UK: Employment Update

Welcome to the June Employment Update. In this briefing we explore a broad spectrum of topics including how to assess the reasonableness of an employer's decision, whether a subcontractor's employees will TUPE transfer when services are brought in-house and the advantages of contractual provisions on: how to calculate a day's pay and self reporting third party allegations of impropriety.

Key issues

- Employer's contractual decision-making: what is reasonable?
- Do a subcontractor's employees TUPE transfer when services are brought back in-house?
- Paid volunteer's leave proposal withdrawn
- Calculation of a day's pay
- No implied obligation on an employee to report allegations of impropriety

Employer's contractual decision-making: what is reasonable?

It is not unusual for employment contracts to give an employer the contractual power to determine a specific issue in addition to giving the employer the contractual discretion to do or not to do something or to confer a right. Employers, for example, often provide that bonuses may be awarded or sick pay paid at their absolute discretion. The case law is fairly well established in relation to the exercise of contractual discretion and, in essence, an employer must not act irrationally, perversely or arbitrarily or otherwise than in good faith when exercising such a discretion.

More recently, the Supreme Court has examined the situation where the employer has a contractual power to determine a specific issue. In the case in question, the employment contract provided for death in service benefits to be paid upon the employee's death except if, in the opinion of the company, the death arose as a result of the employee's wilful act, default or misconduct.

B worked on a tanker. He disappeared from the ship one night and his employer had to form a view on whether he had died accidentally or committed suicide. An investigation report was prepared by the ship owner and based on this the employer concluded that B had committed suicide. This was "wilful default" for the purposes of the contract of employment and accordingly no death in service benefit was payable to his widow. B's widow brought a claim for breach of contract in respect of the non-payment of the death in service benefit.

The Supreme Court examined the question of what test should be applied when determining whether the decision of a contractual fact-finder is a reasonable one.

The majority of the court held that a two-limb "Wednesbury" reasonableness test must be applied: (i) have the right matters been taken into account in reaching the decision in question? (ii) even though the right things have been taken into account is the result so outrageous that no reasonable decision-maker could have reached it?

The majority considered that the employer should not have accepted the investigation team's view that suicide was the most likely explanation for B's disappearance. The contractual decision-maker should have asked itself whether the evidence was sufficiently cogent to overcome the "*inherent probability*" of suicide; this was especially the case given the absence of any positive indications of suicide (no suicide note, no extraordinary behaviour and the fact that B was a Roman Catholic for whom suicide would be a mortal sin). The Court concluded that the

decision, although it was not arbitrary, capricious or perverse, was unreasonable as it had been formed without taking the relevant matters into account.
The facts of this case are clearly highly unusual, however, the Supreme Court's decision may have broader implications for employers in general, where the employer has an express contractual power to determine a specific issue. Circumstances where this might arise include:

- where the contract provides for a bonus if specific targets are achieved, the employer has to determine whether they have been attained;
- where the contract provides for summary termination in specified circumstances, the employer must decide if they have arisen;
- determining whether an individual is a 'good or bad' leaver for the purposes of variable remuneration, such as share options;
- determining whether a trigger event has arisen for the purposes of exercising either malus or clawback in relation to variable remuneration.

It is clear from this case that if an employer has to determine a question of fact in the context of a contractual provision, its decision can be open to challenge on the basis of this two-limbed reasonableness test. In order to reach a "reasonable" decision, an employer must scrutinise carefully the factual background and all the relevant evidence. A clear document trail is important to evidence such an exercise in order to demonstrate the reasons for, and the reasonableness of, the final decision.

It has been suggested that this decision may lead to an implied requirement for employers to give reasons for their decisions and what they did or did not take into account. Employees may well argue that they should be given the opportunity to identify to their employer what factors should or should not be taken into account before a decision is reached. Indeed, a court may find that the implied term of trust and confidence does require an employer to take into account an employee's representations.

It remains to be seen whether there will be a greater appetite to challenge contractual decisions on the grounds of flawed process as a result of this decision.

[Braganza v BP Shipping Ltd]

Do a subcontractor's employees TUPE transfer when services are brought back in-house?

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) operate to transfer the contracts of employment of the employees of a contractor providing services to a client who then brings those services back in-house. In practice, in many cases a contractor may itself sub-contract all or some of the services/activities that it provides to its client. In such cases, if the client decides to bring the activities in question back in-house, do the contracts of the employees of the subcontractor TUPE transfer to the client?

This issue was recently considered by the Employment Appeal Tribunal (EAT) in relation to a council owned car park. The council entered into a contract with SL for the management of the car park. Subsequently, SL itself sub-contracted the management of the car park to another company, 'R'. Sometime later, the council took back control of the car park and it was argued by the Claimant that, as he had been employed by R when the council took back the management of the car park, his employment transferred to the council under TUPE.

An Employment Tribunal held that, for the purposes of TUPE, the client who had engaged the services of R was SL and not the council. There had been no contractual relationship between R and the council before or after the council regained possession of the car park. Accordingly, the Tribunal concluded that the requirements for a TUPE transfer had not been satisfied.

The EAT disagreed with this legal analysis. It held that it is clear from the case law that in order for there to be a

service provision change TUPE transfer, the activities carried out before and after the putative transfer have to be carried out for the same client. The key issue therefore was who was R's client? Was it SL or was it the council?

The EAT accepted that in the scenario where SL sub-contracted the car park management to R, then SL could be the client of R, however, the council could also be R's client. It was essentially a question of fact for the Employment Tribunal to decide. It also accepted that there could be more than one *"client"* in any given case.

This type of factual scenario is not at all unusual and this case highlights that it may not always be straightforward to assess whether there will be a TUPE transfer of a subcontractor's employees to the ultimate client at the head of a chain of sub-contracts.

[Jinks v London Borough of Havering]

Paid volunteer's leave proposal withdrawn

It has been reported in the Press that the Conservatives' have shelved their proposal to introduce the right for employees to take up to three days' paid leave to carry out volunteering activities. The proposal was that this right would only apply to private sector employees with more than 250 employees.

The proposal was not well received by some who felt that it would simply add additional costs to business. It is unclear at this stage whether the proposal has been dropped completely or is being mothballed for future revival.

Calculation of a day's pay

The Court of Appeal recently considered how a day's pay should be calculated in the context of a strike by teachers where the school was permitted to deduct a day's pay for each strike day. The parties disagreed on how a day's pay should be calculated, with the teachers arguing that it should be based on 1/365th of their annual salary by virtue of the Apportionment Act 1870.

Although many employers will not be faced with the scenario where pay is being deducted for strike absence there may be other situations where an employee will have unpaid leave of absence, for example, in relation to sabbaticals or for other reasons such as unpaid dependant or compassionate leave.

The Court of Appeal held that the Apportionment Act does apply to the employment relationship. It considered that although the Apportionment Act itself does not expressly say that salary accrues daily, in many cases that would be the obvious principle to adopt but essentially, the appropriate rate of accrual will be dictated by the terms and nature of the contract. The Court confirmed that it is possible to contract out of the apportionment principles if the contract makes it clear that the principle of equal daily accrual should not apply. On the facts, the school had managed to contract out of the Apportionment Act and accordingly, a day's pay was to be calculated at the rate of 1/260th of the salary.

In many, but not necessarily all, cases under the provisions of the Apportionment Act salary will accrue on a daily basis so that a day's pay will be calculated on the basis of 1/365th of salary. In order to avoid arguments about such calculations employers would be advised to include a contractual express provision detailing how a day's pay will be calculated particularly if the employer wishes to calculate it on a different basis. Indeed in many cases contracts will provide that a day's pay is calculated on the basis of 1/260th of the employee's salary.

[Hartley and another v King Edward VI College]

No implied obligation on an employee to report allegations of impropriety

A recent decision of the EAT demonstrates the importance of clearly addressing the extent to which an employee is contractually required to report actual and alleged wrongdoing (their own and that of colleagues) occurring both in and out of the workplace if that is what the employer needs.

In the case in question A worked part-time at one educational establishment, R. Unknown to R he also worked at a second educational establishment. He was suspended by the second employer following allegations of sexual misconduct in relation to which charges were subsequently dropped.

After R was made aware of the suspension and charges by the police it dismissed C on the grounds that failure to

inform it of the allegations and the suspension amounted to gross misconduct.

The EAT agreed with the Employment Tribunal that in the absence of an express contractual provision there was no implied obligation on an employee to disclose an allegation of impropriety against him. As there had been no express or implied obligation on C to report the allegations that omission could not amount to misconduct justifying dismissal.

For financial services (and other) employers who need to be sure of an individual's fitness and propriety for the role they perform it is important to consider whether contractual provisions are wide enough to require an individual to self report allegations of impropriety made by third parties as well as wrongdoing that may materially damage the interests of the company. For example an employer may wish to be made aware of any allegations of tax evasion made against an employee by HMRC.

[The Basildon Academies v Amadi & Anr]

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