Hewitsons' Employment
LEGAL UPDATE

April 2018
Vol.20 No.4

What's New

Implied acceptance to variations of contract

In the recent case of *Abrahall v Nottingham City Council* the Court of Appeal (CoA) held that the fact that an employee continues to work following changes to their contract of employment could constitute acceptance of that change, but that this would not always be the case.

This case related to NCC's pay progression scheme. Previously, the administrative employees at NCC were entitled to pay progression on a yearly basis, however, manual workers were not. In 2010 NCC decided to remove this distinction and implemented a single pay scale system that covered all staff determined by a spinal column point.

Shortly after the single pay scale had been put into place NCC brought in a two year pay freeze. The employee unions at this time did not challenge the freeze, nor did any of the individual employees affected. However, when NCC sought to extend the pay freeze, a collective grievance was raised. The grievance was not resolved following which a number of employees issued proceedings claiming that NCC had acted in breach of contract by failing to increase their pay in accordance with the pay scale.

NCC defended the claim on the basis that the employees did not have a contractual right to an annual increase in pay as a result of the single pay scale and that, even if they had, their conduct in continuing to work without protest when the pay freeze was first implemented meant that the employees had accepted the variation in their contracts under which pay increases were frozen.

The CoA held that the employees were contractually entitled to an annual increase in pay. In terms of whether the employees had accepted the variation in their contract so as to freeze their pay, the CoA found that in these circumstances the employees had not accepted the variation by continuing to work without protest during the first two years of the pay freeze. The CoA held that when determining whether acceptance of a variation can be implied it is necessary to look at the circumstances objectively and in this case the fact that a collective grievance was issued, albeit at a later date, was sufficient to show that the variation was not accepted.

Suspension in disciplinary proceedings

In the case of *Blackstone v University College London*, the High Court held that it the

particular circumstances it was not just to grant an interim injunction lifting the employee's suspension, despite the employer's breaches of its own disciplinary procedure.

Mr Blackstone was the head of science and technology at the University, and was suspended from work on the basis of alleged breaches of his contractual duties. Following an investigation, Mr Blackstone was accused of poor leadership, and bullying and intimating other member of staff. The University also blocked Mr Blackstone's access to his work emails during the period of suspension.

Mr Blackstone claimed that the University had breached its duty of trust and confidence towards him and also that the University had acted in breach of its own disciplinary procedure. Mr Blackstone argued that in this case damages were not sufficient and so applied for an interim injunction to be granted to lift his suspension.

The High Court held that Mr Blackstone's suspension breached the University's disciplinary policy. It found that Mr Blackstone was not given an opportunity to comment on the allegations made against him, his email access was unduly restricted and the decision to suspend was not made by an independent individual.

The High Court found that it was arguable that the University's breach in its contractual obligations, breach of duty in suspending Mr Blackstone and restricting his email access, was such that damages would not be an adequate remedy. There could have been serious damage to Mr Blackstone's reputation and career if the suspension was not lifted, and the suspension was not a neutral act in these circumstances as it brought Mr Blackstone's competence into question. The High Court accepted therefore that there could well be circumstances where an interim injunction could be awarded to an employee that had been suspended. However, having listened to the evidence put forward in terms of the effect that Mr Blackstone's actions had on University staff and the stress it had caused them the High Court found that, on balance, the degree of harm that could be caused to the University and its staff in lifting the suspension outweighed the risk of harm to Mr Blackstone. Therefore, Mr Blackstone's application for an interim injunction was refused. This case does however stress the importance for employers to consider fully the circumstances of a suspension before taking the decision to do so and ensuring that it acts in line with its disciplinary procedures.

When is Notice of Termination effective?

The Supreme Court in *Newcastle Upon Tyne NHS Foundation Trust v Haywood*, held that notice of termination is effective from the date the employee receives the notice not the date the notice was delivered by post.

Ms Haywood was placed at risk of redundancy by the NHS Trust in April 2011. On 20 April the NHS Trust had sent written notice of termination to Mrs Haywood via recorded delivery. Mrs Haywood was however on holiday at this time and so the postal service was unable to deliver and returned the letter to the sorting office. The letter was collected by Ms Haywood's father-in-law on 26 April and when Ms Haywood returned from holiday on 27 April she read the letter.

In this case the date at which the notice of termination was deemed to have been delivered was important as it determined the pension that would be due to Mrs Haywood. If deemed delivery of the notice was on 27 April, Mrs Haywood was entitled to a more generous pension.

The Supreme Court held that the notice of termination is effective only when it is actually read by the employee or when the employee has had a reasonable opportunity to read it. Therefore in this case, the date that the notice of termination was effective was 27 April.

WHAT TO LOOK OUT FOR

Bringing an end to sexual harassment in the workplace

The Equalities and Human Rights Commission (EHRC) has published a report, *Turning the tables: ending sexual harassment at work* which details recommendations about how to end sexual harassment in the workplace and how to better protect victims of sexual harassment at work.

The EHRC recommendations include the following:

- a mandatory legal duty should be introduced on employers to take reasonable steps to prevent workplace sexual harassment;
- targeted sexual harassment training for managers to be developed by ACAS;
- a confidential online tool should be available for employees to report sexual harassment;
- introduction of legislation preventing employers from using non-disclosure agreement to prevent disclosure of allegations of past sexual harassment;
- reintroduction of tribunal power to make wider recommendations in sexual harassment cases; and
- that the time limit to bring a claim for sexual harassment should be extended to six months.

For more information on the EHRC report, click here: Turning the tables: ending sexual harassment at work.

For more information on any issues discussed in this update please contact Nick Hall on 01604 233233 or click here to email Nick.

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