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Briefing Note – June 2018

UK: EMPLOYMENT UPDATE

Welcome to the June Employment News in Brief. This month we consider cases covering an eclectic range of topics including the effectiveness of an entire agreement clause, who the real employer is in circumstances where the employee is paid by one company but ostensibly works for another, and whether knowledge that misconduct arose as a consequence of disability is required for a claim of discrimination arising from disability to succeed.

Key issues

- Entire agreement clauses: worth the paper they are written on?
- Who is the employer: it might not be the other party to the contract?
- Discrimination arising from disability: knowledge not a prerequisite to liability

Entire agreement clauses: worth the paper they are written on?

Yes would appear to be the answer according to the Supreme Court. In our August 2016 Briefing we reported the Court of Appeal's decision that a contractual clause that stipulates that a variation will only be valid if effected in writing ("a no oral modification clause" or "NOM clause") cannot prevent the contract being varied subsequently by oral agreement or conduct.

The Supreme Court has now reversed that decision. In its opinion a NOM clause is effective. This is a welcome decision; the inclusion of a NOM clause in an employment contract will achieve contractual certainty, it will help avoid disputes about whether there has been an oral variation to the contract and if so, the precise terms of it and facilitate a complete document trail of the contractual arrangement.

It is recommended that where a NOM clause is included, it clarifies whether variation in writing can be achieved by means of email or not; excluding variations by email is likely to be advisable.

[Rock Advertising Ltd v MWB Business Exchange Centres Ltd]

Who is the employer: it might not be the other party to the contract?

In the words of the Employment Appeal Tribunal (EAT) "*It may at first sight seem surprising that parties who enter into a contract may be unsure as to the identity of the other party to that contract*", however, in the modern world of work, corporate structures are often highly complex with the same individual holding positions of responsibility in a number of companies albeit that they only have an employment contract with one of the entities.

In some circumstances the true identity of the employing entity may well be of great significance to the individual, for example, enforcing an employment tribunal judgment against a UK entity may well be easier than bringing enforcement proceedings against an entity outside the UK.

The EAT has provided some guidance on the correct approach to identifying the true identity of the employer in a situation where there is a written contract of employment. M was engaged under an employment contract with DT, a Jordanian company; at the same time that the employment contract was signed, M received a letter from the Head of Legal of another group company, D Ltd, a UK company. The letter was for M to present to the passport office in relation to his work in the Middle East.

The Employment Tribunal (ET) took the approach that it was necessary to determine whether the express terms of the employment contract with DT accurately reflected what had been agreed between the parties. On the facts, DT paid M, but M's line manager (from whom he received instructions throughout his employment) was a director of D Ltd who did not hold office with DT. The employment contract provided that M would be based at DT's registered address, however, it had no actual place of business. The contract also included a clause that stated: *"…You may be required by the Company to carry out your duties for and/or act as an employee of any other Associated Company"*. Throughout his employment M never performed any work for DT, he only worked for D Ltd and other group companies.

The ET concluded that M was not in fact employed by DT (the Jordanian company); that term in the employment contract was a sham as it was not an accurate reflection of the reality of the relationship in practice.

On appeal, DT argued that its role was to provide personnel and products to D Ltd to facilitate the performance of contracts D Ltd had entered into i.e. it effectively acted as an employment agency. It also argued that the fact that M worked for D Ltd was entirely consistent with M being employed by DL and being required to work for others as stipulated by his contract.

The EAT rejected the argument that the issue that the ET should have considered was whether, in addition to the employment contract with DT, there was an implied employment contract between M and D Ltd to whom his services were provided. The EAT was clear that the issue was who was M's employment contract with? That is, it was a question of identifying who the employing entity was, not, whether a second employment contract had to be implied.

The EAT held that the question of who the employer was is a question of contract and therefore not to be determined by what happened, but by what was agreed. But what happened in practice is evidence of what was agreed. It accepted the argument that if on the evidence there is a seamless stream of events, all of which are consistent, that appear to demonstrate that at no stage throughout the employment did the entity named in the employment contract, or its associated companies, ever behave as if it were the employer this can be good evidence as to what was initially agreed. The ET had therefore been entitled to conclude that the employment contract did not accurately reflect what had in fact been agreed with M.

It is quite common for employees in large multinational companies to be employed by one group company with their services being supplied to

other group companies. Although the facts of this case were unusual in certain respects, the facts were not that far removed from many of these intra group supply of employee arrangements. This decision illustrates that because of the perceived imbalance of power in the employment relationship the employment tribunal may scrutinise the factual matrix to assess whether the written contract does reflect what has been agreed. In some circumstances in the recitals (or elsewhere) setting out how the parties envisage the arrangement will work may reduce the risk of the contract terms being challenged as inaccurate.

[Dynasystems for Trade and General Consulting Ltd v Moseley]

Discrimination arising from disability: knowledge not a prerequisite to liability

The Equality Act 2010 (EqA) prohibits four types of disability discrimination; one of which is discrimination arising from disability. Such discrimination will occur if an employee is treated unfavourably because of something arising in consequence of the employee's disability and the employer cannot show that the treatment complained of is a proportionate means of achieving a legitimate aim.

The employee does not have to draw a comparison between their treatment and that of another employee; he/she simply has to demonstrate unfavourable treatment. The claim will be made out if the unfavourable treatment is because of something that is the result, effect or outcome of their disability. However, there are two potential defences: first, the EqA provides that discrimination arising from disability does not occur if the employer can show that it did not know, and could not reasonably have been expected to know, that the employee had a disability; in addition the employer can also defeat a claim by demonstrating that the unfavourable act/omission complained of was a proportionate means of achieving a legitimate aim.

If the employer knew that the employee was disabled but did not know that conduct for which it disciplined the employee was the result of the disability will that also provide a defence for the employer?

This was the issue considered by the Court of Appeal in a case where the employer, R, knew that C, a teacher, was disabled as he suffered from cystic fibrosis. At the outset of C's employment various reasonable adjustments were agreed to accommodate his disability. Unfortunately, when a new head took over at the school this appears to have fallen by the wayside and C was subjected to an increased workload which he found he could not cope with. He became very stressed due to increased pressure of work; his health suffered badly; and that in turn increased the level of stress as he worried that he would need a lung transplant.

Whilst subject to this high level of stress, C showed a class of 15- year-olds an 18-rated horror film. As a result, the school commenced a disciplinary process that culminated in C's summary dismissal for gross misconduct.

In the disciplinary proceedings, C accepted that showing the film was inappropriate and maintained that it had happened as a result of an error of judgement on his part arising from the high level of stress he was under at the time in consequence of his disability. R did not accept that the showing of the film had been a result of an error of judgement brought on by stress.

The medical evidence before the Tribunal was much more extensive than that available to R during the disciplinary process and demonstrated that very high levels of stress had impacted C's judgement. R argued that it could not be

liable for discrimination arising from disability if it had not appreciated that C's behaviour in showing the film arose in consequence of his disability.

This argument was rejected by the Court of Appeal; it upheld the ET and EAT decisions that there had been discrimination arising from disability. C had been subjected to unfavourable treatment, (the dismissal), this was because of something (showing an inappropriate film) that had arisen in consequence of Cs disability. R had known of the disability and had been unable to demonstrate that dismissal was a proportionate means of achieving a legitimate aim.

One factor that lead the ET to conclude that the dismissal was not proportionate was its assessment that if R had put in place reasonable adjustments as required by the EqA, by reducing the work pressure on C, he would not have been subjected to the same level of stress and it would have been "unlikely in the extreme" that the incident of the film would have occurred.

If an employer is considering dismissing an employee known to be disabled on misconduct or capability grounds, thought should be given to a more comprehensive assessment of whether the capability or conduct issue is in someway connected to the disability and where necessary (further) medical evidence obtained.

This case also illustrates the importance of ensuring that where reasonable adjustments have been put in place to accommodate an individual's disability the situation is kept under review to ensure that adjustments are not neglected and/or that any further adjustments are implemented as appropriate.

[City of York Council v Grosset]

Hong Kong employment law developments

For those readers who have an interest in Hong Kong employment law developments, the following briefing on recent changes to employment rights may be of interest: click here.

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