SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

QUICK LINKS

DISMISSAL AND RE-ENGAGEMENT: PROTECTIVE AWARD UPLIFT

The statutory Code of Practice on dismissal and re-engagement will come into force in July; details are in our Employment Bulletin March 2024. The Code of Practice will apply where an employer is considering making changes to employees' contracts of employment and envisages that, if the employees do not agree, it might opt for dismissal and re-engagement – terminating the employment contracts and offering new contracts on the amended terms. Courts and employment tribunals will take the Code into account where relevant, for example in unfair dismissal claims, and tribunals will have the power to increase an employee's compensation by up to 25% if an employer unreasonably fails to comply with the Code.

The Code of Practice on dismissal and re-engagement does not create new legal obligations, nor does it cover requirements that overlap with the Code, such as collective consultation obligations where 20 or more dismissals are proposed at a single establishment within a 90-day period. However, in order to strengthen the Code's deterrent effect, the Government is also adding the protective award for non-compliance with collective consultation requirements (up to 90 days' gross pay per affected employee) to the list of claims that can attract the 25% uplift in compensation for unreasonable failure to comply with a relevant code of practice. This legislation is scheduled to come into force on 18 July 2024, so we expect the Code itself to be effective from the same date.

HIGH COURT CONSIDERS WHETHER NON-SOLICITATION AND COMMISSION PROVISIONS WERE IN RESTRAINT OF TRADE

Summary: The High Court allowed a claim to enforce a non-solicitation covenant against a former employee to proceed but struck out a claim based on a commission provision because it was unreasonably wide (*X-R Touring LLP v Javor*).

Key practice point: This decision illustrates the potential traps for employers who make announcements about new joiners - there may be a breach of the employee's non-solicitation covenants even if there is no direct solicitation of clients/employees. For employers more generally, it is important to ensure that restrictions in the employment contract cover the employee acting directly or indirectly.

The finding that the commission provision was an unreasonable restraint of trade highlights the distinction (not always easy to identify) between a clause in the employment contract which is triggered by the employee joining a competitor, where the restraint of trade doctrine is likely to be engaged (as in this case), and a restriction which applies simply to prevent payments where the employee is no longer employed by the company, which is more likely to be enforceable. In another recent case, the High Court found that bonus clawback provisions in an employment contract, which were not subject to any non-compete requirement, did not operate as an unreasonable restraint of trade and were therefore enforceable by the employer (see our Employment Bulletin November 2023). The effect of the clawback provisions was simply to prevent payments where the employee was no longer employed by the company; it served as a disincentive to resign but it did not amount to a requirement not to compete.

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Facts: The claimant, X-R Touring LLP (X-R), operated a concert booking agency for artists in the music industry. J, a senior booking agent, had a fixed-term contract with a three-month notice period (part or all of which could, at X-R's option, be spent on garden leave). The contract also contained:

- A 12-month non-solicitation covenant relating to employees, clients and artists.
- A provision obliging J to pay to X-R all commission and other sums related to bookings or potential bookings "*discussed, scheduled, made or contemplated (whether or not actually contracted) or to be made*" prior to the date of termination of his employment received by him or any associated entity (including any future employer) and to ensure all such bookings were contracted via X-R.

After J left employment with X-R to work for WME, a company in the same business, X-R applied for an injunction, pending a full trial, to enforce the non-solicitation and commission provisions.

Decision: The High Court decided that the question of whether the non-solicitation covenant was enforceable as a reasonable restraint of trade, going no further than necessary to protect X-R's connections with its clients and employees, should proceed to trial but that the commission claim should be struck out.

The High Court Judge's view was that there were real prospects of establishing a breach of the non-solicitation covenant at the trial. J had access to X-R's top clients and was talking about bookings with some of them at the same time as he was in discussions with WME. He also appeared to be a "reluctant employee", anxious to extricate himself from X-R as soon as he could. A further key factor was that WME had issued a media press statement, around the time J's employment with X-R ended, announcing that J had joined WME's London office, listing clients with whom J had worked and including a quote from him. The Court thought that the press statement crossed the line from a general appeal for custom to a specific appeal to clients to transfer their business, the Judge noting that a solicitation request does not have to be addressed to an individual customer in every case; there can be solicitation by an appeal to customers collectively.

The Judge rejected J's argument that the non-solicitation covenant was unenforceable because there was no set-off provision for garden leave. Even taking into account the full period of 15 months' restraint, it was arguable that the period was not too long. Nor was the covenant necessarily unenforceable because it restrained the poaching of any employee, however junior, with whom J had material or personal contact during the 12 months up to termination; it was possible that the wording could be interpreted as covering only employees doing the same kind of work as J.

By contrast, the Court decided that the commission provision was clearly an unreasonably wide indirect restraint of trade. It operated as a strong disincentive to J to work for any employer that had any clients in common with X-R. He would have to account to X-R for commission received by him or a person associated with him, including a current employer, even if his discussions with the client before termination were tentative and did not lead to a booking and even if he were not involved in (and not even aware of) the subsequent booking of the same artist. The obligation to "*ensure that all such bookings are contracted via [X-R]*" was absolute and unworkable. The commission provision was not time limited and the lead times between discussions and concerts (and presumably payment) could be long. If valid, the commission provision would make J's job with WME not worth his while. In addition, the Court noted that X-R could have protected itself by a non-dealing covenant.

Analysis/commentary: On restrictive covenants more generally, we are still waiting to hear what the Government has in mind in terms of its proposed restrictions on non-compete clauses, following the announcement last year that it will legislate to apply a statutory three-month limit. The Government did make clear, however, that non-solicitation covenants would not be affected. Meanwhile, in the United States, the Federal Trade Commission has announced that existing non-compete clauses for most workers in the US will no longer be enforceable (possibly from as early as the end of August this year). Although business groups are challenging the new rule in the courts, as it stands it will allow existing non-competes for "senior executives" to remain in force but ban employers from entering into or attempting to enforce any new non-competes, even if they involve senior executives. There is an exemption for non-compete clauses related to a business sale. The new rule will apply to any terms or conditions that prevent workers from seeking or accepting work, or operating a business, in the US. It could affect overseas employers, therefore.

CREATION OF NEW ROLE WITH REDUCED RESPONSIBILITIES WAS BREACH OF CONTRACT

Summary: The High Court decided that the decisions of a new CEO to remove some of the claimant's responsibilities and allocate a new role to her were not a proper exercise of the employer's powers. This was a repudiatory breach which the claimant accepted by terminating the contract, entitling her to damages for breach of contract (*McCormack v Medivet Group Limited*).

Key practice point: Employment contracts should be drafted to allow the employer to assign fewer or alternative duties (as well as additional duties), without the need for the employee's consent. However, if the change to terms is substantial, as it was in this case, the risk of a constructive dismissal or breach of contract claim will remain, particularly if there is inadequate consultation.

Facts: The claimant was the company's Director of Clinical Operations, responsible for day-to-day operations and a number of central functions. Clause 2.5 of her service agreement provided that the company was entitled, through its board of directors, to appoint other persons to act jointly with her or to change her executive office or responsibilities. The key events leading to her resignation were:

- In February 2022, a new CEO was appointed. He met the claimant and was apparently unimpressed, concluding that, whilst she had too many responsibilities and her role was too broad, she was poorly organised and could not keep up with the areas for which she was responsible.
- At a meeting in April, the CEO advised the claimant of his plans to re-organise the management structure, creating two new roles - Chief Clinical Officer (CCO) and Chief Operating Officer (COO) – and to appoint her CCO, a different role to her existing one, and allocate some of her responsibilities to others. The COO suggested by the CEO was less experienced than the claimant.
- In May, the claimant told the company that, since she was being replaced and allocated a role for which she regarded herself as unsuitable, she was willing to agree a planned exit. An impasse was then reached; she appointed solicitors and made a formal grievance. The new arrangements came into effect from July, although they were never fully implemented in relation to the claimant. At about this time, she obtained a sick note and ceased to attend work.
- Later in July, the claimant gave notice terminating her contract of employment because she had been "forced out of [her] role". She made a breach of contract claim for damages for loss of salary, company car, holiday pay, nursery care fees, pension and other benefits.

Decision: The High Court upheld the claim. The decision to divest the claimant, with immediate effect, of some of her responsibilities and transfer them to other employees and, with effect from an unidentified future date, allocate a new role to her, was not taken and communicated properly in exercise of the board's powers under clause 2.5. Those decisions gave rise to a repudiatory breach of the contract of employment. Having accepted the breach and terminated her contract, she was entitled to damages for breach of contract.

The Court explained that, as clause 2.5 conferred discretionary powers which were exercisable unilaterally to the claimant's disadvantage, it was implicit that the company would exercise them honestly, rationally and for the purpose for which they were given. The powers were conferred in the interests of good management so as to apply where there was good reason to appoint others to work with the claimant or change her responsibilities. The High Court found that the CEO's decision was irrational:

- It was taken on an ad hoc basis without reference to the board's contractual powers or the timescale for implementation of the CCO role.
- The proposals were not properly canvassed with the claimant in advance. She was perceived to be "stretched" and the CEO was critical of her organisational competence but no interim solutions were explored with her before the decision was made. There was no meaningful assessment as to how her interim and final responsibilities should be allocated.

- No good management reason was given for pre-emptively divesting the claimant of some of her core responsibilities. Until the CEO's arrival, she had performed her established role without substantial criticism and, by the time he made the decision, the CEO could have had no more than a limited opportunity to evaluate her contribution; his assessment was primarily based on personal discussions with her. Although the decision was communicated to the claimant on the understanding it would take effect at some point in the future, the board's specific decision-making powers could not have been fully engaged since it had not been scheduled for implementation prior to the termination of her employment and the new COO appointment did not take effect until later that year.

The Court concluded that, viewed objectively, the breach of the contract of employment was sufficiently material to be repudiatory. The nature of the claimant's responsibilities and the level of her seniority were significant. Although the company had not done anything to implement the decision, or designate a date for final implementation, prior to the termination letter, it had by then decided to allocate her a new job with different responsibilities. The claimant was entitled to treat the decision as an anticipatory breach and terminate her contract of employment. The Court also found that the company's conduct as a whole, culminating in its failure to engage properly with her formal grievance, amounted to a repudiatory breach of the implied term of mutual trust and confidence between employer and employee.

MINOR CONTRIBUTING FACTOR CAN AMOUNT TO "SOMETHING ARISING" FROM DISABILITY

Summary: The Employment Appeal Tribunal (EAT) decided that there had been discrimination arising from a disability under Section 15 of the Equality Act 2010 in circumstances where, in deciding to refer an employee with depression and anxiety to a misconduct disciplinary hearing, the employer had taken some account of the manner in which she answered questions in the investigation, due to her disability, even though only to a "trivial" extent (*Bodis v Lindfield Christian Care Home Ltd*).

Key practice point: To establish liability for "something arising" from disability, the "something" can be a minor component of the reason for the treatment, provided it is significant enough to be an effective cause. In misconduct scenarios, the case law authorities (and the Equality and Human Rights Commission's Code of Practice) make it clear that only a loose connection between the employee's conduct and the disability is required.

Facts: The claimant was disabled with anxiety and depression. After an investigation into a series of disruptive incidents and harassment of staff at a care home and a disciplinary hearing, the claimant was summarily dismissed for gross misconduct. The Employment Tribunal dismissed her claim that she had suffered unfavourable treatment because of something arising in consequence of disability under Section 15. The Tribunal accepted that, in deciding to refer her to a disciplinary hearing, the investigating officer had taken some account of the manner in which she had answered questions in the investigatory interview but found that it was only to a trivial extent and had not affected the decision of the disciplinary panel to dismiss. In the alternative, the Tribunal held that the referral to a disciplinary hearing and dismissal were proportionate means of achieving the legitimate aim of upholding disciplinary standards in circumstances in which there had been a breakdown in relations. The claimant appealed.

Decision: The EAT held that the Tribunal was wrong to have concluded that treatment was not because of something arising in consequence of disability. However, the claimant's appeal was rejected because the Tribunal had also found that the treatment was a proportionate means of achieving a legitimate aim, and that determination had not been appealed.

The EAT referred to the long-established principle that causation for liability under Section 15 requires a significant influence so as to amount to an effective cause but "significant" means only "more than trivial" and can be a minor component of the reason for the treatment. The Tribunal had found "*the claimant's demeanour was a factor that he took into account in determining to refer the matter to a disciplinary hearing but it was not a substantial matter. It was trivial. It was not the effective cause. The other factors were the most important*". The Tribunal had wrongly referred to the claimant's demeanour not being the effective cause, whereas it need only have been an effective cause. And although the Tribunal had described it as "trivial", it was nevertheless a contributory factor in the decision, albeit a minor one.

HORIZON SCANNING

What key developments in employment should be on your radar?

July 2024	Statutory Code of Practice on Dismissal and Re-engagement expected to be in force
July 2024	Amendment to Reg 13A TUPE to allow small employers, and all employers where a transfer of fewer than 10 employees is proposed, to consult directly with employees if there are no employee representatives
September 2024	Workers (Predictable Terms and Conditions) Act 2023 expected to come into force: right to request a more predictable working pattern
October 2024	Worker Protection (Amendment of Equality Act 2010) Act 2023 expected to come into force: duty to take reasonable steps to prevent sexual harassment of employees
October 2024	Employment (Allocation of Tips) Act 2023 and statutory Code of Practice to come into force: obligations on employers to deal with tips, gratuities and service charges, including having a written policy and tipping records
April 2025	Neonatal Care (Leave and Pay) Act 2023 expected to come into force: entitlement for eligible employees to 12 weeks' paid leave to care for a child receiving neonatal care
Date uncertain	• Proposed three-month limit on non-compete clauses in employment and worker contracts • NDAs to be unenforceable if they prevent victims from reporting a crime • Economic Crime and Corporate Transparency Act 2023: failure to prevent fraud offence for large organisations

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

Employment status: *HMRC v Professional Game Match Officials Ltd* (Supreme Court: whether referees were employees for tax purposes)

Discrimination / equal pay: *Rollet v British Airways* (EAT: whether the Equality Act 2010 protects against indirect associative discrimination); *The Royal Parks Ltd v Boohene* (Court of Appeal: whether end-user had indirectly discriminated against contract workers on grounds of race by paying them a lower minimum level of payment compared to direct employees); *Bailey v Stonewall Equity Limited* (EAT: whether a campaigning group had instructed, caused or induced religion or belief discrimination by the employer); *Randall v Trent College Ltd* (EAT: whether worker's treatment was belief discrimination or was treatment because of objectionable manifestation of belief); *Higgs v Farmor's School* (Court of Appeal: whether dismissal was because of the manifestation of protected beliefs, or a justified objection to the manner of manifestation); *Clayson v Ministry of Justice* (EAT: whether workers were treated less favourably on grounds of part-time status in relation to new pension arrangements)

Redundancies: *USDAW v Tesco Stores Ltd* (Supreme Court: whether implied term prevented employer from dismissing and re-engaging employees); *ADP RPO UK Ltd v Haycocks* (Court of Appeal: whether redundancy dismissal was fair in absence of workforce consultation)

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

Unfair dismissal: *Charalambous v National Bank of Greece* (Court of Appeal: whether a misconduct dismissal was fair when the decision to dismiss was taken by a manager who did not conduct the disciplinary hearing); *Hewston v Ofsted* (Court of Appeal: whether employee unfairly dismissed for misconduct that he had not been forewarned would lead to summary dismissal)

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