Withdrawing a new recruit's job offer

Prior to COVID-19, numerous employers made job offers to new recruits. However, due to the pandemic many businesses are now left in a situation where they are unable take on these new employees.

A question that has come up time and time again from employers throughout the COVID-19 crisis is 'We have made a job offer, with the individual due to start next month and because of the downturn in work caused by COVID-19, we don't need this person now. Can we withdraw the offer?'

It is certainly understandable that during this difficult time, employers facing financial difficulty due to the COVID-19 crisis may wish to postpone a new recruit's start date as a cost-saving measure, particularly if a temporary reduction in demand means there is no current need for the employee. There may also be practical difficulties in taking on a new employee, for example, if the entire team has switched to working from home. However, as reasonable as this may seem, employers must act with caution under such circumstances.

Essentially, a contract is only binding after both offer and acceptance of the offer, so it can be withdrawn at any time before it is accepted by the candidate. However, if the offer has been accepted and a start date has been agreed, a binding contract will be in place. Therefore, if an employer withdraws their offer under these circumstances, the candidate could argue that the employer has breached the contract and look to make a claim.

An employer can withdraw an offer only if it was conditional on certain requirements being met, such as receipt of a satisfactory reference and the reason for withdrawal is that the conditions have not been met.

Frustration

Frustration is a controversial doctrine in employment law in typical circumstances, let alone where an employer is looking to apply it to the uncharted territory of the COVID-19 crisis.

Sometimes, an unanticipated event which is not the fault of either party either makes it impossible to perform their contractual obligations or so radically affects what is required in order to perform them that the law treats the contract as having been 'voided' and the parties are released from their obligations. This is known as frustration.

Although the doctrine of frustration has been applied in employment law contexts, its proper application is a matter of considerable controversy and one on which employment lawyers or specialists find it difficult to reach any consensus.

A finding that a contract of employment has been frustrated will depend on the circumstances of the relevant employer. In particular, it would likely depend on something that cannot presently be assessed, namely how long the present crisis will continue.

For example, an employer might feel that an instruction from the Government to close their business or organisation is a clear example of a 'frustrating event'. On the other hand, employees may feel that the existence of the Coronavirus Job Retention Scheme, especially now it has been extended, is a mechanism that allows for the employment relationship to continue for the present and saves the contract from frustration.

To avoid a claim, instead of withdrawing the job offer, the employer could give the employee notice of termination and pay them for the notice period specified in the contract. In addition, the employer should ensure that the reasons for the decision are well documented to avoid any allegation of discrimination.

Ultimately, the employer should always take care when making job offers in the first place. Unexpected changes are one thing but if a downturn was expected when the employer made the offer, causing the candidate to give up gainful employment elsewhere, that could potentially lead to issues.

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