Bermuda employment disputes

Peter Sanderson, Head of Litigation at Benedek Lewin Limited, gives an overview of the law when things start to go wrong in an employment situation.

It's important to understand how the law works when things start to go wrong in an employment relationship.

The following are relevant in Bermuda:

- The Employment Act ("EA"), concerning minimum terms and conditions, and claims for unfair dismissal, brought through the Employment Tribunal;
- The Human Rights Act ("HRA"), concerning claims of discrimination or harassment in the employment context, brought through the Human Rights Tribunal; and
- 'Common law' claims for breaches of contract, negligence, defamation, breaches of confidence, etc., brought through the Supreme Court or Magistrates' Court.

The above can complement each other so, for example, an employee could have separate claims for unfair dismissal under the EA, discrimination under the HRA, and a claim for breach of contract.

This article is not intended as legal advice but, rather, is to set out some of the key principles and points to help both employers and employees understand how the process works.

Employment Act

The EA can present problems for both employers and employees when navigating the difficult waters of the end of an employment relationship. The EA comes from a Caribbean template and, unfortunately, does not always tie

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in with other Bermuda law concepts. The EA provides minimum standards. Employers cannot go below these standards but, if an employment contract provides for more generous terms, then the contract will prevail.

Legal advice can help with figuring out the best way to proceed.

First of all, who is an employee? The EA defines an employee as a person employed under a contract of employment, or any other person who performs services for another person on such terms and conditions that the relationship with the other more closely resembles that of an employee than an independent contractor. This means that, even if a person is described as an independent contractor they might still be classed as an employee if, in reality, they are more like an employee. For example, if somebody is required to devote 35 hours per week to the 'employer', has little control over their hours, and is unable to substitute another person to work for them, they may well be an employee. This then means they cannot be terminated without following the EA.

Then there are exceptions to the above, such as under-sixteens, casual workers, employees working less than 15 hours per week, students employed during vacations, employees working less than three months per year, and volunteers.

It should be emphasised that there is no difference between the rights of Bermudian and non-Bermudian employees under the EA.

The EA says that employment shall not be terminated by the employer unless there is a valid reason connected with the ability, performance or conduct of the employee, or the operational requirements of the employer's business. It goes on to say that employment shall not be terminated for one of the above reasons unless proper notice is given and, in respect of performance or conduct issues, the proper process under the EA has been followed.

Termination in breach of the EA is treated as unfair dismissal, resulting in compensation of at least 4 weeks' wages per year of employment (i.e. it can be more than 4 weeks per year if justified in the circumstances), capped at 26 weeks, plus any contractual notice required to be paid.

The EA also allows for employees to be terminated when they are employed for a fixed period that has expired or fixed project that has been completed. A fixed period would include retirement if the contract specifies a retirement date. If the terms of employment do not provide

for retirement – and many Bermuda contracts do not – then it will be unfair dismissal to terminate an employee due to their age, and an employer would have to pay a compensation package as set out above. In order for it not to be treated as unfair dismissal to terminate an aging employee, there would have to be circumstances such as poor performance or inability to keep doing the job.

In the event of misconduct, an employee may be given a written warning. If an employee commits a second act of misconduct within six months of the warning, they may be terminated without notice.

For poor performance, an employee may be given a written warning and appropriate instructions on how to improve. If the employee does not improve within the following six months, then they may be terminated without notice.

For both misconduct and poor performance, issues may arise as to whether an employee is being held to a higher standard than other employees, and whether the alleged misconduct or poor performance is simply an excuse for getting rid of an unwanted employee.

If an employee disputes a written warning, whether for misconduct or poor performance, it may be worth taking advice on whether to challenge it at the time. If a warning is not challenged then there is a risk that, in the event of later termination, a tribunal may well find that the failure to challenge the initial warning meant that the employee accepted it was justified.

In the case of "serious misconduct", an employee may be dismissed without notice.

Serious misconduct is misconduct which is directly related to the employment relationship or has a detrimental effect on the employer's business, such that it would be unreasonable to expect the employer to continue the relationship. However, the EA also requires employers to act reasonably when taking disciplinary action, and a decision to terminate an employee amounts to disciplinary action. Typically, an employee should be given an opportunity to answer any allegations of serious misconduct and have their response considered prior to any decision being made to dismiss an employee.

It is unfair dismissal to terminate an employee for one of the following reasons:

- race, sex, religion, colour, ethnic origin, national extraction, social origin, political opinion, disability, marital status;
- age, unless retirement according to the contract;
- Pregnancy, unless it involves absences exceeding leave entitlement;
- trade union activity;
- temporary absence due to sickness or injury, unless occurring frequently and exceeding leave entitlement;
- public duties;
- employee absence due to dangerous work situations;
- lawful industrial action;
- filing of a complaint or participating in proceedings under the EA;
- whistle-blowing activities

It is worth noting that, because termination on the basis of 'national extraction' amounts to unfair dismissal, it may well mean that it would be unfair dismissal to terminate a non-Bermudian employee in order to prefer a Bermudian employee.

Employees may also be terminated with notice if their position is redundant, in which case they will also be entitled to severance pay, typically two weeks per year of employment, capped at 26 weeks. Redundancy is only applicable if the termination is part of a reduction in the work force as a result of a condition of redundancy. There is a long list of conditions of redundancy, including

> (a) the modernisation, mechanisation or automation of all or part of the employer's business;
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> (b) the discontinuance of all or part of the business;
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> (c) the sale or other disposal of the business;
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> (d) the reorganisation of the business;
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> (e) the reduction in business which has been necessitated by economic conditions, contraction in the volume of work or sales, reduced demand or surplus inventory;
>
> (f) the impossibility or impracticality of carrying on the business at the usual rate or at all due to—
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> > (i) shortage of materials;
> >
> > (ii) mechanical breakdown;
> >
> > (iii) act of God; or

(iv) other circumstances beyond the control of the employer.

This creates a slightly artificial process, considering the following fairly common scenario:

Imagine that, due to a reduction in business, an employer wishes to replace a highly-paid senior employee with a more modestly-paid more junior new hire. It is unclear whether hiring the junior and then terminating the senior employee means that the termination amounts to a reduction in the workforce. If not, potentially, the redundant employee might be able to claim compensation for unfair dismissal.

An employee may also be terminated for redundancy if they have been laid off due to a condition of redundancy for four months. If the employment contract provides for laying off, then the employer could lay off the senior employee in the above scenario and then make them redundant after four months without having to worry about whether it amounts to a reduction in the workforce.

The EA also provides for termination due to the operational requirements of the business. It's not clear how far this extends beyond the redundancy / lay off regime, but it would often be the case, for example, that an employer would be able to terminate an employee who is incapable of working for an extended period due to sickness or injury. Legal advice should be sought in such circumstances to ensure that any termination is handled appropriately.

An employee may also claim constructive dismissal if it is unreasonable for them to continue the employment relationship, having regard to the employee's duties, length of service and circumstances. If constructive dismissal is proved, then it is equivalent to unfair dismissal. Constructive dismissal can be a vexed decision for an employee, as it requires immediate resignation without notice, which can expose the employee to refusal by the employer to pay further wages, or even claims by the employer that the employee is in breach of contract. An internal grievance system can sometimes be used as a way to raise constructive dismissal issues, and it might also be possible for an employee to send correspondence that the situation is becoming a constructive dismissal situation, in order to try and resolve matters without taking the momentous step of resigning. Legal advice can assist with making these difficult decisions.

Upon making a complaint of unfair dismissal, the Employment Inspector (a civil servant in the Department for Workforce Development) will investigate it and make efforts to resolve the dispute between the parties. A complaint should be made within three months of the dismissal, although a late complain can still be entertained by the Employment Inspector if there are reasonable grounds to support the complaint.

If the matter cannot be resolved informally, it can be referred to a tribunal.

If a tribunal finds in favour of an employee on an unfair dismissal claim, it will order for the employer to pay compensation, as set out above, plus any payment in lieu of contractual notice. In rare cases, severance pay or other benefits may also be due.

It is emphasised that the amount of compensation is said to be "at least" 4 weeks wages per year of employment, and could be more depending on how much the dismissal has caused loss to the employee, but tempered by the extent to which the employee contributed to the dismissal.

Alternatively, the tribunal can order reinstatement or re-engagement of the employee. Although these two terms sound similar, there is a very big difference. Reinstatement is as if the employee has never been dismissed, so the employer would be obliged to pay the employee's salary and other benefits in the intervening period. Re-engagement is simply for the employee to come back to do work comparable to what was being done prior to dismissal, or other reasonably suitable work. Either remedy is rare, as it is not normally appropriate to force an employer back into an unhappy employment relationship. It would only usually be done where:

- there is little personal animosity between the parties;
- the employee is otherwise a good employee;
- the employee has acted promptly in bringing their claim forwards; and
- the employee can be easily slotted back in to the employer's structure without making somebody else redundant or causing other issues.

Tribunals do not normally award legal costs (although there may be an argument that it has jurisdiction to do so), and so parties with legal representation should be careful to ensure that their legal costs are kept within reasonable limits.

Tribunal decisions can be appealed to the Supreme Court in some circumstances, with the possibility of further appeals after that. The Supreme Court has jurisdiction to order legal costs.

Human Rights Act

Pursuant to the HRA, it is unlawful to discriminate against a person in employment on the grounds of:

- race, place of origin, colour, ethnic or national origin;
- sex or sexual orientation;
- marital status;
- disability (including mental impairments, and subject to provisions as to whether it would cause hardship to an employer to have to comply with the HRA);
- family status;
- religion, beliefs or political opinions;
- criminal record (other than where there are valid reasons to discriminate)

Discrimination can be directly due to one of the above grounds, or indirect, in that a particular action disproportionately impacts on people with a particular characteristic.

Employment discrimination can arise in one of the following circumstances:

- refusal to refer or recruit for employment;
- dismissing, demoting, or refusing to employ or continue to employ;
- paying less for substantially the same work;
- refusal to train, promote or transfer;
- subjecting an employee to probation or apprenticeship;
- establishing or maintaining classifications that exclude people from employment or continued employment;
- maintaining separate lines of progression or advancement or separate seniority lists;
- providing special terms or conditions of employment

It is noteworthy that discrimination can be engaged even at the recruitment stage.

It is also unlawful for an employer, agent or employee of an employer to harass an employee based on one of the grounds above. There is a specific duty on an employer to take action to ensure sexual harassment does not take place at work.

The HRA also has provisions for disability

discrimination. This includes treating a disabled person differently in circumstances where it is possible for the employer to modify the circumstances of employment to eliminate the effects of the disability without causing unreasonable hardship to the employer.

The HRA also has anti-victimisation provisions making it unlawful to terminate or penalise an employee for taking action under the HRA.

Breaches of the HRA can result in damages for loss of earnings, distress and hurt feelings, etc. A complaint should be made to the Human Rights Commission within six months of the breach, but the time limit can be extended up to two years if there are good reasons for the delay and nobody will be prejudiced. The Human Rights Commission will investigate and attempt to mediate a dispute. If this is unsuccessful, it can be referred to a tribunal. Alternatively, a complainant can side-step the Commission and take a claim directly to the Supreme Court. There are pros and cons of each approach.

In some cases, there may be defences that the HRA interferes with constitutional rights to freedom of association, for example if an employer could establish a legitimate reason for discriminating against particular classes of persons.

In particularly serious cases of discrimination or harassment, a person could face criminal charges.

Other claims

Other claims, known as common law claims, can cover many circumstances, and this article is not intended to give an exhaustive list.

Wrongful dismissal

Aside from a claim under the Employment Act for unfair dismissal, an employee may also have a claim for wrongful dismissal if they are terminated without contractual notice, or if the employer commits a breach of trust and confidence such that the employee cannot be expected to continue working. Sometimes the damages for wrongful dismissal might go beyond what an Employment Tribunal might award, for example if there are complex issues resulting from a loss of health insurance, or bonuses, or issues relating to psychological injury or loss of reputation connected to the dismissal that are better dealt with in the Supreme Court.

Other breaches of contract

Many employment contracts contain non-solicitation / non-compete / confidentiality /

intellectual property clauses that employers may attempt to rely on. Employers can enforce these clauses by obtaining an injunction or in a claim for damages.

Non-compete clauses are very difficult to uphold in Bermuda, but non-solicitation clauses can be acceptable, provided they are not worded too broadly.

Whether or not a contract contains a confidentiality clause, a former employee may still have a duty to protect the employer's confidential information, and so sometimes it can be important to take advice on the scope of this.

There may also be issues over the use of intellectual property by a former employee and, again, it can be helpful to obtain advice on what is or is not covered by a clause protecting intellectual property.

Defamation

When an employment relationship breaks down, both sides can be concerned about defamation. From the employee's perspective, they might not want disputed allegations disclosed to third parties as it could affect their future employment prospects. An employer may also be concerned about their reputation if a former employee is spreading disputed allegations about how they were treated by the employer. Claims of defamation can be difficult to pursue but can result in injunctions to stop somebody from repeating allegations, and damages for doing so.

Breaches by employees

There can be consequences for employees who behave recklessly or resign without giving notice. Employers have the option of raising the issue of damages against an employee who has breached their contractual obligations. For example, an employee who resigns without notice might become liable to reimburse an employer for the loss of profits resulting from that, or the cost of having to find a more expensive replacement at short notice. Although rarely pursued, employees need to be mindful of their own obligations, and these issues do crop up in counterclaims against employees who are felt to be bringing an abusive or vexatious claim.

Conclusion

The above merely scratches the surface of the issues that employers and employees alike may need to consider during a contentious

termination of employment. It does not even touch on the issue of labour disputes and industrial action, which is its own topic.

Our litigation department is experienced at seeing things from both sides of the fence, and has acted for employers and employees in various disputes in all of the above areas.

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Peter Sanderson has represented employers and employees in the Employment Tribunal, Human Rights Tribunal, Supreme Court and Court of Appeal, resulting in some landmark employment law judgments. He has also been appointed as a Labour Disputes arbitrator on many occasions. In 2015, he was appointed as an arbitrator in a major labour dispute between the Bermuda Government and all public sector trade unions. He is also regularly appointed as a mediator in disputes between employers and employees. He has been instructed to act as an Investigator into allegations of misconduct by senior employees.

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