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Repudiatory breach of contract by employee does not prevent constructive dismissal claim

Can an employer argue that an employee cannot present a constructive dismissal claim if he himself is in repudiatory breach of his contract? This was the central issue for the EAT to decide in Atkinson v Community Gateway Association, after cases in the English appellate courts had come to different conclusions.

While investigating Atkinson's (A) alleged misconduct, the Community Gateway Association (CGA) accessed his emails and discovered that he had been abusing the email system by sending overtly sexual messages to a female friend, who was "his lover", and had sought to help her obtain a position with the CGA. A resigned before disciplinary proceedings were completed, complaining that they were being conducted in such a way as to constitute a repudiatory breach of contract and amounted to constructive dismissal.

The employer argued that A's claims should be struck out as having no reasonable prospect of success and the ET agreed on the basis that: (i) the constructive unfair dismissal claim could not succeed as a matter of law because A was himself in fundamental breach of contract because of his misuse of CGA's email system; and (ii) the employer's accessing of A's emails was not in breach of his Article 8 (right to private life) rights.

On appeal, the EAT held that the ET erred in law in concluding that where an employee claims a fundamental breach of contract by the employer, but the employer argues that the employee's misconduct had already fundamentally breached the contract, then there can be no claim because there was nothing left for the employer to have breached. Doubts expressed in recent English decisions as to whether there was such a principle had been laid to rest by the Scottish Court of Session in McNeill v Aberdeen City Council. The correct solution in English law, in 'simple' terms, is that an employee is not barred by his own prior fundamental breach of contract from claiming constructive unfair dismissal. However, if that employee's unfair dismissal claim is successful, the breach can be fully taken into account at the remedy stage and compensation reduced accordingly.

As for the human rights issue, the ET had not erred in law in their decision as to Article 8. A had used CGA's email system in breach of the policy, which he had himself devised, to communicate with his lover in the manner described by the ET. To describe this as an unjustified interference with A's private life, when CGA were legitimately investigating A's conduct in the circumstances described, was untenable.

BIS consults on preventing employers avoiding the ban on exclusivity clauses in zero hours contracts

The Small Business, Enterprise and Employment Bill will ban the use of exclusivity clauses in contracts that do not guarantee any hours. The BIS have commenced a consultation , which closes on 3 November 2014, seeking views on the best way to prevent avoidance of the exclusivity clause ban, including actions that employees can take if they are offered such a contract. Specifically, the Government is seeking views on:

- what the likelihood of employers avoiding a ban on exclusivity clauses might be and how that might be achieved;
- how potential avoidance could be dealt with;
- whether there should be consequences for an employer if they circumvent a ban on exclusivity clauses and, if so, what those consequences should be; and
- whether there are any potentially negative or unintended consequences because of the wording of the legislation.

DWP and ODI publish guidance on words to use and avoid when writing about disability

The Department for Work & Pensions and the Office for Disability Issues have published Guidance entitled, 'Inclusive language: words to use and avoid when writing about disability', to be considered when communicating with or about disabled people. Some of the key points are as follows:

- The word 'disabled' is a description not a group of people. Use 'disabled people' not 'the disabled' as the collective term.
- Avoid phrases like 'suffers from' which suggests discomfort, constant pain and a sense of hopelessness.
- Common phrases that may associate impairments with negative things should be avoided, for example 'deaf to our pleas' or 'blind drunk'.

The guidance also contains a comprehensive list of words to use and avoid, e.g. (i) don't use mentally handicapped, mentally defective, retarded, subnormal, but do use with a learning disability (singular) or with learning disabilities (plural); (ii) don't use an epileptic, diabetic, depressive, and so on, but do use a person with epilepsy, diabetes, depression or someone who has epilepsy, diabetes, depression.

Figures published showing employment rates of older workers in GB's local authorities

New figures collated by the DWP, Local authority comparison: Employment rate for the 50 to 64 age group (older workers), reveal those local authority districts which have the highest employment rates for older workers. Watford has the highest estimated employment rate amongst 50 to 64s at 89.5% of this age group in work. The Shetlands followed closely on 88.3% and north Dorset on 87.2%. Other high-performing areas include Stroud in Gloucestershire (85.3%), south Northamptonshire (84.6%), Horsham in Sussex (84.2%), and Tandridge in Surrey (84.2%). These statistics are a valuable tool for diversity benchmarking/monitoring and also for Respondents in 'older worker high employment areas' who have lost unfair dismissal claims involving Claimants in the relevant age bracket and who want to challenge evidence about mitigating loss and future loss.

Content

The aim is to provide summary information and comment on the subject areas covered. In particular, where employment tribunal and appellate court cases are reported, the information does not set out all of the facts, the legal arguments presented by the parties and the judgments made in every aspect of the case. Click on the links provided to access full details. Employment law is subject to constant change either by statute or by interpretation by the courts. While every care has been taken in compiling this information, SM&B cannot be held responsible for any errors or omissions. Specialist legal advice must be taken on any legal issues that may arise before embarking upon any formal course of action.