Focus on the Economy

Across My Desk – Focus on the Economy

The economy has always had an impact on employment law and practice. Now more than ever, when the economy is showing little or no growth, there are a number of initiatives being introduced by the Government to kick-start the economy, reduce unemployment and give employers the confidence to hire employees. In this first edition of the Halebury employment team newsletter, senior employment lawyer Fiona Blakey focuses on the economy and the impact of the business downturn on the work that comes across her desk.

Food for thought: Zero hours contracts are creeping into white collar work, as a broader range of businesses adopt a less traditional employment model that was originally devised to help retailers and restaurants manage busy periods. Zero hours contracts which allow employers to pay employees only when they have demand are becoming more commonplace in other sectors such as media, IT and financial services. These contracts are seen as a way of cost-cutting and controlling headcount whilst retaining skills and expertise. There is much controversy over the use of zero hours contracts as they are claimed to strip workers of employment rights. However, creative ways of employment are thought to be crucial to economic recovery.

Do business cards and LinkedIn contacts constitute confidential information which is capable of being protected? When business relationships turn sour, the issue of restrictive covenants and whether clients will stay with the firm/company or depart with the exiting employee becomes central. One client negotiated an acceptable level of restriction and then the issue of the use of confidential information arose. A contact or client list which has been devised during employment remains confidential and the property of the company, but what about business cards or LinkedIn contacts obtained during the course of employment? The cards contain information

which is available in the public domain. However, in this case, the particular format of the information, the fact that x works for y organisation in z department, and the fact that the cards had only been obtained as a consequence of the employment gave cause for some concern. Ultimately I advised the client to inform the company and keep and use the cards with its consent. In my view, it would have been difficult for the employer to argue that the contact information constituted confidential information.

Unilateral Reduction of Pay: One client who was required to cut its fixed costs by 10% wanted to know what the risks were in unilaterally reducing an employee's pay. The obligations to pay salary and provide work are the two principal obligations owed by an employer to an employee. I advised that reducing pay unilaterally would normally always constitute a fundamental breach of contract which goes to the root of the employment contract and which would entitle an employee to resign in response and claim constructive dismissal. However, *consulting* with an employee about the requirement to cut costs including the business imperative, about the *proposal* to reduce pay, and about the rationale for selecting that particular employee may make a reduction in pay more palatable. If the employee was unwilling to accept the reduction, the employer needed to consider whether to terminate the employee's employment by reason of redundancy or for some other substantial reason, or to accept that its proposal was fundamentally unfair and in breach of contract and that it needed to make a payment to compensate the employee.

Effective use of the probation period: A number of clients have wanted to terminate the employment of recently appointed employees and often have more concern if the employee has successfully completed their probation period. It is still relatively low risk to terminate employment for underperformance without following a full performance improvement procedure where an employee has less than 51 weeks' service (or 103 weeks' service if their start date is on or after 6 April 2012), as, broadly speaking, an employee will not have the right to bring a claim for unfair dismissal. However, where possible, it is far better to use the probation period. I advise employers to put in place a 3 month probation period, diarise with the employee from day 1 a review meeting at 6 weeks and a further meeting at 12 weeks. This mechanism enables the employer to raise issues with the employee, gives the employee the opportunity to reach the required standard and, if necessary, (subject to any unusual circumstances e.g. where disability may be an issue) enables the employer to safely terminate the employment. Employees will normally have a reduced notice period during their probation period and will expect their employment to be under review. Following this process reduces management time and cost to the business.

This article does not constitute legal advice. If you would like advice on topics discussed or more generally, please get in touch with your usual Halebury contact or visit the Halebury website www.halebury.com and contact one of the employment team who will be very happy to help you.

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