UK: Employment Update

In this month's Employment News in Brief we consider the nature of an employer's duty to conduct risk assessments in relation to employees travelling abroad, the tax treatment of termination payments when the termination is consensual, what types of dismissal the ACAS Code of Practice applies to and when settlement discussions are admissible in evidence.

Key issues

- Overseas travel: the extent of an employer's duty of care
- ACAS Code of practice on disciplinary and grievance procedures: what types of dismissal does it apply to?
- Consensual termination: does this impact on the tax treatment of termination payments?
- Settlement Discussions when are they admissible?
- "Non compete" call for evidence

Overseas travel: the extent of an employer's duty of care

It is a well established principle that an employer has a duty of care to maintain a safe place and system of work. This duty can also extend to third party premises to which an employee is sent to work. In this age of international business, to what extent does this duty of care extend to overseas travel by employees?

D was employed by S. His duties related primarily to the UK but occasionally he would be required to travel abroad for the performance of his duties. D died when a helicopter that had been chartered to visit proposed project sites in Peru crashed, killing all passengers and crew.

D's widow brought a claim under the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934 alleging that S was in breach of its duty as an employer to provide a safe place of work, safe equipment and a safe system of working. The High Court and Court of Appeal had to consider: (i) whether the scope of S' duty of care as an employer extended to the charter of the helicopter and flight; (ii) if there was such a duty, whether S had breached it; and (iii) if S had breached its duty, whether that breach had caused D's death.

The Court of Appeal has now upheld the High Court's judgment that D had taken the flight in the course of his employment; S accordingly had a responsibility as his employer to take reasonable care to ensure that it was reasonably safe for D to travel to and from the place of work, in this case the jungle project site.

Both courts held that S had breached its duty of care. On the facts, there was no doubt that the flight was high risk and a dangerous one for the helicopter having regard to its operational limitations. If S' employee was nevertheless to be exposed to that risk, it owed him a duty to take reasonable care to safeguard him from the danger involved. S should therefore have made some enquiry into the safety of the trip and carried out some form of risk assessment. S was in breach of its duty of care because it had done nothing to investigate the safety of the proposed helicopter flight.

Both courts held that S' breach of duty caused D's death on the basis that if there had been a safety enquiry in order to make an appropriate risk assessment, the result would have been that S would have instructed D not to go on the flight because of safety concerns, he would not have taken the fatal flight and died.

Although this case turns on its own very specific, and unusual, facts the courts' reviews of the authorities provides a useful checklist in relation to an employer's obligations:

- a personal, non-delegable duty is owed to employees to take reasonable care for their physical safety;
- the employer's duty is to carry on his operations in a way so as not to subject employees to unnecessary risk;
- unnecessary risk, is any risk that an employer can reasonably foresee and which it can guard against by any measures, the convenience and expense of which are not entirely disproportionate to the risk involved;
- an employer's duty can extend to third party premises abroad and to transport to and from such a place of work;

- what amounts to a suitable and sufficient risk assessment will vary according to the circumstances, but in some cases it will be sufficient for an employer to use a contractor and satisfy itself that the contractor has carried out a thorough risk assessment.

What does this decision mean for employers whose employees take flights abroad on a regular basis? What form of risk assessment should be undertaken? Although the Court of Appeal did not provide any express guidance, the High Court did consider this issue. It took the sensible stance that in most cases an employer could entrust performance of its duty to a reputable travel agent; for example, if an employee is sent on a scheduled flight from London to New York for business purposes, the employer's duty would not require further steps or enquiry to be made. Such a trip would not be subjecting the employee to unnecessary risk. It might, however, be different if the employee was being required to go on a chartered internal flight in an undeveloped country on an airline with a notoriously poor safety record and/or on the EU's banned operator list. It all depends on the facts.

[Storm Harbour Securities LLP v Dusek and others [2016] EWCA604]

ACAS Code of Practice on Disciplinary Procedures: what type of dismissals does it apply to?

The ACAS Code of Practice on Disciplinary and Grievance Procedures (the '**Code**') is intended to provide basic practical guidance for employers on how to handle disciplinary and grievance procedures. Failure to follow the Code will not of itself provide an employee with a platform to bring a claim against the employer. However, in the event the Employment Tribunal upholds certain claims (including unfair dismissal and discrimination claims), it has the discretion to increase the amount of compensation awarded by up to 25% if the proceedings relate to a matter to which the Code applied and the employer unreasonably failed to comply with it. In discrimination cases where there is no cap on the amount of compensation, an uplift could have significant financial consequences.

So what dismissals does the Code apply to? The Code expressly states that it applies to disciplinary situations and does not apply to redundancy dismissals or the non renewal of fixed term contracts. It is silent in relation to ill health capability dismissals. The Employment Appeal Tribunal (**EAT**) has provided some welcome clarification that the Code applies to all cases where an employee's alleged act or omissions involves culpable conduct or performance on their part that requires correction or punishment such as misconduct and poor performance. It considered it difficult to see how ill health fell into this category.

The EAT accepted that the Code could apply in relation to some ill health dismissals where the ill health leads to a disciplinary issue such as a failure to comply with sickness absence reporting procedures. In that situation, if the disciplinary procedure is invoked to address alleged culpable conduct, the Code would be relevant.

In circumstances that might be classified as a 'some other substantial reason' dismissal, it is important to identify the reason for the dismissal and whether it involves any culpability on the part of the individual. If it does, then in most cases it would be advisable to follow the Code.

It should also be noted that the EAT observed that in the event that an employer chooses to proceed by reference to the ACAS Code on the basis that it considers the situation to be a disciplinary one, then whether or not it is correct in that conclusion the Code will be engaged and any failure to comply with it will lead to an uplift in compensation.

[Holmes v QinetiQ]

Consensual termination: does this impact on the tax treatment of termination payments?

Now may not be the time to discuss football, but it does provide the context for an interesting decision by the First Tier Tax Tribunal (**FTT**). It considered whether the absence of a contractual breach by the employer meant that a termination payment agreed in the context of a consensual termination had to be classified as "earnings from employment" rendering it liable to both tax and National Insurance Contributions (NICs).

Termination payments were made to two footballers (Messrs Crouch and Palacios) whose employment was ended by mutual consent prior to the expiry of their fixed term contracts. One of the payments was made under the auspices of a compromise agreement. HMRC argued that in the absence of any breach of contract the fact that the employment ended by mutual agreement rendered the payments 'earnings from employment' and therefore liable to tax and NICs. Tottenham considered that it was a payment received directly or indirectly in connection with the termination of employment and therefore only subject to income tax to the extent that it exceeded £30,000 and was entirely exempt from NICs.

HMRC argued that in order for the termination payments not to be earnings from employment, there had to be a breach of contract by Tottenham but there had been no such breach; a threat to keep one of the players on the bench for the remainder of the fixed term contract did not amount to a breach.

The FTT recognised that the case law was unclear on whether a breach of contract is necessary before a payment made as part of a consensual termination could receive the more beneficial NIC termination payment treatment. It concluded that no breach was necessary.

On the facts it considered that the payments were consideration for the surrender of rights under the players' respective contracts and were not therefore earnings from employment.

Consensual termination sweetened by a termination payment is a common means of parting ways with an employee without the need for a formal management process so this decision will give employers some (temporary) comfort that they will not be liable to NICs on such payments. However the case does illustrate that HMRC is perhaps more likely to adopt an inquisitorial approach in relation to terminations that are classified as 'consensual'. Finally it should be noted that the Government announced in the Spring Budget that with effect from April 2018 employer NICs will be due on termination payments above £30,000.

[*Tottenham Hotspur Ltd v HMRC.*]

Settlement discussions: when are they admissible?

In July 2013 a new settlement discussion ("**SD**") regime came into effect allowing employers and employees to enter into confidential "pre-termination negotiations", evidence of which will be inadmissible in any ordinary unfair dismissal proceedings, unless there has been "improper behaviour". Pre-termination negotiations are offers or discussions with a view to ending employment on agreed terms.

The SD regime was introduced to provide greater flexibility in the use of confidential discussions as a means of ending the employment relationship. Prior to the introduction of the SD regime, if an employer attempted to have a discussion about bringing the employment relationship to an end there was a risk that the employee could argue that the very fact such a conversation had been initiated was a breach of the implied term of trust and confidence permitting the employee to resign and claim constructive dismissal. Alternatively, if the employment relationship continued beyond the discussion but subsequently ended, for example after a capability procedure was carried out, the employee could refer to the fact of the earlier discussion as evidence that the reason for dismissal (e.g. asserted incapability) was not genuine the dismissal being inevitable. In cases where there was no pre-existing dispute the settlement discussions would not be protected by without prejudice privilege.

The EAT has recently explored for the first time how the SD regime evidential inadmissibility rules work.

What evidence is inadmissible? The EAT held that the effect of the SD rules is that evidence as to both the *content* of any offers and discussions held in relation to the termination of employment and *the fact* of there having been such offers and discussions is inadmissible in any subsequent unfair dismissal proceedings provided that there was no improper behaviour in relation to such discussions. This would cover discussions between the employer and employee and internal discussions such as managers reporting back to a board, higher management or HR on any discussions with the employee in relation to a proposed negotiated termination.

What happens where there are both unfair dismissal and discrimination claims? The EAT clarified that where there is another claim in addition to the unfair dismissal claim, the Tribunal must separate out questions on admissibility in relation to the various claims before it; evidence that would be admissible in relation to for example a sex discrimination claim (to the extent it is not covered by any without prejudice privilege) would not be admissible in relation to the unfair dismissal claim under the SD regime rules.

Can the parties waive the rule to render evidence admissible? No: the parties cannot waive the SD rules on non admissibility of evidence.

Without prejudice privilege

The EAT also reviewed the law on without prejudice privilege ('**w/p privilege** ') which can be summarised as follows:

- Common law w/p privilege applies to exclude evidence of negotiations (written or oral) between parties where there is a dispute and the negotiations are a genuine attempt to resolve the dispute.
- Merely labelling correspondence 'without prejudice' is not sufficient to attract w/p privilege if there is no extant dispute, or, no genuine attempt to resolve the dispute.
- Even if a document is not labelled 'without prejudice' it will be covered by w/p privilege if the negotiations meet the criteria of an extant dispute and genuine attempt to resolve it.
- To attract w/p privilege it is unnecessary for a document to set out an offer; it can extend to correspondence setting out a party's position as part of the negotiations.
- The w/p privilege rule may be set aside where the exclusion of evidence would act as a cloak for perjury, blackmail or other unambiguous impropriety.
- w/p privilege can be waived with the agreement of both negotiating parties.

- Waiver must be unequivocal but can in some circumstances be implied from the parties' conduct.
- Referring to w/p materials during an internal grievance will not ordinarily constitute a waiver of w/p privilege.

On the facts of the case, w/p material was referred to in the claimant's claim form, the respondent did not object to the disclosure and then itself referred to the same material in its response form. The EAT held that this amounted to an unequivocal waiver of the w/p privilege by the parties' conduct.

Practical tips

- Before embarking on a settlement discussion consideration should be given to whether the employee may have claims other than ordinary unfair dismissal.
- If so would the conversation be covered by without prejudice privilege: is there a live dispute at all?
- Be alive to the fact that merely marking correspondence without prejudice does not render it so.
- Be careful not to inadvertently waive privilege through conduct such as failing to challenge the use of privileged materials in open correspondence or Tribunal pleadings.

[Faithorn Farrell LLP v Bailey]

"Non compete" call for evidence

As part of its National Innovation Plan the Government has launched a Call for Evidence to consider the way in which industry uses and implements post-termination restrictions. These clauses seek to prevent individuals from using their inside information to compete, poach clients or key employees, or interfere with supply chains. They are commonly found in employment contracts, carry and deferred compensation schemes, settlement agreements, commercial agreements, and shareholder and LLP contracts. This Call for Evidence focuses on whether post-termination restrictions may impact negatively on entrepreneurism. Please get in touch with your Clifford Chance contact before **19 July 2016** if you would like your views to be considered as part of the firm's response, or to discuss the use and enforceability of post-termination restrictions within your business more generally.

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