



Abrahall v Nottingham City Council: Vary Contracts With Caution

The Facts

In an atmosphere of austerity following the 2010 General Election it was announced by Nottingham City Council that they would be freezing pay for their staff for two years. Although the unions did not agree to the freeze, it was implemented from 1 April 2011. The unions continued to object to the change for several months. When the Council decided to impose another freeze in April 2013, hundreds of staff bought a claim for unlawful deductions of wages on the basis that they had a contractual entitlement to pay rises.

The case focused on two key points:

- 1) Whether employees had a contractual entitlement to an annual increase in pay; and
- 2) If employees did have such an entitlement, whether they accepted the change to their contracts by continuing to work without protest following the freeze in 2011.

The Decision

The Court of Appeal found that the employees enjoyed, at the time of the implementation of the pay freeze, a contractual right to pay progression. Withholding the annual increments from 1 April 2011 was therefore a breach of contract.

The Court of Appeal also found that the employees had not waived their right to pay increases by continuing to work. When a contractual variation has been imposed in breach of contract, continuing to work can in some situations amount to a waiver, but not in this case. The union continued to object after the pay freeze had been implemented making it difficult to conclude that the pay freeze had been accepted on an individual level. The change was wholly disadvantageous to employees but was not put to them as something that required their agreement. The court indicated that, in general, acceptance of a wholly disadvantageous change is less likely to be inferred.

Comment

- Employment contract variations have always been something to approach with caution; and while each situation will turn on their own individual set of facts, this case is a salient reminder that it is better to obtain express consent from employees if they are being subjected to a detriment.
- It can be time-consuming to obtain consent, so if you do decide to rely on deemed consent, make sure you set out a defined period in which objections must be raised, and after which, consent will be deemed to have been given.
- If you implement regardless of objections then it may, however, be difficult to rely on deemed consent to a wholly disadvantageous change.

- One option to consider is dismissing employees and re-hiring them on the new terms. The usual rules regarding dismissal would apply.

Pimlico Plumbers v Smith: Supreme Court Employment Status Appeal Dismissed

As the gig-economy continues to expand, employers should take heed of this recent Supreme Court decision. What does self-employed actually mean?

The Facts

Mr Smith worked solely for Pimlico Plumbers. His contract stated that he was an independent contractor, in business on his own account, and he paid tax on a self-employed basis. Although Mr Smith's contract stated that he was not obliged to accept any work from Pimlico Plumbers, the handbook stated that he had to work a minimum of 40 hours a week. Mr Smith also had to wear a Pimlico Plumbers uniform and drive a Pimlico Plumbers van. There was no express right of substitution in Mr Smith's contract but plumbers were able to informally swap shifts between themselves. Mr Smith suffered a heart attack in 2010 and his contract was terminated after his request to work three days a week was denied. Mr Smith brought claims against Pimlico Plumbers for unlawful deductions from wages, failure to pay holiday pay, unfair dismissal and disability discrimination. Having brought these claims a decision had to be made by the tribunal as to Mr Smith's employment status, a decision that has been appealed.

The Decision

The Supreme Court upheld the decision of the Employment Tribunal, Employment Appeals Tribunal and Court of Appeal, confirming Mr Smith was a worker as defined by the Employment Rights Act 1996 and the Working Time Regulations 1998 and his work fell within the definition of employment under the Equality Act 2010.

The question of whether Mr Smith was able to appoint a substitute proved to be important in this case. Mr Smith was only able to swap shifts with another person contracted by Pimlico Plumbers. He did not have an unfettered right to appoint a substitute regardless of their relationship with Pimlico Plumbers. The Supreme Court confirmed that this limited right of substitution was somewhat consistent with an obligation to perform services personally. If someone is a true contractor then the business should be uninterested in the identity of the substitute provided the work is performed.

The Supreme Court held that the Employment Tribunal also was entitled to regard Pimlico Plumbers as more than just a "client or customer of Mr Smith's business". The degree of control Pimlico Plumbers had over Mr Smith, ensuring both his uniform and van were branded, he followed administrative instructions and signed up to post-termination restrictive covenants, meant that they couldn't simply be a client or customer. Mr Smith will now be able to take action against Pimlico Plumbers as a worker in the Employment Tribunal.

Comment

- This ruling again highlights the fact that the courts will look at the reality of a relationship rather than the labels.
- Contractual choreography was criticised in this instance for attempting to serve inconsistent objectives.
- Although the issues in this case are highly specific to the facts, this highlights the pragmatic approach that tribunals and courts are currently taking to employment status with other companies such as Uber, Addison Lee and Hermes all having decisions on the status of their workers going against them.

Roddis v Sheffield Hallam University: A Full-Time Employee Can Be a Comparator for a Part-Time Employee

The Employment Appeals Tribunal held that a full-time employee was a suitable comparator for a part-time employee for the purpose of bringing a claim under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the Regulation).

The Facts

Mr Roddis was employed as an associate lecturer at Sheffield Hallam University on a part-time, zero-hours contract. His contract stated that the University was under no obligation to provide him with work and confirmed that he agreed to work for "such hours each year which may be as few as zero hours per week".

When Mr Roddis brought a claim under the Regulation, he sought to compare himself to a full-time lecturer. The Employment Tribunal, however, held that he had not identified a valid comparator as they were not employed under "the same type of contract". The Employment Appeals Tribunal looked at whether the Employment Tribunal had erred in reaching this conclusion.

The Decision

The Employment Appeals Tribunal allowed the appeal and held that the full-time and part-time lecturers were both employed under the same type of contract. The Employment Appeals Tribunal applied *Matthews v Kent & Medway Towns Fire Authority*. The guidance from this case made clear that the Regulation determines whether a comparator is working under the same type of contract. The Regulation sets out four types of contract that are different to one another. Provided the worker and comparator fit within the same description in one of the four broadly defined categories, they are employed under the same type of contract.

Comment

Employers should ensure that they don't treat zero hours contract workers less favourably than their full-time employees if their roles are broadly similar, unless the treatment can be objectively justified.

City of York Council v P. J. Grosset: Discrimination Arising From a Disability

The Facts

Mr Grosset suffers from cystic fibrosis and is therefore a disabled person for the purposes of the Equality Act 2010. When he started working at a Joseph Rowntree School in 2011 reasonable adjustments were made to minimize stress and accommodate the time-consuming exercise regime required to manage his condition.

When a new headteacher started at the school in the autumn of 2013 he was not told about Mr Grosset's condition or about the earlier adjustments. Mr Grosset's workload increased and he struggled to manage it alongside his condition, which worsened. When highly stressed, Mr Grosset showed a group of vulnerable 15- and 16-year olds an 18-rated horror movie. The school dismissed him for gross misconduct.

Mr Grosset admitted that it was inappropriate to have shown the movie to his students but maintained that this error in judgement only came about because of the high level of stress he was under as a consequence of his disability. Mr Grosset then commenced proceedings against the Council for unfair dismissal and for discrimination arising from a disability.

The Decision

The Employment Tribunal found that Mr Grosset had established the discrimination arising from a disability claim because the stress caused by his disability resulted in him showing the horror movie to his students. The school then treated Mr Grosset unfairly, taking into account their failure to make reasonable adjustments, by dismissing him for the misconduct. The Employment Tribunal found that the dismissal was a disproportionate response despite the fact that the medical evidence available to the school at the time did not show a clear link between the disability and conduct.

The Council appealed this point in both the Employment Appeals Tribunal and Court of Appeal. In the Court of Appeal the Council argued that the legislation requires an employer to be aware of the causal link between the disability and the conduct arising from it. The Court, however, dismissed the appeal finding that this would add an extra stage to the Equality Act test.

The Employment Tribunal dismissed the unfair dismissal claim as dismissal was within the school's range of reasonable responses, given the information they had available at the time.

Comment

- This case is the first time that the Court of Appeal has considered the proper interpretation of this key point in the Equality Act and how it could be problematic for employers.
- An employer could be liable for disciplining an employee for an act that does not appear to be linked to their disability.
- It is important that you always conduct a thorough investigation where a disability may have had any bearing on the actions of a member of staff.

Mbubaegbu v Homerton University Hospital: Dismissal Where There Is No Single Act of Gross Misconduct

The Employment Appeals Tribunal held that an employee was fairly dismissed, without prior warning, for multiple incidences of misconduct, none of which individually amounted to gross misconduct.

The Facts

Mr Mbubaegbu was a consultant orthopaedic surgeon in the Trauma and Orthopaedics department of Homerton University Hospital for 15 years. The hospital introduced new Rules and Responsibilities in April 2013, compliance with which was monitored by his employer. Following two thorough investigations it was found that Mr Mbubaegbu and four colleagues were non-compliant. Mr Mbubaegbu breaches were considered to be the most serious, with disciplinary action taken against him in respect of 17 allegations. Mr Mbubaegbu was therefore dismissed for gross misconduct, without warning. The consultant brought claims of unfair dismissal, wrongful dismissal and race discrimination, but we will focus on the unfair dismissal and wrongful dismissal claims in this update.

The Decision

The Employment Appeals Tribunal dismissed the appeal in relation to unfair dismissal but allowed the appeal in relation to wrongful dismissal.

Unfair Dismissal: The Employment Appeals Tribunal held that the tribunal had not erred in its approach to the acts of misconduct relied upon and it was not necessary for there to be a singular act that amounted to gross misconduct. Mr Mbubaegbu's careless and negligent actions amounted to a pattern of unsafe behaviour and his wilful approach meant that a final written warning would not have been a sufficient response. Conduct, such as this, that undermines the trust and confidence in an employment relationship can amount to gross misconduct.

Wrongful Dismissal: The Employment Appeals Tribunal highlighted that the tests for wrongful and unfair dismissal are different. In a wrongful dismissal case, the tribunal must make its own findings of fact as to whether the claimant was guilty of a repudiatory breach of contract. The tribunal had not addressed whether the individual breaches of contract were sufficiently serious to justify summary dismissal, so the case was remitted back to the tribunal on this point.

Comment

In respect of the unfair dismissal claim, the Employment Appeals Tribunal focused on whether the employee's cumulative actions had undermined the relationship of trust and confidence between employee and employer. It did not focus on whether a single act on its own could amount to gross misconduct. Although in this instance the tribunal was able to find that dismissal was within the range of reasonable responses, this finding depends heavily on the specific circumstances and will not always be the case.

For more information about these issues or if you would like to discuss an employment-related matter, please contact: [Christopher Hitchins](#) at +44 (0) 20 7776 7663 or [Sarah Bull](#) at +44 (0) 20 7770 5222.

Katten Muchin Rosenman LLP Offices

AUSTIN | CENTURY CITY | CHARLOTTE | CHICAGO | DALLAS | HOUSTON | IRVING | LOS ANGELES
NEW YORK | ORANGE COUNTY | SAN FRANCISCO BAY AREA | SHANGHAI | WASHINGTON, DC

This email is sent by Katten Muchin Rosenman UK LLP, a Limited Liability Partnership of Solicitors and Registered Foreign Lawyers registered in England & Wales, regulated by the Law Society.

Attorney Advertising

Reply Address: Paternoster House, 65 St Paul's Churchyard, London EC4M 8AB

Tel: +44 (0) 20 7776 7620

Fax: +44 (0) 20 7776 7621

Website: www.kattenlaw.com/london

Email: info@kattenlaw.co.uk

This email and any files transmitted with it is confidential and intended solely for the use of the person to whom the email is addressed or in the case of an erroneous email address being used, the person to whom it is clear the email was intended. Any unauthorised dissemination, use, copying or editing of this email or its attachments or the information contained therein is strictly prohibited and may be illegal. If you have received this email in error please notify the Office Manager on +44 (0) 20 7776 7628 and delete it from your system.