SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

QUICK LINKS

COURT GRANTS INJUNCTION TO ENFORCE 12 MONTH NON-COMPETE COVENANT

Summary: The High Court found that a 12 month non-competition covenant in the post-termination restrictions of energy derivatives traders was enforceable. The duration was no longer than reasonably necessary to protect the employer's confidential information. 12 months was unreasonably long for other restrictive covenants, however (*Dare International Ltd v Soliman*).

Key practice point: Non-compete covenants are regarded as the most restrictive form of restraint and therefore the most difficult to enforce (hence they should be drafted as narrowly as possible). However, the Court found that, for these particular employees, the confidential information which the covenant covered would have a shelf life of more than 12 months after they had left to join a competitor, and the employer would need a similar time to develop replacement technology and systems. The fact that the Court found that the same considerations did not apply to covenants preventing solicitation, dealing and poaching illustrates that the reasonableness of duration is assessed by reference to the protection the restrictions are intended to provide.

Facts: The claimant, a company trading in the specialist market of energy derivatives, brought proceedings against two of its former senior traders who had resigned to join a competitor. Their employment contracts included a non-compete covenant which, broadly, prevented them, for 12 months following their termination date, from being employed or involved in any business in competition with any of the employer's business in which they had been engaged in the year before termination. Additionally, the contracts contained covenants preventing solicitation of contacts, dealing with clients and the poaching of employees, also for 12 months.

Decision: The High Court found that the non-compete covenant was enforceable. The employer had legitimate business interests in protecting its confidential information and the covenant was no wider than reasonably necessary to protect it. However, the other post-termination restraints were unreasonably long and therefore not enforceable.

Given the nature of the confidential information, the multiplicity of trading relationships that the senior traders were likely to have developed, and the importance of having a stable workforce, a non-compete was a reasonable means of providing protection for the employer's legitimate interests and it would not be feasible to protect them by other less restrictive means (such as restrictions on the use of confidential information, soliciting trade connections or poaching staff), as these could not adequately be policed.

The employer had developed unique trading functionalities which, if relayed to a competitor, would take at least 12 months to replace. In addition, some of the confidential information would have a shelf-life of more than 12 months. The fact that more junior traders had shorter covenants did not mean that lengthier protection was not required for the senior traders. The longer covenants reflected the fact that they were better able to understand the value of the employer's confidential information and memorise and operationalise it for the benefit of a competitor.

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The Court concluded that a similar restraint was not necessary for the non-solicitation, non-dealing and non-poaching covenants because the employer could reasonably be expected to rebuild trading relationships, and to recruit and train personnel, in far less than 12 months.

The Court granted an injunction against one of the traders for the full 12 months. He had breached his contractual and fiduciary duties, by unlawfully refusing to work for the employer during his notice period whilst starting work with the competitor, unlawfully sharing confidential information with the competitor and failing to inform the employer of his wrongdoing. The employer also applied for "springboard" injunctions, for longer than 12 months, to cancel out the advantage which the trader had unlawfully obtained. However, the Court decided that the head-start he had gained by his unlawful activity was not substantial, so it extended the non-competition restraint by just one month. The Court declined to grant any injunctions against the other trader because the employer had already been protected against competition for more than 12 months because of a combination of his absence from work during his notice period because of sickness and the effect of the undertakings he had given to the Court to comply with the covenants.

DISMISSAL BECAUSE OF FACEBOOK POSTS WAS A DISPROPORTIONATE RESPONSE TO MANIFESTATION OF BELIEFS

Summary: The Court of Appeal has found that dismissing an employee following a complaint that her Facebook posts were homophobic was a disproportionate response to the manifestation of her Christian beliefs and therefore unlawful religious discrimination (*Higgs v Farmor's School*).

Key practice point: The decision follows previous cases in confirming that the actions of an employer in response to an employee's manifestation of their protected beliefs may constitute unlawful discrimination unless they are a justified response to the manner of that manifestation. However, the Court of Appeal has now added an extra dimension: the employer must show that its actions were proportionate; it will not be enough that the employer believed them to be justified. This makes it more difficult for employers to defend disciplinary action taken against an employee who expresses personal views that might be considered objectionable. The Court of Appeal found that the dismissal of a long-serving employee because of her personal posts was an obviously disproportionate sanction. Other scenarios will be more nuanced, particularly if the communications are made in a work setting and/or the employer can show evidence of actual reputational risk.

Facts: The school received complaints that their pastoral administrator had posted homophobic and prejudiced views on Facebook. Following an investigation and disciplinary hearing, the employee was dismissed for gross misconduct. She claimed direct discrimination and harassment on grounds of religion and belief. The Employment Tribunal found that her religious beliefs could be protected under the Equality Act 2010 but that she had not been discriminated against or harassed because of those protected beliefs but because of inflammatory language used in her posts, which could have led readers to believe that she held homophobic and transphobic beliefs. The Employment Appeal Tribunal (EAT) ordered the case to be reheard but the employee appealed, contending that the EAT should have upheld her claim.

Decision: The Court of Appeal allowed the appeal and substituted a finding that the dismissal constituted unlawful discrimination on the grounds of religion or belief.

The Court confirmed that the dismissal of an employee merely because they have expressed a religious or other protected belief to which the employer or a third party objects will constitute unlawful direct discrimination. However, if the dismissal is motivated not simply by the expression of the belief itself, or the third party's reaction to it, but by the objectionable way in which it was expressed, assessed objectively, then the dismissal will be lawful only if the employer shows that it was a proportionate response.

The Court found that, on the facts, the dismissal was "unquestionably" a disproportionate response, in particular because:

- The language of the re-posts was not grossly offensive. There were a series of derogatory sneers which did not appear to be primarily intended to incite hatred or disgust.
- The majority of the language appeared only in messages from others which the employee had re-posted. She made clear to her employer that she did not agree with the language used.

- There was no evidence that the reputation of the school had been damaged. No-one would think that the posts represented the school's views and the risk of widespread circulation was speculative. The posts were made on the employee's personal Facebook account, in her maiden name and with no reference to the school. By the time of the hearing, several weeks after the posts were made, only one person was known to have recognised her.
- Neither the school's disciplinary panel nor the Tribunal had believed that the employee would let her views influence her work.

One of the employer's reasons for deciding that the incident merited dismissal was the employee's apparent lack of insight into the consequences of her actions. On this, the Court's view was that where the employee would genuinely find it difficult to acknowledge fault, dismissal would not be justified unless the employer needed to be confident that insight was necessary to prevent a reoccurrence.

The Court added that was debatable whether the investigation needed to be disciplinary or, if it did, whether the school was justified in finding a case to answer. The Court also cautioned against suspension in these circumstances.

Commentary: Given its other findings, the Court did not need to address the employee's claim that the employer was guilty of direct discrimination by stereotyping; in other words, assuming that anyone who expressed her beliefs must be homophobic or transphobic. However, the judgment quoted with approval written submissions from the Equality and Human Rights Commission which noted that treatment of an employee will be discriminatory where the reason given is significantly influenced (consciously or unconsciously) by a stereotype that persons who hold or manifest the belief will share perceived attributes which they might not in fact possess.

EMPLOYMENT TRIBUNAL FINDS DRIVERS WERE WORKERS AND BACKSTOP ON HOLIDAY PAY CLAIMS IS UNLAWFUL

Summary: An Employment Tribunal found that private hire drivers were workers and therefore entitled to receive paid annual leave and the national minimum wage. The Tribunal also decided that the two-year limit on retrospective holiday pay and other unlawful deductions claims is invalid (*Afshar v Addison Lee Limited*).

Key practice point: Although at Tribunal level only, this decision is the first clear ruling on the validity of the two-year backstop, about which there have been lingering doubts for some years. The Tribunal Judge accepted that his conclusion "*will be challenged and may be wrong*" but, if it is upheld by an Employment Appeal Tribunal, claims for underpayment of holiday pay may go back much further than previously thought. In the meantime, parties to transactions will need to consider extending the scope of indemnities to address potential liability for underpaid holiday pay beyond the two-year period.

Background and facts: Underpayments of holiday pay have built up as a result of workers being wrongly classified as self-employed or having their statutory holiday pay (derived from the EU Working Time Directive) calculated on basic pay only rather than normal pay including commission and other payments linked to the job. Under the Employment Rights Act 1996, a worker can claim for a series of unlawful deductions from wages provided the claim is made within three months of the last deduction or underpayment. From July 2015, a two-year backstop period was introduced for most unlawful deductions from wages claims, including for holiday pay; tribunals cannot consider deductions where the relevant date of payment was more than two years before the complaint.

Drivers working for a taxi company were engaged as self-employed independent contractors and their written contracts reflected this model and denied any employment or worker relationship. Nevertheless, the drivers brought a claim for paid annual leave and the national minimum wage. The company contended that even if they had previously had worker status, they later ceased to be workers as a result of changes in its business model in 2021.

Decision: The Employment Tribunal found that the claimants were workers whenever they were logged into the company's software and therefore available to accept work. The Tribunal rejected the contention that changes in the business model had deprived the claimants of worker status. The company had continued to impose sanctions on drivers who refused bookings and the new contractual terms, which purported to state that drivers were free to refuse jobs, did not reflect the reality of the relationship. A new right to sub-contract introduced in 2021 was also ineffectual to prevent worker status because drivers were not permitted to use a sub-contractor when logged into the company app.

The Tribunal found that the claimants were entitled to carry forward the annual leave to which they were entitled as workers. The Tribunal also decided that the two-year limit on unlawful deductions was ultra vires and unlawful. The regulations which introduced the backstop had purported to apply it to both EU-derived and domestic statutory rights, but the legislation under which the regulations were made could only lawfully be used to limit the exercise of rights derived from EU law; changes to domestic rights required separate legislation.

TIME LIMIT FOR DISCRIMINATION CLAIM DID NOT START TO RUN UNTIL FURTHER FACTS CAME TO LIGHT

Summary: The Court of Appeal has confirmed that an Employment Tribunal should not have rejected a discrimination claim on the basis that it had not been brought within the three-month time limit for claims. The claimant had been unaware of important material facts which came to light later.

Practical impact: The decision is a reminder that tribunals have a wide discretion to extend time limits and there may be a significant extension for a discrimination claim if a claimant later discovers evidence that throws new light on the motives of the alleged discriminator. The case also illustrates the potential power of data protection subject access requests.

Facts: In July 2018, the claimant's application to join the defendant company was unsuccessful. She was aware then that her previous employer, against whom she had an ongoing sex discrimination claim, had given her a poor reference. More than two years later, following repeated data subject access requests to the defendant, she received further information suggesting that she had been considered a very strong candidate, but that a senior manager at the defendant company, on learning of her sex discrimination claim, had provided negative feedback from her former employer, leading to her application being unsuccessful. She then brought discrimination claims against the defendant. The Employment Tribunal rejected them because they had not been brought within the three-month time limit and it was not "just and equitable" to extend time; she knew the "essential elements" of her claim in 2018. The Employment Appeal Tribunal (EAT) found that the Tribunal had been wrong to strike out the claims; the defendant appealed.

Decision: The Court of Appeal confirmed the EAT's decision and ordered the request for an extension of time to be reconsidered. The Court's view was that the time limit for bringing a discrimination claim should be three months from when the claimant had knowledge that she had an arguable case. It was not sufficient to justify a claim against the defendant that she knew that her former employer had given her a poor reference, or even that she knew or suspected that they had done so because she had brought discrimination proceedings and/or because she was a woman. Such a claim would only be justified if she knew or had sufficient reason to believe that the defendant itself was motivated by considerations which were discriminatory or based on her having done a protected act (bringing a tribunal claim).

HORIZON SCANNING

What key developments in employment should be on your radar?

Early 2025	Publication for pre-legislative scrutiny of the Equality (Race and Disability) Bill, to extend pay gap reporting to ethnicity and disability for employers with more than 250 staff, extend equal pay rights to workers suffering discrimination on the basis of race or disability, and ensure that outsourcing cannot be used to avoid equal pay
6 April 2025	Neonatal Care (Leave and Pay) Act 2023 in force: entitlement for eligible employees to 12 weeks' paid leave to care for a child receiving neonatal care
1 September 2025	Economic Crime and Corporate Transparency Act 2023: failure to prevent fraud offence for large organisations in force

2025	Some provisions of the Employment Rights Bill relating to trade unions and industrial action may come into force
2026	Earliest date for the majority of Employment Rights Bill provisions to come into force, including on dismissal for failing to agree contractual variation, collective redundancies, zero hours contracts, flexible working, protection from harassment, family leave, equality action plans, tribunal time limits
Autumn 2026	Earliest date on which Employment Rights Bill changes to the law on unfair dismissal expected to come into force
Uncertain	Three-month limit on non-compete clauses in employment and worker contracts proposed by previous government Regulations to bring Victims and Prisoners Act 2024 into force: NDAs that prevent certain disclosures by victims of crime to be unenforceable

We are also expecting important case law developments in the following key areas during the coming months:

Contracts of employment: *Ryanair DAC v Lutz* (Court of Appeal: whether pilot contracted through intermediary was an agency worker)

Discrimination / equal pay: *Randall v Trent College Ltd* (EAT: whether worker's treatment was belief discrimination or was treatment because of objectionable manifestation of belief); *Augustine v Data Cars Ltd* (Court of Appeal: whether part-time status must be sole reason for less favourable treatment); *Bailey v Stonewall Equality Limited* (Court of Appeal: whether third party had caused employer to discriminate); *University of Bristol v Miller* (EAT: whether anti-Zionist beliefs were protected philosophical beliefs and summary dismissal was discriminatory); *Dobson v North Cumbria Integrated Care NHS Foundation Trust (No 2)* (EAT: whether dismissal of for refusal to work at weekends because of childcare responsibilities was objectively justified and not discriminatory); *Corby v Acas* (EAT: whether opposition to critical race theory was a protected belief); *Ngole v Touchstone Leeds* (EAT: whether the withdrawal of a conditional job offer for a Christian mental health support worker because of Facebook posts was discriminatory); *Legge v Environment Agency* (EAT: whether employee discriminated against for not holding feminist belief)

Employment status: *Groom v Maritime and Coastguard Agency* (Court of Appeal: whether volunteer could be worker in relation to remunerated activities)

Industrial relations: *Jiwanji v East Coast Main Line Company Ltd* (EAT: whether a pay offer directly to staff during collective negotiations was an unlawful inducement)

TUPE: *Bicknell v NHS Nottingham* (Court of Appeal: whether merger of NHS commissioning groups was a TUPE transfer)

Unfair dismissal: *Hewston v Ofsted* (Court of Appeal: whether employee was unfairly dismissed for misconduct that he had not been forewarned would lead to summary dismissal); *Sandhu v Enterprise Rent-A-Car Ltd* (Court of Appeal: whether dismissal without prior warning was within band of reasonable responses)

Whistleblowing: *William v Lewisham & Greenwich NHS Trust* (Court of Appeal: whether the motivation of another person could be brought together with the act of the decision-maker to make an employer liable for whistleblowing detriment); *Rice v Wicked Vision Ltd* (Court of Appeal: whether an employer could be vicariously liable for the acts of a co-worker where the alleged detriment was a dismissal); *Sullivan v Isle of Wight Council* (Court of Appeal: whether an external job applicant could bring whistleblowing detriment claim); *Barton Turns Development Ltd v Treadwell* (Court of Appeal: whether employer could be vicariously liable for whistleblowing detriment of dismissal).

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