Employment Law Brief

with

Darren Newman

After writing last month about the legal complications that can arise when an employer and trade union fail to reach agreement on pay, I have been asked an interesting question about what happens when a deal is eventually reached after a lengthy period of negotiation. It is usual in such cases for the new agreement to be backdated to the standard review date so that the length of time it has taken to reach an agreement does not result in employees being penalised. If backdating was not agreed then that would reduce the value of the award and make reaching an agreement that much harder.

But if employees who are in place when an agreement is reached are protected, the question is where that leaves former employees whose employment ended after the pay review date but before the new deal was agreed. Are they also entitled to a backdated award?

Apparently, such payments are common practice – but I don't think they are a legal obligation. This is a question of contractual entitlement and we have to look at what the contract requires at the relevant time – not what it would require at some stage in the future. Suppose new pay rates are normally effective from January each year, but negotiations often drag on for some months beyond that. What is an employee's entitlement in, for example, March? I would say it is the same rate of pay that applied in December. The union and the employer might agree at some stage on a backdated award - so that the employee should then be given a payment that represents the difference between the old and new rates for that month. But that is a contractual obligation that only comes into existence when the new agreement is reached. The fact that the award is backdated does not retrospectively alter the contractual obligations in place in March – it merely creates a new contractual right to an additional payment representing the months lost to negotiations. As a new entitlement, it should only apply to current employees.

I have found some support for this argument in the case law – but I had to dig deep. In Leyland Vehicles Ltd v Reston (the name should give you a clue that this is a decision from 1981!) the issue was the entitlement of employees who were made redundant after the pay review date but before new rates had been agreed. It was standard practice for the new rates to be backdated and the employer had in fact given the employees an extra payment to represent the wages they would have been paid under the new rates. However when it came to the calculation of a redundancy payment, they calculated the 'week's pay' on which it was based on the basis of the old rate rather than the new one. The Employment Appeal Tribunal held that they were right to do so. A week's pay was the amount that the employee was entitled to under the contract of employment in force on the day the employment came to an end. On that date no pay increase had been agreed and so the old rate remained in place.

The Tribunal had held that there was an implied term in the contract of employment to the effect that the rate of pay in the months between the review date and the eventual agreement was the old rate plus whatever was eventually agreed. But the EAT held that there was no basis for implying such a term. I think that must be right. If we are going to imply a term based on custom and practice it should at least be possible to determine what the employer's obligations are on any given day. If we are to say that the contract requires the employer to pay the employee an unspecified amount at some unspecified point in the future once a deal is reached then that seems to me to be too uncertain to amount to a contractual obligation.

It is also difficult to see how a contractual obligation can come into being or change when there is no longer a contract in place. It is not unheard of for some contractual obligations to continue after the contract has ended. The right to appeal against dismissal can be an enforceable contractual right even if the dismissal has already taken effect and in many industries ex-employees are subject to ongoing contractual obligations not to compete with their former employer. But such terms are normally set out expressly in the contract. Implying a term into current contracts based on how ex-employees have been treated in the past seems to me to be something else entirely and altogether too much of a stretch.

I imagine that there are many trade unions lawyers who would vigorously disagree with my analysis – and they might be right. One EAT decision from 1981 is nowhere near enough to consider the matter closed. But even if some sort of contractual obligation to pay backpay to former employees can be found, recovering such sums might not be straightforward. A failure to pay backpay to an ex-employee is not in my view an unlawful deduction from wages because that depends on someone who is employed by the employer being paid less than the amount that is properly payable on that occasion. When the employer fails to pay the amount of backpay that is due, the employee is no longer employed and so the failure to make the payment is not a deduction as that term is defined by the Employment Rights Act. That only leaves a breach of contract claim – and such claims can only be brought in the employment tribunal in respect of claims that either arise or are "outstanding" on the termination of employment. Even if there were some kind of contractual obligation to pay backpay to ex-employees, the employer would not be in breach of it until after the agreement had been reached. This means that a breach of contract claim could only be brought in the normal civil courts.

Whether employers should continue any practice they may have of paying backpay to ex-employees is of course a matter for them. It is not just a question of legal obligation but of good employment relations. The extent to which unions and current employees will be concerned about the treatment of former colleagues who miss out on the benefits of a pay deal should not be underestimated. As a lawyer I would appreciate a clear ruling from the Court of Appeal on the issue, but the process of getting there might well end up costing more than continuing to make the payments on an ex-gratia basis.

Don't forget to check more about Darren Newman on his blog at A Range of Reasonable Responses or on twitter at @DazNewman