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MATERNITY LEAVE AND REDUNDANCY **De Bellin v Eversheds Legal Services Ltd**

Most employers are understandably nervous about making an employee who is on maternity leave redundant. In an effort to avoid any accusations of discrimination, it is not uncommon for the employee concerned to be given preferential treatment over other employees who are affected by the redundancy situation. However, as a recent case has shown, it is important to ensure that this does not cause unfairness to the employees who are not on maternity leave.

Mr de Bellin was a solicitor employed in the real estate department at Eversheds (a large international law firm). Following a downturn in work, Mr de Bellin along with a female colleague who was on maternity leave (Ms Reinholz) were notified that they were at risk of redundancy. In order to decide who should be selected, the firm decided to score both of them against 5 selection criteria.

One of the criteria that was used to measure financial performance was "lock-up" (which measures the length of time it takes to bill work that has been carried out) over the previous 12 months. To ensure that Ms Reinholz was not disadvantaged because she had been on maternity leave during much of this period, she was given a notional score of 2 (the highest possible score) against this criteria. Mr de Bellin, however, only received a score of 0.5. Because they received very similar scores on all the other criteria, this meant that Mr de Bellin was selected for redundancy.

Mr de Bellin brought claims for unfair dismissal and sex discrimination. The tribunal upheld his claims. It found that, although women on maternity leave were entitled to a degree of "special treatment", that did not mean that they should be given blanket protection. Eversheds could have done things differently (e.g. by not using lock-up as a criteria or by using a different reference period). The fact that it did not mean that not only was Mr de Bellin's dismissal unfair but it also amounted to unlawful sex discrimination.

It is understood that Eversheds is appealing this decision and therefore the Employment Appeal Tribunal may provide further guidance on this issue in due course. In the meantime, employers faced with similar situations should not automatically assume that giving an employee on maternity leave the benefit of the doubt in redundancy selection exercises is always the safest option. Consideration should be given to whether there are other ways to level the playing field, rather than automatically favouring the employee on maternity leave.

COMPENSATION FOR FAILURE TO FOLLOW DISCIPLINARY PROCEDURE **Edwards v Chesterfield Royal Hospital NHS Foundation**

It is well established that, where an employer fails to follow a contractual disciplinary procedure before dismissing an employee, the employee will be entitled to claim additional damages equal to the salary that they would have received during the time it would have taken the employer to complete the procedure. The logic for this is that it places the employee in the same position that they would have been had the contract been performed properly.

But what if the employee can show that he would have been exonerated had the disciplinary procedure been followed and therefore would not have been dismissed at all? Can he claim additional damages for breach of contract equal to all his ongoing losses arising out of his dismissal? Contrary to what most lawyers assumed, the Court of Appeal has recently held that the answer to this question is "yes".

Dr Edwards was a hospital consultant. After he was dismissed for gross professional and personal misconduct, he issued proceedings for breach of contract. He argued that, had the Trust properly carried out its disciplinary procedure, the allegations against him would have been dismissed and he would have remained in employment. He claimed that his damages for breach of contract should therefore be calculated by reference to his loss of earnings up to his expected retirement date rather than just the length of his notice period and the period of time it would have taken the Trust to follow the disciplinary procedure.

The Court of Appeal accepted that there was no reason why ongoing damages should not be awarded if it could be shown that an employee would not have been dismissed had a contractual disciplinary procedure been followed. The principle that additional damages were not recoverable for the manner of an employee's dismissal was not applicable where the employer was in breach of an express (rather than an implied) contractual obligation.

This is a very significant decision which could potentially have far-reaching consequences for employers who have contractual disciplinary procedures. It will open the way for employees to claim damages for dismissal over and above the current limit on unfair dismissal compensation. It is also likely to be used by employees who are dismissed within their first year of employment in order to claim damages for losses extending beyond their notice period.

The message for employers is clear - wherever possible, disciplinary procedures should be stated to be non-contractual. This will mean that any failure to follow the procedure cannot give rise to a claim for breach of contract.

RESTRICTIVE COVENANTS

Associated Foreign Exchange Ltd v International Foreign Exchange (UK) Ltd

Although it is well established that clauses restricting an employee's activities following the termination of their employment are only enforceable to the extent that they are no wider than reasonably necessary to protect the employer's business, there are very few cases on the question of what is a reasonable period of time for these types of restrictions to last.

Mr Abbassi was an account executive employed by AFEX. His contract of employment contained a 12 month non-solicitation covenant (preventing him from approaching any clients or prospective clients) and a 6 month non-dealing restriction (preventing him from dealing with clients even if they approached him). After Mr Abbassi left to join a competitor, AFEX applied for an injunction to enforce the 12 month non-solicitation restriction.

The High Court refused to grant an injunction on the grounds that a restriction of 12 months was too long. Relevant factors included the fact that Mr Abbassi was not particularly senior, he had not played a key part in securing new business and the customers were not particularly loyal because they tended to shop around between competitors for the best deal. The court concluded that 6 months was long enough to give AFEX the protection it needed. In any event, the court held that AFEX would not be entitled to prevent Mr Abbassi from soliciting potential customers - this would only be appropriate where a business could show that building up a relationship with potential customers was a long and difficult process, involving a significant investment in time and money.

It is important to note that this decision turned on its own facts and therefore it does not mean that it will never be possible for an employer to justify a 12 month restriction. However, it highlights the need to take care when drafting restrictive covenants. Since the type of duration of restrictions that will be appropriate will vary from one employee to another, it is always preferable for the covenants to be tailored to reflect the particular circumstances of the employee concerned and the threat they pose to the business after they leave.

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