

MANAGING THE DISMISSAL

i. POTENTIAL GROUNDS FOR DISMISSAL

- 1.1 There are numerous economic, personality based and technical reasons why an employer might seek to terminate the employment of a director or other senior employees.
- 1.2 When might these provide a potentially fair reason for dismissing under s.98 Employment Rights Act 1996? Provided the reason is not whimsical or capricious, it is capable of being an “other substantial reason”. However, the tribunal will still have to be satisfied under s 98(4) that the employer has acted reasonably.

Personality clash

- 1.3 *Perkin v St George's Healthcare NHS Trust* [2005] IRLR 934. The employee, who was a senior finance director, had caused a breakdown in relationships with other members of the senior executive committee by reason of his manner and management style. Held, 'personality' could not of itself amount to a reason for dismissal but could manifest itself in such a way as to amount to a fair reason for dismissal.
- 1.4 In these circumstances, it would be necessary for the employer to show both that there was a break down in the employment relationship and that it was irretrievable.

Conflict with the board

- 1.5 *Cobley v Forward Technology Industries plc* [2003] IRLR 706, [2003] ICR 1050. EAT considered when there might be a genuine and substantial business need following a change in ownership of the business. Following a hostile takeover of the Respondent company there was a vote by the board meeting to remove the

Claimant as director. A key factor in *Cobley* was the fact that the applicant's contract expressly permitted his removal as a director by resolution of the board.

Business Restructuring

1.6 Another permissible substantial reason is a business reorganisation (as in *Hollister v NFU* [1979] ICR 542), following change of ownership of the business. However, *Hollister* seems to require there to be genuine and substantial business need.

Performance issues

1.7 Where very senior executives are concerned, there will be a much greater degree of subjectivity involved in an employer's decision to dismiss on the grounds of incompetence.

1.8 *Cook v Thomas Linnell & Sons Ltd* [1977] IRLR 132, [1977] ICR 770:

“When responsible employers have genuinely come to the conclusion over a reasonable period of time that a manager is incompetent we think that it is some evidence that he *is* incompetent. It is ... difficult when one is dealing with such imponderables as the quality of management, which in the last resort can only be judged by those competent in the field... [T]here may be two extremes. At one extreme is the case where it can be demonstrated, perhaps by reason of some calamitous performance, that the manager is incompetent. The other extreme is the case where no more can be said than that in the opinion of the employer the manager is incompetent, that opinion being expressed for the first time shortly before his dismissal. In between will be cases such as the present where it can be established that throughout the period of employment concerned the employers had progressively growing doubts about the ability of the manager to perform his task satisfactorily. If that can be shown, it is in our judgment *some* evidence of his incapacity. It will then be necessary to look to see whether there is any other supporting evidence.”

- 1.9 A fall off in trade might be one piece of evidence which a court will consider in this connection:

“while it could not be positively established that the fall-off was directly attributable to the employee's incapacity, it seems to us that it must be reasonable for employers who have no confidence in their manager where the fall-off in trade is of genuine concern and continuing, to come to the conclusion that he shares some responsibility for it” *Cook v Thomas Linnell*

- 1.10 Where poor performance is the issue, there is arguably less need to give a warning to a very senior employee that he may be dismissed if he doesn't improve. The really important question appears to be whether it was obvious to the individual that his job was in jeopardy: *Littlewoods Organisation Ltd v Egenti* [1976] ICR 516:

Any professional man, any man of the employee's talent, would, if he stopped to think, realise that if it was brought to his notice that his work was not up to standard, and if he did not improve the standard of his work sufficiently, he might be faced with dismissal. That was plain common sense with a man of his calibre and a man of his intellectual position'.

ii. PRACTICAL CONSIDERATIONS: DISCLOSURE ISSUES

- 2.1 All internal documents created for or referring to the dismissed employee will be discloseable in any subsequent court or tribunal proceedings.
- 2.2 **External advisers.** Documents, including legal advice, passing between non-legally qualified advisers and the employing company are all potentially

discloseable. In *New Victoria Hospital v Ryan* [1993] ICR 201, the employer resisted disclosure of communications between their advisers, a firm of personnel consultants, in relation to disciplining and dismissal of the employee. The EAT held privilege should be strictly confined to legal advisers such as solicitors and counsel who were professionally qualified and were members of professional bodies subject to the rules and etiquette of their professions and who owed a duty to the court.

- 2.3 **Internal legal advisers.** However, legal professional privilege does attach to communications with a solicitor in the whole time service of a party.

iii. THE EFFECT OF REPUDIATION ON COVENANTS

Pre termination restrictive covenants

- 2.4 The scenario: *The employee commits a repudiatory breach of contract but then attempts to leave, claiming that any restrictive covenant is at an end.*
- 2.5 The employee cannot take advantage of his/her own wrong-doing. The employer is not obliged to accept the employee's repudiation and permit the employee to leave without notice: *Thomas Marshall v Guinle* [1978] IRLR 174. It may well be to the employer's advantage not to accept the repudiation and to argue that the employee remains bound by pre-termination restrictive covenants. Note however that the employer would have to continue to provide wages and other contractual benefits for the duration of the notice period.

Post termination restrictive covenants

- (i) *Repudiation by the employee*

2.6 The scenario: *The employee is dismissed for gross misconduct and goes to work for a competitor in breach of restrictive covenants.*

2.7 Where there is a justified summary dismissal, the employer can bring the employment to an end (so that he no longer has to employ the employee) without forgoing the right to rely on terms of the contract (such as restrictive covenants). Many executive contracts expressly provide this, but the principle applies even where there is no express provision: see *Measures Bros Ltd v Measures* [1910] 2 Ch 248; *Marion White v Francis* [1972] 3 All ER 857.

(ii) *Repudiation by the employer*

2.8 In a constructive dismissal situation where the employer has repudiated the contract and the employee has accepted that repudiation, the contract comes to an end for all purposes including the restrictive covenants.

iv. WITHOUT PREJUDICE DISCUSSIONS: INVITING THE EXECUTIVE TO A MEETING

3.1 Offering the employee a compromise in a meeting might induce the employee to bring a claim.

3.2 This is illustrated by *Billington v Michael Hunter & Sons Ltd* EAT 2003 (unrep)¹. The appellant was invited to another meeting at which she was invited to resign (rather than be dismissed) and was offered favourable terms if she did so. She claimed constructive dismissal.

¹ UKEAT/0578/03/DM

- 3.3 The EAT found that the facts were “only consistent” with a conclusion that the respondent did not conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between the parties.
- 3.4 Can an employer provide protection by stating that the conversation is without prejudice?
- 3.5 The purpose of the rule is to protect a litigant from being embarrassed by any admission made purely in order to achieve settlement. It is a rule of public policy aimed at encouraging litigants to settle their differences rather than litigate them to a finish².
- 3.6 The label ‘without prejudice’ does not conclusively render privileged a document so marked. Conversely, the rule applies to all discussions genuinely aimed at resolving a dispute, even if the words “without prejudice” are not expressly used³. Hence it is the nature of the conversation, rather than the without prejudice label, which will protect its contents from being used against the employer.

***BNP Paribas v Mezzotero* [2004] IRLR 508.**

- 3.7 This case considered the circumstances in which the employer might use the ‘without prejudice’ label. The EAT held an employment tribunal chairman had not erred in holding that an employee who had raised a grievance about her treatment following her return from maternity leave, and whose employer subsequently offered her a termination package at a meeting expressed to be without prejudice, was entitled to give evidence as to the contents of that meeting in support of her claim. The claim alleged sex discrimination and victimisation by her employer in seeking to terminate her employment.

² *Cutts v Head* [1984] Ch 290

³ *Chocoladefabriken Lindt v Nestle Co Ltd* [1978] RPC 287

3.8 The ‘without prejudice’ rule did not apply because there was no extant dispute at the date of the meeting as to the termination of the applicant’s employment. Raising a grievance did not necessarily mean the parties were in dispute. It was unrealistic to regard the parties as having agreed to speak without prejudice given their unequal relationship, the vulnerable position of the applicant and the fact that the suggestion was made by the employer only once the meeting had begun.⁴ EAT also held that remarks alleged to be discriminatory do not fall within the without prejudice rule.

***Framlington v Barnetson* [2007] IRLR 598**

3.9 ***Framlington*** potentially widens the scope of the kind of dispute which might justify without prejudice privilege. When the Claimant took up his appointment, it was agreed orally that he would be given shares and a right to participate in a bonus scheme, but left for later written confirmation. Negotiations about these became difficult and he had heated conversations with the Chairman culminating in the Chairman telling him he would be dismissed at the end of the year. There were further exchanges about what were acceptable terms for early termination. The Claimant was dismissed and claimed unfair dismissal.

3.10 The employer sought to exclude evidence about the later stages of the discussions. The Court of Appeal said the crucial consideration was whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree. The rule would not be confined to negotiations of a dispute in the course of or after threat of litigation. The parties were well and truly at odds as to Mr Barnetson’s contractual entitlement. Both parties were “clearly conscious of the potential for litigation”.

3.11 **NB *Framlington*** is concerned with implied without prejudice.

⁴ The “unambiguous impropriety” exception, applies where the rule “would act as a cloak for perjury, blackmail or other unambiguous impropriety”.

- 3.12 What seems to be required is some dispute between the parties in which litigation is a possibility. *BNP Paribas* suggests the raising of a grievance may not suffice.
- 3.13 Ideally, the employer should ensure the employee knows in advance what the issue between them is, to explain to him/her what the ‘without prejudice’ rule means and to ensure that the employee freely agrees to it applying.
- 3.14 BNP Paribas suggests that the courts will allow an exception to the “without prejudice” rule where it is being used by one of the parties as a cloak for discriminatory conduct. This aside, the Court of Appeal has recently suggested, the courts can only go behind the veil of ‘without prejudice’ if there has been unambiguous impropriety⁴.

Conclusions

- *BNP Paribas* and *Framlington* are difficult to reconcile. But it seems there is no need for either party to have threatened litigation. The issue is whether they “might reasonably have contemplated litigation”.
- It is implicit that that dispute need not relate to the termination of employment (cf *BNP Paribas*)
- The fact an executive is taking legal advice may make it easier to establish that there is an actual or potential dispute in existence.
- The courts may have some regard to whether there was genuine consent to the meeting being held on a without prejudice basis (per *Paribas*). However, the key question is whether the discussions were genuinely aimed at resolving a dispute.

- The courts will not allow the without prejudice rule to be used where there is an allegation of discriminatory conduct during the meeting.

Waiver

3.15 It is important to be alive to the possibility that both parties may waive privilege by referring to privileged documents or discussion in the course of proceedings, or even before proceedings have been issued.

3.16 *Brunel University v Vaseghi* [2007] IRLR 562 involved a victimisation claim based on the publication in a university newspaper article about unsuccessful tribunal proceedings between certain employees. The issue arose whether privilege had been waived in the course of grievance proceedings in which earlier without prejudice negotiations were referred to. The Court of Appeal said that had it been a normal employer's grievance hearing, this would not have waived privilege. However, as the university had conducted quasi judicial proceedings using an external panel, privilege had been waived. Moreover, the parties waived privilege by referring to these matters in their ET1, ET3 and witness statements.

V. GARDEN LEAVE

4.1 Senior executive contracts frequently contain provisions entitling the employer to require the employee to stay away from work for all or part of the notice period. Such clauses are used:

- (i) to allow commercially sensitive knowledge to become stale;
- (ii) to prevent the employee from working for a competitor;

- (iii) to ensure that restrictive covenants applying during the currency of the employment contract are honoured;
 - (iv) because of a perception that the courts are more likely to uphold a garden leave restriction than a post-termination restrictive covenant.
- 4.2 An employer may be able to impose garden leave even where there is no express contractual right to do so. In theory, at least, pre-termination restrictive covenants should continue until the end of the notice period.

The old law:

- 4.3 In *Provident Financial Group v Hayward* [1989] 3 All ER 298 the Court of Appeal recognised that ‘garden leave’ provisions provide a potential exception to the principle that a contract of employment cannot be specifically enforced. Although on the facts, the Court declined to grant an injunction, it gave general guidance. The Court said it could grant an injunction keeping the employee on garden leave. They rejected the Defendant’s argument that an injunction seeking more limited restraint than that contained in the contract could not be enforced. So, on the facts, the express term preventing the employee working for anyone else would not be upheld because it was too wide, but it may be possible for the court to impose a restraint on working for specified rivals for the duration of the notice period. The Court of Appeal also approved the possibility of imposing a shorter period of restraint than that specified in the contract.
- 4.4 *Hayward* and the cases which followed it approved the application of a more flexible approach to garden leave clauses that that applied to restrictive covenants and, specifically, the ability to grant an injunction which was narrower than the express terms of the contract⁵.

⁵ As an example see *Credit Suisse v Armstrong* [1996] ICR 882

The new law: William Hill v Tucker

4.5 In *William Hill v Tucker* [1998] IRLR 313 the Defendant was a “senior dealer” for a spread betting company. He tried to resign giving one month’s notice. William Hill insisted on him serving six months notice, albeit he was not required to attend work and he received full pay. The Judge refused to grant an injunction restraining him from working for a competitor until the expiry of his notice on the basis that the employer had a contractual obligation to provide him with work, and that its failure to do so was a breach of contract entitling the employee to accept the repudiation and end the contract.

4.6 The Court of Appeal dismissed the appeal but did not uphold all the Judge’s reasoning. The Court held as follows.

(i) The Judge was wrong to hold that the employee has a duty to provide a skilled employee with work and the opportunity to exercise its skills save where there is an express or implied right not to do so.

(ii) Although the courts have traditionally been reluctant to find an obligation on an employer to provide work where there is a contract of indefinite duration for a fixed wage save in exceptional cases⁶, social conditions have evolved so that there are more jobs in which it could be said that there is a need to exercise skills, such as skilled workmen and “even chartered accountants”.

(iii) There is no obligation to find work if there is none to be done or to allocate work to the employee in preference to another, but the courts may be willing to find an obligation to provide work where they would not previously have done so.

⁶ such as actors and singers where constant practice or publicity is necessary

(iv) On these facts, the employee had a right to work. His post of senior dealer was unique and specific and his skills required frequent exercise and continued experience of spread betting work.

(v) It is necessary to look at the terms of the contract to see whether the consideration the employer is required to provide extends to an obligation to permit the employee to do the work.

(vi) NB If the employer is under an obligation to provide work, there must be an express garden leave provision to protect it from breach of contract.

4.7 Importantly, Moritt LJ stated that despite the recent trend towards treating garden leave provisions as more flexible than restrictive covenants:

“... the court should be careful not to grant interlocutory relief to enforce a garden leave clause to any greater extent than would be covered by a justifiable covenants in restraint of trade previously entered into by an employee”.

4.8 Having said that, subsequent cases have shown that courts are willing to grant injunctions to prevent employees from working pending termination. Further,

4.9 ***SBJ Stevenson v Mandy* [2000] IRLR 233** provides an illustration: the words in the contract: “[t]he Executive shall exercise such powers and perform such duties (if any)...” were sufficient to make clear that there might not be any duties to perform.

Summary

4.10 When will the courts find that there is a contractual obligation on the employer to provide work which precludes the use of gardening leave?

- Logically the courts can only find a contractual obligation to provide work where there is no express gardening leave clause. *William Hill* focuses on the construction of the contract to see if it provides the right to work. This would be negated by an express garden leave clause.
- An important feature in the decided cases is whether the skills necessary for the post required frequent exercise.
- Where there is no express term, there is in principle nothing to stop an employer placing an employee on garden leave using a combination of the notice period and express pre-termination restraints in the contract if it can show that the restrictive covenants are reasonable and there is no obligation to provide work.
- Where there is an express garden leave provision, the approach in *Provident v Hayward* of imposing an injunction which was narrower in scope than the original clause has not been expressly overruled.
- The approach likely to be taken by the courts is that they will enforce an express garden leave provision if, and for so long as, it is shown to be reasonably necessary to protect the legitimate interests of the employer.
- An express garden leave clause could still be struck out as an unreasonable restraint of trade. The courts is more likely to look favourably on an application for an injunction upholding an express restraint (eg confidentiality/non competition etc.), albeit founded on the garden leave clause, than to uphold the garden leave clause and prevent the employee from working (as in *Symbian v Christensen* [2001] IRLR 77:- Express garden leave clause for notice period. Court granted an injunction but only on the basis of the 'exclusive service' term set out above. The injunction, for the

duration of the notice period, simply prohibited him from working for Microsoft whereas Symbian had sought to prevent him from working for any competitor.)

- the imposition of garden leave even where there was an express term permitting it, may face opposition as a breach of the implied term of trust and confidence: *TFS Derivatives v Morgan*⁷ (unrep)

4.11 For a recent case where a garden leave injunction was upheld, see *Crystal Palace v Bruce* [2002] SLR 81.

vi. COMPANY LAW AND COPORATE CONSIDERATIONS:

5.1 The senior employee may have other roles and functions which need to be addressed.

5.2 For example, s/he may be a director, a shareholder in the company or another group company, a trustee of the pension plan and an option holder or equivalent under a share incentive plan.

Directors

5.3 The Companies Act 1985 defines a director as “any person occupying the position of director by whatever name called”⁸. It is therefore a question of law and fact whether a person is a director. This affects various issues, including whether fiduciary duties are owed and whether formalities are required to remove the individual from the board.

⁷ [2004] EWHC 3181 (QB) *Lawtel*; also an application for interlocutory injunction

Removal from the board

5.4 A company's articles of association often contain express provisions governing the removal of directors from the Board, hence it is important to review these documents. Similarly, it is quite common to find equivalent provisions in shareholder agreements, providing he the shareholders will exercise their power to remove in certain situations. This might, for example, be by resolution of the board or resolution by company directors.

5.5 Where there is no express right to remove, the company is obliged to adopt the "special notice" procedure under s.303 Companies Act. This is relatively complex, involving giving at least 28 days notice to members and an advertisement.

The executive as a shareholder

5.6 It may be disadvantageous for a private company to have the executive remain as a disaffected shareholder in the company. There are often contained in articles, shareholders agreements, and occasionally, the executive's own contract, provisions which deal with what should happen to the employee's shares on termination.

Compulsory transfer provisions

5.7 Often a departing director or even a senior executive who is not a director is required to transfer any shares he holds in the company - probably in the first instance to the other shareholders. The provisions are usually structured so that the departing employee is deemed to give "transfer notice" under the share transfer pre-emption mechanism. Note: this could trigger an offer to the company to purchase the shares which, if not taken up (due to lack of funds or otherwise), could result in the shares being offered to a third party or remaining in the hands of the departing executive.

Options

5.8 Most share option schemes provide that any option which has not been exercised on termination of employment. Clearly, if the executive is wrongfully dismissed then, subject to the rules of the share option scheme, the loss of any profit on the inability to exercise share options could be a head of damages on a wrongful dismissal claim. Scheme rules are often drafted with an exclusion clause to avoid such claim, and such an exclusion has been held to be enforceable⁹.

vii. FACTORS RELEVANT TO THE TERMINATION PACKAGE

6.1 Often, employers simply have regard to the compensation which would be awarded to the executive if he or she was forced to instigate proceedings (whether for unfair dismissal, breach of contract or discrimination). Other factors will be important however:

- (a) the merits of any potential complaint;
- (b) the evidence supporting any potential complaint (bearing in mind the relevant burden of proof);
- (c) to what extent is there any common ground about the potential complaint or evidence underlying it;
- (d) the financial resources available to the parties;
- (e) the likely costs of any proceedings;
- (f) management time;

⁹ *Micklefield v SAC Technology* [1990] 1 WLR 1002

- (g) the inclusion of additional restrictive covenants or similar in the compromise agreement;
- (h) the need for confidentiality surrounding the settlement;
- (g) any reputational issues;
- (h) the offer of a reference;
- (i) proximity to the expiry of relevant time limits.

6.2 A very useful case in calculating the likely losses under an unfair dismissal claim is *Digital Equipment Company v Clements (No 2)* [1997] ICR 237 which sets out the stages to go through for the compensatory award. (Don't forget uplifts under the EA 2002!)

8.10.07

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