UK Employment Law Round-up

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Welcome to the August edition of our UK Employment Law round-up. It's been a busy time in the employment world, with the Supreme Court's decision on Employment Tribunal fees making "breaking news" headlines, gender pay gap back in the spotlight with the BBC's report on the pay of its top stars, and the fallout from the publication of the Taylor Review in July. Issues around the gig economy are still live, with Addison Lee being the latest company to have been found to have wrongly categorised its workforce.

In this issue, we consider the Supreme Court's ruling and some of the other recent significant cases addressing the application of TUPE post-share purchase, the whistleblowing "public interest" test, the latest instalment in the holiday pay saga and some of the nitty gritty points of construction of post-termination restrictive covenants.

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In this issue...

Supreme Court holds Employment Tribunal fees are unlawful

In what has been described as the biggest news in employment law in the last 50 years, on 26 July 2017, the Supreme Court ruled that the Employment Tribunal fees regime introduced controversially in 2013 was unlawful.

The decision was surprising, partly because UNISON, who brought the claim, had lost the three previous hearings in the lower courts. However, it was also surprising because it was based first and foremost on profoundly English common law principles relating to the constitutional right of public access to justice, and only secondarily on EU law and European human rights principles. As such, the ruling has been described as "*Brexit-proof*".

The lead judgment even cites Magna Carta as a guarantee of access to courts, which administer justice promptly and fairly: "*Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam*" ("We will sell to no man, we will not deny or defer to any man either Justice or Right.")

In reaching its decision, the Court reviewed the evidence regarding the effect of fees on Tribunal claims, noting: "*... a dramatic and persistent fall in the number of claims ...*" since fees were introduced three years ago.

The Court also observed that many claims are for modest amounts and that if: "*... fees of £390 have to be paid in order to pursue a claim worth £500 (such as the median award in claims for unlawful deductions from wages), no sensible person will pursue the claim unless he can be virtually certain that he will succeed in his claim, that the award will include the reimbursement of the fees, and that the award will be satisfied in full.*"

The introduction of Employment Tribunal fees has been regarded by many as a bar to proper access to justice. Particularly as fees are often payable at a time where the claimant would invariably be in the weakest of financial positions.

The Court noted that discrimination cases will typically cost more for claimants, because of the complexity of the claims and the time allocated for hearings. It found that Tribunal fees were contrary to the Equality Act 2010, as they disproportionately affect women, who are more likely to bring discrimination claims.

Readers should note the immediate practical effect: the 2013 Fees Order has been held unlawful and quashed so that, as from 26 July 2017, fees have ceased to be payable for Employment Tribunal claims and appeals to the Employment Appeal Tribunal. Moreover, the Lord Chancellor has given an undertaking to reimburse all fees previously paid.

UNISON has estimated that the government will have to refund more than £27 million to the thousands of people charged for bringing claims in the Tribunal since July 2013.

It is worth noting that the Court stressed that the key issue was not that there were fees in place. It was the fact that the level of fees introduced made no sense other than to deter people from enforcing their statutory rights.

The Supreme Court confirmed that fees would be lawful so long as they were not indirectly discriminatory (or justified if they were) and: *"... if set at a level that everyone can afford, taking into account the availability of full or partial remission."*

As such, it remains to be seen whether there will be a return to the pre-2013 level of Tribunal claims or whether the government will attempt to re-introduce fees in a different form.

TUPE transfer after a share purchase

ICAP Management Services Limited v. (1) Dean Berry and (2) BGC Services (Holdings) LLP

It is generally accepted that the TUPE Regulations will not apply to a transfer of shares. This is because there is no change in identity of the employer following a share sale. All rights, duties and liabilities in connection with the employees' contracts of employment remain with their employer after the share purchase.

However, it is worth remembering that where a transferee intends to integrate its businesses following a share purchase, it should be aware of the risk of creating an internal TUPE transfer. The recent ICAP case, and the detailed judgment of Mr Justice Garnham, serve as a useful reminder of this.

Facts

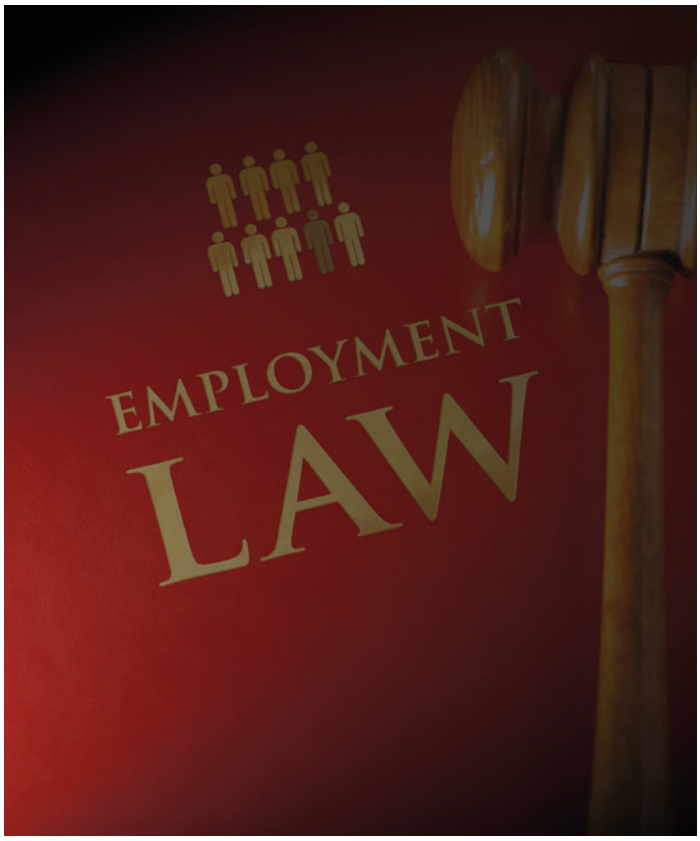
In *ICAP*, when Mr Berry wanted a quick release from a 12-month period of garden leave his employer had imposed on him, he sought to use the fact of a TUPE transfer to get out of his contractual obligations.

Where TUPE applies, employees have a right under the Regulations to object to the transfer, which means that their contract of employment will terminate on the transfer date, but the employee will not be treated as having been dismissed.

While Mr Berry had been serving out his notice on garden leave, the shares in his employer's parent company were sold to Tullet Prebon plc. After the share sale had been finalised, Mr Berry notified his employer that he considered that a TUPE transfer had taken place, that he had objected to the transfer and that his employment had terminated on the transfer date. ICAP naturally disagreed and sought and obtained an injunction upholding the garden leave clause.

Decision

The High Court held that, on an assessment of the facts, there had been no TUPE transfer that Mr Berry could object to. Mr Justice Garnham, however, provided some



helpful guidance as to when a TUPE transfer will be deemed to have taken place in the context of a share sale. Specifically, no TUPE transfer will take place unless the third party:

- has become responsible for carrying on the business;
- has incurred the obligations of employer; and/or
- has taken over the day-to-day running of the business.

The key question therefore is whether the third party has "*stepped into the shoes of the employer*".

The High Court stressed that the key issue in establishing whether or not a TUPE transfer has occurred or may occur will be around management and reporting lines. The Court will take a top-down approach to this analysis. In other words, where senior management reports into employees of the third party, this is, in itself, unlikely to suggest a TUPE transfer has occurred. However, where more junior employees are reporting directly into employees of the third party, this is highly likely to suggest that there has been a relevant transfer.

Practical impact

From a practical perspective, where integration post share purchase is proposed, the parties should consider how they structure the integration and how far they go with such integration. In some circumstances, it may actually be beneficial to structure the changes such that a TUPE transfer does in fact occur. However, the parties should be mindful of the consequences. For example, the obligation to inform (and potentially consult) pretransfer

will arise where TUPE applies. Further, there is a risk of employees objecting to the transfer and being released from their contractual obligations.

In other circumstances, the parties may wish to avoid a TUPE transfer (for example, because of undesirable tax or fiscal consequences). In those circumstances, the parties should think carefully about how they restructure and what level of ostensible authority they wish to clothe the employees of the acquired business with. New business cards and email addresses are likely to be a no-no.

Whistleblowing: the public interest test

Chesterton Global Ltd v. Nurmohamed

The Chesterton case has been doing the rounds for a number of years. The facts are relatively straightforward but the principles involved are highly important.

Facts

Mr Nurmohamed and around 100 of his colleagues had profit-based commission arrangements in place. Mr Nurmohamed made a number of complaints that the company was deliberately manipulating its accounts by overstating its actual costs and liabilities, in order to reduce the commission payments. Mr Nurmohamed was dismissed and brought a number of claims, including a claim under the whistleblowing legislation. The key question in the claim was whether or not Mr Nurmohamed's disclosure was in the public interest.

In June 2013, the whistleblowing legislation was amended to require that, in order to benefit from protection, a worker must have reasonably believed that he or she was making the disclosure "in the public interest". The scope of this test has been hotly debated since the changes were introduced and Chesterton was the first appeal case to consider the issue.

Decision

The Court of Appeal dismissed the employer's appeal and has, effectively, confirmed that the threshold for meeting the public interest test may be relatively low. The Court noted that parliament had chosen not to define what "the public interest" means in the context of a protected disclosure, and it must therefore have intended employment tribunals to apply it "as a matter of educated impression". Essentially, there are no absolute rules as to what can be in the public interest.

The Court also noted that public interest and personal interest may not be mutually exclusive. It held that, in a whistleblowing case where the disclosure relates to a personal matter (such as breach of the whistleblower's contract), there may nevertheless be features of the case that make it reasonable for the worker to regard disclosure as being in the public interest as well as their own personal interest. This will be largely fact specific. The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.

Perhaps controversially, the Court also noted that belief in the public interest need not be the predominant motive for making the disclosure, or even form part of the worker's motivation. The statute uses the phrase "*in the belief...*", which is not the same as "*motivated by the belief...*".

From a practical perspective, the Court cited its approval for the four factors proposed by Mr Nurmohamed's counsel as a "*useful tool*" to help assess the reasonableness of a worker's belief that disclosure was in the public interest:

- the numbers in the group whose interests the disclosure served;
- the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed;
- the nature of the wrongdoing disclosed; and
- the identity of the alleged wrongdoer.

In Chesterton, the Court found that the disclosure related to deliberate wrongdoing, which, together with a number of other factors, was likely to render Mr Nurmohamed's belief that the disclosure was in the public interest reasonable.

Practical impact

The decision has been seen as a win for whistleblowers and a warning for employers. However, Underhill LJ did sound a note of caution to tribunals not to offend the "broad intent" behind the public interest test, which was to prevent whistleblowing laws being used in the context of "private workplace disputes", where none of the other factors pointing towards a public interest element are present.

Holiday pay: voluntary overtime

Dudley Metropolitan Borough Council v. Willets and ors

The issue of holiday pay has been back in the courts.

Following the EAT's decision in Bear Scotland and the Court of Appeal's decision in Lock, it's fairly clear that statutory holiday pay derived from the Working Time Directive should be based on "normal remuneration", and must include:

- payments intrinsically linked to the performance of the tasks which the worker is required to carry out under their contract of employment;
- payments which relate to the worker's professional and personal status; and
- an amount to reflect the contractual results-based commission a worker ordinarily receives.

In other words, holiday pay should include commission, guaranteed compulsory overtime, "non-guaranteed overtime" and, potentially, bonus.

Facts

In Dudley, the EAT has upheld a Tribunal's decision that regular payments for voluntary overtime should also be taken into account in calculating employees' holiday pay.

The case involved a group of 56 employees with set contractual hours. In addition, the employees volunteered to perform additional duties which their employment contracts did not require them to carry out.

The EAT noted that this work was done almost entirely at the whim of the employee, with the Council having no right to enforce work. Notwithstanding that, the employees sought to argue that their holiday pay should, amongst other things, reflect the voluntary overtime.

At first instance, the Tribunal held that the voluntary overtime payments were paid in such a manner, and with sufficient regularity, to be considered part of normal remuneration and should, accordingly, be included for the purposes of calculating holiday pay.

Decision

The Council appealed to the EAT and the EAT dismissed the appeal. The EAT noted that the ECJ in British Airways plc v. Williams and ors had set down the overarching principle that holiday pay should correspond to "normal remuneration" so as not to discourage workers from taking leave, and that the division of pay into different elements cannot affect a worker's right in this regard. In order to be considered "normal" a payment must have been paid over a sufficient period of time. This will be a question of fact and degree.

The Council sought to assert that overtime payments were not "normal remuneration" because they lacked an intrinsic link to the performance of tasks required under the employment contract.

The Tribunal held at first instance that if there is an intrinsic link between the payment and the performance of tasks required under the contract, this will be decisive in that the payment should be included as part of "normal remuneration". However, whilst this was a decisive criterion, it was not the only determinative criterion, and the absence of such a contractual link does not automatically mean that a payment need not be taken into account.

The EAT agreed, rejecting the Council's narrow interpretation. In any event, on the facts, the EAT found a clear link between the payments and the performance of the workers' duties because, when they were working the overtime, they were essentially performing the same tasks as under their contracts.

Practical impact

We'll have to wait to see whether this decision will be appealed, but the direction of travel seems to be clear from the prevailing case law. As a rule of thumb, if voluntary overtime payments are regularly made to employees, it is highly likely that they should be included for the purposes of calculating holiday pay.

Non-compete post-termination restrictions: de minimis carve-out

Tillman v. Egon Zehnder Limited [2017] EWCA Civ 1054

We considered the case of Tillman in our last edition of the newsletter but it's back again. Ms Tillman has successfully appealed to the Court of Appeal, which has made a finding that her non-compete restriction was impermissibly wide, and therefore void.

The case of Tillman is a cautionary tale and a reminder of the importance of the construction and drafting of post-termination restrictions.

Facts

Ms Tillman was hired by Egon Zehnder in January 2004. She was hired into a relatively junior post but with a view that she would quickly progress and work her way up the ranks in the business. Ms Tillman's contract included a six-month non-compete post-termination restriction in the following terms:

> *"13.2.3 [You shall not...at any time within the period of six months from the Termination Date] directly or indirectly engage or be concerned or interested in any business carried on in competition with any of the businesses of the Company or any Group Company which were carried on at the Termination Date or during the period of twelve months prior to that date and with which you were materially concerned during such period."*

As anticipated, Ms Tillman was quickly promoted a number of times, ultimately becoming co-Global Head of the Financial Services Practice Group in 2012. Ms Tillman was not required to sign a new employment contract upon any of her promotions.

Ms Tillman left Egon Zehnder in January 2017 and notified the company that she wished to start work for a competitor in New York on 1 May 2017. Egon Zehnder successfully sought to enforce Tillman's non-compete. The High Court upheld the non-compete restriction and granted the company an injunction restraining the breach.

As set out in our last newsletter, the focus of the High Court decision was on whether or not the post-termination restrictions were reasonable at the time the contract was entered into. The High Court held that in deciding whether a restriction was reasonable, the court had to consider what was in the contemplation of both parties, and that could have included an expectation of promotion in the future. On the facts, the High Court found that the protection sought by Egon Zehnder was no more than was reasonable.

The High Court did, however, also consider two points of construction. Ms Tillman argued that the lack of territorial limitation made the restriction unenforceable, and that being "interested" in a competing business was too wide as it could prevent her from holding a minor shareholding in a competitor for investment purposes.

On the second point, counsel for Egon Zehnder noted that the restrictions during employment contained in Ms Tillman's employment contract included an express provision allowing a 5 per cent shareholding in publicly quoted companies. He said that "*it would be commercially anomalous if the non-compete covenant restricted all shareholdings...because then the post-termination restrictive covenant would be wider than the obligations during employment*". He therefore submitted that the words "interested in any business" should be construed so as not to capture a minor shareholding. The High Court agreed with this analysis and found that the clause was not void for being wider than reasonably necessary.

Decision

The Court of Appeal disagreed and has upheld Ms Tillman's appeal.

The Court found that it was impossible to say that a shareholder in a company was not "*interested in*" that company in accordance with conventional usage. The Court referred to the case of CEF Holdings Ltd v. Mundey [2012] IRLR 912, in which the High Court held that the words "interested in" cover holding one share in a publicly quoted company, and that a restraint including that phrase was therefore impermissibly wide.

The Court of Appeal held that the principle that a court should prefer the construction of a clause that would be enforceable (if legitimate) only applies where there is genuine ambiguity. On the wording of the clause in this case, the Court found that there was no such ambiguity.

Counsel for Egon Zehnder sought to argue that the words "*or interested in*" could be severed from clause 13.2.3, leaving a valid restriction. This argument was swiftly dismissed by the Court for two reasons. First, even if the words "*or interested in*" were removed, the restriction would still be too wide, since being a shareholder in a competitor is likely to involve "*being concerned in*" that business, at least indirectly. And second, it is settled law that the constituent parts of a single covenant cannot be severed.

Practical impact

This case highlights the importance of including *de minimis* provisions (which allow the holding of minor shareholdings as an investment) in the drafting of both restrictions during employment and postemployment, and ensuring that those provisions are consistent.

In other news

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In the press

Dentons' Employment team has had a couple of articles published in key trade publications on this month's topical employment issues. Victoria Albon, associate, wrote an article on how to get to grips with data protection and Emma Naughton, associate, examines two recent cases on the tricky issue of which country's courts have jurisdiction to hear an international worker's employment claims, published in Employment Law Journal.

Getting to grips with new data protection law - http://www2.cipd.co.uk/hr-inform/comment-and-analysis/legal-round-up/newsletters/july-2017.aspx

Published by CIPD, written by Victoria Albon, 13 July 2017

The General Data Protection Regulation (GDPR) will come into force on 25 May 2018, replacing the Data Protection Act 1998 (DPA). The ways in which we use and share data have changed so much that the existing legislation is somewhat archaic. European Union (EU) governments have imposed the legislation in a variety of ways across the EU, which makes cross-border data sharing more complex than necessary.

TERRITORIAL JURISDICTION: Location, location, location - http://lawjournals.co.uk/journals/employment-law-journal

Published by Employment Law Journal online, written by Emma Naughton, 14 July 2017

As the workforce continues to become more mobile and global, it is not always clear which country's courts or tribunals should hear an employee's claims. This article looks at the possible impact of two recent cases dealing with the issue of territorial jurisdiction.

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