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Legal news and views for employers and human resources professionals

Limits on Damages for Dismissed Employees

Employees can generally only sue for unfair dismissal compensation on the termination of their employment if they have one year's service with their employer. (There are some statutory exceptions to this principle that are outside the scope of this article.) However, what about employees who are dismissed without proper notice just before they complete one year's service—employees who, had they received the period of notice to which they were contractually entitled, would have acquired a year's service and the concomitant unfair dismissal protection? Can they claim any additional compensation? Until July of this year, the answer appeared to be yes: employees should be able to recover damages representing the lost chance to sue for unfair dismissal compensation. In July, however, the Employment Appeal Tribunal closed that loophole.

The high-water mark for loss of opportunity claims came with the case of *Raspin v. United News Shops Limited (1999) IRLR 9*, in which the Employment Appeal Tribunal (EAT) held that an employee who was dismissed in breach of a contractual disciplinary procedure could claim damages for the lost chance to sue for unfair dismissal. This decision was made on the basis that, had the procedure been followed, the employee would have acquired a year's service and thereby met the precondition for bringing an unfair dismissal claim. By extension, employees argued that if the employer's failure to give proper notice of termination deprived them of the chance to acquire a year's service and thereby unfair dismissal protection, they should be compensated for that loss.

However, in the latest case, *Virgin Net Ltd v. Harper (EAT 9.7.03)*, the EAT has restored the old orthodoxy. The EAT held that parliament had legislated that only employees with a year's service had the right to sue for unfair dismissal. Employees with less than a year's service, albeit due to their employer's failure to give proper notice, should not be permitted to circumvent the limits parliament had imposed, by making a loss of a chance claim.

The EAT, however, left undecided the question at the heart of the *Raspin* decision, namely whether an employee who is dismissed in breach of a contractual disciplinary policy, and who thereby fails to acquire a year's service, can sue for loss of a chance to claim unfair dismissal.

So what lessons can employers take away from this?

- Firstly, make sure that employees who are not performing satisfactorily are dismissed before they acquire a year's service—even if this means dismissing them without proper notice of termination.
- Secondly, avoid drafting contractual disciplinary procedures. That way, if the employer fails to follow the procedure, it cannot be said that he or she has breached the employee's contract. Bear in mind, however, that it is all too easy to inadvertently give disciplinary procedures contractual force by including a statement in the employee's employment contract that the contract incorporates the staff handbook, without stipulating which parts of the handbook are intended to have contractual force and which are merely matters of policy.

However, employers need to be mindful of the fact that the government is introducing statutory disciplinary procedures next year. Those procedures will be implied by law into all employment contracts. Once those procedures are in force, an employer dismissing even short-serving employees would be well advised to follow those procedures strictly—especially in the case of employees who are near to acquiring a year's service.

By Henry Clinton-Davis (henry.clinton-davis@haledorr.com)

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Hale and Dorr has developed an "off the shelf" staff handbook, updated to reflect the raft of recent employment legislation and case law in the U.K. The handbook provides HR professionals with the know-how and procedures to assist employers in maintaining compliance with the law. If you would like further details, please contact Henry Clinton-Davis (henry.clinton-davis@haledorr.com) on +44 20 7645 2507.

U.K. Employers Beware: U.S. Anti-Discrimination Law May Apply

Unlike the United States' diplomatic foreign policy which changes to a certain degree with each new administration, its "employment law" foreign policy has remained consistent since 1991. With the enactment of the 1991 Civil Rights Act, the U.S. embarked upon an "employment law" foreign policy to extend the protections of a number of U.S. employment discrimination laws (e.g., prohibiting discrimination in the workplace on the basis of race, sex, and disability, et al.) to certain U.S. citizens working abroad. Specifically, in order for a U.S. citizen working outside of the States to have the protections of the U.S. employment discrimination laws, he or she must be working for an American employer or a foreign corporation *controlled* by an American employer. The determination of whether an American employer controls a foreign corporation is based on four factors: (a) interrelation of operations; (b) common management; (c) centralised control of labour relations; and (d) common ownership or financial control of the two entities. In decisions by U.S. courts, all four factors need not be present in all cases and no one factor is determinative.

The aforementioned extra-territoriality protection can best be understood by applying it to the following scenario:

> Helen is a citizen of the U.K. who works as the human resources manager for Wickets, a U.K. company based in London. Wickets was created by AmeriReach, a U.S. company, to market internationally AmeriReach's products. AmeriReach owns 40% of the stock of Wickets. Some of the members of Wickets' board of directors are officers and/or board members of AmeriReach. The two companies have distinct corporate forms and separate management and operational staff. Secondment of employees between AmeriReach and Wickets is quite common. AmeriReach has a global human resources function in the States that sets company-wide personnel policy and which must approve certain personnel decisions. AmeriReach also dictates changes in marketing and sales strategy as necessary for sale of AmeriReach's products abroad.
>
> Mark, Wickets' marketing manager, is a U.K. citizen who has approached Helen because he wants to replace Edward, an American citizen, age 52, who is working in Wickets' London office. Mark explains that, although Edward has been a satisfactory employee, Mark does not think Edward will be able to develop effective strategies to reach the young, female adults targeted by the company's new marketing plan because he does not have enough in common with them. Mark wants to bring in a recent, female university graduate who will better be able to "identify with" the target market.

Is there sufficient control by an American corporation?

Under the above scenario, while Wickets is not an American employer, in all likelihood it would be considered as *controlled* by an American employer. AmeriReach is a substantial shareholder; Wickets exists and performs services principally for AmeriReach's benefit; AmeriReach monitors and modifies marketing and sales practices and sets corporate policies on labour matters; and there is also some overlap in board membership and officers between the two companies.

Is Edward covered?

Yes. Because Edward is a U.S. citizen working abroad, he is covered by the extra-territorial application of the U.S. Age Discrimination In Employment Act and Title VII of the Civil Rights Act of 1964. Conversely, U.K. citizens Helen and Mark would not be covered by U.S. employment discrimination laws, since they are foreign nationals.

What is prohibited?

While U.S. employment *discrimination* laws, such as Title VII (prohibiting discrimination on the bases of sex, race, national origin, colour and religion), the Age Discrimination In Employment Act (prohibiting discrimination against employees 40 years or older), and the Americans With Disabilities Act (prohibiting discrimination against employees with a disability, a history of a disability or who are perceived as being disabled) have extraterritorial application, other U.S. employment laws do not. Such laws whose application is limited to U.S. territories include: the National Labor Relations Act (which governs union-management relations), the Fair Labor Standards Act (which establishes minimum wage and overtime requirements), the Worker Adjustment and Retraining Notification Act (which provides for notice to employees of mass layoffs and plant closings), the Family and Medical Leave Act (which provides a leave of absence for family- and medical-related reasons), the Occupational Safety and Health Act (which sets safety requirements in the workplace), and the Employee Retirement Income Security Act (which governs pension and welfare benefit plans).

Are there any defences?

U.S. employment discrimination statutes do contain a "foreign laws" defence, which provides that it is not unlawful for an employer to take otherwise prohibited action if compliance with the U.S. employment discrimination statute with respect to an employee in a workplace in a foreign country would cause an employer to violate the law of the foreign country in which the workplace is located. A clear example of its application is a 1983 case involving an American helicopter pilot flying over Mecca in Saudi Arabia. Under then Saudi law, a non-Muslim would be beheaded for such conduct. However, the helicopter pilot could do the job if he converted and therefore the company's requirement that he do so to do the job was not unlawful. It is still unsettled whether the foreign law defence is limited to codified statutory law or would extend to contractual agreements under a foreign law as well.

Increasingly, U.S. corporations are deciding to expand internationally to remain competitive, increase profits and/or market share. U.S. corporations will continue to deploy U.S. citizens from the home office to staff certain positions abroad, often on a temporary secondment basis. The result is usually a mix of foreign and U.S. citizens in offices abroad which can lead to thorny issues where the laws of the U.S. and the foreign jurisdiction diverge. In our scenario, the applicability of U.S. discrimination law with respect to age does not yet have a corresponding equivalent under English law. Accordingly, U.K. human resources professionals working at American employers or American-controlled employers should be mindful of the extra-territorial application of the U.S. employment discrimination laws when making employment decisions with respect to U.S. citizens working in the U.K. and should consult with labour counsel on how to comply with and harmonise diverse law applicable within the same workplace.

By Jonathan Rosenfeld (jonathan.rosenfeld@haledorr.com)

Handling Stress Claims

There has been a great deal of publicity about the dangers of stress at work, and many employers have faced unfair dismissal claims from employees who have been terminated for extended sickness absences brought about by stress. However, employers are often less aware of their exposure to other claims from stressed employees, notably claims for damages for personal injury and compensation for disability discrimination. Similarly, employers are frequently unaware of the criminal penalties that can be imposed if they ignore their health and safety duties. In this article, we outline the practical and legal issues that can arise when employees suffering from stress-induced illnesses bring personal injury claims.

Damages for Personal Injury

Employees whose health suffers as a result of their employer's failure to take reasonable care of their health and safety may be in a position to sue their employer for damages for personal injury. This is not a claim that can be brought in the Employment Tribunal, but rather is pursued in the County Court, or, in serious cases, the High Court.

Most cases brought by employees who are suffering from stress-induced conditions focus on their employer's failure to provide them with a safe system of work. The employee needs to show that the employer has been negligent, and typically the employee will point to the fact that the employer has overloaded the employee, has failed to provide proper support, or has permitted bullying to go on unchecked. The employee's feelings of generalised stress may then develop into a serious medical condition such as depression, or even a mental breakdown. Where that outcome is a reasonably foreseeable consequence of the workplace arrangements, it is likely that the employer will be liable for damages. Claims can be substantial because personal injury damages are not capped in the same way as unfair dismissal compensation. In *Young v. Post Offices (2002) EWCA Civ 881 (CA)*, for example, damages of £90,000 were awarded. In *Walker v. Northumberland County Council (1995) 1 AER 737*, a case heard eight years ago, the employee's personal injury claim was settled for £175,000.

All is not lost for employers facing such claims however. There are a number of defences that may be open to them, and these should always be considered. Among the defences are the following:

- The system of work was designed for the normal individual, and the fact that the employee happened to be particularly vulnerable was not reasonably foreseeable. However, bear in mind that once the employer is put on notice that the employee has a problem, the employer will be expected to consider changes to working patterns.
- The employer's system of work is not the source of the employee's stress.
- The employee consented to or devised the system of work—not always a complete defence, but certainly helpful to the employer.
- The employer is not under a duty to remove all stressful aspects of a job. Rather he or she should conduct a balancing exercise—weighing up facts such as the level of risk, the severity of the consequences if the risk materialises, and what measures are required to alleviate the risk.

At the root of all these issues, however, is the idea of a risk assessment. By law, all employers are required to carry out risk assessments so that they can identify dangers in the workplace and put in place appropriate measures to comply with their health and safety duties (see *The Management of Health and Safety at Work Regulations 1999* and accompanying *Approved Code of Practice*). If the employer fails to conduct risk assessments and is not on the lookout for factors liable to cause injury (including mental injury) in the work place, the employer is clearly at risk of negligence claims if employees suffer injury as a result.

Faced with a plethora of stress claims, the Court of Appeal has also issued recent guidelines to assist employers (see *Sutherland v. Hatton (2002) EWCA Civ 76*). They include:

- The employer cannot be liable if there was nothing to alert him or her to the fact the employee was at risk. (However, if the employer has failed to carry out risk assessments, arguably he or she will have difficulty hiding behind this defence. The employer should be alert to jobs that have a particularly demanding workload, or to signs such as abnormal sickness or absenteeism.)
- The employer can assume that the employee can withstand the normal pressures of the job unless the employer is aware of a particular vulnerability.
- The employer can take what the employee says at face value. There is generally no duty to make searching enquiries if the employee maintains everything is fine.
- In all cases, the courts must identify the steps the employer could and should have taken before finding the employer in breach of duty. The employer is only in breach if he or she fails to take steps that are reasonable and that are likely to do some good.
- The employer who offers a confidential advice service with referral to appropriate counselling or treatment services is unlikely to be found in breach of duty—(a somewhat controversial remark which will probably be clarified in time).

As we pointed out above, personal injury claims are merely one of several avenues by which employees suffering stress-induced conditions can take action against their employers. However, employers who comply with their duty to carry out risk assessments, who actively monitor the working arrangements in the workplace and who then take appropriate action based on the results, start from a relatively strong position.

By Henry Clinton-Davis
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Retaining Key Employees and Protecting Your Business When They Leave!

The success of many businesses is often dependent to a large degree on key employees continuing to be actively employed and involved in the business. If you lose key employees, the whole business can stutter and sometimes fail completely.

It is therefore essential that you do all that is reasonably practicable to lock key employees into the business. In addition to incentivising the key employees to remain on board by providing them with long term incentive plans and shares and share options in the company, you should ensure that each key employee enters into a service agreement or contract of employment which includes:

- A suitable period of notice. A notice period of three to six months could help to secure the completion of a particular project or deal, provided the employee can be trusted to work conscientiously and loyally during the notice period. Alternatively, the employee can be placed on garden leave during the notice period (see below). Clearly, a balance must be achieved between the higher severance costs associated with longer notice periods (remembering that a payment in lieu of notice is often made in practice) and the potential need to retain the key employee to complete a given project or to keep him out of the market.
- A garden leave provision. Provided that the terms relating to the period of garden leave are reasonable, this type of clause will give the company the option to suspend the employee from his/her duties, to keep the employee away from the office and company's customers and to prevent the employee from joining a competing business during the notice period. While this does not assist the completion of operative work and paying an employee to remain in his garden can prove a waste of resources, it can give the company the breathing space to hire a replacement and reinforce relations with key customers before the key employee joins a competing business.
- A confidentiality clause which prohibits the key employee from disclosing or using the confidential information or trade secrets of the company. The clause should clearly define what is meant by confidential information, which should obviously include confidential business and development plans, product specifications, designs and customer lists. The clause should, however, include carve outs for information which enters the public domain, is ordered to be disclosed by a court of competent jurisdiction or is the subject of a protected act of whistle blowing (under the Public Interest Disclosure Act 1998).
- Restrictive covenants. This is another method of preventing a key employee from being involved in a competing business or from soliciting customers or key employees of the business, but relates to the period after the termination of employment. Contrary to popular belief, restrictive covenants are enforced by the courts in the United Kingdom if they only go as far as is reasonably necessary to protect the legitimate business interests of the company. Accordingly, non-compete covenants included in a service agreement should be drafted very carefully to cover only:
  - the business being operated by the company with which the employee has been materially concerned;
  - the geographical area within which the relevant business is being operated by the company and with which the employee has been concerned; and
  - the period of restriction which is reasonably necessary to prevent the employee from having an unfair competitive advantage as a result of his employment with the company.

At least, when the inevitable happens and you lose a key employee, these contractual provisions provide you with options to minimise the impact of losing the employee and maximise the protection for your business.

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Diary Note

A few places remain available for Hale and Dorr's forthcoming morning seminars on

Employment Issues in Commercial Transactions

The seminars will be held at our London and Oxford offices on 15th and 16th October respectively and are aimed at HR professionals, in-house lawyers and senior executives with responsibility for employment issues.

For further information please contact Margaret Charlton (London) at margaret.charlton@haledorr.com and Kate Seymour (Oxford) at kate.seymour@haledorr.com.

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