



EMPLOYMENT LAW UPDATE

November 2011

Welcome to the November issue of the Moore Blatch Employment Law Update. This monthly bulletin will keep you updated with the latest happenings and legislative changes in the world of employment law.

Employment Tribunal Reform

In September's Employment Update we advised you that the Department for Business, Innovation and Skills had launched a consultation on reforms to the employment tribunal system earlier in the year. The consultation set out a number of proposals, the headline proposals being raising the qualifying period for unfair dismissal to two years and charging claimants a fee.

On 3 October 2011, the Chancellor of the Exchequer, George Osborne, at the Conservative Party conference, announced two significant reforms:

Firstly, that the amount of time an employee has to have worked for a company before being able to bring an unfair dismissal claim will be doubled from 1 year to 2 years. This change will come into effect on 6 April 2012. It is not known at this stage however, whether there will be transitional provisions to protect those who may have already achieved one (but not yet two) years' service by that time.

Secondly, workers will be charged a fee for bringing a claim at the employment tribunal. From the limited information currently available, it appears likely that the following fee structure will apply:

- upfront fee of £250 when lodging ET1;
- further fee of £1,000 payable by Claimant when the hearing is listed;
- higher fees if the claim is for over £30,000.

The fees will be refundable if the claim is successful and there are plans for fees to be waived for those without the means to pay (although the precise details have not yet been released). We question how this will work in practice when the majority of those bringing claims are no longer in employment!

We understand that the aim of these reforms is to discourage vexatious applications to the Employment Tribunal. However, we are concerned that the changes to the qualifying period will not actually reduce the number of claims made to the Tribunal. Those employees who have insufficient service to bring an unfair dismissal claim are likely to bring a claim under discrimination legislation where there is no minimum service requirement.?

Reasonable Adjustments and Cost

Under the Disability Discrimination Act 1995 (DDA 1995), an employer was under a duty to make reasonable adjustments for a job applicant, employee or former employee who, because of their disability, was placed at a substantial disadvantage by a "policy, criterion or practice" applied by the employer. The Equality Act 2010 (EqA 2010), which has replaced the DDA 1995, contains similar rules on reasonable adjustments and direct discrimination. Under the EqA 2010, disability-related discrimination has been replaced by indirect discrimination and discrimination arising from disability, and whether there is a breach of duty will depend on whether a particular adjustment is "reasonable".

In the recent case of *Cordell v Foreign & Commonwealth Office*, the employment tribunal and EAT held that a proposed adjustment for a disabled person was not reasonable because of the cost. The tribunals both found that, as such, the Commonwealth Office (FCO) did not discriminate, nor breach its duty to make reasonable adjustments, when it withdrew an offer because of the cost involved in providing the support required.

Ms Cordell, who was profoundly deaf, was posted abroad by the FCO to a post in Poland in January 2009 and provided with full time lipspeaker support which had an average annual cost of approximately £146,000.

The FCO introduced a Reasonable Adjustment (RA) policy in March 2009 which provided that adjustments costing over £10,000 were subject to a specific procedure for addressing reasonableness.

Ms Cordell was promoted to a post in Kazakhstan in September 2009. The FCO applied the RA policy. As the new post required more costly adjustments than the Poland post (overall annual costs in the region of £249,500) the offer of the Kazakhstan job was withdrawn on the basis that the costs were unreasonable.

Ms Cordell brought tribunal claims. However, the tribunal found that the adjustments were not reasonable, even though refusing the adjustments would have the effect of limiting Ms Cordell's career, as on any objective test the cost of the adjustments were simply unreasonable.

The EAT found that there was no direct discrimination because the reason for withdrawing the job offer was not Ms Cordell's disability but the cost of providing the necessary support to allow her to do her job.

The decisions of both the employment tribunal and the EAT in this case clearly show that an employer is not required to make adjustments at 'whatever cost' and that the outcome of a case will be on the judgement call of a tribunal, based on what the tribunal considers 'right and just'.

TUPE and Variation of Contract

In the recent case of *Smith v Trustees of Brooklands College*, the EAT held that an agreed variation to a contract of employment is effective, where there has been a previous TUPE transfer, when the transfer is not the sole or principal reason for the changes to the contract terms.

In this case, the employees were teaching assistants and were employed by Spelthorne College. Under their contracts of employment, they were paid as full time employees even though they only worked part time. In August 2007 the college was transferred, under TUPE, to Brooklands.

As the employees were on terms out of line with the rest of the sector, Brooklands sought to bring the contracts of employment into line. A consensual variation of contractual rates of pay of a number of employees was made, to the detriment of the employees, with effect from 1 January 2010.

The employees brought a claim in an employment tribunal claiming that the variation in pay was ineffective, on the basis that TUPE made the purported variation of the employment contract void, as the sole or principal reason for the variation was the transfer itself. The employees argued that "but for" the TUPE transfer, the variation would not have taken place.

The Employment Appeal Tribunal (EAT) held that the "but for" test was not the test to be applied. The questions to be asked were, what was the reason for the change and, what caused the employer to make the change?

The EAT found that the judge in the employment tribunal had correctly found that the variation was not for a reason connected with the transfer that had occurred more than two years earlier, and that the reason for the variation was to correct an obvious error in pay.

This case shows that adjustments can be made to employment contracts following a TUPE transfer provided that the change is being made for a reason not connected with the transfer.

Can a notice of termination be retracted?

The general rule is that where an employer has given a notice of termination which is clear and unambiguous they have no right to withdraw it. There has however, been case law which has established that certain limited situations/circumstances may constitute "special circumstances" which entitle the employee in receipt of the notice not to take what is stated at face value.

The Court of Appeal ('the court'), in the case of *CF Capital v Willoughby*, considered the "special circumstances" principle.

The employer sent the employee notification that her employment would terminate on 31 December 2008 and informed her that an alternative agreement would commence on 1 January 2009. The notice was sent to the employee on the assumption that they were in agreement about the terms of a new contract under which the employee would switch from employment to self-employment. When the employer learned that the employee was not willing to accept the new contract they attempted to retract the notice terminating the current employment contract. The employee rejected the attempts of the employer to restore her employment and claimed wrongful and unfair dismissal.

The court found that the employer had intended to terminate the employee's contract and its mistaken expectation that she would accept the proposed self-employment terms was not a "special circumstance". Considering all of the facts, the court held that where an employer provides an intended, unambiguous written notice of termination to an employee, the employer can not subsequently retract the termination notice on the basis that the notice was premature and/or a mistake.

This case highlights the point that an employer's unambiguous notice of termination can rarely be withdrawn and that an employee will be entitled to take such notice at face value unless the employer can show that it did not actually intend to terminate the contract. It is our recommendation therefore that, when serving a notice of termination, to avoid any misunderstanding, a written note should be sent to the employee stating the proposed agreement before a notice of termination is issued.

Mitigation of Loss

In the case of *Debique v Ministry of Defence*, the Employment Appeal Tribunal found that the duty of mitigation applies to claims for compensation in discrimination cases and obliges a wronged employee to consider an offer of new employment with the employer with whom there has been a dispute.

Debique was a single parent who was struggling to combine motherhood with her responsibilities as a serving soldier. After a dispute with her employer, she gave notice to her employer and left.

Debique's employer had made her an offer of alternative employment, during her period of notice, to a posting which would have provided stability and which would adequately have addressed her childcare difficulties. Debique refused the offer.

Debique successfully claimed unlawful indirect sex and race discrimination in the employment tribunal and was awarded £15,000 for injury to feelings. She was not however, awarded anything for loss of earnings, on the basis she had failed to mitigate her loss.

On appeal to the EAT, it was held that whether her refusal to accept the offer made to her amounted to failure to mitigate loss was a question of fact for the tribunal. The EAT held that the tribunal had correctly concluded that Debique had failed to mitigate her loss and upheld the tribunal's finding that there was no case for aggravated damages.

This case highlights that employees who reject an employer's offer of transfer or re-engagement face the risk that no compensation for loss of earnings will be awarded. For employers, this is useful guidance and highlights the advantages of considering alternative offers of employment in situations such as these to reduce the overall liability if the claim proceeds.

Contact Us

If you require any further advice on any of the issues contained in this update, please do not hesitate to contact us.

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