

Employment Law Update

May 2010

Constructive Unfair Dismissal

This special edition of Employment Law Update provides updated information on the Constructive Unfair Dismissal article which featured in the Winter 2010 edition of HR Matters.

“I have had enough...”

De-constructing a constructive unfair dismissal

When is treatment of an employee so poor that they can walk out and claim that they have been constructively dismissed? As the HR manager, what can you do about it?

The Legal Test

It is worthwhile taking the time to review the legal test for constructive unfair dismissal (“CUD”). In theory the test appears to be relatively straightforward. The onus is on the employee to prove the following elements:

- The employer has committed an actual or anticipatory breach of an express or implied term of the contract of employment (in many cases it is the implied term of trust and confidence which is at issue);
- It must be shown that, looked at objectively, the breach in question is so sufficiently serious (often referred to as a fundamental or repudiatory breach) as to justify the employee resigning. If the breach is of the implied term of trust and confidence then the employee must show that the employer acted in a way calculated or likely to destroy or seriously damage the employment relationship;
- The employee must persuade the Tribunal that he or she resigned in response to that breach. Please note:

The employee must resign reasonably promptly in order to avoid the accusation that he or she actually waived the alleged breach;

The employee may give notice rather than resign and leave straight away – the Tribunals recognise that an employee may not be able to afford to simply leave immediately;

A claim of CUD is not necessarily defeated where the employee leaves to take up alternative employment – again the Tribunals recognise the fact that an employee may need to line up alternative employment before they can afford to resign in response to a breach. However, the breach must be the effective

cause for the employee deciding to move on.

- Finally, it remains open for the employer to persuade the Tribunal that, notwithstanding any serious breach of contract, the effective dismissal was still fair. For example, if an employer pays an employee only half their salary one month (because the employer is having financial difficulties and is waiting for a customer to pay up) and has discussed the situation with the employee and has promised to pay the balance of salary as soon as it can - the employer will have fundamentally breached the contract of employment but it is possible that its actions were reasonable in the circumstances and therefore any unfair dismissal claim may fail.

The Last Straw...

Last straw dismissals are not uncommon. This is when the employee alleges that a series of actions by the employer cumulatively add up to a very serious breach of contract. The individual actions or events themselves may not be breaches of contract (or may only be minor breaches) but taken as a whole the employee can say that they have had enough. The last action of the employer however must be capable of adding something to the breach – i.e. it cannot be an entirely innocuous action.

These last straw cases are increasingly problematic for employers. The actions complained about often go back years and are numerous in number. This means that such complaints generate lots of paperwork, suck up huge amounts of management time, usually mean the attendance at Tribunal (and in internal grievances) of lots of witnesses and overall can be very costly and difficult to manage.

In particular, many such last straw claims can arise out of personality clashes. In these situations early intervention is key. Consider mediation or a change of reporting lines. Try to remove the root cause of the problem as soon as is possible. These sorts of relationships rarely get better of their own accord!

The positive news

The test for whether an employer's actions amount to a breach is an objective test. So if you are dealing with a breach of trust and confidence and the employee feels hard done by but objectively the average bystander (or Tribunal Judge) doesn't think things were as bad, then the employee's claim will fail.

In practice, whether the employer's actions amount to a serious breach of the implied term of trust and confidence will be a matter of issue, degree and general impression bearing in mind the particular context. This means that witness credibility in Tribunal will be very important – does the manager come across as a bully or was the employee being oversensitive or cynically manipulating a situation?

The less positive news - is it possible to remedy a breach?

The simple answer is no. This was confirmed by the Court of Appeal in the 2010 appeal case of *Bournemouth University v Buckland*. Professor Buckland alleged that his employer had breached the implied term of trust and confidence when it arranged for exam papers which he had originally assessed to be remarked and up-graded without his backing. Buckland had raised an internal grievance about the matter which the University had upheld so vindicating him completely. Notwithstanding this Buckland still resigned. The Court of Appeal confirmed that it is a key principle of general contract law (which applies equally to employment contracts), that there is no way to cure a breach.

Heat of the moment

One thing an employer can do and indeed should do to attempt to bring a deteriorating situation back from the brink is to allow an employee a cooling off period if they purport to resign in the heat of the moment. The Tribunals recommend in any event that employees should be given a day or two to rethink a heat of the moment resignation and consider if they really want to walk. An employer should not assume that the resignation stands where an employee resigns under pressure or in tears. Always follow up with a request that they confirm their intentions.

Get the breach waived or affirmed

If you have done wrong, try to persuade them to give you a chance to put matters right where possible. The Court of Appeal in *Buckland* recognised that in cases where an employer goes to significant lengths to try and resolve things, the Courts should take a robust approach in deciding if the breach has actually been waived and the contract of employment affirmed.

In summary, if there is a chance to pour calm over troubled waters then take it. It won't let you off the legal hook if the employee decides that they don't want to be pacified but you may be able to persuade certain employees to remain employed and so avoid legal action altogether or at least ensure they remain employed long enough for the Tribunal to conclude that the breach had been waived and the contract affirmed. Of course if an employee does relent and stays working for you it is possible that the original breach can be revived again if future, more minor, breaches occur – so still leaving the possibility of a final straw resignation/dismissal in the future.

Examples of CUD

Whilst you ponder all the legal information above, here are some examples where the Tribunals did find a CUD claim proved. Remember however that each case will be decided on its own particular facts:

- Unilaterally reducing an employee's pay (*Industrial Rubber Products v Gillon* [1977] IRLR 389) or commission (*Star Newspapers Ltd v Jordan* EAT 344/93).
- Unilaterally varying an employee's benefits or duties (or demotion) (*Jones v F Sirl & Son (Furnishers) Ltd* [1997] IRLR 493).
- Failing to give an employee a reasonable opportunity to obtain redress in respect of a grievance (*WA Goold (Pearmak) Ltd v McConnell* [1995] IRLR 516).
- Discriminating against an employee (*Shaw v CCL Ltd* UKEAT/0512/06).
- Operating a clause in a contract which gives the employer the right to vary an employee's sales territory, but doing it in such a way as to cause the employee to lose significant commission income and/or travel twice as much each day to fulfil his or her duties.

For further advice relating to this article please contact a member of our Employment Team.

Quick Fire!

TUPE or not TUPE?

- In *Ward Hadaway Solicitors v Love and others* Ward Hadaway (WH) were one of a panel of four firms providing legal services to the Nursing and Midwifery Council (NMC). However, in 2007 the NMC decided to have a single provider for the services, Capsticks. From that point no new work was given to WH, although WH continued to work on more than 100 cases for some six months (known as a "run-off" period). All new NMC work went to Capsticks.

The EAT upheld the tribunal's decision that there was no service provision change and therefore there was no transfer of staff. One of the main reasons for the decision was that no actual work had transferred between the two firms. Rather, WH continued with its existing cases, and Capsticks took all the new work. Therefore they held that there was no transfer of activities.

Is this a clever way to avoid TUPE? Possibly, in certain circumstances, but advice should always be sought. The decision in this case was based on the activities in question being the work in progress (rather than future work). WH did not have an exclusive contract with NMC so was not entitled to future work. However, if WH had some legitimate expectation and entitlement to future work then there may well have been a TUPE transfer.

Job swapping – a reasonable adjustment?

- In *Chief Constable of South Yorkshire Police v Jelic* the EAT upheld an employment tribunal's finding that it would have been a reasonable adjustment for the purposes of the DDA to swap the roles of a non-disabled police officer and a disabled police officer. On the face of it this is concerning for employers as it would seem to extend the duty to make reasonable adjustments to include the consideration of occupied posts (as well as vacant posts within the same organisation). However, the EAT stressed that this would not be a reasonable adjustment in all cases. The special, disciplined nature of the police service and the requirement for employees to "obey lawful instructions" was an important factor in the decision. Therefore, in many cases it is likely that the negative effect on the workforce would outweigh the advantages to the disabled employee.

Referee too old at 48?

- In *Martin and others v Professional Game Match Officials* the tribunal decided that a retirement age of 48 for football assistant referees was direct age discrimination that could not be justified as a proportionate means of achieving a legitimate aim. There were alternative means of achieving the employer's aim that were less discriminatory, and the employer was unable to explain why it applied a retirement age of 48 rather than any other age.

Although this is only a tribunal decision, it is worth noting their comments that to amount to a legitimate aim capable of justifying direct age discrimination, a policy must have some social or public policy objective and go further than simply meeting the needs of a particular business. This demonstrates how hard employers will find it to justify a retirement age that is lower than the default retirement age.

Holiday entitlements should be paid to employees on long term sick leave

- In *Rawlings v The Direct Garage Door Company* one of the first sickness/holiday pay cases to be dealt with following the outcome of *Stringer*, an employment tribunal held that a worker who had been on sick leave for the last 15 months of his employment was entitled to statutory holiday pay in respect of that whole period. In this case the non-payment of holiday pay amounted to an unlawful deduction from wages.

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Birketts' Seminars - Early Bird Workshops

It is that time again and the dates and venues for the June Early Birds are due to be released any day! Invitations will be sent out in due course and we hope to see you all there!

