



## Hewitsons' Employment LEGAL UPDATE

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### **Discrimination & Redundancy following Sickness Absence**

In the recent case of *Charlesworth v Dransfields Engineering Services Ltd*, the Employment Appeal Tribunal (EAT) considered whether an employee's redundancy following disability-related sickness absence amounted to discrimination arising from disability.

Mr Charlesworth was a branch manager at Dransfields Engineering Services Ltd (DES). Following a fall in profits, from 2012 onwards DES were looking into how it could cut costs. In October 2014, Mr Charlesworth had an operation for cancer, causing him to be absent from work for two months before returning full-time. During Mr Charlesworth's absence, DES identified that it could save £40,000 annually by reallocating Mr Charlesworth's responsibilities amongst the existing branch staff and making Mr Charlesworth's role redundant. Following Mr Charlesworth's return to work, DES went through a redundancy consultation process as a result of which Mr Charlesworth was given notice of redundancy in April 2015. Mr Charlesworth filed various claims against DES including unfair dismissal, direct disability discrimination and discrimination arising from disability.

The Employment Tribunal (ET) rejected Mr Charlesworth's claims. Specifically relating to the claim of discrimination arising from disability, whilst the ET accepted there was a link between Mr Charlesworth's disability-related sickness absence and his dismissal (on the basis it highlighted they could function without covering his role), this was not the same as saying that Mr Charlesworth was dismissed because of his sickness absence. Mr Charlesworth appealed to the EAT.

Dismissing the appeal, the EAT held that the ET had correctly applied the two-stage test, namely (1) there must be 'something' arising in consequence of disability; and (2) the unfavourable treatment must be because of that 'something'. The ET had therefore been entitled to find that Mr Charlesworth's redundancy was not "because of" his sickness absence from work; his absence merely provided the context for DES to identify the potential to make cost savings by making Mr Charlesworth's position redundant.

## **Restrictive Covenants & Enforceability of Non-Compete clause**

In the case of *Egon Zehnder Ltd v Mary Caroline Tillman*, the High Court considered the enforceability of a non-compete clause where an employee had been recruited at a relatively junior level but had been through a series of successive promotions without the employee's original contract containing the restrictive covenants being updated.

Mrs Tillman, a former successful investment banker, commenced employment with Egon Zehnder Ltd (EZ) an executive search company in January 2004, initially as a consultant (a relatively junior role) in the financial services group.

On recruitment, Mrs Tillman was seen as a "significant prize" and it was expected that Mrs Tillman would rise through the ranks quickly given her previous distinguished career. Following the commencement of her employment, Mrs Tillman went through a series of quick, successive promotions including to principal, partner, Global Head of Investment Banking and finally Co-Global Head of the Financial Services Practice Group in 2012. At no point was Mrs Tillman asked to sign up to a new contract.

Mrs Tillman resigned from her employment with EZ in January 2017. A week after her resignation EZ terminated Mrs Tillman's employment with immediate effect and paid her in lieu of the balance of her notice. Mrs Tillman notified EZ that she wished to start working for Russell Reynolds Associates (RRA), a competitor, on 1 May 2017.

EZ applied for an injunction on the basis Mrs Tillman would be in breach of the 6 month non-compete clause contained in her employment contract originally entered into in 2004 at the outset of her employment with EZ. If valid, the non-compete clause would prevent Mrs Tillman from taking up employment with RRA, and indeed any other competitor, until 30<sup>th</sup> July 2017.

Mrs Tillman argued that the non-compete clause was unenforceable as it went wider than was reasonably necessary to protect EZ's legitimate business interests. Not only was there no limit in terms of the territory the restriction applied to but preventing Mrs Tillman from being "interested" in a competing business would prevent her from having a minor shareholding for investment purposes. Mrs Tillman argued this was too wide in light of her original, more junior role as a consultant.

Upholding the enforceability of the restrictive covenant, the High Court (HC) granted an injunction restraining the breach. The HC accepted that EZ had legitimate business interests requiring protection. The nature of EZ's business led to EZ employees becoming very close to clients, constituting a valuable resource for EZ. The cross-border involvement of employees with other group companies also meant that employees could gain access to confidential information and client connections in other jurisdictions. The correct approach was to determine the reasonableness of the non-compete clause at the date of the contract by reference to the employee's status at that time and what was contemplated by the parties as a result of that. As it was in the parties' contemplation at the date of the contract that Mrs Tillman would have a significant level of client engagement and involvement with strategic matters (the HC finding on the evidence that Mrs Tillman was "a bit special" and there had been high hopes for her future from the outset of her employment), the HC held that the non-compete restriction was justified and the 6 months' duration was appropriate.

## WHAT TO LOOK OUT FOR

### Pensions Regulator Completes Auto Enrolment Spot Checks on Employers

The Pensions Regulator has carried out spot checks in Greater Manchester to ensure employers are complying with their automatic enrolment duties. Inspection teams visited dozens of businesses in and around the city to check that qualifying staff are being given the workplace pensions they are entitled to.

The move is part of a nationwide enforcement campaign which began in London to ensure employers are meeting their automatic enrolment duties correctly. Visits will begin in other towns and cities across the UK in the following weeks.

The spot checks will highlight employers who have not taken the required steps to become or remain compliant, paving the way for enforcement action.

### Employment Law Changes: Queen's Speech 2017

The Queen's Speech on 21st June set out details of legislation the government intends to introduce in the 2017-19 Parliamentary session. The key issues for employers to watch out for include:

- **Discrimination & Gender Pay Gap** – the government intends to make further progress in reducing discrimination and tackling the gender pay gap. Whilst no new measures were announced, existing measures including the introduction of gender pay gap reporting and shared parental leave were referenced.
- **Taylor Review** – it was recognised that the Taylor Review (an independent review into the rights of self-employed and gig-economy workers) is a vital step towards ensuring fairness for all.
- **National Living Wage (NLW)** – it is proposed that the NLW will increase to 60% of median earnings by 2020. After 2020, the NLW will continue to rise in line with average earnings.
- **Immigration** – a new national policy on immigration, including new powers concerning the immigration status of European Economic Area (EEA) nationals, will be established by The Immigration Bill. The migration of EEA nationals and their family members will be made subject to relevant UK law after Brexit.
- **Data Protection** – a new Data Protection Bill will make the UK's data protection framework fit for the digital age and give individuals more control over their data, including the right to be forgotten. It will replace the Data Protection Act 1998 and implement the EU General Data Protection Regulation, putting the UK in a position to maintain the ability to share data with EU member states after Brexit.

For more information about the features in this update please contact Nicholas Hall on 01604 233233 or [click here](#) to email Nick.





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