March 2010

Review

Employment

Constructive dismissal – prevention is better than cure

Let us say that as employer you or your staff make some ill-advised remark or some inadvertent error in payroll which technically constitutes a fundamental breach of an employee's contract of employment. If you recognise that error, apologise for it and promptly make any necessary amends, should your employee nonetheless still be entitled to resign and claim constructive dismissal? In other words, can your breach of contract be "cured" by remedial steps you take before the employee chooses to resign?

"Can your breach of contract be "cured" by remedial steps you take before the employee chooses to resign?"

This question was recently considered at some length by the Court of Appeal in *Buckland v Bournemouth University Higher Education Corporation*. Buckland was a teaching Professor at the University. The exam scores he gave to a group of students came under question from colleagues as potentially too harsh. In response to those questions, Professor Buckland's Head of Department arranged for the papers to be re-scored, but he did not consult with Professor Buckland about this or even tell him he was doing it. When Professor Buckland found out he complained and a subsequent internal enquiry report both vindicated his marks and criticised the Head of Department reasonably robustly for having approved the re-evaluation of the marks without consulting him. Nonetheless, he subsequently resigned and claimed constructive dismissal.

It was ultimately found that the Head of Department's commissioning the re-evaluation without notice to Professor Buckland was a fundamental breach of his contract because of the lack of trust and confidence in him which it showed. However, he did not resign until after the issue of the report vindicating him both as to the marks and the inappropriate conduct of that re-evaluation. The University's defence of Professor Buckland's constructive dismissal claim was therefore that the report and vindication attached to it had cured the breach entailed by the re-evaluation by the time he quit, and therefore that Professor Buckland had no grounds for his constructive dismissal claim.

The Employment Tribunal found that the report issued on the matter had indeed gone a long way to curing the breach of contract, but that Professor Buckland still had room to believe (and did believe) that it had not gone far enough – a slur on his integrity remained, he said. It would have been interesting to know whether the Tribunal would have taken the same view had the re-marking exercise found that he was actually at fault but on the facts it felt that the University should have done more if it wanted to remedy the original damage. The Employment Appeal Tribunal took a different view, considering that the question of "cure" should not be looked at subjectively (what did Professor Buckland feel) but objectively (would a reasonable man be satisfied by the report?). The EAT thought that a reasonable man would indeed be satisfied, notwithstanding Professor Buckland's views, and therefore that the breach had indeed been cured.

The Court of Appeal took a different view again, querying instead whether the question of cure, whether looked at subjectively or objectively, actually had any place within the assessment of a constructive dismissal at all. Sedley LJ summed up his concerns (and no doubt those of many employers), saying: *"I confess that if this is the state of the law, it seems to me capable of working injustice. It may... be the point at which the law of contract meets sensible industrial relations. The reason is that something may well be said or done in haste or anger which, if left un-redressed, would strike at the root of the employment relationship – an accusation of dishonesty, for example – but which is regretted and retracted before the other party, who may be either employer or employee, acts upon it by ending the relationship... in the great majority of cases the parties will want the relationship to survive and a retraction will be accepted. But the law is there for those cases where, for what may be less than creditable reasons, the wronged party will not climb down: does the law in such cases ignore the olive branch?"* The question implicit in *Buckland* was therefore whether, if the

employer takes all reasonable steps to put the matter right and does so promptly and effectively, the employee should be obliged to accept that as resolving it – in effect, a duty on him akin to that to mitigate.

To maintain good industrial relations and reflect the inevitability of such mishaps in the lifetime of the working relationship, the answer should surely be yes. Of course, what those remedial steps would reasonably have to be, and whether an effective remedy was actually possible would vary from case to case. Sometimes the employer's breach is simply not capable of remedy. Even though the Court of Appeal found that Professor Buckland had been "petulant" and intransigent in the University's endeavours to resolve the matter to his satisfaction, clearly not behaviours to encourage, it reluctantly felt itself unable to say, in the absence of any supporting authorities, that there was indeed a doctrine of cure available in contract law or in the employment context in particular. The University's mea culpa thus became irrelevant and Dr Buckland was successful.

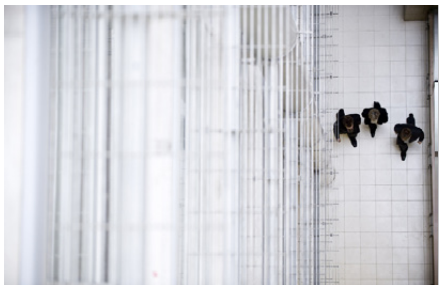
"Sometimes the employer's breach is simply not capable of remedy"

Agreeing in broad terms with Sedley LJ, Jacob LJ noted that he did *"not share Sedley LJ's regret in holding that a repudiatory breach of contract, once it has happened, cannot be "cured" by the contract breaker. Once he has committed a breach of contract which is so serious that it entitles the innocent party to walk away from it, I see no reason for the law to take away without the innocent party's right to go. He should have a clear choice: affirm or go. Of course the wrongdoer can try to make amends – to persuade the wronged party to affirm the contract. But the option ought to be entirely at the wronged party's choice".* As a statement of theoretical contract law this is clearly correct, but it is possible to suggest, with respect, that it is not reflective of daily employment relations, the probability that somebody at some point will say or do something stupid and the reality that it should not be open to the wronged party to obtain potentially significant sums of compensation in relation to something which is retracted and corrected to a reasonable degree immediately.

One can also look at this question from the opposite end. Sedley LJ's comments above referred expressly to the wronged party being either employer or employee. If an employee commits an act which is gross misconduct (ie, the reverse of a repudiatory breach by the employer) can he render a summary dismissal unlawful by his actions pre-termination? It is easy to conclude that if the gross misconduct were marginal (for example a remark which was borderline insubordinate or discriminatory) and the employee's attempts to make amends were immediate, unprompted and effective, a Court or Tribunal would be bound to take that into account in assessing whether it was really summary dismissal material. Sedley LJ accepted that it was "arguable…that reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach. There are likely to be cases in which it is useful. But it cannot be a legal requirement". He used the example of an employer not paying its staff because a major customer had defaulted – perhaps a reasonable step by the employer in the circumstances but nonetheless clearly a fundamental breach. However, what if the non-payment were delayed by a day or two only until the funds were received, the situation was fully explained to the staff and any consequential losses were met by the employer? Would that still entitle staff to claim constructive dismissal? It is tempting to think that it should not.

Even if the Court of Appeal felt itself bound at law to conclude that a repudiatory breach by an employer could not be remedied, it could perhaps have taken a different view of how one assessed whether there had been a fundamental breach in the first place. If it asked itself not whether the employer's act was repudiatory at the moment it took place, but whether the overall situation facing the employee **at the point of his resignation** still amounted to a fundamental breach, it may have come up with a different answer. It would then be possible for the view to be taken that the "curative" steps taken by the employer had had the effect of lessening its impact to the point where it had become no longer repudiatory.

The effect of the Court of Appeal's decision in *Buckland* is to treat employees as not required to show a reasonable degree of tolerance and resilience in the workplace. It potentially rewards those



who are not willing to take a grown up attitude or to let a matter become what the Employment Tribunal described as *"one of those incidents of professional life that a person must accept and move on"*. This decision must therefore be seen as regrettable in practical terms. It should be open to employers, at least in principle, to turn repudiatory breaches into something less by reacting immediately and appropriately to them. If the employer does what it can, and does so comprehensively and effectively but the employee leaves regardless, then that should be his problem – as a minimum, following the EAT's reasoning in this case, he should have to explain why the steps taken by the employer were not sufficient, seen objectively, to cure the breach. Hopefully that prospect would cause less emotional flouncing about and more discussion, hence saving the relationship to the benefit of all parties.

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APRIL WORKSHOPS

Our 2010 programme of Employment seminars and workshops is now under way.

The April breakfast workshops on 'Time off issues' will look at the new right to request time off to undertake study or training (which will apply from 6 April 2010 to employers with 250 or more staff). We will use a case study to consider the practical and legal issues for employers, as well as pitfalls to avoid. We will also be considering recent cases on other time off issues such as time off for dependants and holiday (in particular sickness whilst on holiday) and the implications for employers, as well as briefly discussing the new additional paternity leave and pay scheme.

You will shortly receive an invitation to the workshops.

Further details of our 2010 workshops are available **here**.

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