RadcliffesLeBrasseur

Employment Briefing

May 2010

Case of the Month

When an employee is unfairly dismissed the usual remedy is compensation. Most employers are aware that the test for the amount that will be awarded is loss that arises in consequence of the dismissal that the tribunal thinks is just and equitable. Employees are also entitled to claim expenses incurred in consequence of the dismissal (looking for another job) and any loss of benefits.

After a finding of unfairness there is often a tussle between the employer and employee with the employer arguing, for example, that any gap between employments might have been shorter of the employee had put more effort into looking for another job and the employee seeking to persuade the tribunal that the loss suffered is greater than the employer allows. A full understanding how this test works is essential, particularly when negotiating settlements.

In ***Wood v Mitchell SA Ltd.*** [UKEAT/0018/10/CEA] the Employment Appeal Tribunal (EAT) put straight a tribunal that had underestimated the loss when the employee had become ill after the dismissal for a reason unconnected with the dismissal. The tribunal treated any loss after dismissal as unattributable to the employer. This was an error as the tribunal failed to ask the initial question, which was how long the employee should have been employed but for the dismissal. The EAT held that the fact that an illness is unrelated to the unfairness of the dismissal does not imply necessarily that the employee would have been dismissed for the illness.

This was an issue that should have been explored and was not. The obvious reason for the question to be asked is that usually any employee will receive pay and benefits during a period of illness.

In such a case the employer who wants to argue that the illness ended any liability will have to bring forward the necessary evidence. This will usually include information about the contract and why the illness would have justified a fair dismissal. The fact that there will often be an element of speculation about such an exercise does not mean the evidence should not be considered and assessed by the tribunal using its common sense, experience and sense of justice. The employee will clearly want to bring whatever evidence is available that employment would not have ended with the illness.

The failure of the tribunal to do this exercise properly led to the case being remitted for a rehearing.

First published in The Grapevine Magazine May 2010

Further Information

If you would like further information or to comment in general regaring this case, please contact

Stephen Levinson

stephen.levinson@rlb-law.com

020 7227 6714

www.rlb-law.com