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Work Matters

Employment News

In this issue

HEADNOTE

The Party Is Over...

by **Charles Wynn-Evans**, Head of Employment

With the debris of the festive season well behind us, employers face another tough year. Anyone craving respite from growing legislative and regulatory obligations in respect of their staff should expect to be disappointed in 2006. While the usual case-law and other developments continue apace, a series of new challenges looks set to complicate matters even further over the course of the coming year.

For starters, the introduction of legislation combating age discrimination in the workplace, scheduled to come into force in October, will lead to a major shake-up. Close attention will need to be paid to the final requirements of the regulations. Coupled with this, the imminent arrival of the long awaited new Transfer of Undertakings Regulations promise plenty of food for thought in terms of the drafting and management of business transfers and services contracts. The revised legislation will have far-reaching implications for the way in which organisations oversee and manage their contract work. We will cover these developments in detail as the relevant legislation develops.

So, faced with a whole new set of employment challenges, I'm delighted to introduce our latest edition of Work Matters which covers topics as diverse as constructive dismissal, dismissing staff with difficult personalities and the enforceability of non-competition covenants. The variety of areas which we address in this issue reflects many of the recurring concerns and interests of our clients. I hope you find this a useful and informative issue.

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The Ten Commandments of Constructive Dismissal

By **Carl Vincent**, Associate

One of the most vexing areas of employment law is defining whether an employee has been constructively dismissed or not. A constructive dismissal, as distinct from an actual dismissal of an employee from his employment by an employer, occurs where the decision to leave is the employee's but he can show that he was entitled to do so by virtue of his employer's conduct.

An employee is entitled to leave and claim constructive dismissal when his employer is in "repudiatory" breach of contract. A repudiatory breach is a breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. If that happens then the employee, if he so elects, is entitled to treat himself as discharged from any further performance. Whether a breach of contract is sufficiently serious to amount to a repudiatory breach is a question of fact and degree.

Some cases will be relatively straightforward. Examples of this type include where the employer unilaterally reduces an employee's pay or commission or unilaterally varies an employee's benefits and job duties or fails to afford an employee a reasonable opportunity to obtain redress in respect of a grievance.

Others will not be so clear cut. An example is *Adams v Charles Zub Associates Ltd.* In that case the EAT upheld a tribunal's finding that the employer's failure to pay a senior employee's salary on time did not amount to a repudiatory breach of contract. Relevant factors were that Mr Adams was aware that his employer was experiencing cash flow problems and received an assurance that it would pay the salary as soon as it could. In these circumstances the EAT ruled that while there had clearly been a breach of contract, the tribunal had not erred when holding that the breach was not fundamental.

The following are among the more important rules and principles in this area.

1 The nature of the implied term not to undermine trust and confidence is such that every breach of it can be said to go to the root of the contract and thus will be repudiatory. If a Tribunal finds as a matter of fact that there has been conduct which amounts to a breach of the implied term not to undermine trust and confidence, there will have been a fundamental breach of contract entitling the employee to resign in response and claim constructive dismissal.

2 The breach of contract in question may be anticipatory, as opposed to an actual breach. It is enough if the employer evinces an intention not to be bound by his bargain in the future.

3 A constructive dismissal claim may be founded on the behaviour of a fellow employee even though that employee may not have had the authority to dismiss the claimant in the conventional way.

4 A breach of an implied contractual term will serve just as well as the breach of an express term provided that the breach in question is repudiatory. The most obvious example of this is where term broken is the implied term of trust and confidence. Another is where, in breach of its implied obligation to take reasonably practicable steps to provide a safe system of work, the employer fails to investigate complaints relating to health and safety promptly and reasonably.

5 Under the "last straw" doctrine an employee can resign in response to a series of breaches of contract or a course of conduct by his employer which taken cumulatively, amounts to a breach of the implied term of trust and confidence. It is called the last straw doctrine because often the final incident in the chain is in itself insubstantial, no more than a piece of straw, but is nonetheless sufficient to be the tipping point which renders the whole series of incidents as a breach of the implied term. The test is whether, viewed objectively, the course of conduct demonstrates that the employer over time evinced an intention no longer to be bound by the contract of employment.

6 To succeed in establishing constructive dismissal, the employee must demonstrate that he resigned in response to the relevant breach. The breach may not be the only cause of the employee's resignation but it must be the effective cause.

At one stage it was believed that a departing employee had to make his reason for leaving clear to his employer if he wished to rely upon it as a ground for a constructive dismissal claim. However, the Court of Appeal has subsequently held that the issue of whether the employee had "accepted" a repudiatory breach by his employer was a question of fact for the Employment Tribunal.

7 The general principle is that if one party commits a repudiatory breach of the contract, the other party can choose either to affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at

an end. The innocent party must at some stage elect between these two possible courses. If he affirms the contract, he has waived his right to accept the repudiation.

Occasionally, an employee may, in response to an alleged repudiatory breach of contract by his employer, continue to work and perform his contractual obligations "under protest" so as to buy time and keep his options open. In these circumstances, if the employee continues to work but at the same time makes it clear that he is reserving his rights, or is only continuing so as to allow the employer a chance to remedy the breach, such further performance will not prejudice his right subsequently to accept the repudiation and claim constructive dismissal. But there is likely to come a point when, even in these circumstances, a court may infer affirmation from delay.

8 A constructive dismissal can occur even where an employer is acting on the basis of a genuine, but mistaken belief. However, in this area, the cases suggest that a distinction must be drawn between an actual as opposed to an anticipatory breach of contract.

9 There is no rule of law that a constructive dismissal is necessarily an unfair dismissal. The tribunal must look at the employer's conduct and decide whether it acted fairly. In reality it will be difficult (but not impossible) for an employer to bring itself within the range of reasonable responses in circumstances where it has broken the employment contract.

10 The statutory disciplinary and dismissal procedures do not apply to constructive dismissals. By contrast, the statutory grievance procedures do apply. Therefore any employee wishing to lodge a claim for constructive and unfair dismissal must write a step one grievance letter and wait 28 days before he commences proceedings. In addition, he or she would be well advised to delay lodging his claim form until the applicable statutory grievance procedure has run its course and he has complied with its requirements. This is because the legislation says that if he brings a claim before the procedure was completed and the non completion was attributable to him, any award which he wins will be reduced by 10% and possibly by up to 50%. The employer must itself follow the statutory grievance procedure once commenced to avoid any compensation awarded being increased.

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How To Stop Former Employees Profiting At Your Expense

By **Charles Wynn Evans**, Partner

A common complaint amongst employers – that restrictive covenants are not worth the paper they are written on – can be misplaced. It is often assumed that formal arrangements preventing competition after termination of employment are too troublesome to enforce, because they prevent the affected employee from earning a living or pursuing a chosen career. Three recent cases in particular provide useful insights into the courts' approach to enforceability.

Case 1: *TFS Derivatives Limited v Morgan*

The background

In *TFS Derivatives Limited v Morgan*, Cox J granted an injunction enforcing a non-competition covenant against an equity derivatives broker who was specifically recruited by a competitor to set up a competing desk. The relevant covenant stated that the broker should not "for six months undertake, carry on or be employed, engaged or interested in any capacity in either any business which is competitive with or similar to a relevant business within the territory, or any business an objective or anticipated result of which is to compete with a relevant business within the territory".

The employer was an inter dealer broker in the global foreign exchange and the commodity, equity and paper markets. Its team of forty brokers worked in close proximity to each other for a finite number of clients with whom they built up strong relationships. The employee learned how to broke wholesale equity derivatives during his employment and was the biggest revenue producer.

Three stage process

The judge set out the orthodox three stage process for assessing whether a non-competition covenant should be enforceable. The first stage is to properly construe the covenant. The second is to consider whether the employer can demonstrate that it has legitimate business interests requiring protection. Third, the covenant must be shown to be no wider than is reasonably necessary for the protection of those interests when the contract was made.

Competing capacity and area

The employee argued that, because the covenant prohibited him from being employed in "any business", he was prevented from working in any capacity for a competitor – and this would be too

wide to be enforceable. This argument failed in the light of the covenant's definition of relevant business (broadly the business of the employer with which he was materially involved in the twelve months prior to termination). The covenant was construed as limited to the broking activities in which the employee had actually been involved. The covenant was also attacked as an inappropriate "area covenant", being framed by reference to a defined concept of territory. The judge recognised that territory in terms of location had limited relevance to modern broking skills "applied as they are in global financial markets using the most sophisticated communication technology".

Pre-action correspondence

The employee also relied on the pre-action correspondence, in which the employer's solicitors had demanded that he undertake not to work in any capacity with the competing employer. He argued that this connoted a more restrictive construction (no work in any capacity for the competitor) than that relied upon at trial (no work for the competitor on business of the nature he had been involved in). The judge held that the pre-action correspondence was irrelevant to the reasonableness of a covenant which needed to be assessed by reference to its reasonableness as at the time of contracting.

Brokers' position

The judge accepted the main submissions which the employer made. The key assets of most brokerage companies are generally their brokers, client relationships and confidential information. If a broker has established solid relationships with his contacts and then moves to a different employer, it is quite possible that a trader will move its business with the broker. In addition, whilst personal relationships are important, trader clients are also looking for the best rates which they can achieve and therefore the confidentiality of those rates is crucial. Through working in the equity derivatives room the employee gained an invaluable insight into the amount of business being placed by certain clients. The information which he held and the strength of his relationships with clients would place a competitor who hired him at a significant competitive advantage on his joining. The employer therefore successfully demonstrated that it had legitimate interests requiring protection.

Garden leave as an alternative

The judge rejected the argument that the covenant was unenforceable because a 6 month garden leave clause would be a more appropriate, effective and reasonable alternative. Part of the argument was that employers who wished to restrict the future employability of a former employee should pay for such restrictions by way of garden leave. The judge declined to give general guidance on the interaction of garden leave clauses with non-competition covenants. On the facts, for a variety of reasons, he did not accept that a six month garden leave clause would be more reasonable.

Similar capacity

The employee did win one small victory. The judge held that the extension of the restriction to prohibit the employee from being involved in any business "similar to" a competing business went too far and that, as a severable provision of the covenant, that aspect should "blue pencilled" out and not enforced.

Case 2: *Corporate Express Limited v Day*

In *Corporate Express Limited v Day*, the employee was the employer's sales manager for national accounts. Her contract contained six month prohibitions on solicitation of or dealing with clients and on working for named major competitors. The employer sought to enforce the covenant when the employee left and joined one of the named competitors, arguing that it was exposed to the risk of significant financial losses because during her employment she had had access to confidential information which could be used to attract new customers. The employee argued that the prohibition on working for competitors was not necessary because the company was adequately protected by the non-solicitation covenant.

The court upheld the no compete covenant. It was clear that the employee had had access to confidential information (such as pricing discounts, margins and customer specific requirements) the protection of which constituted a legitimate business interest of the company. Whilst there was no evidence that the employee had actually used this confidential information in her new employment, it was accepted that there was a real risk that such a senior sales employee's knowledge would be of value to the new employer and could be used to erode its customer base. The court was influenced by the fact that the employee's team had managed accounts representing 9% of the employer's turnover.

The non-solicitation covenant was judged to be insufficient to achieve the necessary protection, the need for which far outweighed the detriment to the employee (who would have the option of not working for six months, not working in the same industry or working for one of the many smaller companies not named in the covenant). The covenant was upheld.

Case 3: *Axiom Business Computers Limited v Jeannie Frederick*

In *Axiom Business Computers Limited v Jeannie Frederick,* a company engaged in the development and

sale of computer software programs to commercial customers in the legal and commercial markets sought to enforce a covenant against its former technical services director, who had been one of only two directors, its most senior employee and had a good knowledge of the business. The covenant stated: *"you will not seek or accept employment (whether as employee, agent, director or otherwise) with any of the Employer's competitors in the field of computer systems for a period of one year after termination of your employment with the Employer"*

The employee argued that the clause amounted to a blanket ban on working for a competitor for twelve months, without territorial limitation. Moreover, the clause did not appear to prevent the employee from working on her own account which undermined the argument that she should not be able to work for a competitor.

The employer argued that the clause was necessary because of the employee's intimate knowledge of the employer's business and for its practical protection. It also argued that the clause was deliberately drafted to allow the employee to go into competition on her own account.

The judge held that the absence of any territorial restriction and the generality of the market identified in the clause rendered it unenforceable. The contract's other provisions with regard to preservation of trade secrets and solicitation of customers fortified the judge in his view that the non-compete went beyond what was necessary to protect the employer's legitimate interests. In particular, he agreed that, if the employee could work on her own account, it was difficult to see why she should not work for a competitor. He found it difficult to accept the suggestion that there would be significantly more risk that the employee might make use of confidential information if she worked for a large company.

Conclusions

These cases demonstrate some useful drafting points such as that the validity of a covenant can be undermined if it permits work on one's own account whilst prohibiting other competition. They also demonstrate that the crucial issue for those seeking to draft and enforce non-competes is to establish, in the particular business context, the damage which the departing employee could do in relation to clients, customers and confidential information and to frame the covenants closely to protect these legitimate interests.

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Bonuses, Pay Rises and Maternity Leave

By **Keely Rushmore**, Associate

Employers seeking to apply bonus arrangements and pay rises to employees on maternity leave face a legal minefield. Employees' entitlements to bonuses in respect of periods spent on maternity leave are not specifically addressed by the maternity legislation and often give rise to disputes, grievances and claims. Complaints in this area are normally brought as sex discrimination claims (i.e. less favourable treatment on grounds of pregnancy) or under section 47C(1) Employment Rights Act 1996 ("ERA") which provides that "an employee must not be subjected to any detriment by any act or deliberate failure to act, by his employer done for a prescribed reason". One of the prescribed reasons (section 47C(2)) is "ordinary, compulsory or additional maternity leave".

Statutory Entitlements During Maternity Leave

During her 26 weeks' ordinary maternity leave ("OML"), a woman is entitled to *"the benefit of the terms of conditions of employment which would have been applied if she had not been absent"* (section 71(4) ERA). But in this context the concept of "terms and conditions" *"includes matters connected with an employee's employment whether or not they arise under her contract of employment but..... does not include terms and conditions about remuneration"* (section 71(5) ERA).

Regulation 9 of the Maternity and Parental Leave Regulations 1999 ("the Regulations") adopts the same approach, i.e. it states that employees are entitled to the benefit of their terms and conditions of employment when on OML, except terms and conditions about remuneration. But, Regulation 9 qualifies section 71(5) ERA by providing that only sums payable by way of *"wages or salary"* count as remuneration for these purposes.

During her additional maternity leave ("AML"), an employee is only entitled to benefit from (and be bound by) certain prescribed terms and conditions of employment such as the implied obligation not to undermine trust and confidence and terms as to notice and discipline and grievances.

It follows that unless the contract expressly provides otherwise (and excepting statutory maternity pay) a woman is not entitled to receive "wages or salary" during OML or AML.

Is Bonus Remuneration?

To identify an employer's obligations in respect of bonus for employees on maternity leave, the relevant question is whether a bonus amounts "wages or salary".

The leading ECJ authority is *Lewen -v- Denda*. In that case a Christmas bonus was awarded to all employees who accepted, as a condition of eligibility, that it was a single voluntary payment restricted to Christmas each year, the payment of which did not create any future rights. The claimant was not paid the Christmas bonus because she was on parental leave when it was paid.

The ECJ held that a bonus of this kind constituted "pay" for the purposes of what is now Article 137 of the EC Treaty. This was so even if the payment was voluntary on the part of the employer and even if it were paid mainly or exclusively as an incentive for future work or loyalty to employer or both.

The ECJ's judgment established the following principles. To withhold a bonus payment to an employee who was on parental leave where that bonus was a voluntary and exceptional allowance and which was not referable to work done would be a breach of EU equal treatment law. EU law did, however, permit a female worker on parental leave to be excluded from a bonus which was based on pay for the work done in the year. That said, the bonus could not be avoided solely on the basis that a condition for payment of the bonus was that the worker be in active employment when the bonus was awarded. Nor could a woman be excluded from a bonus entitlement in respect of any period of compulsory leave from work ("CML") (in the UK this is the two week period after the employee gives birth).

Applying *Lewen* in the ET

Lewen was first applied in this country by an Employment Tribunal ("ET") in *Connolly -v- HSBC Bank plc* . The employer operated a an annual incentive award called "Let's reward success", which included a "personal performance factor" and was expressly stated to be "part of the total pay package". The employee complained about a reduction to her payment under this scheme to take account of her absence on maternity leave.

The ET considered that the bonus did constitute remuneration for the purposes of s71 ERA. It was monetary, paid as part of salary and rewarded personal efforts and attendance. Accordingly, the scheme did not apply during the employee's OML and AML and a reduction to reflect those absences was permissible. The ET also applied the finding in *Lewen* that EU law precludes employers from reducing benefits pro-rata on the basis of absence during compulsory leave periods. Accordingly, Mrs Connelly's bonus could not be reduced to reflect her CML.

In *Hoyland -v- Asda Stores Limited* the employer operated a bonus scheme designed to *"reward employees for their work and continued contribution to the financial performance of the business during the calendar year"*. All those employed on 21st February 2003 and who had been employed for at least six months on 21st December 2002 qualified. Payments were reduced for a variety of reasons, one of which was absence for more than eight consecutive weeks. This reduction applied to those who were absent on maternity leave.

The EAT agreed with the ET in rejecting the employee's claims of sex discrimination and pregnancy-related

detriment. The bonus was designed to reward attendance at work which contributed to the overall performance of the business during a bonus year. It was paid in recognition of work undertaken by employees and was paid through payroll subject to deduction of tax and national insurance. The bonus was wages or salary within the meaning of Regulation 9. The EAT said that it was influenced by the fact that the definition of wages in ERA mentions bonuses specifically (s27(1)(a) ERA). It held that no reduction could take place in respect of CML, but that a pro-rata deduction in respect of OML was permissible.

Nature of Bonus

The key issue, therefore, is likely to be the nature of the bonus in question. If it is a bonus which relates to work done, it may well constitute wages or salary and will not be payable in respect of OML and AML. But a bonus which is in substance a loyalty payment (e.g. if it is not referable to work done) may well not constitute wages or salary for these purposes, in which case it cannot be denied to employees on maternity leave.

However, this issue aside, claims may still be brought based on sex discrimination law. This is illustrated by *GUS Home Shopping Limited -v- Green & McLoughlin*. In that case a loyalty bonus was offered with the intention of facilitating the relocation of the employer's marketing department from Worcester to Manchester. It was payable contingent on an orderly and effective transfer over the relevant period, the co-operation and goodwill of the individual employee and the employee remaining in a post until a specified date. One employee was absent from work on maternity leave throughout the relevant loyalty period. A second received a partial payment because she was only away for part of the relevant period on maternity related sick leave and on maternity leave.

Both complained that the refusal to pay their entitlements constituted direct sex discrimination and they succeeded before an employment tribunal. When the company appealed the EAT dismissed the appeal and held that:-

> *".....the fact that the reason for the [employees'] absence from work, which disqualified them from receiving payment under the bonus scheme, was that they were either suffering from pregnancy-related illness or taking maternity leave was a relevant consideration to which the Tribunal was entitled to have regard. "*

In other words, as the reason for non-payment was the employees' pregnancy-related absence, refusal to make payment to them constituted sex discrimination.

Pay Rises and Statutory Maternity Pay

Prior to 6 April 2005, an employee's SMP entitlement was based on the employee's average earnings over an eight week "reference period" ending with the fifteenth week before the expected week of confinement (Regulation 21(3) Statutory Maternity Pay (General) Regulations 1986). In the case of *Alabaster -v- Woolwich plc*, a pay rise was granted to the employee shortly before the start of her maternity leave but this increase was not reflected in the calculation of her statutory maternity pay because the relevant reference period for calculating normal earnings ended prior to the date when the pay rise was awarded. A pay rise after the "reference period" did not count for SMP

purposes even if it took effect before the employee went on maternity leave.

In *Alabaster* the ECJ ruled that, in order to avoid unlawful sex discrimination under EU equal treatment law, where the pay received by a worker during maternity leave is determined on the basis of the pay she earned before her maternity leave began, any pay rise awarded between the beginning of the reference period and the end of the maternity leave must be included in the element of pay taken into account in calculating the amount of maternity pay.

The question that then arose was how this principle should be implemented into UK law and, in particular, how the timing of a pay rise should be treated. With effect from 6th April 2005, employees on maternity leave have the right, in relation to the calculation of SMP, to benefit from all pay rises granted between the twenty third week before the expected week of childbirth and the end of ordinary or additional maternity leave (Statutory Maternity Pay (General) (Amendment) Regulations 2005). Therefore, where a woman is awarded a pay rise (or would have been awarded a pay rise had she not been absent on statutory maternity leave) at any point during the relevant period, the normal weekly earnings used in calculating her SMP must take account of the pay rise for the entire SMP period whether or not the actual pay rise is back-dated.

Whilst this requires employers potentially to recalculate SMP payments and make back payments to reflect pay rises occurring during the relevant period, the new regime applies only to SMP and does not specifically extend to employers' maternity pay schemes offering enhancements to the SMP regime. Failure to effect the proper payments could lead to claims based on unlawful deduction of wages, sex discrimination or maternity related detriment.

Conclusion

Following *Alabaster* employers must ensure that payroll and personnel systems are in place to deal with the issue of pay rises which may trigger additional SMP entitlements. In addition it will be important for employers to ensure that their own enhanced maternity pay schemes operate in such a way as to avoid a potential allegation of sex discrimination. The new SMP rules, which of course apply to relatively low level payments which can largely be recoverable by employers from the Government, take the simple option in resolving the *Alabaster* problem of deeming a pay rise to apply to the whole reference period. It is not at all clear that non-statutory schemes need to mirror the statutory solution. Employers also need carefully to consider the nature and operation of their bonus arrangements for those on maternity leave in order to ensure that it is legitimate to discount maternity absence from the calculation of bonus and to ensure that no reduction is made in respect of periods of CML

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Protecting Employees From Violence – The Employer's Duty Of Care

By **Jason Butwick**, Partner

When employees face a heightened risk of verbal and physical confrontation from members of the public, problems are never far away. For staff in some sectors - such as retail, transport and the hospitality industry– violence is too often a workaday hazard. All employers have a duty to protect their staff in this regard. The clear flipside of this duty is that they can also be held liable in the event of a failure to carry it out.

Employers' duty of care

Employers have a duty to provide a safe system of work for their employees and to take reasonable precautions to ensure that employees remain safe from foreseeable dangers. This duty derives from three separate sources:

- **the contract** - the duty constitutes an implied term of the contract of employment;
- **common law** – the duty forms part of the employer's common law duty of care;
- **statute** - section 2 of the Health and Safety at Work Act 1974 ("HSWA").

The duty encompasses the risk of violence to employees, whether by fellow employees or third parties such as customers.

Employers also have a separate statutory duty to carry out a suitable and sufficient assessment of the health and safety risks to which employees are exposed. The purpose of this assessment is to identify potential risks to employee health and safety and identify reasonable steps which the employer can take to minimise those risks.

Employers also have a duty to keep a written record of certain incidents of violence at work.

Employee remedies and employer liabilities

If an employer fails to take reasonable steps to avoid a foreseeable danger to an employee's health and safety, the employer will be liable to the employee for any injury suffered by the employee as a consequence of that danger.

Even if the employee does not suffer an injury, the employee has a number of potential remedies for an employer's failure to ensure a safe system of work. These are:

- **constructive dismissal** – if the employer's failure is so serious that it may amount to a repudiation of the contract, the employee can accept that repudiation and treat themselves as having been dismissed. In such circumstances, the employee would have potential claims for wrongful and for unfair dismissal;
- **refuse to work** – alternatively, if the employee believes that they are in serious and imminent danger, they can refuse to work until the danger no longer exists. If the employer dismisses the employee for refusing to work in such a situation, the dismissal may be automatically unfair.

General guidance

Following a systematic approach to minimizing the risk of violence is most likely to avoid incidents of violence and will provide employers with the highest level of protection from possible claims by employees. This might include:

- **assess the likelihood of there being a risk of violence** · to help the employer assess how great a risk there may be, employers can ask staff whether they feel threatened (this could be by way of a confidential questionnaire). They can also keep and review records of incidents of violence or harassment to see if there is a pattern, or if one particular branch encounters a higher number of incidents than others. Employers should also consider reviewing crime statistics for the area, or making enquiries of neighbouring organisations or the local chamber of commerce.
- **evaluate the level of risk, and who is at risk** – those most at risk will usually be those in contact with the public. However, there may be others such as those in positions of responsibility such as managers. In evaluating the level of risk, the employer will need to take into account any patterns of violent behaviour. For example, is violence more likely on particular days, or at particular times, for example late at night. The employer should assess the level of protection already in place, and identify the areas where further protection could reasonably be provided.

There are three specific areas to consider:

training and information – providing employees with information about basic safety techniques and training on how best to deal with violence and aggression in the workplace.

premises – provision of CCTV, wide counters, raised floors, protective barriers or glass screens and panic alarms.

working practices – frequent banking of cash to ensure that little cash is kept on site, ensuring that two members of staff are always on the premises, making arrangements for staff to be accompanied home if they fear harassment from a person they deal with at work.

- **make a record** – it is essential to record the findings of the risk assessment. This will help the employer show that they turned their mind to the risk and took steps to address it
- **take action** – put in place the steps recommended in the risk assessment promptly
- **review the assessment** – ensure a regular review of the situation. This could be an annual review,

or triggered by any change in circumstances, such as a rise in crime rates or a rise or change in the pattern of reported incidents.

If an employee is a victim of violence or harassment, the employer must be sensitive to that person in how it deals with them after the attack. In the case of *Nottingham County Council –v- Perez* a teacher who had been the victim of a mugging was put in a classroom which was dark and isolated. The employee did not feel safe and successfully claimed constructive dismissal.

There are a number of practical ways to support victims of violence. Allowing time off work, or arranging for counselling may often be appropriate. The employer should also consider consulting with the employee about any proposed changes to their role to be made in consequence of the attack.

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Holiday Happiness

By **Will Winch**, Associate

Good news for employers. Two unpopular decisions relating to holiday pay have been overturned by the Court of Appeal in Commissioners of Inland Revenue v Ainsworth & Others.

Ainsworth

In Ainsworth, the Court of Appeal was asked to consider the annual leave provisions of the Working Time Regulations 1998 ("WTR") in the context of employees who are absent from work for a substantial period of time due to ill health. WTR provide that employees are entitled to four weeks paid annual leave per year (regulation 13). They also provide that where an employee leaves part way through the year in circumstances where they had not taken their accrued leave entitlement, they are entitled to be paid in lieu for that accrued but untaken leave (regulation 14).

The questions to be decided by the Court of Appeal in *Ainsworth* were:

1. whether employees are entitled to take paid leave while absent from work on long term sick leave; and
2. whether employees who are dismissed for ill health part way through a leave year during which they have not worked, are entitled to be paid in lieu for their accrued but untaken leave.

Kigass Aero Components

In *Kigass Aero Components v Brown* the EAT decided that the answer to the first question was 'yes'. Even if a worker had exhausted their sick pay entitlement, they could receive full pay for an extra month, provided they informed their employer that they were taking holiday in accordance with the procedure set out in WTR (regulation 15).

In *Ainsworth*, the Court of Appeal decided that *Kigass* was wrongly decided. It held that the key word in regulation 13 is "leave" and reasoned that the natural meaning of *"leave"* connotes a release from what would otherwise be an obligation. They held that it is contrary to ordinary usage for an employee who is off work for a year or more as a result of serious illness to say that during some arbitrary chosen part of that period he is taking his annual leave. The crucial question is "leave from what?"

In the opinion of the Court of Appeal the EAT in *Kigass* was distracted from this analysis by emphasising the definition of "worker" at the expense of concentration on the concept of "leave". It pointed out that the purpose and scope of the Working Time Directive, to which the WTR give effect, is to prescribe minimum health and safety standards for the organisation of working time. No health and safety purpose is served by an employee who is not in any event required to work during the period in question taking leave. It simply produces a windfall for the employee. It also runs the risk that employers may be driven to terminating employment rather than letting it continue where there is a long term sickness absence and, in order to avoid the risk of that happening, employees on long term sickness may report back to work earlier than is medically desirable.

As to the second question, the Court of Appeal said that the corollary of its primary finding was that an employee whose employment is terminated part way through a year during which he has been absent from work on long-term sick leave is not entitled to a payment in lieu of accrued but untaken leave under regulation 14.

List Design Group Limited

In *List Design Group Limited v Douglas* the EAT decided that applications to enforce entitlement to holiday pay under WTR can be pursued either under regulation 30

WTR (in which case a complaint must be presented within three months of the alleged non-payment) or as a claim for unauthorised deductions from wages under the Employment Rights Act – in which case claims can be made in respect of a series of deductions and the

time limit for presenting a complaint is three months from the last unlawful deduction in the series.

This decision had potentially costly implications for some employers because it meant that if correct sums had not been paid for holiday pay under WTR e.g. because holiday had been calculated incorrectly, claims could be backdated, potentially to October 1998.

In *Ainsworth*, the Court of Appeal decided that applications to enforce entitlement to holiday pay under WTR can only be pursued under regulation 30 WTR, which requires a complaint to be presented within three months of the alleged non-payment. It said that the decision of the EAT in *List Design* (that such applications can also be pursued as applications in respect of unauthorised deductions from wages) was wrong. It said that the relevant provisions of the Employment Rights Act were enacted at a time when the rights introduced by WTR did not exist and Parliament could not have intended to refer in them to a subsequently created statutory right which comes with its own enforcement regime.

Conclusions

The Ainsworth decision removes the anomaly that an employee on sick leave who has no further entitlement to sick pay could, by the simple expedient of submitting a holiday application form, open the door to an additional four weeks pay at full rates. It also removes what was a disincentive on employers to persevere with employees who are away on long term sick leave. It also limits the potential exposure of employers whose systems for calculating holiday pay are not compliant with the Working Time Regulations to a period of months rather than years.

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Dismissals on Grounds of Personality

By **Georgina Rowley**, Associate

Fair dismissal of an employee on the grounds of that employee's difficult personality is a tough one to call. The issues raised by the recent Court of Appeal decision in Perkin -v- St. George's Healthcare NHS Trust will resonate with many managers and HR directors.

An employee who has a difficult personality and therefore may have problematic relationships with work colleagues and others presents one of the most difficult challenges with which an employer will have to deal. In order to avoid unfairly dismissing an employee who has the requisite one year's service, the employer needs to show that there was a "fair reason" for dismissal falling within the categories set out in Employment Rights Act 1996, s98 (i.e. conduct, capability, redundancy, "some other substantial reason" or contravention of a statutory enactment).

If the employer concludes that the employee's personality and associated behaviour is such that the interests of the business demand his or her removal, then it may not be possible to justify dismissal by reference to conduct or capability because the employee's conduct may not actually constitute misconduct and he or she may be perfectly competent at his or her job and there may well be no redundancy situation either. In those circumstances, has the employer any scope to terminate the employment of an employee whose presence in the business may be extremely damaging and destructive without facing an unfair dismissal claim?

The *Perkin* case looked at whether, in these circumstances, an employer can rely on a defence of *"some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held"* (*"some other substantial reason"* for short). Some other substantial reason is the "catch all" fair reason for dismissal which is often utilised to cover circumstances which do not fall squarely within any of the other four potentially fair reasons.

Of course, even if a fair reason for dismissal can be established, that is not the end of the story. The employer must establish that treating the fair reason as sufficient to justify dismissal lies within the range of reasonable responses and the employer must also conduct a fair procedure, particularly with regard to the statutory dismissal procedures introduced by the Employment Act 2002.

The facts

The claimant was the finance director of an NHS Trust, a job which entailed management responsibilities as well as the need to co-operate with senior colleagues. At no stage was any criticism made (or capable of being made) about the employee's technical competence or integrity. The problems which lead to the employee's dismissal were his personality, his relations with his colleagues and his management style.

In July 2002, while Mr Perkin was on holiday, the Chairman of the Trust held a meeting with KPMG during which she informed KPMG that she wanted an "exit strategy" in place for Mr Perkin by the end of that month. On the same day, the Trust's Chief Executive asked Mr Perkin to resign with immediate effect. He declined and lodged a formal grievance. A disciplinary process was then conducted into alleged serious concerns over the conduct and performance of Mr Perkin as Director of Finance and the consequent breakdown in confidence in his ability to carry out the requirements of his role to the satisfaction of the Chief Executive and the senior executive team.

The Chairman, together with another senior colleague, conducted the disciplinary hearing. Evidence was produced from senior colleagues about their lack of confidence in being able to work with Mr Perkin, his intimidating behaviour during meetings, refusal to discuss matters and the general consensus being that he should leave. Mr Perkin was then dismissed on the grounds that confidence had been lost in him as Director of Finance - his "disabling and negative approach" led the disciplinary panel to conclude that the relationship with the executive team had broken down and was adversely affecting the Trust both internally and externally.

ET findings

The Employment Tribunal ("ET") concluded that the reason for dismissal was conduct/some other substantial reason, both of which it found to be potentially fair. However, the ET concluded that the disciplinary procedure had been unfair particularly because the Chairman chaired the disciplinary meeting. Her views (as expressed to KPMG prior to the disciplinary process) indicated that she was not impartial.

Moreover, the ET found that the Trust had failed to observe the ACAS Code of Practice dealing with dismissals, particularly with regard to the lack of any warning to Mr Perkin that failure to improve might lead to dismissal. Notwithstanding the fact that the dismissal was consequently unfair, the ET found that Mr Perkin had contributed to his dismissal to the extent of 100% and that there would have been no prospect of his retaining his job had a different (fair) procedure being followed. The way in which Mr Perkin had conducted himself at the ET hearing, persisting in "wholly unsustainable" allegations of dishonesty and impropriety against senior colleagues supported that conclusion. The EAT rejected an appeal against this decision.

Appeal

On appeal to the Court of Appeal, Mr Perkin argued that his dismissal could not be for conduct as no allegation of misconduct, whether personal, professional or financial, had been made against him. Nor had incapability ever been alleged. He also argued that the ET's decision (that the dismissal was for some other substantial reason) was not properly reasoned. The Trust argued that an employer must have the right to take action to address problems with employees' personality, approach and its trust and confidence in a senior employee, even if those problems do not lend themselves to detailed and specific particularisation, if they are seriously adversely affecting the proper operation of a business at senior level.

The Court of Appeal concluded that, for there to be a potential fair reason for dismissal on the basis of an employee's personality, the employee's personality problems must manifest themselves in such a way as to bring the actions of the employee, one way or another, within the scope of the fair reasons set out in Employment Rights Act 1996. Personality, of itself, cannot be a ground for dismissal. But manifestations of an individual's personality may constitute misconduct or justify dismissal on the basis of *"some other substantial reason"*. The employer needs to establish the facts which justify the reason or principal reason for dismissal. The appeal was rejected on the basis that an employee's personality could in appropriate circumstances fall within the scope of the fair reason of some other substantial reason.

The Court of Appeal also considered that there was no grounds to interfere with the ET's factual assessment of the contribution which Mr Perkin made to his own dismissal and that the finding of unfair dismissal was safe. The decision also therefore serves as a valuable reminder to employers of the need to follow fair procedures and in particular to ensure that the neutrality of the person making the decision whether disciplinary action should be taken cannot be attacked.

The lesson for employers from this case is that it is not enough simply to rely on an employee's difficult personality to avoid unfair dismissal. The way in which that personality manifests itself in terms of the employee's dealings with colleagues and others need

to be established and dealt with in a procedurally fair fashion involving where appropriate (against the background of the seniority of the employee and the severity of the problem) warnings and opportunities to improve.

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Stop Press – When is a Letter a "Grievance Letter" for the Purpose of the Statutory Minimum Grievance Procedures?

by **Carl Vincent**, Associate

As most employers are already too well aware, from 1 October 2004, employers and employees are required to follow minimum procedures intended to encourage the resolution of disputes in the workplace and reduce tribunal claims. The relevant provisions are set out in the Employment Act 2002 (the "Act") and the Employment Act 2002 (Dispute Regulations) Regulations ("the Regulations"). Caselaw is starting to emerge on how the Regulations work in practice.

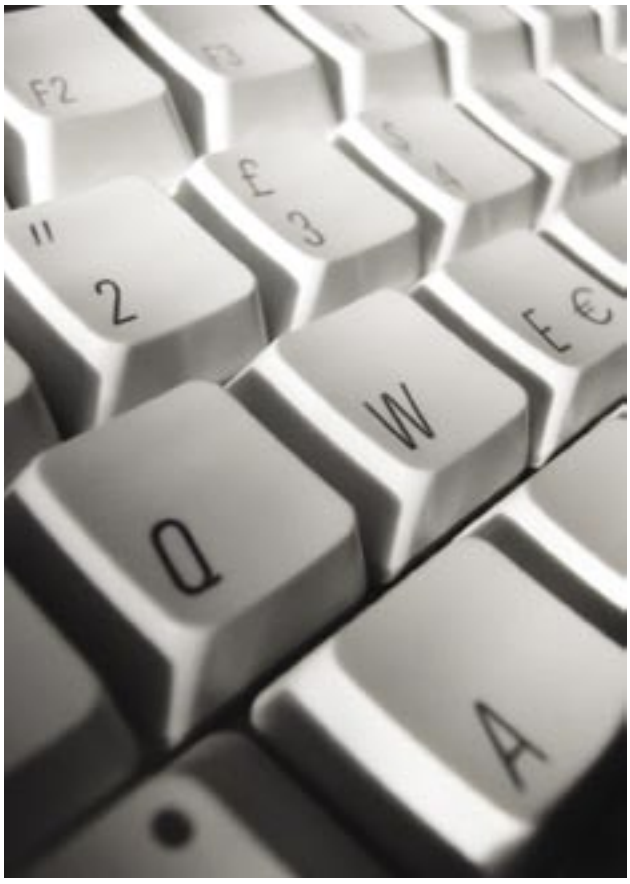
Key Elements of the Procedures

The key elements of the new regime are:

- compulsory minimum disciplinary and dismissal procedures. If an employer does not follow these procedures, a dismissal will be automatically unfair and compensation may be increased by the employment tribunal by up to 50%; and
- compulsory minimum grievance procedures. If an employee does not follow the grievance procedure, he may be prevented from lodging a tribunal claim. In addition, any compensation which he is subsequently awarded may be decreased by up to 50%.

Discipline and Dismissal

The prescribed disciplinary and dismissal procedures apply (save in exceptional circumstances) where the employer is considering dismissing an employee or



imposing a disciplinary sanction such as demotion. They do not apply to warnings.

There are two procedures. The standard and modified procedure. The standard procedure, which will apply in the vast majority of situations, has three stages:-

- Step One - the employer must write to the employee informing him/her of the reasons why it is considering dismissal or taking disciplinary action and inviting the employee to a meeting to discuss these issues.
- Step Two - the meeting takes place. The employer must inform the employee of the outcome and of his right to appeal the decision.
- Step Three - the employer must, if required, hold an appeal hearing and inform the employee of its final decision after the meeting.

The modified procedure applies where the employer summarily dismisses the employee without investigation in circumstances where it was reasonable to do so. It has only two stages:-

- Step One – the employer must write to the employee setting out the reason for dismissal and the basis of the employer's belief in his guilt and informing the employee of his right to appeal.

- Step Two – if the employee appeals the employer must hold an appeal hearing and inform the employee of its final decision after the meeting.

Breach of either procedure renders a dismissal automatically unfair and causes compensation to be increased by between 10 - 50%.

Where an employee reasonably believes that his employer is following a dismissal or disciplinary procedure at the time when the normal deadline for submitting a complaint to an employment tribunal expires, then the deadline is automatically extended by three months to enable the procedure to be completed.

Grievances

The prescribed grievance procedures apply (save in exceptional circumstances) in relation grievances about action by the employer which could lead to a complaint to an employment tribunal under most of the common employment tribunal jurisdictions including unfair dismissal, sex discrimination, unlawful deductions and so on.

In the majority of cases the "standard" grievance procedure will apply as follows:-

- Step One - the employee must write to the employer setting out his grievance (the "step one letter").
- Step Two - the employer must hold a meeting with the employee to discuss the grievance. The employer must inform the employee of the outcome and of his right to appeal the decision.
- Step Three - the employer must, if required, hold an appeal hearing and inform the employee of its final decision.

The modified grievance procedure only applies where the employee has ceased to be employed and the employer did not know about the grievance until after the termination date (or it did know but the standard grievance procedure was either not started or unfinished at the termination date) and both parties agree in writing that it will apply.

It has only two stages:-

- Step One – the employee must write to the employer setting out the grievance and the basis of it.
- Step Two – the employer must respond to the grievance in writing.

An employee may not present a complaint to an employment tribunal for unfair dismissal concerning a matter in respect of which one of the grievance procedures applies if he has not sent his step one grievance letter (or a letter under the modified procedure) to his employer first.

Once an employee has sent his grievance letter, he may not present his complaint until 28 days have elapsed.

In either case, if the employee does present a complaint within the normal time limit, the time for commencing proceedings is automatically extended by three months.

If an employee issues proceedings before the statutory grievance procedure has been completed and the employee is responsible for the non-completion of the procedure, the employment tribunal will reduce any compensation due to the employee by 10-50%. If the employer fails to deal with the grievance in accordance with either procedure, the employment tribunal will increase the award to the employee by 10% and may increase it by up to 50%.

What Constitutes A Step One Grievance Letter For These Purposes?

This important issue was considered in December 2005 by the Employment Appeal Tribunal in the case of *Shergold v Fieldway Medical Centre*. The Claimant wrote a three-page resignation letter setting out the reasons for her resignation. She did not ask for it to be treated as a grievance, although her employers invited her to a meeting to discuss the issues she raised before accepting her resignation.

She then claimed constructive/unfair dismissal but the Employment Tribunal decided that as she had written a resignation letter and not a step 1 grievance letter it had no jurisdiction to hear her complaint. The Employment Appeal Tribunal overturned this. It held that no formality is required in a step one grievance letter. The requirements of the Act are minimal. All an employee needs to do is set out his or her complaint in writing.

The policy angle behind this thinking was a reluctance to see a Claimant barred from proceeding because of *"undue technicality and over-sophistication"*. The purpose behind the statutory grievance procedures is to give the parties a chance to settle disputes before litigating. If Tribunals are too "pernickety" about what is required in a step one grievance letter this may cause injustice to Claimants.

While it is hard to fault the logic of this approach, spare a thought for the poor employer. The correct identification of a step one grievance letter is vital. If

a letter of resignation, protest or other complaint is received but is not recognised to be a grievance letter and the employer does not treat it as such, he may unwittingly find himself liable for automatic unfair dismissal. The EAT's answer to that was to say, *"It is not, in our judgment, the intention of the legislation either that employees should be barred or that employers should unwittingly find themselves liable for automatic unfair dismissal. Those are sanctions, which should be very rarely used...."*. Employers reading these words of comfort may be forgiven a little scepticism.

In the course of the judgment the EAT also confirmed the following as relevant principles:·

- the fact that the written grievance is contained in a letter of resignation "makes no difference at all", provided the letter sets out the employee's complaint;
- it is not necessary for an employee to state in terms in the letter that it is a grievance, or is an invocation of a grievance procedure;
- there is no requirement that an employee must comply with any company or contractual grievance procedure;
- it is not necessary that every detail of the complaint is set out, as a grievance letter is not a pleading. It is sufficient if the employer can understand from the letter "the general nature of the complaint being made";
- it is also unnecessary that the employer have the chance to respond to the grievance before the employee resigns. All the statute requires (for the standard grievance procedure) is for the employee to set out his complaint in writing; and
- the complaint set out in writing must relate to the Tribunal claim which is subsequently lodged. There is no compliance if the two are not connected.

Conclusions

Employers need to be vigilant to ensure that they are not caught out by failing to respond appropriately to a step one grievance letter. Blissful ignorance that the statutory procedures have been set in motion is no excuse. They should scrutinise carefully all letters from employees which set out complaints or criticisms of their actions or inactions where the substance could give rise to Tribunal claims (irrespective of whether they are expressly identified as grievance letters and whether written at the time of resignation or otherwise). In this way step one grievance letters are less likely to be overlooked or misconstrued and clarification of the employee's intentions can be sought at an early stage. This will help employers to avoid falling foul of their obligations under the statutory grievance procedure.

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