Employer cannot cure a fundamental breach of contract once committed

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In the recent constructive unfair dismissal case of Flatman v

Essex County Council, the Employment Appeal Tribunal (EAT) held that a tribunal misapplied the law by failing to identify whether a fundamental breach of contract occurred at any point up to the employee's resignation. In so doing, it reaffirmed the principle that once a fundamental breach has been committed, it cannot be cured.

What does the law say?

Employees have the right to resign and claim that they have been constructively unfairly dismissed where their employer has committed a fundamental breach of a term of their contract of employment (either an express or an implied term). The employee must resign in good time and in direct response to the specific breach.

For these legal rights to arise, three conditions must be met:

- First, the employer's breach must effectively demonstrate an intention to no longer to be bound by the contract going forward.
- Second, the breach must be the reason for the employee's resignation.
- Third, the employee must not have affirmed the contract after the breach has occurred. This happens, for example, where employees continue to work for their employer or delay their resignation before claiming constructive unfair dismissal.

Irrespective of the employee's actions following the breach, if the employer's breach is fundamental, it cannot be cured – i.e. there is nothing that the employer can do to redeem the position.

What happened in this case?

Ms Flatman worked as a Learning Support Assistant in a school maintained by her employer, Essex County Council. From September 2017, Ms Flatman was required to support a disabled

pupil at the school. This involved her undertaking daily weight-bearing and lifting tasks. It was identified at an early stage that Ms Flatman required manual handling training in order to undertake her work safely. Despite assurances that this would be arranged, and Ms Flatman repeatedly asking for such training, it was not provided.

In December 2017, Ms Flatman developed back pain. This became increasingly severe and Ms Flatman was eventually signed off work on 1 May 2018 for three weeks. She returned to work on 22 May 2018. Upon her return, the headteacher of the school advised Ms Flatman that she would not be required to lift the pupil, she would be assigned to another class in the next school year and training would be provided. However, Ms Flatman resigned and claimed constructive unfair dismissal.

What was decided?

The Employment Tribunal dismissed the claim, holding that the Council was not in fundamental breach of its implied duty to take reasonable care of Ms Flatman's health and safety. Instead, it found that the communications when Ms Flatman returned to work demonstrated genuine concern for her health and safety.

The EAT allowed Ms Flatman's appeal. By failing to provide training and requiring her to lift the pupil on an ongoing basis, the employer had breached the implied duty to provide Ms Flatman with a safe work environment. Having reached this decision, the EAT concluded that the tribunal had erred by looking only at the overall picture at the point of Ms Flatman's resignation when assessing the breach. Instead, the focus should have been on whether there had been a fundamental breach at any point during the relevant period, and, if there had, whether Ms Flatman had affirmed the contract.

The EAT concluded that, at the latest, the breach had become fundamental when Ms Flatman was signed off sick. Ms Flatman

had repeatedly requested training and the employer had repeatedly promised it. The risk of harm increased throughout the period, with the result that she was signed off work on 1 May 2018 having suffered significant harm. It could not be said that Ms Flatman had affirmed the contract between 1 May 2018 and her resignation.

The EAT also made an interesting point concerning the assessment of whether a breach is fundamental in relation to different implied terms. It suggested that the heightened risk profile connected with the employer's implied duty to provide a safe working environment for employees is the reason why positive statements of intention or good attitude on the part of an employer have less significance than they might do where the breach is of the implied term of mutual trust and confidence (which does not necessarily have such a serious risk profile).

The EAT ultimately held that if the tribunal had correctly applied the law to its finding of fact, only one outcome was possible. Therefore, it upheld the appeal and substituted a finding of constructive unfair dismissal without remitting the case for a rehearing.

What does this mean for employers?

Whilst the legal position is that a fundamental breach of contract cannot be cured, the commercial position might well be slightly different. Even when the legal position is irretrievable, an employer's attempt to make good will often be enough to resolve the matter with the employee and avoid a dispute. This employer was probably unlucky.

Flatman v Essex County Council

If you would like to discuss any issues arising out of this decision please contact James Hockley (jameshockley@bdbf.co.uk), Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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