HEWITSONS

Employment

LEGAL UPDATE

Absolute Client Focus

Vol.21 No.6

What's new

Unenforceable restrictive covenant rescued by severance

In the *Case of Tillman v Egon Zehnder Ltd* the Supreme Court has held that an unreasonably broad, and therefore unenforceable, non-compete clause could be rescued by severing the offending part (known as the blue pencil test).

The employee resigned from her employment in January 2017 to join a competitor. With the exception of the non-compete clause, the employee advised that she would abide by the restrictions in her contract of employment. The employer sought an interim injunction to prevent the employee joining the competitor in breach of her non-compete covenant. The non-compete covenant referred to the employee not being "concerned or interested in any business carried on in competition with…" any of the employer's businesses. The employee argued that this was unreasonably wide as she would be in breach of it even if she only had a minor shareholding in a competitor.

The High Court granted the injunction, holding that "interested in" did not preclude the employee holding a minor shareholding. The Court of Appeal (CA) disagreed and allowed the employee's appeal indicating that "interested in" prohibited a minor shareholding and refused to sever the offending words from the rest of the clause on the basis that severance was limited to situations where the covenant was in effect a combination of different covenants.

On appeal, the Supreme Court (SC) agreed with the CA that being "interested in" a competing business did include being a shareholder (large or small) and so was unreasonably broad and, on the face of it, unenforceable. Looking at the question of severance, the SC held that it was possible to remove the words "interested in" from the non-compete covenant and for the remainder of the covenant to be enforceable. As such, the employer was entitled to its injunction albeit that, by the time the decision had been made, the restrictive covenant period had expired!

Suspension of teacher for bad handwriting – discrimination?

In the case of *Ahmed v The Cardinal Hume Academies* the Employment Appeal Tribunal (EAT)

considered whether it was discrimination for a school to suspend a teacher due to the adverse effects of his disability.

The employee, a trainee teacher, suffered from dyspraxia which was a condition affecting his co-ordination and, amongst other things, resulted in him having difficulties writing. On the employee's appointment, the employer's occupational health doctor provided a medical report which confirmed dyspraxia was a disability, touched on the adverse impact of it on the employee but certified him as fit to teach. At a meeting between the employee and Head Teacher, the Head Teacher made remarks regarding the employee's difficulties with writing and was dismissive of the employee's suggestions how they could be overcome, which was perceived as harassment by the employee. The school was concerned that the employee would not be able to fulfil his teaching role so, the day after the meeting, the employee was suspended pending an investigation. The employee raised a grievance and subsequently resigned, alleging constructive dismissal, disability discrimination and harassment as a result of the Head Teacher's conduct.

The Employment Tribunal (ET) dismissed the employee's constructive dismissal claim on the basis that the Head Teacher's comments did not amount to harassment and it was reasonable for the school to suspend the employee whilst they looked into the issue. On appeal to the EAT, the employee highlighted that the ET had taken the wrong approach to harassment and had failed to consider the perception of the alleged victim, placing too much emphasis on whether it was reasonable for the conduct to have caused the harassment. The EAT held that the ET had been correct in its approach to harassment, namely that it was not harassment if the conduct was reasonable in the circumstances. Further, the EAT held that the employee's suspension was not directly discriminatory due to his disability as his handwriting issues were an adverse effect of his disability (i.e. his dyspraxia), not the disability itself.

Holiday pay – a change in how long-term back pay claims will be decided by English Courts?

The case of *Chief Constable of Northern Ireland Police v Agnew* established that a gap of more than 3 months in a series of deduction does not break the series.

The case concerned the employer's failure to pay appropriate amounts of holiday pay to police constables and police sergeants. The employer calculated the amount of holiday pay due to each employee by reference to their "basic pay" rather than by reference to "normal pay", which includes basic pay, overtime and various other allowances. The employees claimed unlawful deduction from wages.

The employer argued that the recoverable amount for the employees should be restricted to a period of underpayment ending no later than 3 months prior to the proceedings. Where a gap of three months or more occurred there could not be a series of unlawful deductions. The employees' argued that a gap of more than 3 months between deductions did not break the series and disputed the court's ruling in *Bear Scotland Ltd v Fulton* (which limited the scope for retrospective holiday pay claims where a worker has a gap of more than three months between each holiday period, thereby breaking the series of deductions).

The Court of Appeal for Northern Ireland (NICA) held that:

- Firstly, there is no statutory definition for what amounts to a series of deductions. A series is not broken by a gap of three months or more, provided there was a sufficient similarity of subject matter between all events in the series. NICA highlighted that the identification of a factual link in an alleged series of deductions is what determines whether correct payments of holiday pay breaks the series.
- Secondly, in *Bear Scotland* EU leave (i.e. 20 days) was deemed to be taken first followed by UK leave (i.e. 8 days) and then any additional contractual leave. NICA held that this was not the case and that workers were entitled to all leave, there being no requirement for different types of leave to be taken in a particular order.

- Thirdly, and finally, fixing an arbitrary reference period for calculating holiday pay (i.e. 12 weeks commonly) is incorrect. The reference period should be determined by reference to each claimant and be "long enough to be representative of the claimant's working pattern", which is a fact sensitive question.

Whilst the decision of NICA is not formally binding in England, this case provides strong authority on how future, long-term back pay claims will be decided by English courts.

WHAT TO LOOK OUT FOR

Gender Pay Reporting – extension to smaller companies

Hilary Spencer, the director of the Government Equalities Office recently announced that plans are underway to extend gender pay gap reporting from the current position of applying to companies with 250 employees or more. Spencer explained that various proposals have been put to the House of Commons Treasury Select Committee including lowering the threshold for reporting obligations to include smaller companies. This follows the TUC review, which highlighted the need for companies to actively develop ways to reduce their figures, ensuring that they are not simply reporting as an exercise in compliance.

#WorkWithMe

Virgin Media and disability charity Scope UK are tackling structural issues contributing to the disability employment crisis. The #WorkWithMe pledge aims to assist unemployed, disabled people in the UK who are looking to get back to work.

The #WorkWithMe pledge contains five action points that business must commit to, namely:

- having executive responsibility for monitoring progress on disability;
- implementing appropriate policies and a disability action plan;
- promoting a positive culture around disability;
- collecting relevant data from within the organisation and collaborating with other businesses to share good practice tips; and
- celebrating disability inclusion in the workplace.

It is believed that the pledge will assist in creating a community of businesses who will work together to improve workplace practices, policies and environments to better support disabled people. At least 19 companies have signed up to the pledge. Should you wish to pledge your support, please visit https://workwithme.support.

For more information about any of the topics covered in this update please contact Nicholas Hall by clicking here.

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