Dismissed for refusing a pay cut

14 NOVEMBER 2011

CATEGORY:
ARTICLE

In difficult trading conditions employers may be forced to consider adjustments to pay or bonuses as a means of ensuring the company's survival. But employers cannot change their employees' contracts unilaterally (for example by reducing pay) without a risk of constructive dismissal claims. Even where an employer has a variation clause in the contract it must still act reasonably and consult its employees over significant changes, aiming to obtain their consent. If consent cannot be obtained, employers may have to force through change by dismissing recalcitrant employees and offering to re-hire them on new terms. Plainly this is a risky process.

Two recent cases illustrate how the Tribunals might approach an unfair dismissal claim where a pay cut has been imposed against an employee's will.

In *Garside and Laycock Ltd v Booth*, the company had been undergoing trading difficulties and had asked all its employees to accept a 5% reduction in pay. Mr Booth was one of only two employees of more than 80 who refused to comply and was subsequently dismissed. He brought a claim to the tribunal, alleging that his dismissal was unfair. The Tribunal first had to decide whether there was a potentially fair reason for the dismissal. It decided that in the circumstances, the company had a substantial reason to dismiss, namely the difficult economic conditions, which made the situation so desperate that the only way of saving the business was to propose stringent reductions in pay and conditions. However it was not reasonable for the company to expect an employee to take a pay cut, so the dismissal was unfair.

The company appealed to the Employment Appeal Tribunal (EAT) which overturned the tribunal's decision and made several helpful points for employers facing this situation.

1. The test the Tribunal had applied in assessing whether the change was reasonable was wrong – it was not necessary for an employer to be in desperate straits before it could act reasonably in imposing a pay cut.
2. Secondly, the Tribunal had gone wrong by assessing the reasonableness of the employer's decision to dismiss by asking what it was reasonable for the employee to have done in the circumstances. The question it should have asked was what it was reasonable for the employer to do. It may well be that the decision of the employer, in order to be reasonable, will take account of the employee's views. However this is very different from saying that the decision depends upon what the employee thinks.
3. The Tribunal gave as one of its reasons for rejecting the employer's approach as reasonable, that it lacked 'cogency'. The EAT did not agree. The business faced what the Tribunal accepted were trading difficulties and was seeking to reduce its costs. Furthermore, it was not unreasonable to try to ensure that all members of the workforce were on the same pay scales, rather than one employee being paid more simply because he had refused to accept a cut that all the others were prepared to take.
4. With regard to fairness, assessing this might include considering for example, overall fairness such as management proposing to cut workers' pay, but not its own. It might also involve considering whether or not there were other cost saving measures that might also have been appropriate.

In *Slade v TNT (UK) Ltd*, TNT wanted to discontinue a bonus scheme which incentivised employees to meet certain deadlines when sorting goods at its delivery hubs. The scheme, which had been introduced in 1983, was discontinued for new joiners from 2005; in 2009, TNT began negotiations with the union to discontinue it for current employees as well. After discussions over several months (and several ballots), TNT wrote to the workforce to explain its position. It made a final offer to 'buy out' the value of the bonus in return for employees' agreement to change their terms and conditions. If that was rejected, employees would be issued with contractual notice to terminate their employment. The offer was rejected and the employees received contractual notice. They were then offered re-engagement on the expiry of their notice period, on the same terms and conditions but without the specific bonus scheme and without the buy-out bonus.

The Tribunal considered that TNT had established 'some other substantial reason' for the dismissal (namely, one which it reasonably believed was a sound business reason) and went on to consider whether the dismissal was 'fair', seeking to balance the advantages to the business against the effect on the employees. They concluded that, taking into account its previous engagement in negotiation, TNT's approach was wholly reasonable.

The employees appealed to the EAT which rejected the main arguments in their appeal (having taken the Garside decision into consideration):

1. The employees had emphasised the severe impact of this pay cut upon the workforce and suggested that the Tribunal had failed to engage with this. The EAT disagreed. The Tribunal had commented that both parties had acted reasonably in the circumstances, but that its focus must be the reasonableness of TNT's conduct. This did not mean that the Tribunal had not undertaken a proper balancing exercise between the employer and the employees.
2. The employees had also argued that it was not equitable for TNT to withdraw the offer of a 'buy out' lump sum when they offered re-employment. If TNT could afford to mitigate the impact of the change before terminating the contracts, they argued, it was inequitable

for it not to do so after terminating the contracts. The EAT did not agree that the only reasonable approach would have been for TNT to have offered re-engagement on terms including the lump sum. On the contrary, the lump sum had been offered to secure a benefit to TNT (agreement to the changes without risk of industrial action or litigation). When it was unable to obtain that agreement, it was reasonable to hold back the lump sum (not least as it could then use this to address any threatened litigation).

Practical tips

Both cases show that the law give employers a wide margin within which to take business decisions to make amendments to pay and bonuses, provided that they implement these in a reasonable way (that would include acting reasonably over withdrawing an incentive payment). It is not necessary for the survival of the business to depend on the change and the focus is on the reasonableness of the employer – not the reasonableness of the employee's perspective. Consultation is critical to reasonableness – in both these cases the employer was able to demonstrate that there had been extensive dialogue with the workforce.

Employees are also likely to have an uphill struggle in cases where an overwhelming majority of the workforce accept the change.