Employment news - summer: Fired or still hired?

20 JULY 2009

CATEGORY:
ARTICLE

With the echoes of Sir Alan Sugar's "You're fired" still ringing in our ears after the latest series of 'The Apprentice', most employers would be forgiven for thinking there is little scope for doubting or challenging when an employee's employment comes to an end.

However, a recent Court of Appeal (CA) decision in the case of Radecki v Kirklees Metropolitan Borough Council shows that the position may not be quite so straightforward. Problems can arise if negotiations about a termination package are taking place and the employer has a 'last date of employment' in mind, only to find that negotiations fail at the last minute.

The unfortunate result may be ambiguity followed by unnecessary and expensive litigation in order to work out the exact date of termination.

Failed compromise

Mr Radecki had been employed as a teacher by the Council and was suspended with pay in October 2005. A draft compromise agreement was negotiated which provided that Mr Radecki's employment would terminate by mutual consent on 31 October 2006. The Council removed Mr Radecki from its payroll from that date.

On 22 February 2007, Mr Radecki told the Council that he was unhappy with the terms of the draft agreement. In a letter to Mr Radecki dated 5 March 2007, the Council asserted that his employment had ended by mutual consent on 31 October 2006 after it had acted in good faith, relying on Mr Radecki's advice that he would sign the draft agreement.

Mr Radecki brought a claim for unfair dismissal. As a preliminary issue, the employment tribunal had to determine whether or not Mr Radecki's claim was out of time. A claim must be presented to an employment tribunal within 3 months of the effective date of termination (EDT). Where the employer or employee gives notice, the EDT is the date on which the notice expires. Where the dismissal is without notice, it is the date on which the termination takes effect. The tribunal found that Mr Radecki's EDT was 31 October 2006, so his claim in March 2007, was out of time.

Mr Radecki appealed to the Employment Appeal Tribunal (EAT) which concluded that Mr Radecki's EDT was not the date of his removal from the payroll but was 4 months later when the employer wrote to him stating that the employment relationship had ended. The EAT decided that the removal from the payroll was done in the expectation that the draft agreement would be executed; it had not been done to terminate Mr Radecki's employment.

The EAT also found that there must be an unequivocal act which could be regarded as terminating the employment. It concluded that in Mr Radecki's case, this was not until the Council's letter of 5 March. Another factor influencing the EAT's decision was that when compromise agreements are being negotiated and are expressed as 'without prejudice and subject to contract', either party can withdraw at any time before the agreement is executed. On this basis, the EAT decided there could not be sufficient clarity for a dismissal.

The Court of Appeal

The CA disagreed, concluding that what mattered was whether or not Mr Radecki was aware that his employment had been brought to an end on 31 October 2006.

The CA determined that because Mr Radecki had not been paid for 4 months, it is unclear what he could possibly have thought that his employment status was. More importantly there was no explanation as to why he did not complain about not being paid if he genuinely thought he was still employed. The CA found that stopping pay was the Council's clear expression of its intention to bring the employment to an end. This was borne out by the fact Mr Radecki was not required to attend work or any disciplinary hearing.

The CA decided from the facts that both parties had acted as if Mr Radecki's employment had ended on 31 October 2006 and Mr Radecki's claim was out of time.

Conclusion

This case is clearly limited to its own facts and one might say that the employer was lucky – the CA could quite possibly have gone the other way in their decision making and the EAT's reasoning was just as persuasive. Cases where the only remaining part of the employment relationship left intact is the right to receive pay, are going to be rare. Despite this, there are some practical lessons that employers can learn from the case.

Practical steps for employers

1. The CA's decision underlines the importance of a clear, open and unambiguous statement terminating the employment. We recommend setting it out in a letter specifying the date employment ends and clarifying the position on any appeals process available to the individual.

1. Following on from the termination letter, make all other termination arrangements as soon as possible, for example, making a payment in lieu of notice if appropriate and issuing the P45. This case emphasises how important it is for employers to be aware that the member of staff will remain an employee until the EDT.

1. Make sure that any standard form compromise agreement the organisation uses, is marked “without prejudice and subject to contract” when sent out in draft form.

1. Mr Radecki's case turns on its own facts and how employers proceed will depend on the specific circumstances of their own matter. If termination is going to be contingent on a compromise agreement being signed, it is advisable to agree this in writing with the employee before negotiations start. If this option is taken, employers should ensure that no action is taken on the compromise agreement until it is signed.

1. Mr Radecki's case shows that an intention to enter into a compromise agreement based on an agreed termination date, may not necessarily be enough to secure termination on that date. In Mr Radecki's case, the circumstances were such that the CA decided Mr Radecki must have been aware that his employment had ended.