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THE ACCENT ON EXCELLENCE

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Important considerations employers should understand when making tough decisions

The Royal Court provided a timely reminder towards the end of last year, in *Sahara City Co Ltd v Chiverton*, of the need to follow a fair process in deciding whether or not to dismiss an employee even in the most extreme of circumstances, and also to ensure that the genuine reasons for dismissal are identified and provided. Given the extreme circumstances many businesses may now find themselves in, it is worth reminding of the current position.

Another issue, also considered by the Royal Court, that may well exercise employers' and employees' minds as Guernsey starts, albeit slowly, to follow the UK's lead in becoming more of a gig economy, is the question of "continuous employment" and when legal protections start to kick in for employees.

Mr Chiverton ran the Reception, then became Manager, of La Trelade Hotel from 2011 until his dismissal in 2018. The business was transferred in 2018 such that Mr Chiverton had a new employer from that date. Without continuity of employment from the previous employer Mr Chiverton would not be entitled to claim unfair dismissal. In the event, Mr Chiverton's employment was ended, and the employer cited redundancy as the reason. Mr Chiverton's appeal to the employment Tribunal was successful, the Tribunal finding that Mr Chiverton had been unfairly dismissed. The employer appealed to the Royal Court.

Mr Chiverton was dismissed, on the employer's case, on the basis of poor performance and the fact that the employee had an unspent criminal record. However, in its notice of termination the employer set out that recent economic conditions had necessitated a significant workforce reduction – in other words, redundancy. The Tribunal seized on this rather than looking behind the notice. The Tribunal, for slightly complex reasons, had taken the view that Mr Chiverton's criminal record was spent and so of no relevance. Had the Tribunal fully considered the relevance of the unspent conviction, and given the evidence of poor performance the employer had advanced, the Appellant may have been able to demonstrate whether one of the potentially fair reasons for dismissal applied.

That said, however one looked at the process by which the employee was dismissed, that process was not compliant with what the law required. The employer did not hold any form of hearing with Mr Chiverton before terminating the latter's employment. Whatever the reasons for the dismissal, the process fell short of what is required to make a *potentially* fair dismissal *actually* fair. To be *actually* fair, proper procedures must be followed. As a result, assuming Mr Chiverton benefited from the legal protections, there was always going to be a finding that the dismissal was unfair.

A complaint of unfair dismissal is generally not available unless the person making it had been continuously employed for a period of one year. The employer had argued before the Tribunal that it was putting together a new team at La Trelade, which meant that new contracts were offered by the new employer to staff who had been employed by the previous employer. Mr Chiverton claimed he had been continuously employed since 2011 with no break in employment even if the identity of his employer had changed. The Tribunal accepted this argument.

On appeal, the Royal Court was unhappy with this finding. For continuity of employment, the new employer must either be an associated employer of the first employer, or the business transferred to the new employer. While it was possible that the conclusion the Tribunal reached was correct, that really depends on looking more fully at the question of whether there has been a transfer of the trade, business or undertaking. In submitting the decision back to the Tribunal, the Royal Court found that no consideration had been given to whether the new employer was an associated employer, and therefore it had been wrong to find continuity of employment.

What lessons might an employer learn from this case?

Continuity of employment - If there is any question of whether an employee is continuously employed or not, serious consideration should be given to ensuring there is a real break between contracts. It might be valuable to add an express clause to each new contract confirming it does not run on from the previous contract. A significant and real change in duties might be helpful. In the case of a fixed term contract lasting one year or more, the employee can agree in writing, to waive their rights to make a complaint of unfair dismissal, either as part of the original contract or before the contract expires.

Duty to give reasons – While it is often considered an employee's right to be given the reasons for dismissal (which of course it is) *Chiverton* demonstrates that it is also essential to the employer that those reasons are set out. Employers need to be realistic about their reason for dismissal – even if this will be hurtful to the employee. Setting out clear, unambiguous – and true – reasons for dismissal might have been enough in this case for the employer to have been successful at first instance.

Process, process, process – in the end, as ever, the most important thing an employer can do is follow an appropriate process in considering whether or not to dismiss. Employers need to give consideration to how the employee might put their case across – and then give real consideration to that case. Without an appropriate process, there will always be a significant risk that a dismissal will be found to be unfair.

Babbé provides specialist employment advice, on both contentious and non-contentious employment issues. We have been involved in a number of employment matters and our advocates are ideally placed to assist.

Key Contacts

Andrew Laws – Managing Partner
+44 1481 746 175
a.laws@babbelegal.com

Robin Gist – Senior Associate
T: +44 1481 746 186
r.gist@babbelegal.com

Todd McGuffin – Partner
+44 1481 746 145
t.mcguffin@babbelegal.com