April 2009

# Review

## Employment

# Be clear about the termination date

Negotiations over the terms of a Compromise Agreement can sometimes become protracted and the proposed termination date set out in the draft Agreement may come and go. Employers should be aware that if they do not wish to continue to employ the individual beyond this date they need to take clear steps to terminate his employment.

In *Kirklees Metropolitan Council v Radecki* R was suspended following concerns about his skills and experience. Disciplinary proceedings were instigated but subsequently put on hold following discussions about a possible termination of his employment on terms as an alternative to the disciplinary process. The Council drew up a draft Compromise Agreement marked "without prejudice" and "subject to contract" which stated that R's employment would terminate on 31 October 2006. R was removed from the payroll on this date but the Compromise Agreement was never signed and in February 2007 R said he was not prepared to enter into it. The Council wrote to R on 5 March 2007 advising him that in accordance with the terms of the draft Compromise Agreement his employment had been terminated on 31 October 2006. R disputed this and brought a claim of unfair dismissal, arguing that his employment had terminated on 6 March 2007, being the date on which he received the letter from the Council advising him that his employment had been terminated.

Employers should ensure any decision to terminate is clearly communicated to the employee

The Court of Appeal accepted by a majority the Council's arguments that by stopping R's pay on 31 October 2006 it had shown a clear intention to dismiss him and this was sufficient to terminate his employment with effect from that date. R's unfair dismissal claim was therefore well out of time.

There are a couple of things to take from this case. First of all, the Court made it clear that the fact that the draft Compromise Agreement stated that R's employment would terminate on 31 October 2006 was irrelevant, because the agreement had never been finalised and as such was not binding on either party. The termination arose from the pay being stopped, not the date in the draft agreement. Secondly, not all the Judges were convinced that by simply removing R from the payroll while he was suspended the Council had done enough to demonstrate a clear intention to dismiss him. Employers should therefore ensure any decision to terminate is clearly communicated to the employee – at the same time being aware that in the absence of a signed Compromise Agreement there is nothing to stop an employee presenting an unfair dismissal claim as a result.

In this case R had been suspended on full pay for almost a year by the time his employment was terminated. The disciplinary proceedings had been put on hold in the expectation that the parties would be able to reach agreement on the terms of the Compromise Agreement. This never happened. Fortunately for the Council R's unfair dismissal claim was found to be out of time or else it might have found itself in a very tricky situation, looking down the barrel of a very strong actual or constructive unfair dismissal claim. Employers should be wary about suspending disciplinary proceedings in the hope of reaching agreement. If they go down this route they should impose a long-stop deadline after which negotiations for the Compromise Agreement will cease, or at least the open proceedings would resume in parallel. This case could very easily have gone the other way, leaving the Council facing a claim for substantial arrears of salary.

### CAN A SHAREHOLDER ALSO BE AN EMPLOYEE?

Yes, a controlling shareholder and director may also be an employee and thus be entitled to recover sums from the National Insurance Fund in the event his business fails (*Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld & Howe*).

Employees whose employer becomes insolvent are entitled to recover certain sums from the National Insurance Fund, including arrears of pay for up to 8 weeks, notice pay, holiday pay and a basic award.

In recent years an increasing number of claims have been made on the Fund by controlling shareholders/directors and in *Neufeld* the Secretary of State sought guidance from the Court of Appeal on whether such individuals are employees and thus entitled to payments from the Fund.

The Court of Appeal said there is no reason in principle why someone who is a shareholder and director of a company cannot also be an employee. Ultimately it will be a question of fact for a Tribunal to determine, taking into account such factors as whether there is a genuine contract of employment in place at the time of the insolvency, whether the contract is a true reflection of the relationship between the parties and how the parties have conducted themselves. The fact that the individual has share capital invested in the company, has made loans to it, has given personal guarantees or stands to prosper in line with the company's prosperity are not relevant to the issue of whether there is a contract of employment and as such should be ignored. The Court of Appeal held that both N and H were employees and therefore entitled to payments from the National Insurance Fund.

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This case is of particular relevance at a time when an increasing number of small businesses are becoming insolvent: it is certainly unlikely to stem the number of claims that are being made on the National Insurance Fund. Any employer looking to acquire a small business and dismiss the senior management team should also be aware that in light of this decision such individuals might well be employees and thus gain a number of rights, including the right to transfer under TUPE, the right not to be unfairly dismissed, the right to a redundancy payment etc.

## CLIMATE CHANGE SUPPORTER BRINGS DISCRIMINATION CLAIM

An employee who claims he was sacked because of his strong environmental beliefs has been allowed to proceed with his claim of discrimination under the 2003 Religion or Belief Regulations.

In *Nicholson v Grainger Plc* earlier this year N, a former environmental policy officer brought claims of unfair dismissal and discrimination after being made redundant in 2008. He claims that one of the reasons for his dismissal was his strong belief about the importance of protecting the environment.

At an initial hearing an Employment Judge ruled that N's beliefs were sufficient to constitute a "philosophical belief in climate change" and thus bring him within the scope of the Religion or Belief Regulations. The definition of "religion or belief" covers philosophical beliefs as well as religious beliefs.

Up until now most religion or belief claims have been brought by followers of the established religions and only a handful have dealt with the definition of religion or belief itself. Membership of a political party and allegiance to one's national flag have both been held not to constitute philosophical beliefs. It will therefore be interesting to see how the Tribunal deals with this claim. The full Tribunal hearing is due to take place in June.

## FURTHER INFORMATION

For more information relating to this article, please contact:

**Sue Nickson**
Chief Operating Officer and International Head of Human Capital
E: sue.nickson@hammonds.com

**Mark Shrives-Wright**
Partner & Head of Leeds Human Capital
E: mark.shrives-wright@hammonds.com

**David Whincup**
Partner & Head of London Human Capital
E: david.whincup@hammonds.com

**Nick Jones**
Partner & Head of Manchester Human Capital
E: nick.jones@hammonds.com

**Teresa Dolan**
Partner & Head of Birmingham Human Capital (Employment)
E: teresa.dolan@hammonds.com