



Summer 2010

## A cautionary tale for employers when dismissing employees without notice...

### *Geys v Société Générale, London Branch*

***In a peculiar decision, the High Court has held that an employer's purported summary dismissal of an employee was not effective and his employment did not terminate until after he been paid in lieu of notice and had been notified of the purpose and effect of that payment.***

In a meeting on 29 November 2007, the employer, Société Générale, told Mr Geys that it had decided to terminate his employment "with immediate effect". It gave him a letter to this effect and escorted him from the building. Without telling him what it was, the bank subsequently made a payment into his bank account on 18 December 2007. The bank then sent Mr Geys a letter on 4 January 2008, which asserted that it had given Mr Geys notice

he was summarily dismissed) or on 18 December (when the bank made a payment into his bank account). His contract in fact terminated on 6 January when he received the bank's letter confirming that he had been paid in lieu of notice. This is because employment contracts are no different from other contracts, in that where there is a repudiatory breach of contract (here, summary termination without cause) the innocent party has a choice whether to accept the repudiation or treat



to terminate his employment with immediate effect on 29 November and that the money it had sent him on 18 December had in fact been a payment in lieu of his notice period. Mr Geys issued proceedings in the High Court in relation to the size of the termination payment, which partly depended on when his employment had, in fact, terminated.

The High Court held that Mr Geys' employment contract did not terminate on 29 November (when

the contract as remaining in force. The court held that, to treat the contract as terminated, Mr Geys would have had to "clearly and unequivocally" conveyed this fact to the bank – and he had not done this. If the bank wished to exercise its contractual right to summarily terminate the contract by paying Mr Geys in lieu of his notice period, it had to tell him that that was what it was doing. Merely paying the notice monies into his account was not enough.

**Synergy advises.....**

Whilst it is rare that an employee will refuse to accept that their employment has ended and contend that their contract is continuing, it does remain a possibility. This is especially the case where the termination date will make a significant difference to the employee's financial entitlement – for example, where an earlier termination date would mean an employee losing out on valuable bonus or share option entitlements. Whilst this is only a decision at first instance and does not deal with the point, we may now see employees whose employment has been terminated in breach attempting to affirm the contract as a means to gain the one year's employment necessary to claim unfair dismissal.

To ensure that the employee's contract does indeed terminate with immediate effect, employers should draft termination letters carefully and state specifically if they intend to rely on a payment in lieu of notice clause.



## Concurrent disciplinary and grievance proceedings

***Samuel Smith Old Brewery (Tadcaster) v Marshall and another***

***This case provides helpful guidance on what an employer should do if disciplinary and grievance procedures overlap.***

The case concerned two pub managers whose employer, a brewery, required them to reduce additional staffing hours. They submitted a grievance, arguing that this would mean they would have to work unacceptable hours. The brewery did not uphold their grievance. Despite this, the managers refused to implement the reduction in additional staffing hours, arguing that the brewery had to hear their appeal first. Following

a disciplinary hearing, which the managers chose not to attend, the brewery dismissed them. They claimed that their dismissal was unfair.

The EAT held that the brewery did not have to complete the entire grievance procedure (including the appeal) before it conducted the disciplinary hearing. It will only be in extremely rare circumstances that proceeding with a disciplinary process before hearing a grievance appeal will fall outside the band of reasonable responses. The EAT remarked that such circumstances might include where there is "some clear evidence of unfairness or uncompensatable prejudice".

### Synergy advises.....

A couple of factors counted in the brewery's favour in this case: firstly, they had held a grievance hearing and, secondly, if the managers had attended the disciplinary hearing, they could have raised the points they intended to raise at the forthcoming grievance appeal. Whilst this decision makes it clear that there is generally no need to hold a grievance appeal before instigating disciplinary proceedings for a related matter, employers should still hold an appeal meeting if the initial disciplinary hearing does not result in dismissal.

## Holiday ruined by sickness can be carried over

***Shah v First West Yorkshire Ltd***

***The first employment tribunal case since two important court rulings last year about holiday entitlement has held that employees should be allowed to carry over annual leave entitlement to the next year where they had been too ill to take it in the previous year.***

In this case, Mr Shah had booked four weeks' holiday from 22 February to 21 March 2009. As he worked three days a week, this accounted for 12 days of his annual holiday entitlement. The relevant holiday year under his contract of employment ran from 1 April to 31 March.

Mr Shah subsequently broke his ankle and was absent from work between 15 January to 18 April 2009, which meant that his

sickness absence overlapped with his booked period of holiday. During this absence he received contractual sick pay and was also paid holiday pay, at a higher rate, for the twelve days' leave he had booked. On 4 April 2009 he wrote to his employer, asking to reclaim his 12 days' holiday. FWYL responded that the holiday could not be reclaimed as it related to a previous holiday year and had therefore been "lost".

Following decisions of the European Court of Justice and the House of Lords in *Stringer & Others v HM Revenue & Customs*, which we reported in our previous bulletin, the tribunal held that, as Mr Shah had not been able to take his holiday because of sickness, FWYL had acted unlawfully by not permitting Mr Shah to take his accrued holiday in the following holiday year.

### Synergy advises.....

The implications of this decision conjure up images of employees feeling a bit under the weather whilst on holiday and phoning their employer and saying they want to take a proportion of their holiday entitlement at another time. In reality, its application will hopefully be rare. However, employers should bear this decision in mind when dealing with holiday requests from those who have been off work as a result of illness and should be aware that workers who are on sick leave for a prolonged period may well build up a substantial amount of annual leave which can be carried over to the following leave year.



## Varying Employment Contracts

### *Bateman and others v Asda Stores Ltd*

**The Employment Appeal Tribunal has held that the employer in this case, Asda, was entitled to introduce new pay terms without the consent of its employees because it was able to rely on a statement in its staff handbook which reserved a right to make unilateral variations to their contracts of employment.**

Asda had wanted all its store staff to be on the same pay and work structure. It had approximately 18,000 employees working under an old pay structure and required them to change to the terms under which the majority of its store staff worked.



Asda's staff handbook stated that it reserved the right to amend or replace the contents of the handbook from time to time "reflecting the changing needs of the business". Some sections of the handbook, including the sections relating to pay and the right to change terms, were stated to form part of the employees' contracts of employment.

After a period of consultation, 8,700 employees did not agree to transfer to the new regime. Asda relied on the wording of the handbook to transfer those employees to the new regime without their express consent. 700 employees then brought claims for unauthorised deductions from wages, breach of contract and, in some cases, unfair dismissal. Six test cases were heard by the employment tribunal and then the EAT.

Even though in a minority of cases the variation amounted to a variation in pay, both the tribunal and the EAT held that the wording in the handbook allowed Asda to impose the new regime on its employees without obtaining their further express consent. The EAT went further, holding that it could, in fact, have imposed the changes without any consultation.

### Synergy advises...

In practice, employers are unlikely to be able to rely on general flexibility clauses to make anything other than reasonable or minor administrative changes which are not detrimental to the employee. Even where the contract authorises the change which the employer is seeking to make, it does not necessarily mean that the change is lawful in other respects. However, this case is useful for employers who wish to make changes to working practices to reflect the changing needs of their business. According to this decision, provided that the clause permitting the variation is sufficiently clear and steps are taken to ensure that there is no breach of trust and confidence, an employee's contract may be varied without further consent, even if it causes financial loss.

Whilst the EAT held that the variations could have been imposed without consultation, when carrying out a similar exercise, employers are well advised to consult with any affected employees and clearly explain exactly what any variation clause means, as to do otherwise could be deemed to damage the relationship of mutual trust and confidence. Employers should also still be wary if introducing a change which would lead to a substantial detriment to employees as the EAT noted that the courts would "seek to avoid" an unreasonable result.

# Legislation Update

## Anti-blacklisting laws introduced

Regulations were introduced on 2 March making it unlawful for employers, employment agencies etc to compile, sell, supply or use a "blacklist" of trade union members or activists for discriminatory purposes such as employment vetting or the dismissal of such employees.

## Equality Bill - Update

The Equality Bill received Royal Assent on 8 April 2010 and became the Equality Act 2010. The majority of the provisions, which we outlined in our Autumn 2009 Newsletter, are still expected to take effect in October 2010. Any updates will be reported.

## Minimum wage set to increase

The national minimum wage will increase from 1 October 2010 and the adult rate will be extended to those aged 21 (the qualifying age is currently 22). The new hourly rates will be:

- Workers aged 21 and over: £5.93 (rising from £5.80)
- Workers aged between 18 and 20: £4.92 (rising from £4.83)
- Workers aged 16-17: £3.64 (rising from £3.57)

A new minimum wage for apprentices of £2.50 per hour will also be introduced. It will apply to apprentices under 19 years of age or those aged 19 and over but in the first year of their apprenticeship. All other apprentices already receive the national minimum wage depending on their age.