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SOLICITORS

JULY 2015

Employment Law BULLETIN

Welcome to our July employment law bulletin.

In this issue we discuss cases on a variety of issues.

The Northern Ireland Court of Appeal has, in *Patterson v Castlereagh Borough Council,* concluded that there is no reason, why, in principle, voluntary overtime cannot be included in the calculation of statutory holiday pay for the purposes of the Working Time Regulations. A tribunal has to consider whether the remuneration received is a sufficiently permanent feature of remuneration to justify its inclusion in the calculation of statutory holiday pay.

In *Plumb v Duncan Print Group Limited* the EAT has held, applying European law, that employees who are sick may carry forward their holiday leave into a subsequent leave year and it is not necessary to show that they are unable to take leave. It is sufficient that the employee simply chooses not to take annual leave during a period of sickness. But the right to carry forward is not unlimited. Relying on an international convention, the EAT held that, at most, workers on sick leave have to take their deferred annual leave within 18 months of the relevant leave year if they were unable or unwilling to take it because they were sick.

In *Adeshina v St George's University Hospitals NHS Foundation Trust and Others* the EAT upheld a tribunal's decision that an employee's dismissal was fair, even though there were serious procedural failings at the first stage of the process. On the facts, having regard to the nature and extent of those errors, they had been remedied during the appeal process.

Two further cases in the European Court have confirmed the meaning of 'establishment' for the purposes of collective redundancy consultation. In *Lyttle v Bluebird UK Bidco 2 Limited and Cañas v Nexea Gestión Documental SA, Fondo de Garantía Salarial* the European Court has agreed that the word 'establishment' means the unit to which the employee was assigned to carry out his duties rather than the organisation as a whole.

On the same subject of information and consultation on collective redundancies, in *E Ivor Hughes Educational Foundation v Morris* the EAT considered the correct point at which information and consultation should have commenced with regard to a governors' decision to close down a school. Applying both UK and European law the EAT considered that an earlier decision in principle to close the school was either a fixed, clear, albeit provisional, intention to close the school, or alternatively, amounted to a strategic decision on changes compelling the employer to contemplate or plan for collective redundancies, thus triggering the duty. An award for a protective award for 90 days for failure to consult was appropriate given there had been no consultation at all and the failure resulted from a "reckless" failure to consult legal experts on the employment implications of the closure.

Our client briefing is on the subject of dismissing an employee.

May I also remind you of our forthcoming events:

Click any event title for further details.

Employment Law Update for Charities

- Full Day Annual Conference, 11th June 2015

And in conjunction with ACAS

Understanding TUPE: A practical guide to business transfers and outsourcing

- Full Day Conference, **Cardiff**, 14th May 2015

Understanding TUPE: A practical guide to business transfers and outsourcing

- Full Day Conference, **Leeds**, 2nd June 2015

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1: New laws on strikes

The Trade Union Bill has now been published.

Under new proposals, lawful industrial action will require a 50% turnout in a ballot and, in relation to important public services, 40% of all eligible voters must vote in favour of industrial action. Those ‘important public services’ mean health services; education of those aged under 17; fire services; transport services; decommissioning of nuclear installations and management of radio active waste and spent fuel; and border security. It will no longer be unlawful to use agency staff to cover striking workers. There will be a four month limit on the mandate for strike action following a ballot, after which another ballot will be required, and two weeks notice will be required to be given to employers of any industrial action (increasing this from seven days).

The proposals have attracted anger and opposition from trade unions, but were welcomed by the CBI.

2: Voluntary overtime might count towards statutory holiday pay

The Northern Ireland Court of Appeal has, in ***Patterson v Castlereagh Borough Council,*** considered whether voluntary overtime can be included in statutory holiday pay for the purposes of the Working Time Regulations (Northern Ireland) 1998.

As will be remembered, in *Williams v British Airways Plc* [2011] IRLR 948, the European Court of Justice explored the meaning of 'normal remuneration' for the purposes of calculating statutory holiday pay. The ECJ held that a worker on holiday is entitled not only to basic salary but also to remuneration which is "intrinsically linked to the performance of the tasks which he is required to carry out under his contract of employment and in respect of which a monetary amount, included in the calculation of his total remuneration, is provided".

In *Lock v British Gas Trading Limited* (Case C-539/12) the ECJ considered that where a worker's remuneration includes contractual commission, determined with reference to sales achieved, statutory holiday pay cannot be based on basic salary alone but must include commission if commission payments were directly (and intrinsically) linked to the performance of tasks required to be carried out under the employment contract.

In *Bear Scotland Ltd v Fulton and Others* (UKEATS/0047/13), *Hertel (UK) Ltd v Woods* (UKEAT/0160/14) and *Amec Group Limited v Law & Others* (UKEAT/0161/14) the EAT held that statutory holiday pay should include non-guaranteed overtime (that is to say, overtime which the employee is obliged to work if required, but which the employer is not obliged to provide).

In *Bear Scotland* the EAT did not have to rule on the question of whether voluntary overtime should be included in the calculation of statutory holiday pay. But the EAT considered that if a payment is made for a sufficient period of time it might qualify as "normal" remuneration.

In *Patterson* the Northern Ireland Court of Appeal tackled this point directly. Mr Patterson was employed by Castlereagh Borough Council as an assistant plant engineer. He regularly worked overtime on a purely voluntary basis for which he was paid at time and a half. But his holiday pay was calculated by reference to his basis hours only, without taking into account the voluntary overtime. He brought proceedings in the Northern Ireland Industrial Tribunal claiming that he had suffered an unlawful deduction from wages and that the Council was in breach of the Working Time Regulations (Northern Ireland).

The Industrial Tribunal rejected his claim but Mr Patterson appealed to the Northern Ireland Court of Appeal. The Northern Ireland Court of Appeal upheld the appeal, holding that the Industrial Tribunal had erred in finding that voluntary overtime could not, as a *matter of principle,* be included in statutory holiday pay.

Whether voluntary overtime is to be included in statutory paid leave is a question of fact for the tribunal. It has to consider whether the remuneration received is a sufficiently permanant feature of remuneration to justify its inclusion in the calculation of statutory holiday pay. No details of the regularity of overtime had been produced before the Industrial Tribunal and the case was therefore remitted for it to examine this issue.

There is no reason in principle, said the Northern Ireland Court of Appeal, why voluntary overtime should be excluded from statutory holiday pay. The key question is whether there is an intrinsic link between performance of the tasks which a worker is required to carry out under the contract and the remuneration received. The ruling is not strictly biding on courts and tribunals in Great Britain, but has persuasive force.

3: Carry forward of holiday entitlement on ground of sickness absence

Employers have traditionally restricted an employee's ability to carry forward unused holiday entitlement into a subsequent holiday year. But, interpreting the EU Working Time Directive, the European Court, in *Pereda v Madrid Movilidad SA* [2009] IRLR 959, decided that, if workers do not elect to take their holiday entitlement during a period of sick leave, the employee must be allow to enjoy it at a different time, even if that means it is carried over into the next leave year. In NHS Leeds v Larner [2012] IRLR 825 the Court of Appeal interpreted the Working Time Regulations 1998 in line with the Directive and the ruling in Pereda.

In ***Plumb v Duncan Print Group Limited*** in 2010 Mr Plumb suffered an accident at work and was away on sick leave for nearly three years. Then his employment was terminated. Mr Plumb did not take or request any holiday until September 2013, when he requested permission to take all of his accrued holiday from 2010. The company agreed to pay for accrued holiday for the current leave year (2013/2014) but declined to pay for unused holiday for the previous leave years. Mr Plumb brought a claim for payment in lieu of that untaken leave. An employment tribunal, interpreting Larner, concluded that the issue was whether Mr Plumb was *unable* to request leave due to his medical condition. On the facts the tribunal concluded Mr Plumb was able to take annual leave if he had so elected and dismissed his claim.

Before the EAT Mr Plumb argued that employees off sick are not required to show they are unable to take annual leave. It is, he argued, sufficient to be absent on sick leave and to choose not to take leave during that period. He also argued that he was entitled to sue for unpaid leave on an indefinite basis without limitation in time.

The EAT agreed with him on the point whether it had to be proved whether he was unable to take leave. The EAT considered that the Court of Appeal in *Larner* did not lay down any principle of law that the worker must be able to demonstrate that they are physically unable to take annual leave in order to benefit from carried over leave. So it is not necessary, said the EAT, for the employee expressly to request leave when absent or to show that he is unwilling or unable to take such leave. It is sufficient that he simply chooses not to take annual leave during his period of sickness.

On the other hand, the claim could not be unlimited. In *KHS AG v Schulte* [2012] IRLR 156 the European Court held that there is a limit to the length of time an employee on long term sick leave can carry over untaken statutory annual leave under the Working Time Directive. The Court said that the carry over period should be longer than the leave year but, in that case a period of 15 months was a legitimate cut off date for the purposes of the Directive. However it is unclear whether the 15 months should be treated as a minimum cut off period for all cases or whether it was merely appropriate on the facts of the *Schulte* case itself. For example the Advocate

General in that case had suggested a period of 18 months having regard to the International Labour Convention 132, the terms of which allow postponement of holiday accrued during sick leave for up to 18 months after the end of the leave year.

The EAT therefore denied Mr Plumb's claim for unused holiday for the 2010/11 and 2011/12 holiday years as they went beyond a period of 18 months. The Directive does not require national law to permit unused leave to be carried over indefinitely. At most, workers on sick leave have to take their annual leave within 18 months of the relevant leave year if they were unable or unwilling to take it because they were sick.

Finally, the Working Time Regulations were to be interpreted accordingly, with words inserted to ensure this outcome.

4: Can an employee be fairly dismissed despite procedural deficiencies and non-compliance with the Acas Code?

Yes, held the EAT, in ***Adeshina v St George's University Hospitals NHS Foundation Trust and Others.*** The EAT upheld a tribunal's decision that an employee's dismissal was fair, even though there were serious procedural failings at the first stage of the process. The tribunal had sufficiently considered the nature and extent of those errors and concluded on the facts, that they had been remedied during the appeal process.

In this case, Ms Adeshina was a principal pharmacist. She was leading a particular project when various allegations of misconduct were raised against her. This included unprofessional and inappropriate behaviour, and failure to co-operate with staff in order to lead her team effectively.

As a result, disciplinary proceedings commenced which led to her dismissal. There were a number of failings during this process in particular, due to the fact that not all the reasons for the dismissal had formed part of the disciplinary process.

The claimant appealed the dismissal. The appeal was carried out as a rehearing. Following this the panel upheld the decision to dismiss on the basis that Ms Adeshina's conduct amounted to gross misconduct. Ms Adeshina then brought a number of claims, including for unfair dismissal.

The tribunal dismissed the claims. It found that there were errors during the first stages of the disciplinary process. However, it considered, they were corrected by the appeal process so there was a reasonable belief of the misconduct and the dismissal was fair.

The EAT dismissed the claimant's appeal. The EAT held that the internal appeal was capable of rectifying procedural deficiencies. The tribunal had had regard to the nature and extent of the deficiencies carried out at the first stages of the disciplinary process. It had considered fully whether they had been remedied on appeal and concluded in the circumstances that it was fair. The EAT agreed with this decision.

Furthermore there was no bias in the constitution of the appeal panel. The EAT accepted that in reality senior managers will have involvement in the management of a number of employees and may also sit on disciplinary panels in which those employees might be involved. Additional evidence of bias would be needed to conclude that a dismissal was unfair on the basis of bias.

5: European Court confirms the meaning of ‘establishment’ for the purposes of collective redundancy consultation

In our May employment law bulletin we recorded that the European Court had, in *USDAW and Wilson v WW Realisation 1 Ltd* (in liquidation), *Ethel Austin Ltd and Secretary of State for Business Innovation an Skills* (Case C-80/14), decided that, for the purposes of compulsory information and consultation on collective redundancies under the EU Collective Redundancies Directive 98/59 (and also s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992), where the obligation arises where 20 or more employees are to be dismissed at any one “establishment”, the word “establishment” means the unit which the workers are made redundant and assigned to carry out their duties, rather than the organisation as a whole.

The European Court has confirmed this interpretation in two further cases, ***Lyttle v Bluebird UK Bidco 2 Limited and Cañas v Nexea Gestión Documental SA, Fondo de Garantía Salarial.***

In Lyttle v Bluebird UK Bidco 2 Limited, Bon Marché operated stores in the United Kingdom. In Northern Ireland and the Isle of Man it regarded its stores there as constituting one region for the purposes of administration only.

The claimants in this case were employed by Bon Marché at four different stores located in different towns, each employing fewer than 20 staff. Each store was treated as an individual cost centre and, although head office decided on stock and sale promotion and other matters, each branch manager could influence the amounts and types of goods provided. Store managers were responsible for achieving objectives within their respective stores and although the budgetary provision allocated to staffing was decided centrally, the branch manager had discretion as to the number of full time and part time staff who would be employed.

Bon Marché became insolvent and the company was transferred to Bluebird. Bluebird then began restructuring, which entailed the closure of many stores, including those in which the claimants worked.

As fewer than 20 employees were employed in each store, the question of the meaning of ‘establishment’ for the purposes of the Northern Ireland collective redundancy legislation was referred to the European Court by the Northern Ireland industrial tribunal. Did ‘establishment’ mean a single store or the Bon Marché organisation as a whole?

The European Court confirmed the interpretation in *USDAW* to the effect that an establishment means the unit to which the employee is assigned to carry out his duties. In *Athinaiki Chartopoiia* (Case C-270/05) the Court had further clarified the term ‘establishment’ by holding that an establishment might consist of a distinct entity, having a certain degree of permanence and stability which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks.

In the present case, it appeared to the Court that each of the stores in issue in the proceedings was a distinct entity that was ordinarily permanent, entrusted with performing specified tasks, namely primarily the sale of goods, and which had, to that end, several workers, technical means and an organisational structure, and each store was an individual cost centre managed by a

manager. So such a store was capable of satisfying the criteria for an establishment (although the ultimate finding was for the referring industrial tribunal to establish in light of the Court's guidance).

In *Cañas v Nexea Gestión Documental SA*, Mr Rabal Cañas worked as an employee for Nexea. Nexea had two operations, one in Madrid and one in Barcelona. In December 2012 Mr Rabal Cañas and 12 other employees in Barcelona were informed of their dismissal on the ground of redundancy. The question arose as to the meaning of 'establishment' for the purposes of calculating the numbers threshold for the collective redundancies information and consultation obligation. The European Court held that the operation in Barcelona was capable of meeting the criteria set out in the case law relating to the term 'establishment' and therefore, for the purposes of calculating the number of redundancies, regard had to be had to the number of redundancies in the establishment in question, rather than the organisation as a whole.

Incidentally, in *Cañas* the European Court held that there is no need to take into account individual terminations of contracts of employment which are concluded for limited periods of time or specific tasks.

In the UK, the non-renewal of fixed term contracts originally fell under the definition of dismissal for the purposes of the collective redundancies legislation and such terminations would be counted (see *University College Union v University of Stirling* [2015] UKSC 26, where the Supreme Court overrode decisions to the contrary in the Scottish Court of Session ([2014] CISH 5) and the EAT (EATS/0001/11)). However, this was reversed by the Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013 (see Trade Union and Labour Relations (Consolidation) Act 1992, s.282) under which employees on fixed term contracts which reach their agreed termination point are excluded from collective redundancy obligations.

6: Unlawful deductions: time limits for retrospective claims

The law on when, exactly, the employer's obligation to inform and consult about projected redundancies under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 is far from clear at the moment. The last ruling from the European Court of Justice, in *Akavan Eritysialojen Keskuslitto AEK Ry v Fujitsu Siemens Computers OY* [2010] ICR 444, was less than clear on the point. The possible tests applicable when it is proposed to close a business were summarised by the Court of Appeal in United States of America v Nolan [2011] IRLR 40, where the Court of Appeal identified the competing tests as follows:

> "Whether the consultation obligation arises (1) when the employer is proposing, but has not yet made, a strategic or business operational decision that will foreseeably or inevitably lead to collective redundancies; or (2) only when that decision has actually been made and he is then proposing consequential redundancies?"

In the UK, the EAT in *UK Coal Mining Limited v National Union of Mine Workers (Northumberland area)* [1998] IRLR 4 followed the former test. In *Akavan* the ECJ held that an employer's duty to consult under article 2(1) of the Collective Redundancies Directive 98/59 is triggered once a strategic or commercial decision has been taken compelling it to contemplate or plan for the collective redundancies and not when such a decision is merely contemplated. But the British Courts have

considered that Akavan sheds insufficient light on the point. The Court of Appeal in *Nolan* therefore referred the matter to the European Court for a more definitive ruling. Unfortunately the European Court denied jurisdiction in the *Nolan* case as the Collective Redundancies Directive excludes from its scope public administrative bodies or establishments governed by public law. And it regarded a US military base in the UK (where the redundancies occurred) as being such a public administrative body, (although UK domestic law itself, contained in section 188, of TULRe(C)A does not exclude public administrative bodies or establishments governed by public law: for more detail see *United States of America v Nolan* (No2) [2014] EWCA 71, currently on appeal to the Supreme Court). The matter was therefore returned to the Court of Appeal and a ruling is awaited.

In the meantime, the EAT had occasion to consider the point on the facts on ***E Ivor Hughes Educational Foundation v Morris***. In this case, E Ivor Hughes Educational Foundation operated a girl's school. Due to the decline in pupil numbers it decided, at a meeting on 27th February 2013, to close the school unless numbers increased. The meeting also addressed a variety of other possibilities, including changes in the subjects taught, resulting in savings in staff costs, amalgamation with another school, recruiting extra pupils and altering the age range of pupils. On 25th April 2013 the Headteacher informed the governors that public numbers were now projected to be just 99 for the 2013/14 academic year resulting in a deficit of £250,000. The governors then decided on that date to close the School at the end of the summer term 2013. Staff were entitled to a term's notice. In order to save an extra term's salary, the governors gave staff notice of dismissal on 29th April 2013 so that their contracts would end on 31st August 2013.

The School did not carry out any consultation with the staff prior to the decision to dismiss. It appears that governors did not know that they had a legal obligation to consult when they were proposing to dismiss and did not seek legal advice as to their obligations. 24 claimants brought proceedings alleging that the School was in breach of its obligations under section 188 of TULRe(C)A.

An employment tribunal concluded that the obligation under section 188 to consult prior to dismissing staff as redundant arose on the earlier date of 27th February 2013. The decision on that date to close the school unless numbers increased (which was considered to be unlikely) was either a fixed, clear, albeit provisional, intention to close the school or, alternatively, amounted to a strategic decision on changes compelling the employer to contemplate or plan for collective redundancies. On either analysis, the duty to consult arose on that date. In this regard this met the test in *UK Coal Mining v NUM and Akavan v Fujitsu*.

Furthermore, the employment tribunal was entitled to conclude that there were no special circumstances which made it impracticable to consult and therefore a protective award of 90 days was appropriate given that there had been no consultation and the failure to consult resulted from the "reckless" failure to consult legal experts on the employment implications of the closure. The fact that the employees had not suffered actual loss was not capable of amounting to a mitigating factor justifying a reduction in the period of a protective award that would otherwise be just and equitable, having regard to the seriousness of the employer's default.

7: Proving a particular disadvantage for indirect discrimination under the Equality Act 2010

In an indirect discrimination claim, the claimant must establish both group disadvantage and why the provision, criterion or practice (PCP) disadvantaged them personally. In ***Home Office (UK Border Agency) v Essop and others***, the Court of Appeal established some general guidelines on how the tribunal should approach this requirement.

At the Home Office, all staff have to pass a standardised test, the Core Skills Assessment, in order to be eligible for promotion to the post of higher executive officer or above. The claimants in this case were either black or minority ethnic employees aged over 35 and statistically much less likely to pass the assessment. They claimed that they were disadvantaged by the test and as a result unable to be eligible for promotion.

The claimants tried to argue that evidence of a casual link between the group and the individual disadvantage was not needed as their case was more akin to direct discrimination (i.e. favourable treatment "because of" a protected characteristic) rather than indirect discrimination. However, the Court of Appeal disagreed.

The EAT had held that there was no need for members of the disadvantaged group to show why they had suffered a disadvantage. However, the Court of Appeal overturned this decision. It held that statistical evidence could, in principle, show a group disadvantage. However, there is also a need to show how a claimant had been personally disadvantaged due to the PCP. Each individual would need to show why they had failed the test and there should be a causal link between the policy and the failure of the test leading to the disadvantage i.e. adverse affect on the individual. The particular PCP needs to have the effect of disadvantaging a group of people with a particular protected characteristic when compared with others who do not (group disadvantage). If this is evidenced then it is for the employer to show it was a proportionate means of achieving a legitimate aim i.e. objectively justified.

But the Court concluded it was not sufficient to just show an individual belonged to a certain group. An individual had to have been affected personally by the PCP and been disadvantaged as a result. The casual link is a significant part of the process for indirect discrimination to be demonstrated.

In conclusion, the Court of Appeal's guidance for how tribunals should approach such claims on indirect discrimination is, as follows. First, the Court noted that, in principle, Claimants could rely on statistical information as evidence to support their arguments that they had been disadvantaged. Secondly, it needs to be shown that both group and individual disadvantage have occurred due to the PCP, which is a matter of fact for the tribunal. Thirdly, this casual link is needed for indirect discrimination cases and not just direct discrimination. Finally, if the Claimant is able to show this then the burden of proof shifts to the employer to show that there was an objective justification.

8: Client Briefing: Dismissing an employee

This client briefing just provides an overview of the law in this area. You should talk to a lawyer for a complete understanding of how it may affect your particular circumstances.

This client briefing sets out the steps an organisation should follow when it is considering dismissing an employee.

Why is it important to follow the law when dismissing an employee?

Dismissing an employee for a reason other than one allowed by law, without following the correct procedure or giving adequate notice, may lead to a claim for unfair or wrongful dismissal against the organisation. Compensation for a successful claim can potentially be substantial. Regardless of whether the claim succeeds, the costs of defending it, in terms of management time and legal costs, may be significant and are not usually recoverable.

Establish whether there are grounds for dismissal

There are several potentially fair reasons for dismissing an employee:

- Their conduct at work (for example, they have filed a fraudulent expenses claim or persistently arrive late at work);
- Their inability to carry out their job because they lack the necessary skills required (for example, a sales manager has consistently failed to meet reasonable sales targets despite receiving additional support and training);
- Their absence on long term sick leave and inability to return to their job;
- Their job is redundant (for example, if the organisation is declining or the workplace is facing closure). Do not use redundancy as an easy alternative to dismissing an employee for poor performance. The 'redundant' employee could make a claim for unfair dismissal;
- Their continued employment would be illegal (for example, the organisation has discovered that an employee's immigration status does not permit them to work);
- They are being dismissed for what is known as 'some other substantial reason', i.e. something not falling into one of the above categories which nevertheless warrants dismissal, such as where the relationship between the parties has broken down.

Dismissing an employee for any reason other than those listed above will be unfair.

Even if a organisation has established a potentially fair reason for dismissing an employee, it must still follow the correct procedure. Failure to do so could lead to a claim for unfair dismissal.

Generally, an employee must have completed their qualifying period of service before they can bring a claim for unfair dismissal. The qualifying period is two years.

However, certain dismissals are deemed automatically unfair and an employee is protected as soon as they start work. These include (but are not limited to) dismissals connected with:

- Pregnancy;
- Parental leave;
- Requests for flexible working;
- Whistleblowing; or
- Trade union membership or activities.

Check the employee's contract

It is possible to dismiss an employee fairly but still be in breach of contract if the organisation has not given the employee the correct notice under their contract. An organisation does not want to take any action that could breach an employee's contract because::

- It may lose valuable protections in the contract such as post-employment restrictions (for example stopping an employee going to work for a competitor);
- The employee may have a claim for wrongful dismissal in breach of contract (for example, if the organisation fails to give them their contractual notice period or pay a contractual bonus).

PILON clauses

A payment in lieu of notice (PILON) clause is a contractual right that enables an organisation to pay an employee a lump sum rather than require them to work out their statutory or contractual notice period.

Before terminating employment and making a PILON, the organisation should ensure that the contract of employment they wish to terminate allows for termination in this way. If the contract does not allow for a PILON to be made, then it will probably be a breach of the employment contract to do so.

If an organisation decides to make a PILON, it must notify the employee that a PILON is being made to them in exercise of the employer's contractual right to terminate the employment with immediate effect. Simply making the PILON will not be sufficient to bring the contract to an end.

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