

Employment

June 2007

This months update deals with:

- What triggers the "without prejudice" privilege?
- Breach of warranty by employee affects employer's obligation to pay under a Compromise Agreement
- Contact list on employee's computer belongs to employer
- Compromise agreement induced by fraudulent misrepresentation
- Minimum Wage To Rise

What triggers the "without prejudice" privilege?

The Court of Appeal in *Framlington Group Limited and Axa Framlington Group Limited v Barnetson* considered the question of how proximate unsuccessful negotiations leading to litigation have to be to the start of that litigation to trigger the "without prejudice" rule.

The Court of Appeal held that the ambit of the "without prejudice" rule should not be extended beyond that which was necessary, in the circumstances of any particular case, to protect the underlying public policy interest, which was to encourage parties to settle disputes without recourse to litigation. However, it was the nature of the discussions and not the timing which would determine whether they were "in contemplation of litigation".

On 7 March 2005, the Chairman of Framlington Group Ltd ("Framlington") offered Mr Barnetson the post of Chief Operating Officer until 1 April 2007. They discussed terms for salary and benefit and the means by which Framlington could terminate the contract early (by way of pay in lieu of notice).

Mr Barnetson started work on the basis of these orally agreed terms which were to be confirmed in writing by Framlington. It subsequently became clear that the two parties were at odds over their understanding of what had been agreed and discussions regarding this continued between the parties until the end of October 2005. Mr Barnetson was then informed that Framlington intended to dismiss him at the end of the year and invited him to enter into discussions on the terms of his departure.

Mr Barnetson produced a sheet setting out terms which were acceptable to him for his departure. Exchanges followed between the parties, including the provision of a draft Compromise Agreement by Framlington.

Mr Barnetson threatened legal proceedings against Framlington if a resolution was not reached quickly but discussions broke down. On 20 December 2005, Mr Barnetson was given notice that his employment would terminate on 31 December 2005. In April 2006, he issued proceedings in the High Court for damages for wrongful dismissal.

Framlington claimed that paragraphs included in Mr Barnetson's witness statement were not admissible in evidence as they recounted the "without prejudice" discussions which had taken place between the end of October and December 2005. Mr Barnetson argued that the without prejudice rule did not apply at that point as the parties were not in dispute until litigation was commenced in April 2006. It was argued that until notice was given on 20 December 2005, Mr Barnetson did not even have a potential claim against him for wrongful dismissal.

The Court of Appeal held that communications pre-dating litigation could attract the without prejudice rule, in the same way as exchanges after the start of litigation, as long as there was "a real dispute capable of settlement in the sense of a compromise". The critical feature was the subject matter of the dispute, rather than how long before the threat, or start of litigation, it aired in negotiations between the parties. A crucial consideration was whether, in the course of negotiations, the parties contemplated or might reasonably have contemplated litigation if they could not reach agreement.

In this particular case, when Framlington indicated that it intended to dismiss Mr Barnetson before the expiry of his full contractual term, the large amount of money in issue and the manner and content of negotiations were indicative of the fact that litigation was in both parties' minds between October and December 2005.

The Court of Appeal ordered that Mr Barnetson should re-serve his witness statement omitting reference to the negotiations that had taken place between the parties between the end of October and December 2005.

Breach of warranty by employee affects employer's obligation to pay under a Compromise Agreement

The High Court held in the case of *Collidge v Freeport plc* that an employer did not have to make a payment due under a compromise agreement because the employee was in breach of a warranty he had given as part of the compromise agreement.

The judge gave some useful pointers to employers on the wording of such warranties in compromise agreements.

Mr Collidge was chief executive of Freeport plc (the "Company"). Following allegations about his activities, the parties entered into a compromise agreement which provided for the termination of Mr Collidge's employment by his resignation. Various sums, including £445,680 gross compensation were said to be payable under the Compromise Agreement following termination.

All payments were specified to be "*Subject to and conditional upon the terms set out below...*"

Clause 7 of the compromise agreement was a warranty from Mr Collidge in the following terms:

*"You warrant as a strict condition of this agreement that as at the date hereof:
(b) there are no circumstances of which you are aware or of which you ought to be aware which would constitute a repudiatory breach on your part of your contract of employment which would entitle or have entitled the company to terminate your employment without notice...."*

Before the payment of £445,680 was made, the employer discovered, amongst other things that Mr Collidge had submitted fraudulent expenses claims. Mr Collidge issued proceedings for payment under the compromise agreement.

The High Court held that the effect of the wording relating to the company's obligation to pay: "*Subject to and conditional upon the terms set out below*" and the introductory words to clause 7: "*You warrant as a strict condition of this agreement*" were that, if the facts set out in the warranty provisions of clause 7 were not true, the company was not obliged to pay. The court added that it could have been more simply expressed as "*Freeport do not have to pay if 7(a), (b), (c) or (d) are not so*".

The company had evidence of gross misconduct which would have entitled it to dismiss Mr Collidge. The court found that there were numerous circumstances of which Mr Collidge was aware, which constituted repudiatory breaches of his employment contract. It followed that he was not entitled to payments under the compromise agreement.

Tips for employers

Many standard form compromise agreements include a provision requiring employees to confirm (or warrant) that they are not aware of any circumstances that would entitle the employer to dismiss summarily. Following the guidance in this case, employers should check that the payment provisions are linked to that warranty, so that the warranty becomes a pre-condition to payment under the agreement.

Contact list on employee's computer belongs to employer.

In *PennWell Publishing (UK) Limited v Isles and others*, the High Court held that a list of contacts created by an employee but held on

the employer's computer system belonged to the employer.

This list of contacts included personal and business contacts which the employee, Mr Isles, a journalist, had accumulated prior to joining the employer.

The court also held that Mr Isles was in breach of an express contractual provision which prohibited him from having outside interests during employment. He also breached his duty of good faith and fidelity by being in a position of conflict of interest and failing to take steps to prevent a former colleague from canvassing business away from the employer to the new competing business venture.

Mr Isles was a journalist employed by PennWell Publishing (UK). In 2005 Mr Isles and another colleague decided they would set up in business together competing with PennWell.

Mr Isles had removed a contact list from his computer which listed all his contacts that he had accumulated over the time he had been a journalist, including personal contacts and contacts which pre-dated his employment at PennWell. PennWell argued that this list had been compiled for the purposes of Mr Isles' employment and as such was to be regarded as confidential property of Penwell. Mr Isles argued that only 20% of the contacts were compiled whilst he was an employee of PennWell and that the contact list was his personal information. He argued that to deprive him of it would be a breach of Article 10 of the European Convention of Human Rights 1950 (concerning freedom of expression) in that the quality of his journalism would be compromised since he would have had to disclose to PennWell confidential sources used in his journalism.

The Court held, however, that where an address list is contained on Outlook or another similar programme which is part of the employer's email system then the list of information belongs to the employer and as such cannot be copied or removed in its entirety for use outside or after employment.

The Court stated that it was "highly desirable" that employers should devise an email policy which makes it clear whether email can be used for personal use. Had Mr Isles kept the list as a private address book to which he added contacts for his career purposes (as opposed to purposes for his current employment) then the court would have held that he was entitled to develop and maintain such a list.

The warning to employees is that contacts should be kept in different categories of personal or business. Employers should make sure that their email policies are properly incorporated into employee's contracts, clearly identifying what they consider to be the property of the employer. Similar issues should also be addressed where mobile phones are provided by the employer.

Compromise agreement induced by fraudulent misrepresentation

In *Crystal Palace FC (2000) Limited v Dowie*, the High Court held that the employer, Crystal Palace Football Club, had been induced into entering a compromise agreement by the employee, Mr Dowie's, fraudulent misrepresentation as to his future intentions.

The Court refused, however, to order the rescission of the contract since neither party wanted this and it would have had a detrimental impact on third parties.

Mr Iain Dowie was employed as manager of Crystal Palace Football Club in a contract due to expire on 30 June 2008. The contract

contained a compensation clause which stated that should Mr Dowie leave and gain employment at any other Football League Club or Premiership Club before the 30 June 2008 Crystal Palace were to receive £1,000,000 compensation.

Having failed to secure promotion to the Premiership in 2006, Mr Dowie spoke to Crystal Palace chairman Mr Simon Jordan about not seeing enough of his family. It was agreed that Mr Dowie could talk to clubs nearer to his home in the north of England and that Mr Dowie would leave Crystal Palace. Mr Jordan agreed to enter a compromise agreement releasing Mr Dowie from the compensation clause in his contract.

On 17 May 2006 a representative of Mr Dowie spoke to Charlton Athletic Football Club, a rival London club, as to Mr Dowie's services. On 20 May 2006, Mr Dowie told Mr Jordan that he had "had absolutely no contact whatsoever from Charlton". On 22 May 2006, Mr Jordan and Mr Dowie signed the compromise agreement, and Mr Dowie told Mr Jordan he had been approached by Derby County FC and Nottingham Forest FC, but did not mention Charlton Athletic FC. Charlton announced on 30 May 2006 that Mr Dowie was the new manager following Mr Dowie being offered the job on 25 May 2006.

Crystal Palace commenced proceedings against Mr Dowie claiming that he had made fraudulent representations to Mr Jordan which were intended to, and did, induce Mr Jordan into signing the compromise agreement.

The High Court held that Mr Dowie had made misrepresentations in stating that he intended to leave Crystal Palace for geographical reasons and by stating that he had not had any contact with Charlton Athletic when in fact he had. The court accepted that a major part of the thinking behind Mr Jordan's proposal to waive Palace's rights under the compensation

clause in Mr Dowie's contract, was to allow Mr Dowie to move back to the North of England to be nearer to his family.

The Court refused to grant the remedy of rescission since this would retrospectively revive Mr Dowie's employment with Crystal Palace, something neither party wanted. The Court considered it inappropriate since Mr Dowie was no longer employed by Charlton Athletic and Crystal Palace now had another manager in place. It was held that practical justice would be served by making orders for damages or other financial relief.

Minimum Wage To Rise

The National Minimum Wage Regulations 1999 (Amendment) Regulations 2007 (the "NMW Regulations") have been put before Parliament for approval. If accepted, the new regulations will come into force on 1 st October 2007 and will increase the national minimum wage. However, they will also add to the number of categories of workers who will not qualify for the minimum wage.

The new 2007 regulations will amend hourly rates for the following categories of workers:

- Standard Rate for workers aged 22 and over increasing to £5.52 from £5.35
- Development Rate for workers aged 18 to 21 increasing to £4.60 from £4.45
- Young Workers Rate for workers under 18 but above compulsory school age increasing to £3.40 from £3.30

The additional categories of workers who will not qualify for the national minimum wage. will include workers attending work experience as part of a further education course, workers taking part in the European Community "Youth in Action" programme and workers in the "Programme Led Apprenticeships" in England. The accommodation allowance under

regulation 36 of the NMW Regulations, which is the sum that counts towards the NMW if accommodation is provided as a benefit in kind will also increase from £4.15 a day to £4.30 a day. If an employer charges for accommodation provides by it , any excess above this figure must be deducted from the worker's gross pay when calculating whether the worker has received the NMW.

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