**Destination anywhere? Reasonableness of Mobility Clauses in employment contracts**

Mobility clauses are often incorporated into employment contracts as a matter of course as part of a “belt and braces approach” to contract drafting. As with any contractual terms, mobility clauses can be subject to limitation and their enforceability will depend on the wording of the clause itself, coupled with the particular circumstances of the situation on the ground for employees.

The UK Employment Appeals Tribunal, in the case of *Kellogg Brown & Root (UK) Ltd. v (1) Fitton and (2) Ewer*, recently examined in detail reliance by an employer on a “mobility clause” in an employment contract in circumstances of an office closure as part of a business rationalisation.

**Mobility Clauses**

In accordance with the Terms of Employment (Information) Act, 1994 to 2014, employees are entitled to receive at the outset of employment a statement of their terms and conditions of employment, including specifying where the employee’s place of work will be. In order to maintain flexibility in this regard, and to allow for situations whereby transferring the place of employment may become necessary, relocation or mobility clauses are typically incorporated in contracts.

Such clauses are generally drafted to specify that a company reserves the right to change the place of work and that an employee may be required to work from any office or location of the company as the need arises. Mobility clauses become especially relevant in the event of a business reorganising, being sold and/or merging with another company with the result that employees are expected to work at a new site, which may be located some distance away from their previous place of work.

***Kellogg Brown & Root (UK) Ltd. v (1) Fitton and (2) Ewer***

In the *Kellogg* case the employing company relied on a standard mobility clause when deciding to close one of its two UK offices:

*The location of your employment is …. but the company may require you to work at a different location including any new office location of the company either in the UK or overseas either on a temporary or permanent basis. You agree to comply with this requirement unless exceptional circumstances prevail.*

Affected employees were notified in April of 2015 that they would be required to move that June. Two employees, Fitton and Ewer, were dismissed when they refused to work at the new site, on the basis that working at the new location would have increased their commute times by some 20-30 hours per week.

The employer believed that it could rely on the mobility clause such that it was a reasonable instruction to require the employees to work at the new location. The company considered that the availability of work at the new site meant that redundancy was not available and that the refusal to work at the new site was a breach of contract.

The Tribunal however deemed the instruction to move to be unreasonable and decided that the dismissals of Fitton and Ewer were unfair. The mobility clause was held to be overly broad and to lack certainty. Steps which the company had taken to mitigate the longer commute were not considered significant in terms of the two employees in question: Fitton had just purchased a flat near the original site and didn’t own a car while Ewer was a year away from retirement and had a lifelong connection to his prior working town. Both employees were deemed entitled to a redundancy payment.

**Reliance on Mobility Clauses/Take-Aways**

Mobility clauses, and the lack thereof, are routinely examined by employment tribunals in the course of deciding claims brought under unfair dismissal and redundancy payments legislation. The key question to be decided is whether it is reasonable for an employer to rely on such a clause, or conversely whether it is reasonable for an employee to refuse alternative employment on offer.

In terms of relying on mobility clauses, the following are key considerations:

* **Proximity of new workplace is a relevant factor**:

It will be difficult to argue that a request to transfer is unreasonable when the new work location is in close proximity to the old. So an employer was justified in dismissing an employee who refused to relocate to a warehouse located 5 miles down the road from the previous base, and the Employment Appeals Tribunal stated that a change of location would not give rise to redundancy situation where employees can reasonably be expected to get to their new destination (*Employee v Employer*UD1968/2011).

* **Mobility Clauses cannot be exercised in an unfettered fashion**:

A clinical manager who had complained about standards of care in her workplace was transferred to another section on foot of a flexibility/mobility clause in her contract. The Adjudication Officer found that her transfer was related to the complaint that she had made and noted that such clauses cannot be “exercised in an unfettered fashion”, stating further that mobility clauses confer a discretion on employers, a discretion which is subject to limitation. Ultimately it was held that the Complainant’s transfer was a form of penalisation (*A Nurse v A Hospital* ADJ-00000053).

* **Employers are required to act reasonably and responsibly**:

In the case of *Employee v Employer* (UD893/2012, RP703/2012), a company sought to close its Carlow office and relocate employees to Waterford due to straitened economic circumstances. The Claimant objected on the basis that the alternative role offered to her in Waterford was not suitable and thus it was reasonable for her to decline the position. In turn, the employer pointed to the mobility clause in her contract, which stated that:“*… you may be required to transfer to another Department and/or place of work. Before implementing any changes we will consult you and consider any reasonable objections that you may have*…”Ultimately the employer sought to relocate the Claimant without engaging in the consultation provided for in the clause itself and without considering any of the Claimant’s objections, and the Claimant was expected to relocate in circumstances where she would be paid less for the same work. Ultimately the Claimant was held to be entitled to redundancy.

* **Test of reasonableness is subjective not objective**:

The Employment Appeals Tribunal set out in *Deirdre Heavey v Casey Doors Limited* (RP1040/2013) that the legal test regarding reasonableness is subjective rather than objective and that the Tribunal will consider the employee’s subjective view as opposed to what the employer deemed to be reasonable. The employer in this instance was compelled to find alternative premises dues to circumstances beyond its control. Though the Claimant’s contract contained a mobility clause, it was deemed reasonable for the Claimant to turn down the relocation as due to childcare and transport difficulties she herself would have significant difficulty in reaching the new premises, a distance of 28km from the old location, on a daily basis.

* **Engagement with employees is important**:

Regardless of whether or not a contract contains a mobility clause, it is important that employees are consulted on any proposals in terms of relocation. In the case of *Employee v Employer*(RP431/2012, RP433/2012), the employer company was involved in the provision of security services. Due to the closure and demolition of a particular site where two employees were based, security services were no longer required. The employer had no other alternative locations based in the same area (Mayo) and offered positions at other locations in Donegal on a temporary basis, with the employees to return to Mayo once contracts became available there. The Tribunal looked at the distance involved and also the fact that the employer had failed to engage in any meaningful way with the employees or their representatives regarding the alternatives available, and decided that each employee was entitled to redundancy.