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Albion Chambers EMPLOYMENT NEWSLETTER

Relief from sanctions

Brothers separated at birth

For some time now, the practice and procedure in the Employment Tribunal has been moving closer to that in the civil courts. So, since 2001, there has been an overriding objective to deal with cases "justly"; the Tribunal has power to strike out hopeless cases (and has shown an increased willingness to do so); the power to award costs has increased to £20,000; and now, of course, fees are payable when a claim is issued, just as in the County Court or High Court.

The convergence of the Employment Tribunal Rules and the CPR was of course encouraged by the decision of the doyen of Employment Appeal Tribunal judges, the great HHJ Peter Clark, in *Goldman Sachs v Montali* [2002] ICR 1251.

The process has continued with the new Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 which came into force on 1 July 2013 and replaced the 2004 Rules. For example, Rule 31 gives the Tribunal the power to order such disclosure as *"might be ordered by a county court"*; and Rule 78 gives the Tribunal the power to carry out a detailed assessment of costs to be carried out by the county court *"or by an Employment Judge applying the same principles".*

Those of us with long memories will remember the time when a distinction was drawn between the user-friendly Employment Tribunal and the stuffy civil courts. This distinction has become ever-more blurred as the Tribunal Rules move closer to the CPR, as "Chairmen" have become "Judges", as lay members disappear and as hearings are commonly held in Court rooms.

Due to this ever-greater affinity with the civil courts, it is inevitable that the cold wind which has been chilling the bones of civil lawyers will soon make us shiver in the Employment Tribunal.

Relief from sanctions

For a long time, rule 3.9 of the CPR gave the civil courts a checklist to follow when considering whether or not to grant relief from sanctions. There were nine items on the checklist, including the promptness of the application, whether the failure was intentional and whether the trial date was at risk because of the failure.

The Employment Tribunal was not obliged to follow the checklist slavishly, but was required to apply the same general principles (see *Governing Body of St. Albans School v Neary* [2009] EWCA Civ 1190.

Under this regime and the way it was applied, one could be reasonably confident that relatively minor breaches resulting in draconian sanctions would be forgiven, the sanction would be set aside, and the claim/defence would be restored.

Jackson and Mitchell

All this has changed with the introduction of the Jackson reforms in the civil courts. These have heralded a new and much tougher approach to non-compliance with rules and orders.

The Civil Procedure (Amendment) Rules 2013 came into force on 1 April 2013. They include a new, more forceful overriding objective. The new rules have also swept away the friendly CPR r.3.9 checklist. In its place comes a simple paragraph stating that "the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders."

Lord Justice Dyson MR has made clear how this is to be interpreted:

"The tougher, more robust approach to rule-compliance and relief from sanctions is intended to ensure that justice can be done in the majority of cases. This requires an acknowledgement that the achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations." (paragraph 27 of the 18th Implementation Lecture).

The threatened storm broke over civil lawyers in the case of *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537. This was a case concerning the foul-mouthed former Chief Whip Andrew Mitchell MP, who, it will be remembered, admits swearing at police officers, but denies using the word "pleb".

Mr. Mitchell is suing The Sun for defamation. In accordance with a costs management scheme dealing with such cases, he was required to file a costs budget by a certain time. Despite chasing from the Master, he failed to do so. Pursuant to the scheme the mandatory sanction for failure was that rather than recover the anticipated costs of £506,425 he would only recover (if successful) the court fees. This is the sanction the Master applied.

As a result of a fairly innocuous failure, Mr. Mitchell (or more likely his solicitors, since they are acting under a no-win no-fee agreement) stand to lose about £500,000.

Mr. Mitchell applied for relief from the (draconian) sanction, but this was refused (the Master confirmed that she would have been far more likely to grant relief under the old Rules). His appeal direct to the Court of Appeal was also refused.

The Court of Appeal confirmed that *"trivial"* failures, where there has been a failure of *"form rather than substance"* would normally be excused; but where the failure is not trivial, the defaulting party will have to show a good reason for the default. The example given in the judgment of a good reason is a serious accident; over-work or error will not be a good reason. The concluding paragraphs

state the wish that they "send out a clear message" and express the hope that *"in time, legal representatives will become more efficient and will routinely comply with rules, practice directions and orders."*

The new CPR r.3.9 pre-dates the new Tribunal Rules and there is no directly comparable paragraph. However, Rules 6 and 37 give the Tribunal power to strike out a claim or response and Rule 38 gives the Tribunal the power to set aside the sanction of an unless order if it in the "interests of justice" to do so. This wording is vague enough to incorporate the civil jurisprudence of Mitchell. Given the trend to ever-greater assimilation of the two jurisdictions, this must be the likely direction of travel.

Conclusion

Having lived through the debacle of the Dispute Resolution Regulations 2004 and the rather benign landscape since, we have entered a new era, in which any default has potentially dramatic consequences, from which relief is unlikely. Be careful!

Elizabeth Cunningham

Managing absence for mental ill-health.

Recent figures from the Health and Safety Executive show that in 2012 stress overtook cancer as the most common cause of sickness absence from work. The average number of days lost in 2012 for stress, depression or anxiety was 24 days per employee, and was higher than for musculoskeletal disorders (17 days). Employers have duties under the Management of Health and Safety at Work Regulations, 1999 to assess the risk of stress-related ill health arising from work activities; and under the Health and Safety at Work etc. Act 1974, to take measures to control that risk. There are practical things that organisations can do to manage the risks associated with work-related stress.

The HSE propose that organisations incorporate a set of Management Standards that provide employers with a comprehensive risk assessment approach to identifying, exploring and tackling work related stress.

Increasingly the courts will scrutinise the training that all staff have been given on identifying and dealing will mental illness. Our clients will have to put robust policies in place that address mental illness absences and capability issues in the same clear terms as other illnesses.

'Work related stress' or 'anxiety' are regularly cited on medical certificates. Where the number or length of absences for an employee suffering with a physical illness would trigger an occupational health referral or some other medical assessment, *employers must have in place the policy and procedures to feel confident to do the same for mental illness.* Mental illness is significantly less well-understood than physical ill-health which is why many employers will feel uncomfortable about discussing it. Long-term absence for 'long-term stress' is increasingly common in both the public and private sector. I find that many respondent clients still feel unease about how to approach and manage it.

The benefits of a clear mental health policy as part of an organisation's overall sickness policy are many; first it enables managers and HR taking employees through the process to know how to approach the situation, reducing the 'I'm not sure what do about…' factor, and second it enables the employee to be more open about their illness as they can expect it to be treated as all other illnesses are treated. Taken together these two factors will contribute to the safe return to work in a timely manner, or will enable both parties to work towards a possible ill–health/ capability dismissal if that is not going to be possible.

Also, I can't remember when I last did an unfair dismissal case when one, if not all, members of the tribunal did not ask to look at the employer's policy. It reveals that tribunals see the stated policies as a good indication of the employer's approach to employer/ employee relations generally, whether or not adherence to the policy is a matter in issue.

Mental illness – a disability?

Four years on from the Equality Act 2010 employers are feeling the effects of the widening of the definition of 'disability' particularly in respect of mental ill-health. Where, under the DDA 1995 a mental illness would only trigger the protection afforded by the statute if it was 'clinically well-recognised', that is not a requirement of the Equality Act 2010. The Act focuses on the effect caused by the mental illness – the 'impairment' – does it have a substantial adverse effect on the normal day to day activities of the sufferer?

What is clear is that the removal of the closed list of 'normal day-to-day activities' means that even though 'stress' or 'anxiety' may not be a clinically recognised illness, we know the sufferer may be disabled for the purposes of protection under the Equality Act 2010. In *J v DLA Piper* [2010] ICR 1052 the EAT rejected the argument that a qualifying 'impairment' could necessarily be inferred from the existence of a substantial adverse effect and the judgment suggests that reference to 'stress' or 'anxiety' will not be enough. Bear in mind both s.6(1)(a) (the impairment) and s.6(1)(b) (its substantial and long-term adverse effect).

However, when an employee is signed off with 'work–related stress' good management practice is to consult fully with the employee upon their return to work, and notes of that consultation should be made. The employer has a duty to limit the employee's exposure to stress not simply to avoid litigation! But it is a balancing exercise between, on the one hand, the needs of the business, the terms of the contract, the nature of the role and, on the other hand, the employee's ability to do the role. Increasingly tribunals are commenting on the lack of contemporaneous evidence concerning an employee's return to work and how the employer approached it.

Where an employee tells an employer on his return to work that his absence was work related stress caused by (say) the excessive rise in tasks he has to do following a restructure, or a particular piece of work he is involved in at the moment, measures may need to be taken to manage this but often there is little of practical assistance that can be done; not all organisations can offer counselling or a variation to contract terms, so the employer is in some difficulty, meaning that the employee is likely to have a subsequent absence.

However, any employer, in an organisation of any size, should refer an employee to an occupational health consultant in circumstances of a repeated absence for stress or any mental illness.

In these circumstances, by the time a matter gets to Tribunal (if it does) the conscientious employer will have knowledge of whatever is set out in the occupational health reports so will not be

chasing the claimant employee for medical records or evidence at that stage, which is likely to be more expensive and emotive as the parties are locked in litigation.

More pragmatically though, the employer will have been able to make a far earlier assessment of whether the employee is going to, or may, fall within the definition disabled and what duties that may trigger.

Dismissal - a potentially fair reason?

Sickness absences and incapability owing to mental illness are potentially fair reasons for dismissal, but it comes back to the essential point; there must be clear sickness absence and dismissal policies in place that expressly include mental ill-health. Put another way – mental ill-health and the associated absences of an employee are to be approached by the employer in the same thorough, sensitive and consistent way as any other form of sickness and sickness absence.

It is clear that a fair dismissal process for capability under Section 98(2)(a) will require the employer to have consulted fully with the employee to ascertain the nature of the illness and the prognosis for the condition. All the relevant case law states that it is a balancing exercise for the employer between the likely length of absence and the needs of the business. Time and again claimants base an unfair dismissal claim on an assertion that the employer dismissed 'too soon' and should have waited. The question for the Tribunal will be, can the employer reasonably be expected to wait any longer before dismissing. It will not simply be a matter of how long the employer has waited, but also what have they done to ascertain all the facts in the mean time. That will involve meetings to discuss the absence, the reason for the absence and the obtaining of medical evidence. It will then involve a meeting to discuss the medical evidence and the prognosis.

A decision will then need to be taken to decide if dismissal is contemplated; if so, there needs to be a meeting to discuss potential dismissal with a further meeting followed up by correspondence to effect the dismissal. There must follow an opportunity to appeal.

This process is hard for both parties and if the mental illness is an Equality Act disability, the employer must be careful to ensure that applying the capability dismissal procedure does not fall foul of any duty to make a reasonable adjustment or, perhaps more common, an act of discrimination under Section 15, namely discrimination arising from disability. In these circumstances the defence of justification is crucially dependant on evidence that the employer has discharged the balancing exercise between the needs of the business and the rights of the employee fairly, and that dismissal is a proportionate means of achieving a legitimate aim. This will require that there is a clear, reasonable policy in place and that it has been followed and that the employer has ascertained and discussed with the employee the nature of the illness, the prognosis and likely future ability to work.

The statistics at the top of this article are from the Health and Safety Executive website which provides excellent guides on how to carry out stress risk assessments and other very practical advice.

Nicholas Sproull

The implied term of trust and confidence

Orthodoxy remains

The implied term of trust and confidence has in the 25 years or so of its development been seen as a flexible friend to both dismissing employers and dismissed or resigning employees. Recent judicial guidance has made it clear that the concept is not as flexible as some employers would have it.

Judicial cold water first came from Mummery LJ in *Leach v Ofcom* [2012] IRLR 839 when he observed at paragraph 3 of his judgment:

" The trust placed by an employer in an employee is at the core of their relationship, which can break down in a wide spectrum of circumstances. Some cases fall short of a 'conduct' reason for dismissal. The legislation is clear: in order to justify dismissal the breakdown in trust must be a 'substantial reason'. Tribunals and courts must not dilute that requirement. 'Breakdown of trust' is not a mantra that can be mouthed whenever an employer is faced with difficulties in establishing a more conventional conduct reason for dismissal."

More recently, employers have been reminded that they must take care not to breach the implied term of trust and confidence in the manner in which they conduct disciplinary procedures. In Leeds *Dental Team Ltd v Rose* [2014] IRLR 8 the Claimant was the practice manager at a dental practice. Mrs Rose's employers discovered that she had not been recording a colleague's sickness absence. Other staff members also alleged that the claimant had been showing favouritism. In constructive dismissal proceedings brought by Mrs Rose following her resignation, the Tribunal found that she had indeed been constructively dismissed. It found that the company had breached the implied duty to maintain trust and confidence in the way it had handled the disciplinary process by, a) their refusal to allow her to have been accompanied by a colleague; b) the absence of any investigatory interview before the disciplinary hearing; c) the company telling her that she would not have been paid if she did not attend the disciplinary hearing, when they had expected her to attend without the companion of her choice; and d) the failure to disclose a particular piece of documentary evidence on which they relied.

These are not particularly unusual circumstances, and are typical of cases before employment tribunal on a regular basis. However, Mrs. Rose's case is interesting because of an argument mounted by her employers. They argued that a Tribunal should make a finding as to the intention of the employer in acting towards the employee as they did. That argument was based on the decision of the Court of Appeal in the case of *Tullett Prebon plc v BGC Brokers LP* [2011] IRLR 420 CA. In his judgment in *Tullett Prebon*, Kay LJ rejected a submission that the employer's intention was irrelevant, and whilst hearing an application for permission to appeal said, *"A party can still have an intention which may be relevant ... but the intention is to be judged objectively."*

In *Rose*, the EAT rejected the notion that there was an obligation to make a finding as to intention. HHJ Burke QC reiterated the orthodox approach of objectivity. In doing so he said:

"If the whole of the passage from the judgment of Kay LJ (in Tullett Prebon) is read together, it can be seen that the principle that all the circumstances must be taken into account in so far as they bear on an objective

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assessment of the intention of the contract-breaker is no different from the traditional test set out from Woods onwards, namely that the tribunal has to consider objectively whether the conduct complained of was likely to destroy or seriously damage the relationship of trust and confidence between employer and employee... The test does not require a tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of..."

The approach to be adopted by tribunals therefore remains firmly as established in the early case law of *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27 CA and *Woods v WM Car Services (Peterborough) Ltd* [1981] IRLR 347. In the Woods case, the EAT (Browne-Wilkinson J), said:

"To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract: the tribunals' function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it... The conduct of the parties has to be looked at as a whole and its cumulative impact assessed": Post Office v Roberts [1980] IRLR 347'

The basis of the implied term of trust and confidence therefore remains firmly rooted in the law of contract and the assessment standard continues to be an objective one. The intention of an employer, whilst possibly of background explanation, cannot excuse repudiatory conduct.

Stephen Roberts