



Senior departures – are employment tribunal claims more likely?

By **Kate Potts** - 31 January 2018

When dealing with senior terminations, contested employment tribunal claims tend to be considered as a fairly unlikely prospect, particularly where such termination is linked to misconduct. Senior executives usually prefer to keep out of the spotlight that the employment tribunal can bring and protect their reputation, and employers will often settle such claims for the same reasons. Additionally, many of the claims that can be brought in the tribunal are subject to a statutory cap on damages meaning that bringing a claim is often not worthwhile for highly paid executives.

However, the AA's former chairman, Bob Mackenzie, has bucked the general trend and brought employment tribunal proceedings in relation to his dismissal for gross misconduct following a bust-up in a hotel bar with another employee.

Last summer, Mr Mackenzie was caught on film physically attacking a fellow executive in a hotel bar after an argument about the AA's strategy for the future of its insurance arm. The AA considered Mr Mackenzie's behaviour to have been unacceptable and, perhaps not unpredictably, his employment was terminated by reason of gross misconduct.

Currently, the precise details of Mr Mackenzie's claim are unclear, although several news outlets have suggested that he has claimed for wrongful, rather than unfair, dismissal. The maximum award Mr Mackenzie could be awarded for wrongful dismissal in an employment tribunal is limited to £25,000. Given that it is reported that Mr Mackenzie's was paid £1.36m a year, the amount is paltry and would be unlikely to even cover legal fees he would incur bringing the claim. So why is Mr Mackenzie bringing the claim?

There is suspicion that the reason Mr Mackenzie is fighting this is to assist him in his bid to retain annual bonuses received in 2016 and 2017 which the AA are seeking to clawback. These bonuses total somewhere in the region of £1.2m.

Further, it is expected that Mr Mackenzie will be considered a "bad leaver" under the terms of the AA's share scheme, meaning he may be forced to relinquish his scheme rights. These rights are potentially worth "scores of millions", according to one of his advisors,



and as reported in the Financial Times.

Clawback provisions have long been a feature of share schemes and other deferred remuneration arrangements, but the current close scrutiny of executive pay and the continuing regulatory fallout from the financial crisis means that these provisions are now being activated and relied on more frequently than ever before.

Therefore, this claim is likely to be more about building a platform from which Mr Mackenzie can more persuasively argue that he should be entitled to retain his bonus payments, and seek reclassification as a “good leaver” under the share scheme rules, rather than recovering the awards available from the tribunal itself.

So, why is this of interest to businesses? Usually, the risk of a senior executive in a large company bringing a claim in the employment tribunal is low, particularly where the most valuable aspects of their remuneration package are concerned with contractual provisions relating to share options.

However, given the potential for a judgment in a relatively short period of time (at least compared to the High Court, even with the newly slowed pace of the tribunals following the abolition of fees), the tribunal may now look like an attractive forum to ‘lay the groundwork’ for other, more lucrative negotiations, involving bonuses and share schemes. Legal advisers and HR managers should take careful stock of the practical difficulties and reputational damage a tribunal claim could do when planning a senior exit, even where misconduct might limit the employer’s appetite to make any form of severance payment. Settlement agreements or even contractual waiver agreements could be used at the point of departure to tie up the risks.