SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

QUICK LINKS

FUTURE OF WORK REVIEW

Although last month's Queen's Speech did not include an Employment Bill (or any other employment measures), the Government has published a policy paper with terms of reference for a Future of Work Review, to be led by Matt Warman MP.

The Review, which will take place this Summer, will be in two parts – a first phase to evaluate the key strategic issues and a second phase to provide more detailed assessment of selected areas of focus. The Review will make policy recommendations to the Government, based on its findings on questions such as:

- the importance of place and local labour markets in facilitating access to good jobs;
- the role of automation; and
- how flexibility can be developed whilst ensuring sufficient protections are in place to prevent exploitative practices.

Meanwhile, the Government has confirmed, in a response to a report from the Women and Equalities Parliamentary Committee, that it will not be introducing mandatory ethnicity pay gap reporting. The Government has accepted the recommendation from the 2021 report of the Commission on Race and Ethnic Disparities that reporting should continue to be on a voluntary basis. However, it will publish guidance this Summer to address some of the challenges identified in voluntary reporting, for example:

- Using specific ethnic groups rather than broader categories, to cater for the difficulty that ethnic groups sharing the same race can have very different outcomes.
- Reporting in demographically different areas, to help employers with small ethnic minority populations who cannot produce statistically meaningful pay reporting because the numbers are too low.

NO INJUNCTION TO ENFORCE 12 MONTH NON-COMPETE CLAUSE

Summary: The Court of Appeal refused to grant an employer an injunction to enforce a 12-month non-compete covenant against a former employee. The time that had elapsed since the employee had joined the competitor, together with the inadequacy of damages as a potential remedy for the employee if the covenant was subsequently found to be unenforceable, were factors in the Court's decision (*Planon v Gilligan*).

Key practice point: Employers need to act quickly when they discover that a departing employee has joined a competitor. The Court commented on the employer's delay in taking action to enforce the covenant.

Facts: The employee was a sales manager for a company specialising in facilities management software. His employment contract contained post-termination restrictions, including a non-compete covenant which prevented him from working in the field of facilities software management for 12 months. He resigned on 23 July 2021, giving one

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month's notice (so that his contract ended on 23 August). His employer put him on garden leave on 6 August. On 1 September, he joined a competitor. His former employer applied for an interim injunction to enforce the non-compete covenant. The High Court refused the application.

Decision: The Court of Appeal dismissed the employer's appeal and declined to grant an injunction. The Court analysed the principles on injunctions, derived from the *American Cyanamid* case. The employer had to show:

- There was a serious issue to be tried – the employer had met this requirement, as the covenant was not obviously wider than reasonably necessary to protect its legitimate interests and there was evidence of a breach by the employee.
- Damages would be an adequate remedy for the employee if the covenant were found at trial to be unenforceable.
- The "balance of convenience" was in favour of granting the injunction.

The Court of Appeal refused the application for an injunction because it did not meet the balance of convenience test, given the delay. By the date of the hearing of the appeal, the employee had been in post for seven months and the non-compete restriction had about four months to run. Although, to some extent, the length of time the case took to reach the Court of Appeal was outside the employer's control, the Court noted that there had been a delay in the employer taking action. The fact that the employee had joined the competitor came to the employer's attention on 2 September, the day after he started work, but the solicitors' letter before action asking for undertakings from the ex-employee was not sent until 20 September and court proceedings were not issued until a month later. By the time of the High Court hearing, he had been working for the competitor for over two months. The Court said that the significance of this was that if the new job posed as severe a threat to the employer's trade secrets or customer connection as the employer claimed, the damage would have been done in the first few days, and certainly well before the lapse of two months.

The Court of Appeal also found that damages would not be an adequate remedy for the employee if an injunction was granted at the interim stage but the covenant was proved at trial to have been an unenforceable restraint of trade. One of the judges commented that the argument that damages would be adequate was likely to have traction only in cases of very wealthy employees, or where the employer is offering paid garden leave for the whole period of the restraint. Here, there was evidence that the employee had a family, a mortgage and other commitments. It was not clear that his current employers would be able and willing to transfer him to work which had no connection with facilities management software (described as a niche area). The Court concluded that the likely effect of an injunction would be to deprive him of income for 12 months, unless he could find a new job.

Analysis/commentary: The Court's comments on the financial impact of an injunction on an employee are significant. Employers looking to enforce lengthy non-compete restrictions will have to obtain evidence of financial resources and may have to consider ways in which the employee's income can be protected.

DISMISSAL FOR REFUSING TO RETURN TO WORK FOR HEALTH AND SAFETY REASONS WAS NOT AUTOMATICALLY UNFAIR

Summary: The Employment Appeal Tribunal (EAT) confirmed that the dismissal of an employee who had refused to return to work due to his concerns about exposure to COVID-19 was not automatically unfair under Section 100 of the Employment Rights Act 1996. (Section 100 protects employees who leave or refuse to return to the workplace because of health and safety concerns.) The Employment Tribunal had correctly rejected the claim, finding that there was evidence that the employee did not reasonably believe that there was serious and imminent danger that prevented him returning to the workplace *(Rodgers v Leeds Laser Cutting Ltd)*.

Key practice point: Whilst agreeing with the Tribunal's decision on the facts, the EAT commented on the broad scope of automatic unfair dismissal protection for health and safety dismissals, noting that the danger need not arise from the workplace itself and that the employee only has to show a reasonable belief that there were circumstances of danger.

Facts: The claimant worked at a large warehouse. After working with a colleague who displayed symptoms of COVID-19, he developed a persistent cough, left work and was dismissed after he told his employer that he intended to stay off work until the lockdown eased. He brought a claim for automatically unfair dismissal under Section 100 (which does not require the usual two years' service). Section 100 requires the employee to show that there were "circumstances of

danger" which he reasonably believed to be "serious and imminent" and which he could not reasonably have been expected to avert. The Employment Tribunal dismissed the claim, finding that the employee had been unable to establish on the facts that the Section 100 protection applied.

Decision: The employee's appeal was rejected. The EAT confirmed that it is not necessary for the circumstances of the danger to be generated by the workplace itself; an employee could reasonably believe that the pandemic was a serious and imminent circumstance of danger outside the workplace that prevented a return to the workplace. However, the fact that the employee had genuine concerns about the pandemic did not mean that he necessarily had a genuine belief that there were serious and imminent circumstances of danger that prevented him from returning to work. The Tribunal had made a number of findings that were contrary to his contention that he reasonably believed that those circumstances existed. Even if the Tribunal had been wrong about this, it had been entitled to find that the claimant could reasonably have taken steps to avert the danger, such as wearing a mask and social distancing.

As the Tribunal had accepted that the pandemic had created circumstances of danger at work, the EAT did not need to decide whether the employee had established that point. However, the EAT thought that there was some force in the argument that a claimant only needed to show a reasonable belief that there were circumstances of danger (as well as a reasonable belief that the danger was "serious and imminent"). The EAT pointed out that it would be surprising if employees were protected for reasonably but erroneously believing in the seriousness and imminence of a threat to their health and safety, but not for a reasonable but erroneous belief in the underlying circumstances of danger.

HORIZON SCANNING

What key developments in employment should be on your radar?

2022	Extension of ban on exclusivity clauses to lower paid workers
Date uncertain	Statutory Code of Practice on "fire and rehire"
Date uncertain	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

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

- **Employment status:** *Griffiths v Institution of Mechanical Engineers* (EAT: whether trustee of professional body is worker for whistleblowing protection)
- **Employment contracts:** *USDAW v Tesco Stores Ltd* (Court of Appeal: whether implied term prevented employer from exercising contractual right to terminate on notice to remove entitlement to enhanced pay); *AMDOCS Systems Group v Langton* (Court of Appeal: whether employer was obliged to pay PHI escalator payments no longer covered by its insurance policy); *Cox v Secretary of State for the Home Department* (Court of Appeal: whether employer withdrawal of check-off arrangements was in breach of employment contract; *Benyatov v*

Credit Suisse Securities (Europe) Ltd (Court of Appeal: whether employer had duty of care to protect employee from criminal conviction)

- **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:** *Morais v Ryanair DAC* (Court of Appeal: whether workers are protected from detriment for participating in industrial action during working hours); *Tyne and Wear Passenger Transport Executive v NURMT* (Court of Appeal: whether employer can claim rectification of a collective agreement)
- **Unfair dismissal:** *Fenten v Outform* (Court of Appeal: whether bringing forward the termination date on payment of a contractual PILON was a dismissal)
- **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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