on the approach to be adopted by the Employment Tribunal when considering whether or not it has jurisdiction to hear an unfair dismissal claim where the claimant works overseas.

In the case in question D was employed by a UK subsidiary of an American company based in New York. D worked in Dubai. The sales he handled were processed in London. D's line manager was employed by the American parent and was based in India.

The EAT explored the case law on the territorial jurisdiction of the Tribunal and extracted the following principles:

- The general rule is that the place of employment is decisive; but
- Where the employment has much stronger connections with Great Britain and with British employment law than with any other system of law the claimant will be able to bring an unfair dismissal claim if the connection is sufficiently strong;
- If the claimant is employed wholly abroad then a comparative exercise must be carried out between Great Britain and the jurisdiction where the claimant worked;
- The country in which the claimant lives is relevant but if the claimant lives and works abroad then an *especially* strong connection with Great Britain and British employment law will be required before an exception can be made for him to bring an unfair dismissal claim;
- If the claimant lives and/or works for at least part of the time in Great Britain then a comparison of the connections with Great Britain and the country in which he works is not required. All that is required is that there is a *sufficiently* strong connection to enable it to be said that parliament would have considered it appropriate for an Employment Tribunal to deal with the claimant's unfair dismissal claim.

Where an employee works wholly outside Great Britain and a comparative exercise has to be carried out to determine whether there are stronger connections with Great Britain than with the country in which he or she worked, the following matters are likely to be relevant:

- The governing law of the contract;
- Whether any training has taken place in the UK;
- Who receives the benefit of the work;
- Where tax and social security is paid;
- How the employee is classified by his employer (for example expatriate, commuter or secondee);
- Whether the employee has a home in the UK;
- Whether there are ties to a third country; and
- Any representations made to the employee about the applicable law regime.

It is clear that each case must be examined on its own facts and there is no blanket rule that merely because an employee works wholly outside Great Britain he or she may not have a claim of unfair dismissal in the English Employment Tribunal.

[*Dhunna v Creditsights Ltd]*

HMRC proposals to address disguised employment in LLPs

HMRC has published a consultation paper setting out its proposals to address concerns that Limited Liability Partnerships (LLPs) are being used to disguise employment relationships to obtain certain tax advantages. It is proposed that:

- LLP members should no longer automatically be treated as traditional partnership partners for tax and NIC purposes.
- An LLP member who meets one of two conditions will be classed as a 'salaried member'.
- Salaried members will be treated as employees for all tax and NICs purposes.

Under Condition 1 an LLP member will be classified as a salaried member if they would be regarded as employed by the partnership.

Under Condition 2 an LLP member will be deemed a salaried member if he/she:

- Has no economic risk (loss of capital or repayment of drawings) in the event that the LLP makes a loss or is wound up;
- Is not entitled to a share of the profits; and
- Is not entitled to a share of any surplus assets on a winding up.

If an LLP member is a salaried member he will be treated as an employee for all tax purposes including: income tax, NIC's treatment of expenses, application of employer's NICs.

HMRC does not consider that the status of the following will be affected:

- Members who carry on partnership in common with a view to profit, who take the risk in the business and, who are to a significant degree, rewarded on the basis of a share in the profits.
- Members who are taken on at an appropriate point in their career in recognition of their professional knowledge skills etc (even if as junior they are substantially awarded by a fixed profit share).

It is HMRC's intention that the following will be classified as salaried members:

- Members who are engaged on standard terms as part of a mass recruitment exercise.
- Members who, having been an employee of a company, then become members of a successor LLP on essentially identical terms.
- Members who have no significant entitlement to reward that is related to profitability of the LLP and who do not risk loss of capital contributed to or accumulated in the LLP.

It has been suggested that there will be a targeted anti avoidance rule so HMRC will look at the factual reality when assessing whether Condition 1 or 2 is satisfied and will ignore contractual provisions or other arrangements if it considers that they are aimed at preventing the first or second condition being met.

The possible consequences of LLP members being classified as 'salaried members' may include:

- Salaried members will lose the benefit of income tax deferral as income tax will be collected through PAYE.
- The LLP will be liable for employer's NICs.
- LLP members who are found to be salaried partners under Condition 1 are likely to be employees for the purposes of asserting statutory employment rights in relation to unfair dismissal, whistleblowing, statutory redundancy pay and holiday pay. (It should be noted that discrimination protection already exists for partners).
- Notification by HRMC of salaried member status may cause some individuals to raise the question of their employment status and consideration should be given as to how to respond to this.
- The enforceability of restrictive covenants of salaried members (classified under Condition 1) may be construed by the courts more restrictively from the perspective that the member is an employee i.e. more restrictively than if they were a partner in a traditional partnership.

[Partnerships: A review of two aspects of the tax rules]

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