



On The Case

July 2011

Insistence on compromise agreement did not breach contract

A collective agreement in place between Mirror Group Newspapers and the British Association of Journalists, the terms of which were incorporated into individual contracts of employment, provides for enhanced redundancy payments (ERP). The agreement made no reference to any requirement that an employee had to sign a compromise agreement before receiving such a payment, but nevertheless it had always been the practice to do so. When Mr Garratt was made redundant, he refused to sign a compromise agreement and did not receive an ERP.

A county court rejected Mr Garratt's breach of contract claim. The court found Mr Garratt's contract contained a term, implied through custom and practice, that receiving the ERP was conditional upon entering into a compromise agreement. The Court of Appeal agreed. For a term to be implied by custom and practice it has to be reasonable, certain and well known throughout the organisation. No employee had received an ERP since 1993 without entering into a compromise agreement and Mr Garratt was well aware that he would have to sign one to receive it. This meant the practice was sufficiently well established to have become an implied contractual term.

It is understandable that employers may wish to insist upon compromise agreements in such circumstances, but even though the employer was successful in this case, the wisest course is to have a clear, written express term that an enhanced payment will be conditional upon a compromise agreement being entered into.

Garratt v Mirror Group Newspapers Ltd [2011] IRLR 591

Interim relief order overturned

In certain types of unfair dismissal case, including those involving public interest disclosures, a tribunal can grant the employee interim relief by making an order for the continuation of their employment pending final determination of the case. Interim relief can only be granted if the tribunal thinks that the claimant is "likely" to establish at a full hearing that the protected disclosure was the reason (or principal reason) for dismissal. Interim relief cases are rare, so the EAT's view on the provision that relief will only be granted if the case is 'likely' to succeed is of interest.

Mr Sarfraz alleged that he had been dismissed for whistleblowing because he had made disclosures in good faith to his employer of a failure to comply with legal obligations. The employment judge granted an order for interim relief, thereby having the effect of continuing his employment until determination of his claim. The EAT upheld the employer's appeal and the application for interim relief was dismissed.

The word "likely" [to establish that whistleblowing was the reason for dismissal] does not mean "more likely than not" (that is at least 51% probability), but connotes a significantly higher degree of likelihood. The employment judge had erred in failing to consider whether the claimant's belief was reasonable that he was disclosing information that tended to show a breach of legal obligations, so his decision could not stand. On the evidence it was almost certain that Mr Sarfraz's belief that there had been breach of legal obligations by the employer was not reasonable, since there appeared to be no breach of contract in the manner in which his grievances had been handed, which formed the basis of his claim.

Ministry of Justice v Sarfraz [2011] IRLR 562

Employment transferred under TUPE

Mr Marcroft, was employed by PMI Health Group Ltd (“PMI”) in the commercial insurance department. He resigned and his notice expired on 26 October 2009. The commercial insurance business was transferred as a going concern to Heartland (Midland) Ltd on 2 October 2009. After the termination of his employment, Mr Marcroft went to work for a rival company. Heartland argued that Mr Marcroft’s employment transferred under TUPE and therefore restrictive covenants applied. Mr Marcroft defended the case by raising two very unique arguments.

Firstly, he contended that he was no longer assigned to the undertaking transferred because he had previously given in his notice and was put on garden leave when the transfer took place. As Regulation 2(1) of TUPE defines “assigned” as meaning “assigned other than on a temporary basis”, he argued that by handing in his notice his assignment in commercial insurance was temporary. The Court of Appeal disagreed, holding that it cannot be right that an employee is automatically assigned on a temporary basis, thereby losing the protection of TUPE, simply as a result of handing in his notice.

Secondly, Mr Marcroft argued that there was no valid transfer because he was not provided by PMI with information in writing about the transfer, which would have enabled him to exercise his right to object. The Court of Appeal also rejected this argument. Regulation 13 of TUPE requires that the representatives of the affected workers be provided with certain information. This does not, however, include the right to object and does not impose an obligation to provide the information to Mr Marcroft personally.

Marcroft v Heartland (Midlands) Ltd [2011] IRLR 599