UK Employment Law Round-up

December 2016 | Volume 1 - Issue 11

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Welcome to the December edition of our employment law round-up. In this edition, we couldn't fail to give you an update on the most important piece of constitutional litigation of our time, which has been heard by the Supreme Court on Article 50. Other festive treats include a summary of recent restrictive covenants cases (first published on HR-Inform) and unfair dismissal litigation. We have also given you our take on calculating rest breaks for workers, and the dangers of using employees' personal data unlawfully.

High Court Brexit ruling: the government cannot trigger Article 50 without parliamentary approval

The High Court in *R(Miller) v. Secretary of State for Exiting the European Union* has held that the UK government cannot trigger Article 50 of the Treaty on the European Union (TEU) without parliamentary approval, in the most important constitutional decision in recent years. The case has since been considered again by the Supreme Court.

Legal background – Brexit and Article 50

Following the Brexit referendum vote on 24 June 2016, there has been controversy and uncertainty about the process for leaving the EU. Article 50 TEU sets out the procedure by which a member state can leave the EU. The member state must notify the European Council of its intention to leave, and this is then followed by a two-year negotiation period for its exit.

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The legal issue in question in this case was whether the government can trigger Article 50 without obtaining parliamentary authorisation, or whether it can instead rely on its royal prerogative powers without the need for such authorisation. The Claimants, Gina Miller and others, in this case argued for the former, and the Defendant, the government, argued for the latter.

The government's case: the royal prerogative

The government argued it can lawfully exercise its royal prerogative powers and leave the EU without the need to consult parliament. The royal prerogative powers are special powers that the Crown (or ministers acting on behalf of the Crown) has which mean that it does not need to consult with Parliament. Often, the conduct of foreign affairs and the making or breaking of treaties involve the use of these special powers. Further, nothing in EU law domestically limits their use.

The government argued that in exercising its powers, it is acting in accordance with the will of the majority of the population, as evidenced in the referendum result. The Referendum Act 2015 is silent on the issue of whether legislation needed to be passed to give notice under Article 50, but the government argued that it could be implied that it could act using its prerogative powers.

The Claimants' case: parliamentary approval

The Claimants based their case on Article 50(1), which requires that when a member state leaves the EU it must do so in accordance with its constitutional requirements. The Claimants contend that it is a constitutional requirement under the European Communities Act 1972 (ECA 1972) that the UK must obtain parliamentary authorisation in the form of an Act of Parliament.

The Claimants also raised the issue of timing. Both parties agree that triggering Article 50 is irreversible; and that it will be too late for Parliament to vote once the exit terms have already been negotiated with the EU.

The High Court decision

The Court agreed with the Claimants and held that the royal prerogative powers do not give the government authority to trigger Article 50 without parliamentary approval. The Court held that there was a conflict of constitutional principles in this case; but that the supremacy of Parliament is constitutionally higher than the royal prerogative powers. Further, the ECA 1972 had a fundamental impact on domestic law, to the extent that it cannot have been Parliament's intention for the rights it created to have been subject to changes via the royal prerogative powers.

Finally, the Court did not uphold the government's argument that the referendum result gave it an implied mandate to exercise its royal prerogative powers. The Referendum Act 2015 only made provision for an

"advisory referendum", i.e. that the vote is powerfully influential but not legally binding on the government.

The High Court also made clear that its ruling was a legal, not a political one, and it did not reflect upon the merits of leaving the EU.

What next? Supreme Court appeal

The government has appealed the High Court decision and its case has been heard by the Supreme Court, with judgment expected in January 2017.

Its grounds for appeal are broadly the same as its High Court case: (1) the referendum legislation had been passed with a clear expectation that the government would implement the result; (2) the use of royal prerogative powers to trigger Article 50 would be a "classic exercise" of the powers; and (3) the ECA 1972 is a "conduit" or vehicle by which rights came into UK law but these can be amended or removed through use of the royal prerogative.

This is a divisive and high profile case which we will be monitoring as it unfolds.

Do you need to make sure your workers take a break during the workday?

Under UK law, the starting point is that a worker is entitled to a rest break of 20 minutes, where he or she works for more than six hours a day (Regulation 12(1), Working Time Regulations 1998 (the WTR)). If an employer refuses to permit a worker to take a rest break, then the worker can bring a claim in the employment tribunal (Regulation 30, WTR).

Previous EAT authorities have held that a literal interpretation must be taken in deciding whether or not

an employee can bring a claim for a failure to provide a rest break under the WTR (principally the decisions in *Miles v. Linkage Community Trust Ltd* [2008] IRLR and *Carter v Prestige Nursing Ltd* UKEAT/0014/12). This literal interpretation required (i) a positive assertion by a worker of his or her right to have a rest break and (ii) a positive refusal by the employer to accommodate the worker's right. This approach may have led to the unsatisfactory situation where, if an employer failed to respond to a worker's request for a rest break, rather than positively refusing it, through no fault of the worker, he or she may have been unsuccessful in bringing a claim.

More recently in the case of *Grange v Abellio London Ltd [2016]* UKEAT 0130/16/1611, the Court has departed from this literal interpretation in favour of a purposive approach. Mr Grange's role was to record the arrival and departure times of a bus service for Abellio London Ltd (Abellio). Over time, Mr Grange's working hours were changed, and whilst he previously worked for eight hours with a half hour lunch break, his new working hours meant that he worked for eight hours uninterrupted (with the intention that employees could leave work half an hour sooner at the end of the working day). Approximately two years after the change to Mr Grange's working hours was made, he raised a grievance with Abellio that this health had deteriorated because of the lack of a rest break. Mr Grange's grievance was rejected and he brought a claim at the Employment Tribunal.

At first instance, the Employment Tribunal followed the literal approach preferred in the cases of *Miles* and *Carter*. The Employment Tribunal held that, as Mr Grange had not satisfied the two-step approach outlined above (namely positively asserting his right to a rest break, which the employer subsequently refused), then Mr Grange could not be successful in his claim. Mr Grange appealed to the Employment Appeal Tribunal (the EAT).

The EAT permitted Mr Grange's appeal, and remitted the matter to the Employment Tribunal for reconsideration.

The EAT considered the wording of the WTR and determined that, in simple terms, the WTR provided Mr Grange with an entitlement to a rest break and the opportunity to enforce that right if Abellio refused him a rest break. Nowhere in the WTR did it say that an explicit refusal must be given by an employer before a worker could bring a claim and, in that respect, the earlier authorities which took a literal approach applied an additional hurdle for an employee to bring a claim which was not required by statute. Consequently, the EAT preferred the observations of the Advocate General in *Commission v. United Kingdom* (Case C484/04) [2006] ECR 1-7471 which were approved in another EAT authority (*Scottish Ambulance Service v. Truslove* UKEAT/0028/11) that it is not enough for an employer to take a passive role in affording rest breaks to workers, and instead employers have a "*duty to afford*" rest breaks to them.

We suggest that employers take a fresh look at current working arrangements with staff. Employers need to make sure that you positively afford them the opportunity to take a rest break if they so wish. Of course, some workers may choose not to take a break, but so long as you are not stopping them from taking a break, it is unlikely that they will complain about the lack of a rest break nor should they have grounds for bringing a claim.

Statutory Maternity Pay must be expressly referred to in settlement agreements

The case of *Campus Living Villages UK v. HMRC and Sexton* is a reminder to employers that, if a Statutory Maternity Payment (SMP) is included in a settlement agreement, this must be made clear.

Facts

Ms Sexton, the Head of Finance at Campus Living Villages UK (CLV) was made redundant whilst she was pregnant. Ms Sexton claimed against the appellant for unfair dismissal and pregnancy dismissal. The claim was settled in a COT3 Form following conciliation by ACAS.

Ms Sexton was owed an SMP payment even though she was no longer going to be an employee at CLV, as she was made redundant within 11 weeks of her due date. During negotiations, Ms Sexton initially calculated that her entitlement to "maternity pay entitlement" was £41,143.45, which was calculated with reference to her salary during maternity leave, rather than an SMP calculation.

The claim was compromised and she was ultimately paid £60,000 by CLV. Ms Sexton's settlement agreement confirmed that the settlement applied to "all and any

claims" and that it was not limited to the legislation set out in the agreement. CLV had intended this settlement to be full and final, including SMP, but the agreement did not specifically refer to SMP.

Ms Sexton subsequently complained to HMRC that she had not received her SMP.

Decision

HMRC held that Ms Sexton was entitled to receive an SMP payment, and that the apportionment for "maternity pay entitlement" in the settlement agreement was not SMP, as it did not explicitly refer to SMP. Further, if the employer had wanted to pay SMP, then tax and national insurance contributions should have been deducted, and they were not.

HMRC also noted that CLV should have taken into account a £44,000 bonus payment which Ms Sexton had received during the eight-week reference period for SMP. Under current legislation, any earnings, including discretionary bonuses or other one-off payments, are included in the calculation of SMP if they happen to fall within the reference period. It does not matter that such payments are not "usual" earnings.

CLV appealed HMRC's decision to the First Tax Tribunal (FTT), on the grounds that: (1) it had implicitly included SMP in its settlement payment; (2) the bonus payment should not have been included; and (3) an ACAS officer had approved the settlement agreement. The FTT upheld HMRC's decision on each point. It commented that it was "unfortunate" that CLV was incorrectly advised by ACAS, but that HMRC was correct in its decision.

Comment

This decision illustrates the need for employers to be careful when paying SMP under a settlement agreement. If it is not explicitly referred to in the agreement, employers could face unexpected payment requests from HMRC.

If SMP is to be paid under a settlement agreement, employers should ensure the following:

- SMP is expressly referenced and includes a breakdown of how it was calculated in a settlement agreement;
- tax and national insurance contributions are deducted in respect of SMP, and this is expressly stated;
- if any one-off or irregular payments (e.g. bonus) are made during the eight-week reference period, these must be included in SMP calculations; and
- even if an ACAS officer has assisted with or approved a settlement agreement, this will not affect HMRC's application of the law, and so cannot be relied upon as a failsafe.

A wealth of recent unfair dismissal decisions

Seasonal businesses can have a tough time if they try to sell ice cream in the UK in the winter or turkeys in the middle of summer. Conversely, when seasonal businesses are at peak time, employees and businesses are faced with additional pressure to provide goods and services, often within very short timeframes. This article summarises three recent unfair dismissal cases, including a tricky situation faced by such a seasonal business.

Christmas hamper gate

The busiest time of year at food company, Bramble Foods Ltd (Bramble), is the two-month period from mid-September each year when they produce Christmas hampers. Bramble's employment terms include a standard provision that employees are required to work additional hours when required by the business. Bramble took the decision to formalise its overtime arrangements with its employees by requiring employees to choose four to eight Saturday mornings that they could work during this busy period. Mrs Edwards was the only employee who refused to work any Saturdays at all.

Bramble was extraordinarily patient in attempting to get Mrs Edwards to agree to this management instruction to work some Saturday mornings. Bramble had several informal discussions with her explaining that, if all the employees split the workload between them, the business could meet its tight supply deadlines. In response, Mrs Edwards continued to refuse to work additional hours, as she wanted to spend her weekends with her husband and boasted to her colleagues that, while they would be working, she would be enjoying a lie-in.

Mrs Edwards was ultimately dismissed by Bramble, following several complaints from her colleagues. One of the principal reasons that Bramble dismissed her was because of its belief that a number of its other employees would renege their consent to weekend-working and Mrs Edwards was a real threat to fulfilling its Christmas orders.

Mrs Edwards brought an employment tribunal claim which she lost. Despite a number of minor procedural flaws, the tribunal found that she was fairly dismissed,

as she had no legitimate reason for refusing what she accepted was a reasonable management instruction. Dismissal was therefore within the range of reasonable responses. While this is only a first instance decision, it will come as some relief to employers who bend over backwards to manage difficult employees. It is noteworthy, however, that Mrs Edwards had no good reason for refusing to work on Saturday mornings. The outcome might have been different if, for example, she had family or religious commitments which could give rise to arguments around indirect discrimination. (*Edwards v. Bramble Foods Limited* ET/20610556/2015).

Effect of "manifestly inappropriate" disciplinary action

Our second case deals with the situation where an Employment Tribunal has held that disciplinary action taken by an employer is "manifestly inappropriate", and whether it is in the Employment Tribunal's remit to further determine whether, if different disciplinary action had been taken by an employer, the employer could have dismissed an employee.

Mr Bandara had an exemplary record at the BBC, where he had worked for 18 years. On 23 July 2013, Mr Bandara decided to put a story on the birth of Prince George on the backburner, partly because that day was also the 30th anniversary of Black July (a remembrance day in his native Sri Lanka). Although Mr Bandara later published the story, he was subjected to disciplinary action and given a final written warning. The BBC then commenced further disciplinary investigations into Mr Bandara's behaviour (including allegations that he had bullied junior colleagues) and summarily dismissed him a short while later. Mr Bandara brought claims in the Employment Tribunal for unfair dismissal, racial and religious discrimination.

At first instance, the Employment Tribunal decided that the decision to give Mr Bandara a final written warning was "*manifestly inappropriate*" and that the final written warning had been taken into account by the BBC when dismissing him. The Employment Tribunal then directed itself to consider whether, if Mr Bandara had instead been given a written warning (which it considered to be a legitimate disciplinary action in the circumstances), the decision to dismiss Mr Bandara would have been fair. The Employment Tribunal held that, in all the circumstances, Mr Bandara's dismissal would indeed have been fair.

Mr Bandara appealed to the EAT, which found that the Employment Tribunal had gone too far in considering whether it would have been appropriate to have dismissed Mr Bandara for a hypothetical written warning. The correct approach would have been for the Employment Tribunal to decide how much weight the BBC had given to the final written warning when deciding to dismiss Mr Bandara and the actual reason why Mr Bandara was dismissed.

On that basis, the EAT remitted the case to the Employment Tribunal for reconsideration. Mr Bandara was ultimately successful in his unfair dismissal claim (although his discrimination claims were dismissed), as the Employment Tribunal was satisfied that the dismissing manager was significantly influenced by the fact that Mr Bandara did not have a clean disciplinary record. Mr Bandara was subsequently awarded £50,000, which was halved due to his own contributory fault.

While Mr Bandara contributed to his own dismissal, it is not surprising that a final written warning in these circumstances was not appropriate for an employee with many unblemished years of service. We encourage employers to always consider, among other things, an employee's current disciplinary record and length of service in context before making any decisions to discipline an employee. (*Bandara v. BBC* UKEAT/0335/15/JOJ).

How will a "perfunctory and insensitive" redundancy consultation effect a dismissal?

This decision is a useful reminder to employers to take care if they are considering carrying out a sham redundancy process, and to point out the dangers of getting it wrong.

Mr Thomas had been employed by BNP Paribas since 1972, most recently as a Director in its Property Management Division. BNP Paribas decided to make Mr Thomas redundant and made a catalogue of errors in the process. For example, BNP "*insensitively*" got Mr Thomas's first name wrong in correspondence, and suggested alternative vacancies which did not exist. When Mr Thomas was made redundant, he appealed the decision on the basis that the process was a sham. Mr Thomas subsequently brought claims for unfair dismissal, age discrimination and disability discrimination.

Mr Thomas's claim for unfair dismissal was surprisingly rejected by the Employment Tribunal, even though it also found that BNP Paribas's redundancy process was handled in a perfunctory manner, with a lack of sensitivity. On appeal to the EAT, the EAT was concerned that the Employment Tribunal found that Mr Thomas's dismissal was within the range of reasonable responses even though it identified material flaws in the process.

The Employment Tribunal should have explained why it had reached its decision, and so the EAT remitted the case to a differently constituted tribunal. (*Thomas v. BNP Paribas Real Estate Advisory & Property Management UK Ltd* UKEAT/01344/16/JOJ).

Why restrictive covenants must be fit for purpose

This article was first published in HR-Inform: http://www2.cipd.co.uk/pm/peoplemanagement/b/weblog/archive/2016/12/06/why-restrictive-covenants-must-be-fit-for-purpose.aspx

For employers, the turn of the year is a double-edged sword: it is the best time to find new hires, but it's also an organisation's most vulnerable time of the year for losing key staff.

On such occasions, post-termination restrictions are an important tool in an employer's toolkit for protecting confidential information, trade connections and the stability of their workforce. However, the law on the enforceability of employment-related restrictive covenants is a minefield, and there have been a flurry of employee competition cases recently in the High Court, some of which have muddied the waters.

In *Decorus Limited v. (1) Daniel Penfold (2) Procure Store Limited* [2016] EWHC 1421 (QB), the court considered what constitutes an adequate "consideration" (payment or benefit necessary to form a contract) for a new post-termination restriction. The employee, Daniel Penfold, signed a contract with relatively onerous non-compete and non-solicitation clauses on joining the company, which were likely to have been unenforceable (as restraints of trade). A year later, he signed a new contract, in which the lifetime of these clauses was reduced from nine to six months. But had there been adequate payment for this change?

The facts here were similar to those in another case, *Re-Use Collections Ltd v. Sendall & Anor* [2014] EWHC 3852 (QB). In both cases, there was a gap of three weeks between the employee signing the new contract and receiving a pay rise. In *Sendall*, the judge held it had not been made clear to the employee that the pay increase depended on him accepting the new contract, so the restrictions were unenforceable. In *Decorus*, the restrictions were held to be valid (although the decision is not binding). Perhaps the difference was that, in the 2014 case, the new contract introduced new restrictions, whereas in the later case, the variation only amended an existing restriction.

It is worth noting that, paradoxically, a variation that introduces what appears to be a less onerous restriction may actually be more onerous for the employee, because it is more likely to be enforceable.

Whether a restriction is enforceable or not will be judged at the time a contract is made, not when that restriction is enforced. In *Pickwell and Nicholls v. Pro Cam CP Limited* [2016] EWHC 1304 (QB), two trainee agronomists moving to a competitor claimed their non-solicit and non-dealing restrictions were unenforceable, as they were drafted too widely, given the junior nature of the roles. The trainees were expected to acquire knowledge and develop skills, and were exposed to confidential and commercially sensitive information during their training. Even though the restrictions were drafted widely, the court held they were enforceable. Both the employer and the trainees knew the training period was just an initial phase at the time the contract was signed and that the trainees would become fully qualified in the near future. It was, therefore, reasonable for the parties to make provision for the future when the contract was made.

This decision contrasts with the result in *Bartholomews Agri Food Limited v. Thornton* [2016] EWHC 648, which involved a non-compete clause imposed on a trainee agronomist, preventing him from competing with any of the company's customers, even though he only dealt with a fraction of them. This was held to be unenforceable, partly because the terms were inappropriate for such a junior employee at the time the contract was made, and partly because the drafting was far wider than necessary to protect the company's business interests.

These decisions emphasise the importance of ensuring restrictions are carefully drafted and tailored to individual circumstances. Employers need to identify what legitimate interest requires protection, and then ensure that the restriction is no wider than necessary to protect it. The key issues to consider are duration, scope and geographical extent. What might be appropriate for a senior employee may be inappropriate for a junior one, so employers should consider updating restrictions when employees are promoted, and offering some form of payment for the change. Simply continuing to employ the employee is unlikely to be enough.

Employees' personal information must not be used unlawfully by employers

The case of *Brown v. Commissioner of Police for the Metropolis* is a reminder to employers that it is unlawful to use employees' personal information for anything other than its intended purpose.

Background

Under the Data Protection Act 1998 (DPA), personal information is any data which relates to any individual that will identify that individual. It can also be data or information which a data controller holds in relation to an individual, or is likely to hold. Personal information can include any opinion given about the individual and any indication of the intentions of the data controller or any other person in respect of that individual.

Facts

The Claimant, a police officer, was on sick leave from her employment at the Defendant, the Metropolitan Police Service (MPS). Whilst on sick leave, the Claimant breached police procedures and travelled to Barbados with her daughter. She did not notify her manager of her travels, and the MPS brought disciplinary proceedings against her.

To obtain evidence for use in the proceedings, the MPS requested the Claimant's personal information from the National Border Targeting Centre and from the airline with which she had travelled. The MPS received the Claimant's flight details, passport photograph, date of birth, name and information about her daughter.

Decision

The County Court held that the MPS had unlawfully obtained the Claimant's personal information. The Claimant was awarded £9,000 in compensation.

The damages were awarded in respect of:

- **Article 8, Human Rights Act 1998:** the MPS breached the right to respect for private and family life from interference by a public authority. The police should be acutely aware of its responsibilities in respect of this right.
- **Section 13 (1)/(2) DPA 1998:** the Claimant was entitled to compensation for damage suffered in respect of any breach by a data protection officer. "Damage" in this case took the form of the distress suffered by the Claimant.

The damages in this case were notable. The court noted the difficulty in determining the amount that should be awarded in respect of distress. The guidance from the High Court, whilst used, started at a minimum of £10,000, which was disproportionately high in this class of case. The award was set at £9,000 in light of the absence of any repeated misuse of the personal data and the fact that it was not obtained with any intent to injure or embarrass the Claimant.

Comment

This case is a reminder to employers to be careful when requesting their employees' personal information. Employers and staff must be aware of both what constitutes personal information and the purpose for which it was obtained. It is advisable to ensure that staff are aware of data protection laws and compliance training should be organised. It is notable that, in this case, the Defendant was the police force, an organisation which should be even more alert to the pitfalls of obtaining personal information unlawfully.

Whilst this case did not concern sensitive personal information, employers should also be aware that there are additional requirements for handling sensitive personal information. Most importantly, explicit consent of the data subject must be obtained unless the employer can rely on any of the limited specific exceptions as set out in Schedule 3 DPA 1998. These include where the data must be obtained under employment law, where it is required by a health professional, or if it is in the context of equal opportunity monitoring.

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Brand-1135-UKEmploymentLawRoundUpNewsletter_December-2016_final-20/12/2016