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December 2012

A legal update from Dechert LLP

UK Supreme Court Decision Limits Employers' Power to Terminate Employment

Today the Supreme Court has handed down its widely anticipated judgment in the case of *Société Générale v. Geys*. The decision clarifies the powers of employers to terminate the employment of employees without giving full notice, and will have far reaching implications.

Among the issues considered in the case was the apparently straightforward question: does a party to an employment contract have to accept the other party's repudiatory breach to bring the contract to an end? It is a cornerstone of contract law that where one party is in repudiatory breach of contract (sometimes referred to as fundamental breach) the other "innocent" party has a choice. It can accept the breach and bring the contract to an end. Or it can affirm the contract, in which case the contract will continue. By a majority of four to one, the Supreme Court confirmed that employees have this choice where their employer is in repudiatory breach. In other words, it is up to the employee whether his employment comes to an end or, as was the case with Mr Geys (with important financial consequences), continues.

Lord Wilson commented, that to find otherwise, would cause *"the law of England and Wales in relation to contracts of employment to set sail, unaccompanied, upon a journey for which [he could] discern no just purpose and [could] identify no final destination."*

Mr Geys was entitled to very large sums of money on the termination of his employment. The precise amount turned on whether his employment ended before or after 31 December 2007. If after, the termination payment would be significantly more (to the tune of millions of pounds). Mr Geys' contract included a term entitling Société Générale ("the Bank") to terminate his employment by making a payment in lieu of notice.

On 29 November 2007, the Bank handed a letter to Mr Geys stating that his employment would terminate with immediate effect. A few weeks later, the Bank made a payment to Mr Geys which was intended to be a payment in lieu of his notice. However, Mr Geys only discovered this payment on or around 2 January 2008. On the same day, Mr Geys wrote to the Bank stating that he affirmed his contract (in other words, he did not accept that his employment had come to an end). On 4 January 2008, the Bank wrote to Mr Geys stating that it had terminated his contract and had made a payment in lieu of notice to him. This was the first time the Bank had told Mr Geys that it had exercised the right to terminate his contract by making a payment in lieu.

The Supreme Court decided that Mr Geys' employment had terminated on 6 January 2008. This was the date on which (according to certain provisions in the Bank's handbook) Mr Geys was deemed to have received the Bank's letter of 4 January 2008 stating that it had made a payment in lieu to him.

For Mr Geys, this meant that he was entitled to a larger termination payment from the Bank.

For employers, this decision will have far reaching implications:

- First, unless there has been gross misconduct or an employer has an express contractual power to terminate employment with a payment in lieu of notice, an employee will be able to insist that his employment continues until his notice expires. One consequence of this is that employers will not be able to prevent employees gaining unfair dismissal rights, if their notice period would take them over the relevant qualifying period. Forward planning and contractual review are therefore more essential than

ever.

- Secondly, even if an employer has a contractual power to terminate employment with a payment in lieu, that power must be operated to the letter of the relevant contractual term. This means giving notice in the prescribed way and at the prescribed time. As noted by Lady Hale *“it is necessary... that the employee not only receive his payment in lieu of notice, but that he receive notification from the employer, in clear and unambiguous terms, that such a payment has been made and that it is made in the exercise of the contractual right to terminate the employment with immediate effect”*.
- Finally, although this will depend upon the particular wording of the relevant employment contract, employment will not generally terminate until the payment in lieu of notice has actually been made. According to Lord Sumption, the parties in *Geys* accepted that Mr Geys' employment would have ended at his meeting of 29 November 2007, had a cheque been handed to him at that time. Employers need to ensure two things in connection with such payments: first, that the relevant contractual power is clear about when payment should be made (and when employment ends) and, second, that payment is made in good time, even if it involves a same day payment into the employee's bank account.

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