SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

QUICK LINKS

12-MONTH NON-COMPETITION COVENANT ENFORCEABLE IN SERVICE AGREEMENT BUT NOT IN SHAREHOLDERS' AGREEMENT

Summary: The High Court upheld a 12-month post-termination non-competition restriction in an employee's service agreement but declined to enforce a similar provision in a shareholders' agreement. The covenant in the service agreement was limited to competition with the parts of the employer's business in which the employee had been involved and was no wider than reasonably necessary for the protection of the employer's interests (*Law by Design Limited v Ali*).

Key practice point: The decision shows that a non-competition clause in an employment contract, or in a shareholders' agreement, must be drafted so that it relates to the work the employee was carrying out. The case also illustrates that it is helpful to refresh restrictive covenants to reflect any changes in the employee's role; whether they are no wider than reasonably necessary is assessed at the time they are entered into.

Facts: The employee, a lawyer employed by a legal company in Manchester (LBD), was subject to post-termination restrictions (PTRs) in her Service Agreement (SA). She had a small stake in LBD, regulated by a Shareholders' Agreement (SHA). The SHA also contained PTRs. When she resigned to join a larger competitor, LBD sought to enforce the PTRs.

The covenants in the SA restricted her from involvement in a business in competition with any "*Restricted Business*" of LBD for 12 months post-termination. "*Restricted Business*" was defined as "*those parts of the company with which the employee was involved to any material extent in the 12 months before termination*". The wording of the non-compete covenants in the SHA was slightly different; it restricted competition in any territory in which LBD had operated (i.e. England and Wales) at any time during the previous 12 months.

Decision: The Court held that the covenant in the SA was enforceable but the covenant in the SHA was not, as it was wider than was reasonably necessary for the protection of LBD's legitimate business interests.

The Court found that the covenant in the SA extended no wider than was reasonably necessary. The definition of "*Restricted Business*" was critical. This limited the operation of the covenant to parts of LBD in which the employee was involved to a material extent at the time of her departure and ensured that the covenant was reasonable in scope. The Court also found that 12 months was a reasonable period for the protection. That length of restriction was necessary in order to find, successfully recruit, train and integrate a lawyer into a small niche firm such as LBD based in Manchester. In addition, 12 months reflected the shelf life of the confidential information and the employee's ability to remember it.

Other factors in the Court's decision were:

- The SA was agreed between the parties comparatively recently – less than four months before the employee's resignation. It reflected the development of the

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relationship between them and the need to secure a period of stability and growth for LBD.

- The deal was reached in the context of significant give and take by both sides. In exchange for an extension of the duration of the restrictive covenant from six to 12 months, LBD gave the employee a significant pay increase.
- The non-competition covenant was a necessary and practical solution to the difficulty of policing and enforcing the confidentiality PTRs in the SHA and SA. The Court recognised that there might be serious difficulties in identifying confidential information. For example, LBD and the competitor already shared a significant client and identifying why that client had decided to reallocate a file to the competitor would be problematic.

By contrast, the Court found that the covenant in the SHA was wider than was reasonably necessary for the protection of LBD's legitimate business interests. The Court rejected LBD's submissions that it should approach the issues as if the parties to the SHA were parties to a commercial arrangement and therefore a less stringent approach to enforcement of PTRs should be applied. The covenant operated to restrict involvement in any other business in England and Wales that directly or indirectly competed with any part of LBD's business as operated in the 12 months before the employee ceased to be a shareholder. It was operative whether or not she had any role in the conduct of a part of the business and whether she had enjoyed customer connections in relation to that part of the business. For example, it would have prevented her from involvement with any firm that indirectly or directly competed for commercial work in England and Wales, even though she undertook little or no such work herself and was in possession of no trade secrets or confidential information in relation to that work.

Analysis/commentary: There have been other recent examples of courts deciding that non-compete covenants lasting longer than six months can be enforceable if the nature of the employee's role and the employer's business justify it. In *Eville and Jones (Group) Ltd v Aldiss*, decided earlier this year, the High Court found that 18-month non-competition PTRs contained in a shareholders' agreement were enforceable against a director/employee, given the long-term nature of the contracts used in the business (providing veterinary services for export certification). It was relevant that the employee was a managing director, and therefore in a privileged position to know all the confidential matters relating to the business.

Meanwhile, the Government has recently said that it is still considering responses to its December 2020 consultation on possible restrictions (such as mandatory compensation) in post-termination non-compete clauses.

CLAIM AGAINST FORMER EMPLOYER FOR AIDING DISCRIMINATION CAUGHT BY SETTLEMENT AGREEMENT

Summary: The Employment Appeal Tribunal (EAT) held that an employee's allegation that his former employer had engineered the rejection of his job application by a connected company, because he had brought discrimination proceedings while in employment, potentially fell within Equality Act 2010 provisions which make it unlawful to aid discrimination. However, the claim was precluded by the terms of a COT3 settlement agreement, which covered claims arising indirectly out of employment (*Arvunescu v Quick Release (Automotive) Ltd*).

Key practice point: The victimisation claim arose before the employee signed the COT3, so the difficult issue of whether a settlement agreement can be drafted so as to protect an employer from claims made after the date of the agreement did not arise. However, the fact that the wording covered claims arising "directly or indirectly" from employment was crucial. The case is also a reminder of the broad scope of rarely used provisions, in Sections 111 and 112 of the Equality Act, that impose liability for discrimination for instructing, causing, inducing or knowingly helping someone to discriminate against, harass or victimise another person, or to attempt to do so.

Facts: Following termination of his employment, the claimant brought a race discrimination claim against the employer. The claim was settled via Acas conciliation and recorded in a COT3 settlement agreement. The COT3 wording stated that the payment was in full and final settlement of all claims *"of any kind whatsoever, wheresoever and howsoever arising …. directly or indirectly out of or in connection with"* [employment] *"its termination or otherwise and even though the claimant may be unaware of the circumstances which might give rise to it or the legal basis for such a claim"*.

Before signing the COT3, the claimant had applied unsuccessfully for a job with a company based in Germany that was a wholly owned subsidiary of his former employer. An HR representative of his former employer allegedly refused or failed to progress his request for a reference. The claimant then brought a new claim against his former employer under Section 112 for aiding discrimination (in the form of victimisation for the protected act of having made a discrimination complaint). He asserted that, given its close connection with the German company, his former employer was responsible for the failure of his application and that this was because of his earlier discrimination claim. The Employment Tribunal decided that he could not bring the Section 112 claim because it had been compromised by the COT3 and that, in any event, the former employer could not be held liable for the German company's rejection of the job application. The claimant appealed.

Decision: The EAT agreed with the claimant that he could bring a Section 112 claim. Section 112 imposes liability on anyone who "knowingly helps" another to contravene the Equality Act. There was evidence that the employer's HR representative knew the German company reasonably well, and that discussions about the claimant had taken place between individuals at the two companies.

However, the EAT confirmed that the claim was precluded by the COT3. The wording of the COT3 was wide enough to cover the new claim – it arose "*indirectly out of and in connection with*" the claimant's employment. One of the necessary ingredients of his succeeding in a claim under Section 112 was the protected act based on his treatment while he was employed. In addition, the waiver applied even if the employee was "*unaware of the legal basis for a claim*".

NEW EMPLOYMENT TRIBUNAL COMPENSATION LIMITS

From 6 April 2022, new increased compensation limits for employment tribunal claims will come into force under the *Employment Rights (Increase of Limits) Order 2022*, including:

- A revised figure of £571 (currently £544) for the maximum amount of a week's pay. This figure is used to calculate awards including statutory redundancy payments and unfair dismissal basic awards, so the maximum will become £17,130 (up from £16,320).
- A maximum unfair dismissal compensatory award of £93,878 (currently £89,493), or 52 weeks' actual pay if lower.

The new limits apply where the "appropriate date" (the effective date of termination, for dismissals) is on or after 6 April 2022.

COURT OF APPEAL CONFIRMS THAT COMMITTEE PANEL MEMBER WAS A WORKER

Summary: The Court of Appeal has confirmed that a panel member chair of the Nursery and Midwifery Council's Fitness to Practice Committee was a worker for the purposes of the Employment Rights Act 1996 (ERA). The Court found that worker status entails a contract to do work or services personally for an employer who is neither a customer nor a client. An "irreducible minimum of obligation" is not a requirement (*Nursing and Midwifery Council v Somerville*).

Key practice point: This is a further decision indicating that contractors and other casual staff who are required to perform services personally are likely to be workers unless the other party is a client or customer of the worker. The Court of Appeal confirmed that, in circumstances where an overarching contract exists between the parties under which the worker agrees to (and does) perform services personally in respect of a series of separate contracts, there is no extra requirement for an "irreducible minimum of obligation".

Facts: S was appointed as a panel member chair for a four-year term in 2012 and reappointed for a further four-year term in 2016. S brought a claim for unpaid holiday pay – this depended on being able to satisfy the definition of "worker" in Section 230 of the ERA. The Employment Tribunal had found that there was a series of individual contracts between the parties each time S agreed to sit at a hearing, for which the Council agreed to pay him a fee. There was also an overarching contract between them in relation to the provision of his services as a panel member chair, evidenced by letters of appointment and in a Services Agreement, agreed to by both parties in relation to each four-year term of appointment. The Tribunal and Employment Appeal Tribunal found that S agreed to provide his services personally to the Council and concluded that he was a worker, although not an employee. The Council appealed, arguing

that there had to be "irreducible minimum of obligation" - an obligation on the worker to perform a minimum amount of work - in order for a contract to fall within Section 230.

Decision: The appeal was dismissed. The Services Agreement stopped short of requiring S to do or perform personally any work or services. However, each time the Council offered a hearing date and S accepted it, an individual contract arose whereby S agreed to attend the hearing and the Council agreed to pay a fee. Under each individual contract, S had agreed to provide his services personally, and the Council was not the client or customer of a profession or business carried on by S. This was sufficient to entitle the Tribunal to conclude that S was a worker. In the Court of Appeal's view, there was no need to introduce the concept of an irreducible minimum of obligation.

The fact that S could withdraw from the agreement to attend a hearing even after he had accepted did not alter the analysis. S had nevertheless entered into a contract to provide personal services, which existed until terminated. The definition of worker did not require an added obligation to provide services separate from the provision of services on a particular occasion. In addition, the fact that the parties were not obliged to offer, or accept, any future work was irrelevant.

Analysis/commentary: There is still no word from the Government on when it will publish the Employment Bill. The Bill is expected to include provisions relevant to employee/worker status.

HORIZON SCANNING

What key developments in employment should be on your radar?

4 April 2022	Deadline for gender pay gap reporting
2022	Legislation expected to provide for: • Entitlement to one week's unpaid leave for employees who are carers • Extension of redundancy protections for mothers • Neonatal leave and pay • Extension of permissible break in continuous service from one week to one month • Right to request a more predictable contract • Single enforcement body for employment rights • Tips to be retained in full by workers

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

- **Employment status:** *HMRC v Atholl House* (Court of Appeal: whether the IR35 rules applied to a presenter providing services through a personal services company)
- **Employment contracts:** *AMDOCS Systems Group v Langton* (Court of Appeal: whether employer was obliged to pay PHI escalator payments no longer covered by its insurance policy)
- **Discrimination / equal pay:** *Higgs v Farmor's School* (EAT: whether a Christian employee's gender critical beliefs were protected under Equality Act 2010)
- **Trade unions:** *Mercer v Alternative Future Group* (Court of Appeal: whether protection from detriment for trade union activities extends to participation in industrial action); *Tyne and Wear Passenger Transport Executive v NURMT* (Court of Appeal: whether employer can claim rectification of a collective agreement)

- **Unfair dismissal:** *Rodgers v Leeds Laser Cutting Ltd* (EAT: whether, for automatic dismissal for a health and safety reason, the serious and imminent danger must be directly linked to working conditions)
- **Whistleblowing:** *Kong v Gulf International Bank* (Court of Appeal: whether dismissal for questioning colleague's competence on the subject matter of a protected disclosure was automatically unfair).

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