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Script

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In a recent case, the Employment Appeal Tribunal (EAT) examined a claim of unfair dismissal brought by an employee who had refused to accept a reduction in pay proposed because the employer was undergoing trading difficulties (Garside & Laycock Ltd. v Booth).

Garside & Laycock Ltd. provide building construction and maintenance services to public sector clients. In early 2009, the company suffered a downturn in its business and therefore held a number of meetings to explain the situation to its employees.

Dismissals for Refusing to Accept a Pay Cut

It asked them to accept a five per cent reduction in pay in order to avoid possible further redundancies. Ultimately, Mr Booth, who had worked for the company for seven years, was the only employee who refused to accept a cut in salary. Garside & Laycock made attempts to negotiate a new contract with him, including an offer to review his pay levels after six months, but he rejected its offers and was therefore dismissed.

The Employment Tribunal (ET) first examined whether or not Garside & Laycock had established that there was 'some other substantial reason' as a ground for the dismissal of a kind such as to justify it, and found that it had.

The ET then went on to consider whether the dismissal was or was not reasonable. Relying on the judgment in Catamaran Cruisers Ltd. v Williams, the ET held that Mr Booth's dismissal was unfair. In its view, Garside & Laycock's financial position could not be said to be 'desperate'. Also, the ET found that the company's evidence as to why a pay cut was necessary 'lacked cogency' and concluded that it was reasonable in the circumstances for Mr Booth to seek to preserve the terms and conditions he had enjoyed for many years.

The EAT held that the ET had erred in a number of ways when deciding that Garside & Laycock had acted unreasonably in dismissing Mr Booth. Firstly, Catamaran v Williams does not establish a test that a dismissal will only be fair if a business is in such a desperate financial situation that the proposed pay cuts are the only way to save it.

Secondly, the ET had taken the wrong approach when it had asked what it was reasonable for Mr Booth to do in the circumstances. Section 98(4) of the Employment Rights Act 1996 provides that the focus should be on whether the employer, having established some other substantial reason for the dismissal, acted reasonably or unreasonably in treating the reason as sufficient to dismiss the employee.

Furthermore, the EAT disagreed with the ET's finding that Garside & Laycock's approach lacked 'cogency'. Taking the word as defined in the Oxford English Dictionary, there was nothing lacking in cogency in a business facing trading difficulties seeking to reduce its costs, nor in trying to ensure that all members of staff were remunerated on the same pay scales without one employee being paid more because he had rejected terms and conditions accepted by the others.

The EAT therefore allowed the appeal. It declined to reach its own decision, however, and remitted the case to a fresh ET for rehearing in order to ensure that the question of reasonableness was determined taking into account all the facts that might be relevant.

Contact Dean Parnell on 0121 698 2200 (d.parnell@sydneymitchell.co.uk) or Norman Rea on 0121 746 3300 (n.rea@sydneymitchell.co.uk) for advice on any contractual matter.

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Companies Fined After Death from Fall at Work

Two companies have been fined a total of £450,000 and ordered to pay costs after health and safety failures led to a maintenance worker falling to his death.

Christopher Booker, 49, was working at Aberthaw Power Station when the accident happened in 2007. The power station was undergoing renovations, including work on a deep pit in the water cooling system. This necessitated inserting equipment into the pit to prevent sea water from entering it during high tides while the work was in progress. Mr Booker and eight other workers were performing urgent modification work on the equipment to ensure that the pit was effectively sealed.

Sections of the floor grating at the top of the pit had been removed to allow easier access to it, leaving gaps in the walkway. As night fell, electric lights were turned toward the inside of the pit, where the modifications were being made, leaving the walkway above the pit in near darkness. Mr Booker fell through a gap in the walkway into the pit 12 metres below and died as a result of multiple injuries to his chest and pelvis.

The Health and Safety Executive (HSE) conducted an investigation and found that, following the removal of the floor gratings, a large opening had been left unprotected and inadequate precautions had been taken to protect those working near it. There was also 'confusion and misunderstanding' between RWE npower, which owned the power station, and AMEC Group Ltd., the principal contractor, over who was responsible for controlling the work being done at the time Mr Booker fell.

RWE npower pleaded guilty to breaching Section 2(1) of the Health and Safety at Work etc. Act 1974 and was fined £250,000. AMEC Group Ltd. pleaded guilty to breaching Regulation 11(1) of the Management of Health and Safety at Work Regulations 1999 and was fined £200,000. The two companies were also ordered to pay £30,000 each in costs.

HSE inspector Caroline Bird said, "Inadequate planning and a poor choice of safety control measures meant that a very obvious hazard remained. […] Both companies had a duty of care to Mr Booker that they failed to meet – with catastrophic consequences. This awful incident could so easily have been prevented had the correct safety measures been taken."

Employers have a duty to assess risks to the health and safety of their workers, and to members of the public who may be affected by their business activities, and to take reasonable steps to remove or reduce those risks. Employers who fail to do so are likely to face prosecution and substantial fines, as well as civil claims for compensation, if an employee or visitor to their premises is injured.

Information on assessing and managing health and safety risks in the workplace can be found on the HSE's website at http://www.hse.gov.uk/risk/index.htm

Contact Mike Sutton on 0121 698 2200 or by email to m.sutton@sydneymitchell.co.uk

Amenity Value of Land Stops Development

A recent case serves as a warning to developers who regard covenants as inconveniences rather than serious impediments.

Builder Wimpey had secured land in Gloucestershire and proposed to build 17 houses on it. The land had a covenant attached to it which prevented any building on it, so Wimpey applied to have the covenant removed.

Wimpey argued that the covenant impeded the 'reasonable use of the land' – a ground which can justify a covenant being modified or removed. However, a group of local people opposed the removal of the covenant on the ground that if the development took place, the character of the land would change from being semi-rural to being suburban. This, they argued, would cause them a substantial loss of amenity value.

The Tribunal backed the action group.

The case shows that determined opposition can make it difficult or impossible for a developer to proceed with the development of land which is subject to a 'no build' covenant.

We can advise you on all aspects of property development.

Case Shows Difficulty of Removing an Administrator

If a creditor of an insolvent business believes that their position could be improved by the administrator of the business taking legal action, but the administrator refuses to do so, relations between the administrator and the parties affected by the inaction are likely to be strained.

In a recent case, this is exactly what happened and, because the administrator refused to take proceedings, creditors sought to have him removed and replaced by another. The Insolvency Act 1986 permits this where there is 'good or sufficient reason' for doing so. This does not mean that the administrator is unfit to act or is guilty of misconduct, but that the removal of the administrator is in the interests of the majority of the creditors.

In the case in point, the purpose of the proposed legal action was to reduce the creditors' liability under personal guarantees.

An initial application to remove the administrator was refused and an appeal was made to the Court of Appeal. The Court ruled that if the administrator was unbiased and had reached a decision based on the material before him, then the fact that a different administrator might reach a different conclusion might be a reason to challenge the decision, but not to remove the administrator altogether.

The courts are reluctant to overturn decisions when a professional person has been shown to act impartially and has taken a decision which is within the range of reasonable decisions open to them based on the information available.

The essential lesson to be learned from this case is that the time to make arguments of this nature is early on in the process. Persuading the administrator to take action is more likely to be successful than a subsequent legal challenge after the administrator has decided not to do so.

If you are faced with your interests being affected by the insolvency of another party, we may be able to assist you in negotiations with the insolvency practitioner responsible. Contact Kam Majevadia on 0121 698 2200 or email k.majevadia@sydneymitchell.co.uk.

Disability Discrimination – Failure to Make Reasonable Adjustments

A man who was dismissed on the ground of incapacity, after he was absent from work on sick leave for five months whilst recovering from a stroke, has been awarded £390,871 in compensation for disability discrimination.

Jonathan Jones, 56, worked as a branch manager in Wales for the builders' merchant Jewson. He had worked for the company for 20 years and, prior to his stroke, had worked more than 60 hours a week and had not taken his full annual holiday entitlement.

Mr Jones's doctor advised him that he would be able to return to work provided he avoided stress. However, Jewson decided that there were no suitable roles within the company and dismissed him, even though other employees had been allowed longer periods of sickness absence.

Mr Jones brought a claim of disability discrimination, which was upheld by the Cardiff Employment Tribunal on the ground that Jewson had failed in its duty to make reasonable adjustments in order to facilitate his return to work.

The compensation award is the highest ever discrimination payout made in Wales. To discuss any Employment matter, please contact Dean Parnell at our Birmingham office on 0121 698 2200 or Norman Rea at our Shirley office on 0121 746 3300.

Family wealth lost when children divorce

Even someone who takes only a passing interest in the news must have heard about the latest multi-million pound lottery winners. Dave and Angela Dawes of Wisbech have won just over £101 million in the Euromillion lottery, having only played on two previous occasions.

They are clearly overwhelmed by their good fortune and have publicly announced that they intend to make generous gifts to people who have helped them during the course of their lives and this will undoubtedly include family members.

Whilst most people are not in the fortunate position of having such fabulous wealth the provision of money by grandparents, and more commonly parents, to the younger generation to help them get on to the housing ladder is not uncommon. However, when monies are provided to children or grandchildren there is rarely a discussion about the terms on which the money is provided and this can cause real difficulties later on when the child concerned is purchasing a property with a partner or spouse. Little or no discussion is entered into about what will happen if that relationship breaks down and this is causing increasing difficulties in situations involving family breakdown.

Having specialised in family law for about 20 years I have noticed the increased involvement of other family members, generally parents, in proceedings which follow a relationship breakdown. When I was first in practice this was the exception and whilst it still does not occur in the majority of cases there is an increasingly significant minority of cases which involve the parents of one spouse or the other in the financial applications arising from a divorce. This causes a huge increase in the emotional distress and stress of such proceedings together with an increase in the costs.

All too commonly in those types of cases parents take the view that they are providing their children within the benefit of financial assistance. It follows as a natural consequence that the child's spouse also benefits but if asked the direct question as to whether the money should be divided between the child and their spouse if the marriage broke down most would, understandably, answer "no". It is not unreasonable to feel that the money has been made available for your child and not for distribution between them and their spouse if it all goes wrong. But where there is no discussion, and nothing put down in writing, this situation can all too often lead to both the husband the wife, and one set of parents, fighting over the money in front of a Court and attempting to recall from many years previously who said what to whom and when.

The parents become involved in proceedings incurring legal fees themselves, then proceedings become lengthier and more costly to the divorcing couple and there is then potential for guilt and resentment arising between the "child" and his or her parents.

As with many areas of law these types of difficulties can be avoided by taking legal advice before advancing the money and ensuring that agreements about the provision of the monies are set out in writing. In an age where pre-marital agreements between spouses are increasingly popular, it is becoming socially acceptable to consider and discuss the prospect of a relationship breaking down before it legally begins. The same should apply to monies provided by any family member to one spouse or the other particularly in connection with the acquisition of property. Many baulk at the suggestion of paying maybe £1,000-£1,500 to ensure the appropriate agreement is in place at the outset but, if this both safeguards your money for the benefit of your child, and prevents you and your child spending several thousands of pounds in legal fees should the worst occur, it is money well spent. In law, as in medicine, prevention is better than cure.

If you intend to provide monies to a child and their partner, to help purchase a property, consider the following:

a) How should the monies be treated in the event of the relationship breaking down?

b) Are monies provided as a loan or a gift?

c) If a loan or a gift, to whom?

d) If it is a loan, what are the repayment terms?

e) Is it intended that the monies that you provide should be for a fixed repayable sum or should they be repayable as a percentage of the value of the property?

Discuss the above options with your legal adviser. Decide what is really right for you. Discuss the position with your child, and their partner, and then get your solicitor to set out the basis on which you are prepared to provide the monies and get a formal agreement, which you all sign, which deals with all monies.

And finally, do not leave it until the day before your child is due to exchange contracts on their dream "must have" home to address the issues.

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