XpertHR Podcast

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Jeya Thiruchelvam: Hello and welcome to this week's XpertHR podcast with me, Jeya Thiruchelvam. The concept of constructive dismissal continues to flummox employers. Are you confident that you know what the term constructive dismissal actually means, or that you could explain it to a colleague or that you would recognise a constructive dismissal claim that was brewing in your office? Joining me on the phone to demystify the concept of constructive dismissal is Max Winthrop, who is a partner with Short Richardson & Forth Solicitors. Hi, Max. [0:00:45.6]

Max Winthrop: Hello.

Jeya Thiruchelvam: So constructive dismissal is a much discussed and much misunderstood concept, so can you describe it for us in a nutshell? [0:00:52.8]

Max Winthrop: Yes. It's that situation where an employee is entitled to, effectively, walk out of his or her job, but still be able to claim that they are the innocent party and can bring a claim just as if the employer had actually dismissed them.

Jeya Thiruchelvam: So that's it in a nutshell, but there are some key elements to that concept, aren't there? [0:01:11.4]

Max Winthrop: Yes, very much so and it's taken the courts and tribunals to evolve this over quite a long period of time, really starting right back in the '70s when the idea of employment rights was comparatively new. So if you break it down, what you've got to have is, firstly, a fundamental breach of contract by the employer. And that's important, because that introduces the idea of the contract as being the key relationship between the parties. Contrast that with unfair dismissal, which is a sort of statutory right all about reasonableness, so it very much harks back to the contract itself and I'll look at that in a little bit more detail in a moment.

Jeya Thiruchelvam: And this is regardless of whether an employer and an employee have a written contract? [0:01:50.4]

Max Winthrop: Oh, absolutely, yes. Don't forget that a contract simply means the…in another context it's sometimes called the wage-work bargain. Somebody agrees to work for an employer for a set wage or salary. That creates a contract and when we use the word contract often we're not referring to the written statement for the terms of that contract. Now for there to be a constructive dismissal there has to be, then, a breach of contract. The employee has to resign in response to that breach and the employee can't wait too long before he or she

takes action, otherwise the employee will be treated as if they affirmed the contract or waived the breach. These are technical terms from contract law but they really mean the same thing. If you sit around and just accept what has happened to you, there will come a point when a court or tribunal will say, well, if you objected to it, you should have gone, you've left it too late.

Jeya Thiruchelvam: So can we take the first one of those things that you've mentioned, so the fundamental breach of contract committed by the employer, can you expand on that a little bit for us? [0:02:50.3]

Max Winthrop: Take an easy example to start off with. Supposing the employer doesn't pay the wages – that's a fundamental breach of the contract of employment. The employee would be able to resign in response to that particular breach. Now there will be other express terms that the parties have agreed. In those cases it's actually pretty easy to say, well, clearly breach of contract, the employee has the option to resign. Where it's a little difficult, though, is where there isn't an express term in the contract, but you then start getting into the realm of the duty of trust and confidence.

Jeya Thiruchelvam: So this is a term that's implied into contracts of employment? [0:03:26.1]

Max Winthrop: That's right, yes. So what the actual implied term is, is that the employer would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust.

Jeya Thiruchelvam: So that sounds like it could potentially cover a multitude of sins. So what kinds of things would constitute a breach of the implied term of trust and confidence? [0:03:47.5]

Max Winthrop: Well you're right when you say multitude of sins. It does cover a very wide range of conduct. It would look at things like the status of the employee – not an overt kind of demotion, but a situation where that status is undermined by when you have a situation where an employer puts in another layer of management above an employee and effectively side lines another employee, a situation where the employer takes away a benefit that might not be part and parcel of the contract, but has been enjoyed for some years. More or less anything that has that effect of undermining the employee can fall within that category. Now it's important also to remember that they may not necessarily be a kind of short, sharp change. It can be something that's brewing over the years.

Jeya Thiruchelvam: Okay, so that's quite an important point, isn't it? So we're not necessarily looking for one dramatic event, but it might be a drip, drip, drip effect? [0:04:38.8]

Max Winthrop: Very much so and again I think if you go back to the earlier cases that was recognised that there can be a steady pulling away of the rug from someone, it doesn't have to happen all in one go. And the courts also have this idea of the last straw. You can look at the events, but then say, 'Ah, well. Something happened that was the last straw in that relationship and brought it to an end.'

Jeya Thiruchelvam: That sort of brings us on quite nicely, actually, to the second element that you mentioned, which is that the employee has to resign in response to the fundamental breach. Because that probably is kind of a judgment call for the employee, isn't it, in terms of when precisely do they resign? [0:05:16.8]

Max Winthrop: Yes. We may look at delay later on, but the important point to bear in mind is that the resignation has to be in response to the breach. If you know a little bit about things like unfair dismissal, you might remember that when an employer is having to show the reason for dismissal, the statute talks about the *principal* reason for dismissal. Well this is a bit different.

Supposing you've got an employee who, after five years or so of exemplary service, suddenly finds that her performance reviews are inexplicably poor, that she is not put forward for a bonus, she didn't get the promotion that she was expecting. Now that may be perfectly proper conduct within the terms of the contract of employment, but supposing it's been motivated by some issue and the employee thinks, 'My line manager has got it in for me and always has. I'm not going to put up with this anymore.' Now if the employee resigns but waits a little bit, perhaps until a new jobs comes up, what has the employee resigned for? Has she resigned to go to a new job, or has she resigned because of the breach? Well the courts say it doesn't really matter. You have to answer the question, 'Did the employee resign in response to the employer's breach?' And even if there were mixed motives or there was some other reason for that resignation that might have played a part in it, it doesn't matter. It's a response to the breach that's the important issue.

Jeya Thiruchelvam: Okay. So that's important, there has to be a causal connection between the breach and the resignation, but that doesn't discount the fact that there might be other strands of causes that might have been affecting the employee's decision-making process? [0:06:48.5]

Max Winthrop: Absolutely right, yes.

Jeya Thiruchelvam: And I think we've covered the last element, which was the employee not delaying too long. [0:06:55.0]

Max Winthrop: If we were in a commercial context and, in a way, the terminology here is the same terminology you might have in a civil engineering contract or whatever, but you will find one big difference between the law when it looks at a commercial relationship between the parties and it looks at the relationship between an employer and an employee because a degree of pragmatism creeps in and the courts and tribunals will recognise the pressure an employee might be under. If, say, there was a change to the contract of employment, supposing, let's say, the employer decides instead of having an hour long lunch break, the employer is strapped for cash, they really need to increase productivity, and tells everybody that from next week their lunch break is reduced to 30 minutes. In a commercial context that sort of contractual change would require almost an instant response to it to avoid that argument that you've affirmed the contract itself.

In the employment field it's different and an employee might be given significantly more in terms of latitude in how long they take to respond. In a situation like that it could be measured in weeks rather than days. Much might depend if the employee was going to say, 'I'm working under protest here' in any event. The courts and tribunals will look at all the circumstances in the round and they will give the employee a pretty high degree of latitude. I've come across cases where the employee has sort of thought, 'Should I go? Should I stay? Should I go? Should I stay?' And it's taken six/seven weeks before the employee has decided to make a move and the tribunals have said, 'Well that's fair enough in that context.'

Jeya Thiruchelvam: So employers probably have to wait for a fair amount of time before they can breathe a sigh of relief in relation to proposed or actual changes? [0:08:36.2]

Max Winthrop: Again it is very much dependent upon the facts. Supposing they imposed a change, but the employee makes their position very clear they are working under protest, then it could be a considerable period of time before they can safely assume, if ever, that that contract has been affirmed. If, however, there is no indication of a rejection of the new contract, then that period is going to be a lot shorter. Again, it is very much dependent on the individual facts.

Jeya Thiruchelvam: So you've talked there about fact-sensitivity and that's probably something which is particularly important to constructive dismissal to all of the elements, isn't it? [0:09:08.9]

Max Winthrop: Absolutely critical. You've got to look at these cases in the context in which they exist. So what works in one employment relationship might not in another. There will be different standards of behaviour that I suppose could be said to be acceptable. It's not a completely elastic concept though. You won't get away, I don't think in this day and age, by saying, 'In our industry we have a standard that demands an autocratic management style.' That sort of thing is going to down like a lead balloon, basically, in most tribunals. It will look at the individual circumstances, but I don't think trying to excuse a management style that might have gone down or been acceptable in the 1950s or '60s, even if you say, 'We're a football club or an iron works.' Those sorts of arguments, I think, are probably history now.

Jeya Thiruchelvam: So that gives us a really useful insight into the concept of the constructive dismissal, but if someone goes to a tribunal claiming constructive dismissal, things don't end there, do they? So how does an employer defend a constructive dismissal claim in the employment tribunal? Because presumably they will have been arguing that their actions didn't constitute an effective dismissal of the employee if the employee persuades the employment tribunal that they have been dismissed, the employer then has to somehow argue that dismissal was unfair. So how do they do that effectively in their response and their defence generally? [0:10:28.3]

Max Winthrop: It will vary from case to case. For example, if the argument is one that the employer breached the implied term of trust and confidence, it can be very hard for the employer to say, 'Okay, fair enough, I did breach it, but it was fair in all the circumstances.' That may not be the

case in every constructive dismissal claim. If we go back to our changing the hours of work, if there was a good reason to impose that and it had been imposed fairly but perhaps not without the breach of contract, the employer may still be able to say, 'Well I did have a reason for doing what I did and therefore my dismissal will be fair.' Assuming, of course, that it's reasonable in all the circumstances. That's going to be harder in a constructive dismissal claim, but not impossible. However, what you might find is the more common sort of Plan B in defending these cases, is to say, 'Well, okay, fair enough, yes, we were too quick in imposing this. But we would have had to have done it anyway and within X number of weeks we would have had to take the decision and we would have done it properly and therefore instead of this compensation being open-ended, it's going to be time limited, if you like.' If you've managed to persuade the tribunal that would have done whatever it is that the employee is complaining about within a month or so, then that will also have the effect of limiting compensation.

There is an interesting side issue here that everybody was getting excited about a few years back, but I think has now been resolved by the courts and tribunals. There was the beginning of an argument to say, well, hang on a minute, supposing the employee is also in breach of contractual obligations, can they even bring an unfair dismissal claim? At one time there was some suggestion that in those circumstances they couldn't do that. That argument has been kicked into touch. Basically how it works is this – a good example is a case called *Atkinson v Community Gateway Association* where Mr Atkinson was getting up to all sorts of things unknown to his employer, at least at the time he was seen to be conducting an affair in breach of the company's own provisions as to its internet policy, which he himself has actually put in place. He was preferring his lover to other job candidates and such like. None of this came out until after his resignation and the tribunal, when they heard that story said, 'Okay, we've heard enough, you can't possibly win your claim, Mr Atkinson, so we're knocking it out at half time.'

Well it's a pretty bold thing for the tribunal to do and perhaps not surprisingly when the case was appealed, the Employment Appeal Tribunal said, 'Sorry, you just can't do that.' There is no absolute bar on bringing a constructive dismissal claim, however, in those circumstances, even if constructive dismissal had been established, then there would be a reduction for contributory fault, and on the basis of the employee's behaviour in that case, it would have 100% contributory fault. So that's another example of the Plan B in defending these cases. You may have got it wrong in terms of how you run the contract, but is the employee to blame for what has happened? Can you seek to reduce the damage by arguing for contributory fault?

Jeya Thiruchelvam: And that's actually really important, isn't it? Because as much as people tend to focus on liability, the value of the employee's claim obviously affects how much the employer has to pay out and so it's something which gets neglected, probably too often. [0:13:44.4]

Max Winthrop: I think employment claims are always very personal for everybody involved, whether you're involved as the HR officer who may have

sanctioned a particular decision-making process, or obviously the employee in that. So everybody wants to vindicate their own position. Sometimes you need to step back a bit and think, 'Well, just a minute, what's really at issue here? What's this really saying in terms of value? Can we justify what we might be spending in terms of management time and legal fees in defending a claim that may be only worth a few hundred pounds?'

Jeya Thiruchelvam: Just to finish off, presumably most constructive dismissal claims do start off with a complaint or a grievance being lodged, so is it useful for employers to bear that in mind? [0:14:24.8]

Max Winthrop: Yes it is. You're going to get some inkling, I would have said, in perhaps 90% of constructive dismissal claims, as to what is brewing. There will be a history of grievances or, even if not a formal grievance, the employee is likely to have made their position known. The employee may well be expecting to go through that grievance process rather than simply springing the issue on the employer. It would look odd if the circumstances sprung fully formed out of a resignation. There will be some back history, so you'd know what's coming. And of course the employer can then take appropriate steps. Clearly hearing the grievance properly, not jumping to conclusions and investigating where appropriate is going to be just as important in a constructive dismissal claim as it would be in a claim that might lead to an express dismissal.

Jeya Thiruchelvam: I suppose, potentially, that's the opportunity for the employer to rectify a breach if it perceives that there has been one? [0:15:21.6]

Max Winthrop: Yes. Now be careful here. There is an interesting point about the question of how far can you rectify a breach at all? I think it is illustrated by a case called *Bournemouth University v Buckland.* What happened in that was that Professor Buckland had issues as to the way in which his marking had been received by the university and had begun a series of grievances. When the case got to the EAT, the judge there held that the grievance process had actually cured the fundamental breach that Professor Buckland was complaining about. That was a pretty radical finding and perhaps not surprisingly when the case got to the Court of Appeal, the Court of Appeal said, 'Hang on a minute, you can't do that.' If there has been a fundamental breach, it can't be cured. Now, again, like everything else it's easy to put it in those stark terms. The point, though, about grievances is if the grievance stops an issue developing that could otherwise have led to the point at which it can be said there has been that fundamental breach, then I suppose in analysing that we're not using the term 'curing the breach' but we're stopping it happening in the first place. So it's important to make that distinction between doing things that take the heat out of the situation and stop the point being reached when a fundamental breach has occurred, because if you've got to that point, then unfortunately there is no turning back in terms of whether or not there has been a constructive dismissal.

Jeya Thiruchelvam: Okay. So we can't rewrite history, we can just try and prevent the breach from occurring in the first place.

We have guidance on constructive dismissal in the form of a how to guide that sets out practical guidance on how to protect against claims of constructive dismissal and further guidance in the termination chapter of the XpertHR Employment Law Manual.

Well that brings us to the end of this week's podcast. Thanks for listening. We're back again next Friday, but until then it's goodbye from us. [0:17:14.2]