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earwiggin : employment law update

LENGTH OF SERVICE & REDUNDANCY SELECTION

Rolls-Royce Plc v Unite the Union

Many employers still use length of service as a criterion for selecting employees for redundancy. Since the introduction of the age discrimination legislation in 2006, some have argued that using length of service unlawfully discriminates against younger workers. However, in a decision published last week, the Court of Appeal has ruled that the use of length of service was justified because it rewarded loyalty and helped to maintain a stable workforce during a redundancy exercise.

Rolls-Royce's collective agreement with Unite included an agreed method of selecting employees for redundancy. Where two employees received identical scores against the agreed criteria, length of service was used as a deciding factor. In a slightly unusual move, Rolls-Royce (who wanted to get rid of the scheme) applied to the court for a declaration that the use of length of service was unlawful. Unite (who wanted to keep the scheme) resisted the application.

The Court of Appeal ruled that, although using length of service did indirectly discriminate against younger workers, it was not unlawful because it was a proportionate means of achieving a legitimate aim (i.e. it rewarded loyalty and it helped to maintain a stable workforce). In reaching this decision, the Court took into account the fact that length of service was only one of several criteria and that it had been negotiated as part of a collective agreement.

It is worth noting that this decision is not authority for the proposition that "Last In First Out" will always be a legitimate method of selecting employees for redundancy. It is likely to be difficult to justify if it is used in isolation. Therefore, if it is considered appropriate to use length of service, it should only be used as one of a number of other criteria.

CONSTRUCTIVE DISMISSAL

Bournemouth University Higher Education Corporation v Buckland

It is often the case that, before resigning and claiming constructive dismissal, an employee will raise a grievance about the thing they are unhappy about. The employer in this situation is faced with a dilemma. If it dismisses the grievance then it is more likely that the employee will continue to be unhappy and claim constructive dismissal. On the other hand, if it upholds the grievance, the employee may still resign and use the employer's decision as an admission that there were grounds for claiming constructive dismissal. More often than not, the employer decides not to uphold the grievance even if the employee has a legitimate complaint. However, a recent decision suggests that there is something to be said for finding in the employee's favour in these circumstances.

Professor Buckland was employed in the Archaeology Department of Bournemouth University. After some exam papers that he marked resulted in a high failure rate, his Head of Department decided that they should be remarked. This resulted in many of Professor Buckland's marks being overturned without his knowledge. Professor Buckland subsequently found out what had happened and brought a complaint against his Head of Department. Following an enquiry by the University, his complaint was upheld. Nevertheless, Professor Buckland was not happy because he felt that he had not been fully exonerated by the enquiry. He resigned and brought a claim for constructive dismissal.

The Employment Appeal Tribunal found that, although Professor Buckland had been entitled to wait for the enquiry report before deciding whether to treat himself as constructively dismissed, the University had remedied the breach of contract by upholding his complaint. As a result, he was not able to demonstrate that he had been constructively dismissed.

This case is a useful reminder that, in appropriate circumstances, upholding an employee's grievance can be a very effective way of minimising the risk of liability for constructive dismissal. Having said that, each case is different: there will be some occasions where "pleading the 5th amendment" remains the most sensible option!

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