CLIFFORD
CHANCE

Briefing Note – Spring 2019

UK: EMPLOYMENT UPDATE

In this Spring Briefing we consider a Court of Appeal judgment that explores whether suspending an employee can amount to a repudiatory breach of contract. We also report on a case that is a useful reminder for firms that are currently or will be subject to the senior managers and certification regime that credibility findings of an employment tribunal are relevant to an individual's assessment of fitness and propriety. This Briefing also looks at a TUPE case which illustrates that a transferee cannot cherry pick which employees to take on.

Key issues

- Suspension of employee did not amount to a repudiatory breach of contract
- A Fit and Proper Dismissal: employment tribunal comments on credibility can be career limiting
- TUPE: transfer not personality clash was the sole/principal reason for dismissal
- Discrimination: injury to feelings compensation bands revised

Suspension of employee did not amount to a repudiatory breach of contract

The Court of Appeal has overturned a High Court decision that the suspension of a teacher was a repudiatory breach of contract allowing the teacher to resign and claim constructive dismissal.

A was a teacher who was involved in some incidents that involved the use of force with children. A was suspended pending an investigation into the incidents; this prompted her to resign the same day claiming repudiatory breach of contract by the employer; a claim that was upheld by the High Court.

The High Court's decision caused some consternation for employers seeming to suggest that suspension could provide a platform for constructive dismissal in many cases. The Court of Appeal has now clarified that the test for considering whether there has been a repudiatory breach of contract is: 'has the employer without reasonable and proper cause conducted itself in a manner that was calculated or likely to destroy or seriously damage the implied term of trust and confidence'.

In the context of the suspension of an employee the question, therefore, is whether there was reasonable and proper cause for the suspension, not whether the suspension was necessary. This will depend on the factual matrix prevailing at the time. On the facts of the case the allegations of misconduct were serious and needed to be investigated; given that the employer was responsible for safeguarding the interests of young children it was open to the judge to conclude that there was reasonable and proper cause to suspend.

It is clear from the Court of Appeal's decision that in some cases suspension will not be reasonable and can therefore amount to a repudiatory breach of contract. When assessing the reasonableness, or otherwise, of a suspension the fact and manner of suspension, the preceding background and whether the suspension is a knee jerk reaction are all factors that may be relevant.

ACAS have issued updated Guidance on Discipline and Grievances at Work; this includes a section on 'Suspension'. This states that suspension should only be considered exceptionally if there is a serious allegation of misconduct and:

- There are reasonable grounds to believe that the employee might seek to tamper with or destroy evidence, influence witnesses and/or sway an investigation into the disciplinary allegation;
- Working relationships have severely broken down to the point that there is a genuine risk to other employees, property, customers or other business interests if the employee remains in the workplace;
- The employee is the subject of criminal proceedings which might affect what they can do in their job.

The Guidance can be accessed here.

[London Borough of Lambeth v Agoreyo]

A Fit and Proper Dismissal: employment tribunal comments on credibility can be career limiting

Banks and insurers are currently subject to the senior managers and certified person regime (SMCR). With effect from 9 December 2019, SMCR will apply to solo regulated FCA firms. The SMCR regime requires employees in senior manager and certified person roles to be assessed on an annual and ongoing basis as 'fit and proper'.

A recent EAT decision illustrates how an employment tribunal's views on the credibility of an individual giving evidence is relevant to a firm's ongoing assessment of his/her fitness and propriety and may provide the platform for a fair dismissal provided the procedure followed is fair.

C brought disability discrimination proceedings against his employer, R. In its judgment the employment tribunal (ET) held that in several areas C had not told the truth or had misled the ET and noted: "*the claimant's behaviour as a regulated person would be a matter of grave concern*". On receiving the judgment, the employer suspended C pending a disciplinary meeting which was then convened without a prior investigation meeting being held.

At the disciplinary hearing, C was given a full opportunity to raise any issues he wanted. R had to consider whether C's behaviour was consistent with him continuing to work as an analyst which required a high degree of honesty and probity and FCA registration. As part of the disciplinary process the FCA FIT Handbook was taken into account; this states that firms should, when assessing fitness and propriety, take into account inter alia whether a person has been "*criticised by a Court or Tribunal*". R concluded that the ET findings meant that C could not be seen as a fit and proper person in accordance with the FCA Handbook and neither could C be employed in a different position, he was accordingly dismissed for gross misconduct. No right of appeal was given.

C then brought a claim of unfair dismissal, which failed. C appealed to the EAT on the grounds that the ET was wrong in law: (i) to hold that R had been entitled to dismiss the individual without any investigation; and (ii) to hold that a failure to allow an appeal did not make the dismissal unfair.

The EAT held that it was open to the ET to find that a lack of investigation did not render the dismissal unfair where the basis for the dismissal was the ET's finding that C was evasive and not a credible witness. The question was whether R's procedure was within the range of reasonable responses; R had acted reasonably in treating the ET findings as a sufficient reason to dismiss an FCA regulated managing director without further investigation. It commented that the two stages: investigation followed by disciplinary meeting; are not required by statute or even the ACAS Code of Practice on Disciplinary and Grievance Procedures. It did observe

however, that there may be many reasons why it is better to have an investigation prior to a disciplinary meeting.

However, the second ground of appeal succeeded, the ET had not made sufficient findings to justify its decision that having no appeal would have made no difference, so the dismissal was unfair.

The extension of the SMCR regime will require many more individuals to be assessed as fit and proper in order for them to be permitted to perform their roles as senior managers or certified persons. This case is a timely reminder that when engaged in litigation whether as claimants, individual respondents or witnesses conduct during proceedings and any judicial observations may cause a firm to revisit its assessment of an individual's fitness and propriety (and arguably should), which in turn may provide a fair reason to dismiss. However, a fair reason to dismiss is not on its own sufficient to avoid unfair dismissal liability. This case illustrates that an employer's procedure must also be fair. In many cases, this will require a reasonable investigation to be carried out and a right of appeal to be given. In this case a lack of investigation was not fatal because of the tribunal's clear finding but in many cases it would be; but the lack of appeal was.

[Mr M S Radia v Jefferies International Limited]

TUPE: transfer not personality clash was the sole/principal reason for dismissal

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) provide that an employee of a transferor or transferee of a transferring undertaking will be treated as automatically unfairly dismissed if the sole or principal reason for the dismissal is the transfer (provided the employee has at least 2 years' service). Prior to 1 January 2014 the test was slightly different; a dismissal would be automatically unfair if it was 'connected' to the transfer. The case law demonstrated that this was a wide test and some dismissals were found to be 'connected' to a transfer that had occurred some two years before.

There have been relatively few cases examining the new test of whether a TUPE transfer is the sole or principal reason for a dismissal. The Court of Appeal has considered this question in a case where it was asserted that the claimant, K, was dismissed because of a personality clash with a colleague.

K worked for H&W alongside a colleague, X. For various reasons K and X clearly had a very strained working relationship. H&W ceased trading and H Wines took on its business and employees, including X who was to become one of its directors. The exception was K who was dismissed immediately prior to the transfer of the business to H Wines.

The evidence before the tribunal on how K's employment was terminated was somewhat opaque. However, once the tribunal had concluded that K had been dismissed (and had not objected to the transfer thereby bringing her employment to an end) the key question that fell to be determined was whether K was dismissed because she got on badly with X (who was about to become a director of the business) and the proximity of the transfer was coincidental; or because the transferee, H Wines, did not want her on its books, because she got on badly with X.

The Court of Appeal rejected an argument that there is a distinction between the situation where a transferee refuses to take on all the employees in the undertaking where the transfer is clearly the sole/principal reason for the dismissals and a situation where the transferee picks out one or two individuals to be dismissed but retains the rest where the dismissal is for purely 'personal' reasons and not by reason of the transfer. It held that the law of unfair dismissal and TUPE does not recognise a 'purely personal reason' category of dismissal.

The Court of Appeal upheld the Tribunal's view that the transfer had not simply been the occasion for K's dismissal. K' s problems with X had been tolerable prior to the transfer however, they would not be tolerable to H Wines after the transfer; this in the Court's view meant that it was the transfer that was the cause of the dismissal.

This case illustrates that a transferee cannot cherry pick which of the transferring undertaking's employees it acquires because it dislikes the 'personal' or professional attributes of individual employees in the undertaking.

It is also clear that a wholesale failure in terms of record keeping made it very difficult for the transferor and transferee to evidence the reasons that they asserted were the reasons for K's termination; illustrating the importance of good record keeping.

[Hare Wines Ltd v Kaur]

Discrimination: injury to feelings compensation bands revised

In cases where an employment tribunal upholds a claim of discrimination, harassment or victimisation under the Equality Act 2010 it may award compensation for injury to feelings. This is in addition to any compensation awarded for financial loss. The level of injury to feelings compensation will generally fall into one of three bands (known as 'Vento bands') depending on the seriousness of the discrimination and the seriousness of the injury to feelings.

The Vento bands are revisited annually by the President of the Employment Tribunals. The revised bands applicable with effect from 6 April 2019 have now been published and are as follows:

- Lower band: £900 - £ 8,800;
- Middle band: £8,800 - £26,300;
- Upper band: £26,300 - £44,000 (the most serious cases).

In exceptional cases it is open to an Employment Tribunal to award in excess of £44,000 for injury to feelings. Employers should also be aware that a tribunal can also award aggravated damages in cases where the respondent has behaved in a high handed, malicious, insulting or oppressive manner following the act of discrimination complained of. This could for example arise in a case where an employer deliberately refuses to investigate a complaint of harassment and/or who has shown a high degree of insensitivity.

CONTACT

Chris Goodwill
Partner

T +44 207 006 8304
E chris.goodwill@cliffordchance.com

Mike Crossan
Partner

T +44 207 006 8286
E michael.crossan@cliffordchance.com

Alistair Woodland
Partner

T +44 207 006 8936
E alistair.woodland@cliffordchance.com

Chinwe Odimba-Chapman
Partner

T +44 207 006 2406
E chinwe.odimba-chapman@cliffordchance.com

Tania Stevenson
Knowledge Director

T +44 207 006 8938
E tania.stevenson@cliffordchance.com