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Managing your workforce: the seven deadly sins

4 JUNE 2015
Agenda

1. Contractual protection (LUST) David Williams
2. Atypical workers (SLOTH) Naomi Sansom
3. Bonuses (GREED) Virginia Allen
4. Discrimination (WRATH) Virginia Allen

COFFEE BREAK

5. Data protection gaffes (ENVY) Elizabeth Marshall
6. Performance mismanagement (PRIDE) Amy Douthwaite
7. Terminations (GLUTTONY) David Williams
The first deadly sin – lust (and employment contracts)
David Williams
Agenda

- S1 ERA – the basics
- Contractual terms – the value add
  - generally
  - incentives and benefits
  - termination arrangements
- Changing terms
- Practical tips
Particulars that must be given in a single document (the principal statement)

- The names of the employer and employee
- The date the employment starts and the date the employee's period of continuous employment began
- Pay (or method of calculating it) and interval of payment
- Hours of work
- Holiday entitlement and holiday pay
- The employee's job title or a brief description of the work
- Place of work
Employment contracts – S1 ERA cont.

Particulars that may be given in another reasonably accessible document (e.g. staff handbook)

- Terms relating to absence due to incapacity and sick pay
- The notice periods for termination by either side
- Information about disciplinary and grievance procedures
- Terms as to pensions and pension schemes (generally)

Section 4 statement required if contract varied

If there is any change to any of the required statutory particulars, the employer must give the employee a written statement containing details of the change at the earliest opportunity and, in any event, no later than one month after the change.

Compensation

- Declaration
- Two weeks' pay – subject to being accompanied by another successful employment claim
Employment contracts – the value add

General

- **Conditions precedent** – references/immigration etc.
- **Flexibility** on location and job role, title and reporting structures
- **On-going restrictions in order to protect the business:**
  - ability to undertake other work
  - duty to:
    - act in the best interests
    - disclose wrongdoing, etc.
- **General variation provisions**
- **Entire agreement clause** – replacing representations & terms of any offer letters etc.
Employment contracts – incentives and benefits

- **Remuneration, bonus and incentive provisions (as appropriate)**
  - better not to include reference to share incentives
  - clear references to discretion/fettering discretion
  - clear rights on termination
  - claw back – potential for penalty
  - FSA – remuneration code implications

- **Holiday pay and sick pay**
  - *Holiday pay*:
    - potential to nominate EU derived holiday (too early)
    - deal with part-time arrangements fairly
  - *Sick pay*:
    - length of entitlement
    - conditions – e.g. certificates and medical examination etc./employee facing disciplinary charges
    - PHI implications
Employment contracts – incentives and benefits cont.

- **Other benefit provisions – including in particular insurance arrangements:**
  - contain right to substitute provider and to make other changes
  - deal with other relevant implications
Employment contracts – termination arrangements

- **Notice provisions** (probationary notice, general notice and short/immediate notice notice)
  - contract otherwise subject to “reasonable notice”

- **PILON** (although will render payment taxable cf implications for restrictive covenants)
    - summary dismissal must be accepted by the employee – and it will not be easily inferred

- **Right to place the employee on garden leave** (cf changing duties)
Employment contracts – protecting the business

- **IP provisions** – although most rights vest in employer automatically

- **Confidentiality provisions**
  - dealing with the grey area between clearly confidential information and skill and knowledge

- **Restrictive covenants**
  - specifically tailored to employee and the employer’s business
  - require valuable consideration

*It is good practice to ask the employees to enter into new covenants when they are promoted to a new role.*
Employment contracts – other considerations

- **Directors:**
  - obligation to resign as director, etc.
  - D&O insurance
  - clarification as to duties
  - consistency with articles

- **FSA and other regulatory implications**

- **Fixed-term and part-time worker rights**

- **Other discriminatory** and **TUPE** implications, etc.
Changing terms

▪ Will the proposed changes affect the contract?
  – express
  – implied – e.g. for business efficacy or custom and practice
  – incorporated by reference – e.g. by reference to a policy

▪ Is there a contractual right to vary the term?
  – any ambiguity will be construed against the employer
  – any flexibility clauses will be given a restrictive interpretation
  – general flexibility clauses can probably only be used to make reasonable or minor administrative amendments that are not detrimental to the employee
Changing terms

The preference

▪ Get express agreement to the new terms (either from the employee or through a binding collective agreement)

▪ Note that restrictive covenants need to be accompanied by “valuable” consideration

Other alternatives:

▪ **Unilaterally impose the change** and use the employee's conduct to establish implied agreement to the new terms
  – risk of constructive dismissal
  – more risky for changes which will not have impact for some time
Changing terms

- Terminate the existing contract and offer continued employment on the new terms
  - need to consider:
    - need for the change
    - impact of the change on the individual
  - information and consultation obligations
Common challenges

▪ Practices which have become contractual by custom and practice – e.g. redundancy arrangements

▪ Handbooks which are contractual

▪ Unsigned contracts

▪ Dealing with alleged breaches raised by employees – avoiding constructive dismissal

▪ Enforcing contractual rights against employees:
  – declaratory relief
  – negative declaratory relief
  – injunction
  – breach of contract
Practical tips

- Review *types of engagements* to make sure that employees are employed on correct contractual arrangements

- Review *terms of contractual arrangements* and policies:
  - Do they provide the rights that you require during the term of the contract
  - Are they clear on remuneration, incentives and benefits
  - Do they give you the flexibility that you require
  - Do they provide adequate rights and protection on termination

- Update as appropriate

- Develop strategy for implementation
The second deadly sin – sloth (and atypical workers)
Naomi Sansom
Agency workers: potential risks

- Agency workers: the first to go in collective redundancy situations?
- Potential claims: discrimination
- Agency staff can make data subject access requests
Agency workers: hidden rights

- Temp to perm
- Pensions auto-enrolment
Other atypical workers

- Fixed term employees: beware the 4 year (and 2 year) milestones
- Casual workers, no more exclusivity clauses
- Consultants: are they actually employees?
Homeworking

- 26 weeks’ service

- The pros:
  - Don’t have to provide the office space which is a cost saving
  - Happier employees
Out of sight, out of mind?

- The cons:
  - Increased risk of stress?
  - Consider health and safety of equipment provided
  - Make sure there is a reporting procedure for accidents
  - Ensure employees use authorised software
The third deadly sin – greed
(and bonuses)
Virginia Allen
The third deadly sin – greed – and bonuses

- The danger of adverse media coverage

- Bonus terms - good intentions v contractual commitments

- Bonus awards - avoiding discrimination claims

- Closing the stable door after the horse has bolted - how and when to recover a bonus
Bonuses: adverse media coverage
Good intentions v contractual commitments: when does a bonus promise become contractual?

- Line between contractual and discretionary entitlements often blurred

- If employee not contractually entitled to bonus, employer under no obligation to exercise discretion reasonably - employee must establish that employer exercised discretion capriciously or irrationally by not awarding (*Clark v Nomura International plc* [2000])

- Best practice = cautious approach. Oral announcement to employees re: bonus expectation can result in a contractual entitlement (*Attrill v Dresdner Kleinwort Ltd and Commerzbank AG* [2010])
Clawing back your money- how and when to recover a bonus

- Listed companies should include clawback provisions in bonus schemes (UK Corporate Governance Code) and in the financial sector, performance adjustment provisions are required under the Remuneration Code.

- Clawback provisions need to be time limited and drafted carefully to ensure they cover relevant circumstances and rebut potential employee arguments that they are a (i) penalty clause, (ii) restraint of trade, or (iii) unenforceable under doctrine of forfeiture.

- Clause which potentially restricts employee activity post-employment may be unlawful restraint of trade (Sadler v Imperial Life Assurance [1988]) but recouping sign-on payments and loyalty bonuses after resignation enforceable (Tullett Prebon plc v BGC Brokers LP [2010])
Bonuses awards: avoiding discrimination claims

- **Pregnancy / maternity**: effect of pregnancy and maternity leave on employee’s right to receive a bonus (including the “Lewen principle”)

- **Gender / equal pay**: must have robust reasons for awarding bonuses, especially if the effect is that comparator(s) receive higher pay-out under discretionary scheme (*Barton v Investec* [2003])

- **Disability**: may be an issue where bonus is linked to attendance and/or performance (*Land Registry v Houghton* [2014])

- **Fixed-term employees**: excluding from bonus scheme, this will be less favourable treatment, unless it can be justified
The fourth deadly sin – wrath (and discrimination)
Virginia Allen
Employees on maternity leave

- **Promotions**
  - *Be careful not to overlook employees on maternity leave for promotions*

- **Pay rises**
  - *Employees on maternity leave remain entitled to pay rises*

- **Redundancies – Reg 10 MPL Regulations**
  - *Right to be offered suitable alternative vacancy*
  - *Priority over other employees at risk*
Discrimination – reasonable adjustments

- Equality Act 2010 – duty to make reasonable adjustments.
  - Disabled person placed at a substantial disadvantage by:
    (a) an employer's provision, criterion or practice;
    (b) a physical feature of the employer’s premises; or
    (c) an employer’s failure to provide an auxiliary aid.

- Subject to the employer’s knowledge:
  - either knew or should reasonably have known
  - Gallop v Newport City Council
Avoiding sex discrimination

- Shared parental leave
  - Potentially discriminatory?
  - *Shuter v Ford Motor Company Ltd*
Discrimination – age

- Default Retirement Age
  - Abolished from 6 April 2011
  - Dangers of retaining a company default retirement age

- Hidden age discrimination
Coffee break

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The fifth deadly sin – envy
(and data protection)
Elizabeth Marshall
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1995.....
Why the change?

Almost every business has employees and uses technology - iPhones, remote working, the Cloud…

Increasing obligation on businesses to protect that data and to use it properly

Current regulations rarely enforced, other than for public bodies

General Data Protection Regulation - created to bring in more control around data protection
What does it all mean?

• **Consent to processing**
  - stricter test for employee “consent”
  - in the absence of valid consent, personal data may only be processed under the current Directive:
    • (i) *if it is necessary for the performance of a contract to which the data subject is party or to comply with legal obligations or for the protection of the vital interests of the data subject*,
    • (ii) *if it is necessary for the performance of a task carried out in the public interest or in the exercise of official authority, or*
    • (iii) *if necessary for purposes of legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interest of the fundamental rights and freedoms of the data subject.*
What does it all mean?

- **Fines and enforcement**
  - proposed fines of €10m, or 5% of global annual turnover

- **Breaches**
  - to be notified to the regulator and data subjects - target of 72 hours

- **Data Protection Officers**
  - > 250 employees or processing data of > 5,000 individuals
Other data protection gaffes to avoid…

• *Failing to respond to Data Subject Access Requests*
  - fines and reputational damage

• *Monitoring employees without consent or a “legitimate interest”*
  - impact assessments will become mandatory

• *Ignoring mistakes by contractors*
  - businesses liable for contractors’ breaches
The sixth deadly sin – pride
(and performance mismanagement)
Amy Douthwaite
The issue

- Employee underperforming for a period of time
- Business has had enough, want to dismiss asap
- Can we dismiss?
The problem

- Unfair dismissal rights from two years’ service

- Poor performance potentially fair reason of capability or conduct – which one?

  PROCESS PROCESS PROCESS

- Ensure have good performance management and disciplinary policies in place and follow them
Expectations of Tribunal

For capability:

- Employee aware of requirements of the role
- Issues addressed as they arise informally
- If issue persists, an investigation carried out
- Formal hearing
  - Employee made aware of the issue
  - Opportunity to improve → set appropriate and realistic targets
  - Relevant training or support identified
  - Periodic review over review period (could be 3 – 6 months)
Fair to dismiss?

- Employee not aware there is an issue
- No opportunity to improve
- Not identified any underlying issues causing poor performance
- Undermined evidence that there is a performance issue and therefore reason for the dismissal
What to do now

- Have good performance management and disciplinary policies
- Follow the policies
- Deal with issues on a day-to-day basis as they arise
- Address performance issues in appraisals
- Have the difficult discussions to avoid even more difficult discussions
- Consider performance at bonus time
The seventh deadly sin – gluttony (and mismanaging terminations)
David Williams
Agenda

- Identifying the employee’s rights
- Unfair dismissal – the potentially fair reasons and applicable strategy
- Identifying contractual levels to support dismissal strategy
- Activating contractual rights properly
- Avoiding the potential for a constructive dismissal claim
- Settlement strategy
- Practical tips
Identifying the employee’s rights

Breach of contract/wrongful dismissal

- notice - express or implied (reasonable notice)
- other rights – e.g. bonus, commission and other incentives

Unfair dismissal

- generally two years’ service requirement
- there are numerous exceptions to this rule

Other rights:

- discrimination
- whistleblowing
Unfair dismissal – potentially fair reasons

- **Capability [or qualifications]**
  
  **Performance**
  - reasonable targets over reasonable review period – open to challenge
  - unless the employee is senior and should know better/not practicable to implement process
  - entitlement to notice
  
  **Ill-health** – cf disability implications

- **Conduct**
  - disciplinary process involving investigation and disciplinary hearing
  - potential to avoid notice payments in gross misconduct cases
Unfair dismissal – potentially fair reasons

- Redundancy

  - need to establish dismissed requirement for work of a particular kind
  - process involves consultation on:
    - rationale of redundancy
    - ways of avoiding redundancy
    - pooling and bumping and if appropriate the selection criteria
    - potential for alternative roles
  - notice and redundancy pay implications

Note: ECJ judgment in *USDAW and another v WW Realisation 1 Ltd (in liquidation), Ethel Austin Ltd and another (C-80/14)* – meaning of establishment where there are 20 or more dismissals
Unfair dismissal – potentially fair reasons cont.

- Breach of a statutory duty or restriction
- “Some other substantial reason” (SOSR)
  - Business re-organisation - the employer must demonstrate that the changes were not imposed for arbitrary or capricious reasons but were in pursuit of a "sound business reason"
- Refusal to accept changes to terms and conditions
- Personality clashes - employer must demonstrate that:
  - situation cannot be retrieved
  - employer is to blame
- Pressure from third parties – e.g:
  - client’s requesting removal from contract
  - by new owners following a hostile take over
- Reputational risk – proceed with caution
- Breakdown in trust and confidence – employer must demonstrate that:
  - situation cannot be retrieved
  - employee is to blame
- Expiry of limited-term contract
- Dismissal for an ETO in the context of a TUPE transfer
Devising unfair dismissal strategy - considerations

- What is the most appropriate potentially fair reason – note that:
  - there is generally no going back after you have selected one reason (Screene v Seatwave Ltd UKEAT/0020/11)
  - it may be possible to combine reasons, but generally this is only appropriate for more senior employees

- What is the strength of the employer’s position – is it backed up with consistent evidence

- What is the duration/implications of the process that should be followed
Identifying contractual levers to support dismissal strategy

- **Garden Leave**
  - straightforward garden leave
  - change to duties – not discounted from restrictive covenants

- **PILON – basic salary?**

- **Incentive and benefit implications**
  - rights often expressed to fall away on termination
  - potential obligation to pro rate entitlement if they do not

- **Restrictive covenants**
  - are they enforceable?
  - implications of a breach of contract

**Other considerations:**
- right to remove from board
- right to prevent access to systems etc.
Activating contractual rights

**Geys v Société Générale, London Branch [2013] IRLR 122**

- A repudiatory breach does not automatically terminate the employment contract, rather the contract is not brought to an end until and unless the innocent party elects to accept the breach:
  - "If the law requires acceptance of the repudiation, the requirement is for real acceptance - a conscious intention to bring the contract to an end, or the doing of something that is inconsistent with its continuation"
  - "Silence or inactivity", including failure to perform the contract, "will not normally satisfy this test, as it is generally equivocal"

- An employer may still purport to dismiss summarily where there is no contractual PILON, but if it does so this will constitute a repudiatory breach and the employer runs the risk that the employee will not accept it as bringing the contract to an end.

- It is not clear from Geys for how long an employee may sustainably argue that the contract still subsists, notwithstanding that its main purpose is not being performed.

- It seems that it will be possible to argue that such a dismissal is ineffective for common law purposes, but effective for the purposes of unfair dismissal law.
Stay in control – avoid potential for constructive dismissal

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed." (Western Excavating (ECC) Ltd v Sharp [1978] ICR 221)

– employee must accept breach
– last straw doctrine
– anticipatory breaches
– the breach does not have to be the only cause of the employee’s resignation
– breaches can be waived or affirmed
– if there is no constructive dismissal and the employee is in breach by arguing that there is, it will be open to the employer to not accept that breach
Settlement strategy

Pre-termination negotiations
- pre-termination negotiations conducted from 29 July 2013 onwards cannot be referred to in evidence in an ordinary unfair dismissal case unless there has been "improper behaviour"
- "pre-termination negotiations" means "any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee".

The general “without prejudice” rule
- covers discrimination and other claims
- must be a “pre-existing dispute”
- subject to limited exceptions, e.g:
  - misrepresentation, fraud or undue influence.
  - perjury, blackmail or other unambiguous impropriety

Generally, it is preferable to:
- instigate some process before endeavouring to settle
- either:
  - wait for or “engineer” a dispute before making an offer; or
  - better still, ask the employee whether they would be interested in you going back to the business to explore settlement
Practical tips – drawing this together

- Identify potential unfair dismissal exposure and devise strategy
- Consider contractual implications and options available
- Work out what levers there are in the contract and how to maximise them – including post-employment restrictions
- Make sure that any contractual levers are exercised properly
- Avoid takings steps which could lead to a constructive dismissal argument – respond quickly and appropriately to any allegations of this nature
- Identify when and how to offer settlement
- Be prepared for employee not to act as anticipated – have a contingency plan
- Remember that there is generally no going back!
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