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Albion Chambers EMPLOYMENT NEWSLETTER

Archaeologist wins constructive dismissal case... so what?

(Buckland v Bournemouth University [2010] EWCA Civ 121)

The facts

B, a professor in archaeology, had marked examination papers and failed a high proportion of the students. The second marker endorsed B's marks and a board of examiners checked and confirmed the results. Nonetheless, the Chair of the Board arranged for the papers to be remarked, which elevated some of the scores. B objected and an inquiry was held. The inquiry criticised the Board's conduct and vindicated B. B, however, was not satisfied; he resigned and claimed constructive dismissal.

The issues

The case was important because it raised two important and (surprisingly) unresolved questions of employment law:

(i) Whether the conduct of an employer, who is said to have committed a fundamental breach of the contract of employment, is to be judged by a unitary test or a *"range of reasonable responses"* test;

(ii) Whether an employer who has committed a fundamental breach of contract can cure the breach while the employee is considering whether to treat it as a dismissal.

The history

In the Employment Tribunal: B had been constructively dismissed, as U's actions amounted to a fundamental breach of the relationship of mutual trust and confidence and the inquiry had not cured that breach. U appealed.

In the EAT: The test of whether an employer's actions fell within the band of reasonable responses had no application when there had been constructive dismissal. It found that U was in fundamental breach of B's contract of employment. However, it also considered the question of whether that breach had been cured and found that the tribunal had erred in using a subjective, rather than an objective, test and allowed U's appeal. B appealed and U cross-appealed.

In the Court of Appeal:

- B argued that the law of contract, including employment law, did not recognise that there was an ability to cure a fundamental breach of contract. Therefore, unless the wronged party waived or affirmed that breach, he had an unfettered choice as to whether to treat the breach as terminal irrespective of his reasons or motives
- U argued that an employer had to be entitled to show that its conduct lay within the band of reasonable responses, as employees often claim that conduct amounts to a fundamental breach because of its unreasonableness.

The Court held that:

(i) The correct test for a fundamental breach of contract by an employer is not a reasonable range of responses test. The test is objective. *Per curiam (paragraph 28):* reasonableness may be useful as one of the tools in deciding whether there has been a fundamental breach but it is not a legal requirement;

(ii) Once a breach has occurred, it cannot be undone. The doctrine of cure is not found in the general law of contract and there is no justification for it to be introduced in employment law alone. *Per curiam (paragraph 44):* that does not mean, however, that tribunals cannot take a reasonably robust approach to affirmation: a wronged party, particularly if it fails to make its position entirely clear at the outset, cannot ordinarily expect to continue with the contract for very long without losing the option of termination, at least where the other party has offered to make suitable amends (see, however, the dissenting judgment of Jacob LJ on this point, paragraph 52).

(iii) The Court criticised the "ping-pong" practice of sending cases back to the tribunal or lower court. This should only occur as a last resort as it generally served litigants badly, prolonged matters and increased cost.

The archaeologist, as it turns out, made some useful new discoveries.

Jason Taylor

Prestatyn!

The personification of pleasure

With great joy and enthusiasm, the current Mrs Shepherd bustled into the parlour clutching my morning tea and toast, lashings of foie gras, slippers and smoking jacket. Nothing unusual there then. But she also clasped in her other hand the *'Pearl of Prestatyn 2010 Summer Escapes'* brochure. As we marvelled at the opportunities for cultural exploration such a trip would afford us, my mind began to wander as to how I would squeeze in a long weekend into my busy court diary. I was especially concerned as my Clerk had previously allowed me a whole week off already to rest a particularly troublesome bout of gout.

I immediately checked with my Clerk, nervous as to his reaction to my ▸

requesting a long weekend away and how he would manage my diary in my absence. His response, after furious head scratching and detailed analysis of the diary, a small smirk and then - *"anytime you like, you're always free"* - as an afterthought he kindly added *"Sir"*, then turned away from me shaking his head.

However, the lack of diary pressure, though Prestatyn's gain, led me to wonder whether a summary of holiday entitlement and pay, incorporating the developments of the last couple of years, would be useful to you in this run up to the main holiday season. Whether that wondering is accurate or not, here it is anyway.

Established position

In the hope that I am not about to embark on egg-sucking instruction, it may be useful to briefly recap on the standard position in relation to pay and entitlement, prior to reviewing the recent case law.

Day entitlement

Most workers are 'entitled' (and we will return to that word later) to a minimum number of days of paid holiday per year - the statutory paid holiday entitlement. The calculation depends on how many days an employee normally works per week. Of course, the self employed are not entitled to such wondrous rewards but neither are the police, the armed services and some civil protection services.

Once we have ascertained the normal days per week worked, we then use the statutory multiplier of 5.6. For example, an individual working five days per week would accrue 28 days per year, whilst an employee doing 2½ days, would have the benefit of 14 days. Simple. However, a statutory maximum of 28 days applies (the Working Time Regulations1998, as amended). Those workers toiling for six or seven days each week, will not see the benefit in terms of holiday days accrued (please note, if the 'leave year' began before 1st April 2009, the maximum is 24 days). Also note that four weeks holiday is still the EU's minimum, whilst the UK has given an extra factor of 1.6.

Space within this newsletter prohibits a review of the concept of a 'leave year' as a legal term but, in short, if it is not agreed or in the contract, look it up, there are prescribed dates, depending upon circumstances.

As with much of the UK's employment law, contractual terms can increase but not decrease that 'entitlement' (that word again, keep it in mind).

Bank holidays

Moving on, bar those in their first year of employment, the eight statutory bank and public holidays in England and Wales are ordinarily knocked off the calculated entitlement, if they are given as time off work, unless the contract provides for a more generous view. For ease of reference, those eight days are as follows: New Year's Day, Good Friday, Easter Monday, Early May Bank Holiday, Spring Bank Holiday, Summer Bank Holiday, Christmas Day and Boxing Day.

Rolling up

In terms of holiday pay, some commentators suggest that this can simply be calculated at the standard rate. Though this may be correct, it is not quite as clear cut as the statement may suggest. In practice, some employers add a worker's holiday pay to their hourly rate and expect the worker to 'save' this up themselves, or in common parlance, 'roll it up'.

In the Scottish EAT and the Court of Sessions, this 'rolling up' method has been found to be unlawful, predominantly on the basis that the absence of payment during a holiday period would discourage employees from taking their holiday entitlement (it keeps cropping up) at all.

However, south of the border, the position is less draconian, but it should be remembered that 'rolled up' holiday pay should be on top of an employee's standard hourly rate, not included in it, and it would be very good practice that this should be clearly set out on a payslip - a percentage or fraction would probably be sufficient.

Notice

An employee can request to take their holiday whenever they want to, however, an employer does not have to agree to the request if the dates are unsuitable. An employee must give his or her employer notice of their intended holiday period and the notice period should be double the length of holiday that the employee wishes to take. Conversely, if the employer refuses a request, it must give equal notice as the length of the holiday requested. Further, if the employer wishes to 'force' employees to take holiday at a specific date or dates (factory shut downs at Christmas spring to mind), the employer must give double the notice period than the period of holiday imposed.

Outstanding holiday and leaving employment

The previously mentioned developments in the case law (to which I will come shortly) predominantly stem from these two areas. On a strict reading of the Regulations no provision is made for carrying unused holiday into the next leave year. However, an employer can allow an employee to carry it over by writing it into the contract. On the other hand, an employer cannot make an employee carry over holiday into the following year.

In addition, if an employee leaves their position before using up their entitlement, payment must be made for any holiday pay owed to them. Contract terms may of course agree an enhanced level of payment to be made instead of the untaken holiday, but the statutory position is as set out above.

Recent developments – holiday pay and sickness

The case of ***Stringer & others v HMRC***, an ECJ case that travelled a long way from its roots in mid-Wales before returning to the House of Lords (becoming ***HMRC v Stringer and others***) clarified and stretched an area of law that had some commentators a little hot under the collar, particularly on the side of employees.

The case centred on two key questions:

(i) Are workers entitled to take paid statutory holiday while they are off sick? and;

(ii) Are employees who have been off sick for a part or the whole of a leave year entitled to be paid in lieu of accrued statutory holiday if their employment terminates?

By way of background, the basic position under the Regulations is that at least the first four weeks leave must be taken in the current holiday year and so it cannot be carried forward to the next holiday year (those days over the statutory minimum do not fall within this). As a result, how does this affect an individual who is on long term sick, throughout that year who then leaves or is dismissed?

The ECJ decided that the right to be paid annual leave arises from the very first day of employment until the date termination. This view followed an earlier decision of ***Pereda v Madrid Movilidad SA*** in which the ECJ had considered whether employees who were sick during scheduled annual leave should be allowed to take the holiday on another occasion (NB; the ***Pereda*** decision does not have

direct effect for the majority of workers in England and Wales).

As a result of the decision, an employee/worker continues to accrue holiday days during periods of sickness absence. The ECJ went on to leave the question to each Member State as to whether annual leave can actually be taken during sickness absence. Therefore if the converse stance is adopted, i.e. leave cannot be taken during sickness absence, an employee/worker must be permitted to carry that leave forward to avoid infringing Working Time Directive.

In the House of Lords, the HMRC conceded that, following the ECJ's decision, the Regulations must be interpreted so as to allow annual leave to be taken during sick leave where a worker is off sick for the remainder of the holiday year. Implicitly, their Lordships accepted this position and so it became law.

Time limits

There was still one outstanding issue for the House of Lords to rule on; whether or not claims in relation to statutory holiday pay can be brought as a claim for unlawful deductions from wages under the Employment Rights Act 1996 (s.13 Employment Rights Act) or whether they have to be brought under the self contained mechanism provided for within the Regulations?

The importance of this lies in the time limits applicable to each claim. Under the Act, claimants are required to bring a claim within three months of a deduction, or of the last in a *series of deductions*. This is more favourable than claims under the Regulations, which must be brought within three months of *each* failure to pay in respect of the worker's holiday entitlement. The Lords decided that the former interpretation should be preferred. The effect? Well, a claim could go back for years, or, more specifically, six years, adopting the normal rules of limitation.

The House of Lords decided that statutory holiday pay falls within the definition of "wages" and therefore they can be brought as unlawful deductions claims under the Act. The net result is that, where an employee has been repeatedly denied the right to be paid in respect of leave during a period of sickness, he or she can institute a single claim covering all breaches.

Effects

Stringer was applied in the domestic courts in the Sheffield Tribunal case of ***Rawlings v The Direct Garage Door Co***, a case stayed pending the outcome of ***Stringer***. Mr Rawlings was off sick for the entirety of 2005, and up to his eventual leaving date in 2006. The Tribunal found, as it had to, that he was entitled to claim for monies in lieu of his accrued holiday days. In short, an individual with a dismal attendance record due to sickness will be entitled to exactly the same level of holiday (and pay) as an individual with a perfect attendance card, on leaving.

Limitations of Stringer

The matters set out above are the extent of the decision in ***Stringer*** and this is where our language of 'entitlement' becomes important. The Regulations treat holidays as an entitlement. Imagine our notional employee, Mr A. He is beavering away during the year but fails to exercise his statutory entitlement. It is fair to argue (and the majority of commentators support this view) that an employer would not therefore be liable for the fact that holiday had not been taken within the year.

I simply pose the question, should this same logic not also apply to another employee or worker, Mr B, who is off sick during the same period? On the above analysis, a worker or employee may have had to have requested those holidays, in order to trigger an entitlement to claim under ***Stringer*** (except in termination/ leaving cases). Similarly, Mr B may be entitled to holiday pay for those periods of enforced shut down (i.e. Christmas) even though he was absent during the period. This type of analysis may find favour with those who prefer clean rules, but I suspect that in due course this stark line will be eroded.

In addition, under the Regulations, there is no mechanism to pay monies in lieu of untaken holidays, except in the case of termination (the case of *Stringer*). Therefore, taking Mr B on long-term sick, is an employer required to pay the 'in lieu monies' at the end of each 'leave year'? ***Stringer*** does not seem to go this far. Similarly, as stated above, the Regulations specifically prohibit the statutory minimum holidays from rolling over to the next leave year. Therefore if Mr B is off sick how can he 'roll over' the 2010 holidays into 2011? It seems that he cannot.

It may well be the case that the UK's law, as currently interpreted, stretched and constituted, may not comply with the EC Working Time Directive and as a result UK employees may not be given their full armoury of rights. However, as the law currently stands, private sector workers will be stuck with what they've got, whilst public sector workers may have remedy in reference to EU law, within domestic tribunals. We should expect litigation on this point fairly shortly.

Conclusions

I have now booked a luxury static mobile home, with built in chip-pan, Sky TV, and I've paying a supplement to be close to the washing facilities. The owners of *'The Pearl of Prestatyn'* say that, if you stand on the third step down, lean to the left and dislocate the neck, you can almost see the sea! I am told that two couples will be in the next door static, a Father, Mother, Daughter and Son-in-law. I hope they are active and want to go on long walks, away from the TV. I hear that they are from Liverpool.

Looking at the less important conclusions of today's endeavours however, it is clear that the case of ***Stringer*** will expose employers to a greater degree of liability, if a long-term sick employee's employment ends. However, on closer reading it appears that the extent of the judgment may be narrower than hoped by some commentators.

It may well be the case that it is preferable (i.e. cheaper) for employers to maintain a long-term sick employee's employment with the organisation so as to avoid exposure to a substantial backdated holiday pay claim under s.13 Act. The circumstances of each individual's case will necessarily dictate the outcome of this balancing exercise.

Further, whether a Tribunal or the higher courts will 'buy' the argument that the rules as construed to require the employee to activate his entitlement, and the employer's liability, by requesting holidays within the currency of the leave year, is yet to be seen. If anyone fancies a trip to London, rather than mid-Wales, let me know, though I suspect that the higher courts would look for a way around this artificial approach.

In any event, the relationship of ***Stringer*** with previous domestic authorities and our statutory framework is likely to take a little time to be resolved, with redrafts and tortuous interpretations likely to follow. Little is settled after ***Stringer*** but what can be stated with some certainty, is that the law has taken a step in the direction of the employee.

Bon Voyage
Richard Shepherd

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Seminar date for your diary

The 2010 ***Albion Chambers Employment Team Seminar*** will be held on Friday, 11 June 2010 at the Bristol Marriott Royal Hotel, College Green, Bristol.

The cost of the day will be £75.00 (plus VAT) to include refreshments and lunch.

Topics for the day will include:

- Practice and Procedure in the Tribunal and EAT
- The Equality Act
- Constructive Dismissal and *Buckland*
- Discrimination (belief and orientation)

Please email:
seminars@albionchambers.co.uk
for further details and to reserve a place at the seminar.