Channel Islands Employment Law Update

Insights - 09/07/2020

Jersey Tribunal rules HR advisers not protected by legal privilege

The Jersey Employment Tribunal (the **Tribunal**) in *David Slater v Consolidated Minerals*[1] sought to consider an interesting question concerning discovery: whether HR consultants are protected by legal advice privilege, given their status as non-legally qualified advisers. In the context of a constructive unfair dismissal claim, the Tribunal considered whether there should be specific disclosure of the communications, up until the date of resignation, between the former employee and hired HR advisers.

In reaching a decision, the starting point was that the law on legal privilege in Jersey is based upon English law. The Tribunal was swayed by authorities which asserted that legal privilege only applies to advice from a lawyer, including a judgment of the Supreme Court which refused to extend privilege to tax advisers[2]. Consideration was given to a decision of the Employment Appeal Tribunal where it had been found both undesirable and unnecessary to extend legal advice to personnel consultants[3].

This decision clarifies that HR advisers cannot rely upon legal advice privilege, providing certainty to an area of ambiguity. The Tribunal was not, however, required to consider whether litigation privilege can be asserted by personnel advisers. It remains to be seen whether a similar approach will be adopted in the event that a HR consultant asserts litigation privilege.

The English High Court decides not to uphold confidentiality in compromise agreement

In the English case of Duchy Farm Kennels Limited v Graham William Steels[4], the High Court (the Court) was faced with an important issue which had never been the subject of an appeal ruling before: will a former employee's breach of confidentiality relieve the former employer of its obligations to make payments under a settlement agreement? This issue may arise where payments are to be made in instalments. In the UK, the term 'settlement agreement' refers to what was previously known as a 'compromise agreement'. However, both are exactly the same.

In Jersey and Guernsey, such agreements are still known as compromise agreements.

The Court looked to the nature of the confidentiality clause and determined that it was not an express condition of the contract. Usually, essential terms of the contract are drafted as conditions or the wider considerations, such as the level of commercial risk, may persuade a Court that a more generally drafted term is a condition. This did not, however, occur. The Court considered the confidentiality clause to be an 'intermediate term', an important distinction. A breach of a condition would have entitled the employer to terminate the contract and cease making payments. The breach of the intermediate term, being a less important term than a condition, only gave rise to a right to discharge the contract if the employer had been deprived of the whole benefit of the contract, otherwise known as a repudiatory breach of the contract. The employer had not suffered such a deprivation and was required to continue making the payments.

Practically, this decision affirms the importance of careful drafting of compromise agreements. Employers should not assume that a generally drafted confidentiality clause will free them of their payment obligations where there has been a breach by an employee. Solutions may include drafting a confidentiality clause as an express condition of the contract; any breach of a condition should enable the employer to cease making payments. Alternatively, employers may be wise to include a clause providing for the return of payments in the event of an employee's breach of confidentiality.

The Jersey Tribunal waives bus driver's condition of employment

The Tribunal in Glenn Aaron v Ct Plus Jersey Limited[5] considered whether an employer, who had actual knowledge that an employee could not fulfil a condition of the employment contract, could rely on an employee's subsequent breach of that condition to withhold wages. The relevant condition required the employee to hold appropriate qualifications to work as a bus driver in Jersey.

The Tribunal concluded that the employment could not possibly have been conditional upon the employee obtaining the relevant qualifications at the start of his employment. To arrive at this decision, the Tribunal pointed to the former employer's failure to correctly advise of the timeframes to apply for the relevant certificates. The clause was declared to be impliedly waived by reason of the employer's actual knowledge of the circumstances surrounding the breach. The Tribunal placed emphasis upon the fact that the the employer knew that the employee would be unable to hold the necessary qualifications at the start of employment.

This decision may have far reaching consequences, beyond the realms of driving qualifications. It remains to be seen whether an employer's knowledge of an employee's inability to comply with conditions of a different context, for example, the inability to fulfil background checks prior to the commencement of employment, will prevent an attempt by an employer to rely on such a clause against an employee at a later date.

Constructive unfair dismissal claim rejected on all counts

In Ms Tracy Walker (Fallaize) v Aurigny Air Services Limited[6], the Guernsey Employment Tribunal (the Tribunal) considered a constructive unfair dismissal claim brought by a former employee who, after suffering an injury in the workplace, had returned to work for five weeks before resigning and bringing a claim eight months later. The Tribunal sought to consider whether a fundamental breach of the contract had occurred and even if it did, was the claim precluded by a delay in litigating?

In order to reach its decision, the Tribunal looked to the conduct of the employer in managing the employee's sickness absence and found no evidence of a fundamental breach of the employment contract. By continuing to work after the injury, the employee had affirmed the contract, demonstrating that the employee clearly did not treat the contract as being at an end. Even if a breach had occurred, a delay of eight months before resigning prevented relief being granted to the employee.

This decision serves as a reminder to both employers and employees that a contract of employment may only be terminated without notice if the other party has committed a fundamental breach of contract. If a party wishes to litigate on the basis of a fundamental breach, they should take timely action to avoid affirming the employment contract.

The Guernsey Tribunal rules hotelier failed to follow redundancy process

The Tribunal in Chiverton v Sahara City Co Ltd[7] reviewed a claim for unfair dismissal. Despite a fraught employment relationship involving numerous disagreements between the parties, redundancy was identified as the sole reason for dismissal. A termination letter had been provided to the employee which advised that the employment would terminate ten days later due to a downturn in sales.

The Tribunal concluded that the employee had been unfairly dismissed. The decision was based upon the employer's complete failure to follow a redundancy process, whether that be an internal redundancy procedure or the Redundancy Code of Practice. As the employer had not dealt with any concerns about the employee by utilising a disciplinary procedure or investigating conduct, the Tribunal was not persuaded that the dismissal was for a reason other than redundancy. In light of the employee's insubordination, the Tribunal found it just and equitable to reduce the award made to the employee by 15%.

Practically, this decision affirms the importance for employers to maintain and follow a fair redundancy procedure when considering making redundancies. The focus will not, however, be purely on employer conduct. Employees who are subject to a redundancy process should be mindful that the Tribunal may use its discretion to reduce an award to an employee if it is just

and equitable to do so.

[1] David Slater v Consolidated Minerals Limited [2019] TRE 194.

[2] Prudential v Pandolfo [2013] 2 AC 185.

[3] New Victoria Hospital v Ryan [1993] ICR 201.

[4] Duchy Farm Kennels Limited v Graham William Steels [2020] EWHC 1208 (QB).

[5] Glenn Aaron v Ct Plus Jersey Limited [2019] TRE238.

[6] Ms Tracy Walker (Fallaize) v Aurigny Air Services Limited ED021/19.

[7] Chiverton v Sahara City Co Ltd ED021/19.

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