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earwiggin : employment law update

PILON CLAUSES

Geys v Societe Generale, London Branch

If you are looking for a case that confirms the importance of taking care when writing a dismissal letter, you could do a lot worse than this one. The omission of a few simple words cost the employer in this case about €2.5 million. It also confirms (not that further confirmation is needed) that bankers are paid far too much.

Mr Geys was a banker employed by the London branch of Societe General. His contract provided that he would be entitled to a termination payment if the bank terminated his employment in certain circumstances. The precise amount of the termination payment depended on when his employment came to an end.

At the end of November 2007, Mr Geys was called to a meeting and was given a letter confirming that his employment was being terminated "with immediate effect". Although the letter did not say that the bank had decided to exercise its right to make a payment in lieu of notice, the bank paid Mr Geys his notice pay a few weeks later.

In view of the fact that the dismissal letter did not say that the bank had elected to terminate his employment immediately by making a payment of lieu of notice, Mr Geys subsequently argued that the bank had acted in breach of contract (which he had not accepted) and that his employment had therefore not been effectively terminated. The court agreed. This meant that Mr Geys was entitled to a termination payment of about €10.5 million (rather than the €8 million it would have been if his employment had terminated in November 2007).

This decision serves as a useful reminder that, if you are intending to rely on a contractual right to make a payment in lieu of notice, this should be spelt out in the letter of dismissal. This is particularly important if the termination date makes a significant difference to the employer's potential financial exposure (e.g. because the employee is about to acquire one year's service or rights under a bonus or share option scheme).

WHISTLE BLOWING

BP Plc v Elstone and another

The whistle blowing legislation has caused more than its fair share of bewilderment and bemusement over recent years. There have been numerous cases where employees who have made relatively trivial disclosures have had claims upheld. A recent case has extended the level of protection even further in that it confirms that the legislation applies to disclosures made prior to the start of an individual's employment.

Mr Elstone was initially employed by a company which advised BP plc on its safety processes. He was dismissed for misconduct (unauthorised disclosure of confidential information) after he told two senior BP employees about his safety concerns. Shortly afterwards, BP hired Mr Elstone as a consultant. However, BP decided not to extend his engagement after it found out that he had previously been dismissed by his former employer for misconduct.

Mr Elstone brought a claim against BP alleging that he had been subjected to a detriment for making a protected disclosure. BP argued that, since the disclosure in question had been made by Mr Elstone before he started working for them, it fell outside the scope of the legislation. However, the Tribunal and the Employment Appeal Tribunal disagreed. Even though Mr Elstone was not employed by BP at the time he made the disclosure, he was still a "worker" (albeit for a different employer) and therefore he was protected by the legislation.

The message is clear - if you discover that a member of staff blew the whistle on their former employer, it will be unlawful to dismiss them (e.g. because you suspect that they might be a troublemaker) or subject them to any other type of detriment. However, due to an apparent loophole in the legislation, an employer will not be liable if it decides not to recruit someone who it knows or suspects was a former whistleblower.

DISCIPLINARY PROCEDURES

Samuel Smith Old Brewery v Mr and Mrs Marshall

Many employers will be familiar with the problem of an employee raising a grievance in advance of a disciplinary hearing and then insisting that the grievance is dealt with first. What should be done in this situation? Should you postpone the disciplinary hearing or is it safe to go ahead with the hearing and deal with the grievance afterwards?

In this case, the employees (who were pub managers) raised a grievance after their employer required them to reduce additional staffing hours because they felt that this would mean that they would have to work unacceptably long hours. The grievance was not upheld but the employees refused to comply with the employer's instruction, arguing that the employer should hear their grievance appeal first. The employer proceeded to hold a disciplinary hearing (which the employees refused to attend), which resulted in the employees' dismissal.

Although the Tribunal found that the employer had acted unfairly by holding the disciplinary hearing prior to the grievance appeal hearing, this decision was reversed by the Employment Appeal Tribunal. According to the EAT, it would only be unfair in the rarest of circumstances to conduct a disciplinary hearing before completing a grievance procedure e.g. where there was "clear evidence of unfairness or un-compensatable prejudice".

This is a welcome decision for employers. However, it is important to note that this was not a case where no grievance hearing had been held. The outcome may have been different if the employer had gone ahead with the disciplinary hearing without looking into the grievance at all. Ultimately it comes down to a question of what is fair and each case will turn on its own facts.

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