UK Employment Law Round-up

July 2017 | Issue 16

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Welcome to the July edition of our UK Employment Law Round-up. In this issue we look at five recent cases covering issues from multiple equal pay claims, to whistleblowing damages, to employees competing post-exit, to what happens when a court is faced with redundancy, sickness absence and disability discrimination. We also look at the latest on Brexit and immigration and summarise the current position in relation to EU citizens and their status in the UK.

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Redundancy, sickness absence and disability discrimination

In Charlesworth v. Dransfields Engineering Services Ltd the Employment Appeal Tribunal (EAT) upheld the Employment Tribunal's (ET) decision that Dransfields Engineering had not discriminated against the claimant by making him redundant after a period of disability-related sickness absence.

Facts

The claimant was off work for three months in 2014, after developing renal cancer. Dransfields had not been profitable since 2012, and so the company was looking to make cost savings. During the time that the claimant was off work the operations manager identified a way of restructuring the business which would remove the claimant's role, saving the company £40,000 a year. The claimant was subsequently dismissed by reason of redundancy, following consultation, in April 2015. The claimant chose not to appeal against his redundancy, however he subsequently brought claims for unfair dismissal, direct disability discrimination and discrimination arising from disability.

Decision

The ET found that, whilst there was a link between the sickness absence and the redundancy, the sickness absence was not a causative factor in his redundancy. The claimant's absence had highlighted the fact that the company could operate effectively without his role, however the ET held that this was not the same as his redundancy being because of his sickness absence. The ET therefore dismissed the claimant's claims.

The claimant appealed, arguing that it was sufficient to show a cause or influence that did not need to be a significant or an effective cause in order to meet the requirement in s15 Equality Act 2010 (EA 2010) that it was "because of something arising in consequence of disability".

The EAT dismissed the appeal noting that case law required the influence to be significant for the s15 EA 2010 requirements to be met and that it should be an influence or cause that operated on the mind of the discriminator (consciously or not) to such an extent that it could be deemed to amount to an effective cause of the action (here dismissal). The EAT did however note that, in many cases where absence causes an employer to conclude that they are able to manage without a particular employee, this is likely to be an effective cause of the decision to dismiss (even if not the main cause). However, the EAT then went on to say that just because this is the case it does not detract from the possibility on particular facts that absence is merely part of the context and not an effective cause, as was found to be the case here.

Practical impact

This case is in contrast to the case law to date relating to disability discrimination, where whether something could be said to have arisen in consequence of a disability has been interpreted widely in favour of claimants'. The decision is good news for employers, but it is worth bearing in mind that this case is also highly fact-specific. Where employers are in a similar situation they should note the reasons for the redundancy aside from realising that the role was not needed during the employee's absence. It is also worth noting that it is unlikely that a tribunal would have reached the same finding if the employee had been on maternity leave.

Do employees need to disclose intention to compete?

All employment contracts have an implied term ensuring that employees will serve their employer with good faith and fidelity. This implied term covers numerous things, including prohibiting employees from competing with their employer. However in MPT Group v. Peel the High Court found that employees are not under a duty to disclose their intention to compete post-termination.

Facts

One moderately senior manager resigned from MPT Group in order to go freelance, enabling a more flexible working routine. Another manager on a similar level also resigned and both were planning to leave at the same time. The employer became suspicious and so asked the managers what their intentions were after leaving the company. They both denied that they planned to set up a new business in competition with the company after their post-termination restrictions expired; this was actually exactly what they intended to do.

The company sought an interim injunction based on misuse of confidential information and upon breach of the duty of good faith based on the employee's failure to answer the questions truthfully.

Decision

The court noted that, while there was a general duty to answer questions truthfully, it was reluctant to hold that a departing employee is under a contractual obligation to explain his confidential plans to lawfully compete with the company after the expiry of his post-termination restrictions. The court found that the law will however step in to prevent unfair competition, to hold employees to enforceable restrictive covenants or to protect confidential information. However, as in this situation, ex-employees are free to set up a rival business upon the expiry of their restrictive covenants.

Practical impact

As long as employees observe their restrictive covenants, there is not much that a company can do in terms of preventing ex-employees from setting up rival businesses. Therefore it is a good reminder that employees' restrictive covenants should be properly drafted and tailored to each employee to ensure that legitimate business interests are protected for as long as is reasonable. The court did not consider it here, as there was no need, however it may well have reached a different conclusion had the employees been more senior and owed the company fiduciary duties, as such fiduciary duties would require the employees to disclose conflicts of interests and anything that could be detrimental to the company.

Non-compete clauses and employees destined for greatness

The case of Egon Zehnder Ltd v. Mary Caroline Tillman is another useful reminder to ensure that restrictive covenants are fit for purpose and, whilst in this case the covenants were upheld, it is also a reminder to ensure that on promotion, restrictive covenants are updated if necessary.

Facts

The employer in this case hires candidates already working in the field within which they want to operate, and as a result most new employees have established careers and experience. It recruits people initially as consultants, but employees may be promoted to principal and eventually to partner should they do well in their role. The claimant had a distinguished career in investment banking and was recruited as a consultant to work in the company's financial services group in 2004. The company viewed the claimant as "a considerable prize" and, as a result of this, her starting salary and guaranteed bonuses were higher than that of the average consultant for the company. The claimant rose through the ranks of principal and partner quickly, ending up in the position of co-Global Head of the Financial Services Practice Group in 2012, which accounted for 18 per cent of global billings. However, despite her multiple promotions she did not sign a new contract of employment at any stage.

The claimant resigned on notice, and shortly after this, the company terminated her employment and gave her payment in lieu of her remaining notice period. The claimant notified the company that she wanted to start working for one of the company's competitors. The company issued proceedings arguing, that the claimant's proposed actions would breach the six-month non-compete contained in her contract, and sought injunctive relief. There was no argument that her other post-termination restrictions applied (non-solicitation, non-dealing and confidentiality).

The claimant argued, assessing the restrictions at the point of signing the contract (ie. in 2004), that the non-compete was too wide, both territorially as there was no territorial limit, and in terms of being interested in a competing business as this would prevent her from having a minor shareholding in a competitor for investment purposes, and therefore went beyond just protecting legitimate business interests and was consequently void.

Decision

The High Court upheld the non-compete clause and granted the claimant's employer injunctive relief.

The court acknowledged that the point of signing the contract was the correct time to assess the reasonableness of the restrictive covenants. However it also held that it is legitimate to take into account the wider circumstances of the recruitment. Here the company had clearly been intending to groom the employee and promote her as soon as possible, and as a result she had been given more access to clients and confidential information than would otherwise have been expected for a consultant.

In terms of the claimant's territorial argument, the court held that the clause was actually limited to those geographical areas which which the claimant had been materially involved in and therefore did not have global reach.

Turning to the claimant's argument in relation to being interested in competing businesses, the court held that her contract dealt with shareholdings elsewhere and so the non-compete did not need to address this.

Practical impact

This case is a useful reminder of the principles relating to enforceability of restrictive covenants and usefully illustrates how they operate in the situation where an employee has not entered into new covenants upon promotion. This case is especially helpful where employees are recruited with promotions in mind. However it is worth noting that, had the claimant not been such a "prize" and tipped for greatness at the time of her recruitment, the restrictions may well have been held to be too widely drawn.

Long-term loss of earnings and whistleblowing

In Small v. Shrewsbury and Telford Hospitals NHS Trust the Court of Appeal has held that where a claimant's employment has been terminated due to a protected disclosure the tribunal can award compensation for long-term loss of earnings or "stigma damages" (as permitted by Chagger v. Abbey National), even if the Claimant did not raise the point him or herself.

Facts

The claimant was a project manager for the Trust and started working for the Trust, on a temporary assignment, when he was 56 years old. It was understood that full-time employment was likely to follow the temporary assignment. However, within two months of the start of the temporary assignment, the claimant's employment was terminated by the Trust.

Decision

The ET agreed with the claimant that the reason for his dismissal was the fact that he had made a protected disclosure and therefore the termination amounted to an unlawful detriment under s47B of the Employment Rights Act 1996. The claimant, who was representing himself at this stage, sought compensation for loss of earnings up until the date of his retirement (among other things) on the basis that permanent employment was likely to have followed the temporary assignment and that his search for new employment had been hindered by a lack of reference. The ET awarded compensation, including £33,976 for loss of earnings on the basis that he would have been employed for the length of the temporary assignment but no longer. Despite not awarding any compensation for losses beyond this point, the ET did note that the termination had been "career-ending".

The claimant, at this stage with legal representation, appealed, arguing that he should get stigma damages, however the EAT dismissed the appeal, saying that such damages should not be considered by a tribunal as a matter of course.

The claimant appealed to the Court of Appeal, which found that in the "career-ending" circumstances of this case, stigma damages were to be considered by the ET as a matter of course, even if not raised by the claimant initially, and consequently should have been considered.

Practical impact

Whilst fact-specific, this case is a useful reminder of the protections afforded to whistleblowers as well as confirming that stigma damages can be considered and awarded by a tribunal even where these are not raised by the claimant, reaffirming how expensive whistleblowing claims can be.

The rights of EU citizens in the UK

The government has published a policy paper setting out its offer to EU citizens and their families in the UK. It expects the offer to also extend to Norway, Iceland, Liechtenstein and Switzerland. As the rights of British and Irish citizens in each other's countries are rooted in the Ireland Act 1949, Irish nationals will not need to apply for the new status.

The government has stated that there is no need for EU citizens to apply now for EU documentation under the free movement rules to prove they are exercising Treaty rights or have a current right of permanent residence in order to secure their status post-exit. Nor will they need to apply for new British settled status before the UK leaves the EU.

The government has set out its offer to EU citizens. The offer is different depending on how long a person has been in the UK:

People who have been continuously living in the UK for five years

This group of people will be able to apply to stay indefinitely by getting "settled status".

They must still be resident in the UK when they apply. An application must be made for a residence document confirming the same. The residence document will prove an individual's permission to continue living and working in the UK.

Even those already with a permanent residence document will be required to apply. Such documents will not be automatically replaced with a grant of settled status. A permanent residence status is linked to the UK's membership of the EU and so will no longer be valid after the UK leaves the EU.

The application process should come online before the UK leaves the EU, and hopefully in 2018. The government has pledged to make the application process as streamlined and user-friendly as possible. It has stated that it will tailor the eligibility criteria so that, for example, it will no longer require evidence that economically inactive EU citizens have previously held "comprehensive sickness insurance" in order to be considered continuously resident. It is yet to confirm the evidence that it will accept as proof of residence.

If a residence document has not been obtained before the UK leaves the EU, an individual will still have permission to remain in the UK. The government will call this a "grace period", during which time an individual should apply for and receive their residence document. The grace period will last for up to two years. If a residence document has not been voluntarily applied for before the UK leaves the EU, it will be mandatory to apply for one during the grace period when the UK has left the EU.

Settled status is not the same as citizenship – holders of this status do not have a UK passport. Those with settled status and at least six years' residence may apply for citizenship. Settled status would generally be lost if a person was absent from the UK for more than two years, unless they have strong ties here.

People who arrived in the UK before the cut-off date, but will not have been here for five years when the UK leaves the EU

These people will be able to apply to stay temporarily until they have reached the five-year threshold. They can then also apply for settled status as set out above.

People who arrive in the UK after the cut-off date

These people will be able to apply for permission to remain after the UK leaves the EU, under the future immigration arrangements for EU citizens. Any application should be made in the grace period, i.e. within two years after the UK leaves the EU. We do not yet know what the arrangements will be. The government has said that there should be no expectation by this group of people that they will obtain settled status.

In relation to the second two groups of people, we do not yet know what the cut-off date is. This will be agreed during the negotiations. However, we do know that it will not be earlier than 29 March 2017 or later than the date the UK leaves the EU.

Family members

Family dependants who join a qualifying EU citizen in the UK before the UK's exit will be able to apply for settled status after five years (including where the five years falls after the UK's exit), irrespective of the cut-off date. Permission to stay (leave to remain) can be applied for if the family member does not have five years' residence, to enable them to accrue the required five years. The family members may be EU citizens or non-EU citizens. They must be in a genuine relationship with an eligible EU citizen while resident in the UK.

Those joining after the UK's exit will be subject to the same rules as those joining British citizens or alternatively the post-exit immigration arrangements for EU citizens who arrive after the cut-off date. This will apply also to future family members, e.g. a future spouse.

Children of EU citizens eligible for settled status will also be eligible to apply for settled status. This applies whether those children were born in the UK or overseas, and whether they were born or arrived in the UK before or after the cut-off date. Specifically, children of EU citizens who hold settled status and are born in the UK will automatically acquire British citizenship. EU resident parents who arrived before the cut-off date, but who need to apply for permission to stay (leave to remain) after the UK leaves the EU in order to meet the five-year residence requirement, will also need to apply for the same permission on behalf of their child when their child is born.

We will keep you updated on the rights of EU nationals as more information is delivered from the government.

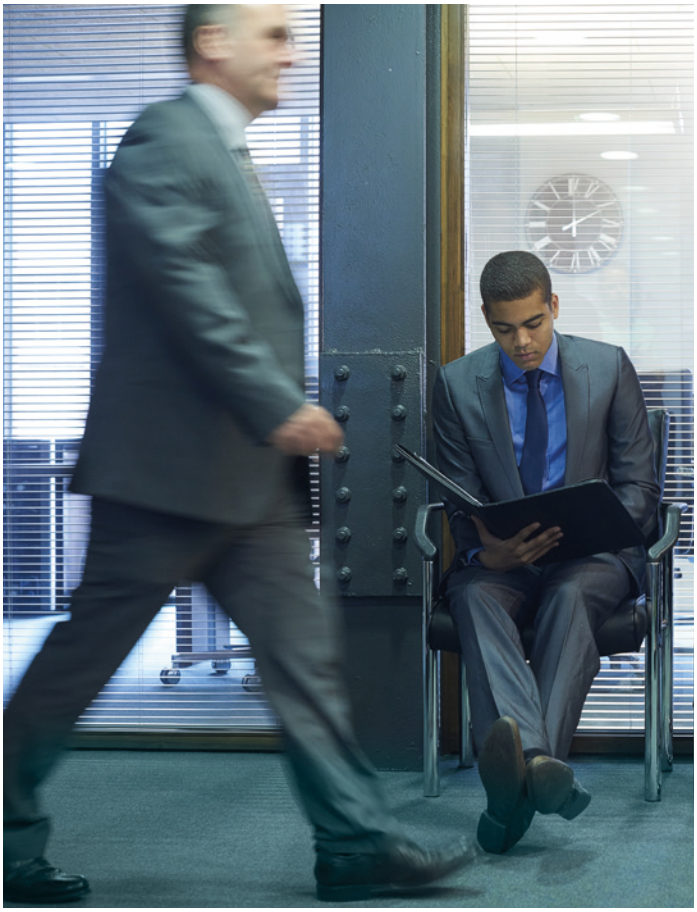
Multiple claims must be based on the same facts

Rule 9 of the Tribunal Rules 2013 allows two or more claimants to make their claims on the same claim form (ET1) if their claims are based on the same set of facts. This has been advantageous for claimants, especially since the introduction of tribunal fees, as multiple fees are lower per claimant than separate individual claims would be.

Five cases regarding equal pay claims were heard together at the Employment Appeals Tribunal (EAT) with the key question being whether equal pay claims involving claimants doing different work could be included in the same claim form under rule 9. The cases fell into two groups:

1. Supermarket

Three of the cases involved claims brought by predominately female staff working for supermarkets. These women were working in different jobs (for example, check-out operator and someone working on the shop floor) and claimed that they were performing equal work to men working in depots. Within the same claim form some men also contended that if the female claimants were successful then they would be entitled to equal pay with the women as they were undertaking equal work.



2. Local government

The other two cases involved women doing different jobs in local government who claimed that their work was equal to men performing a variety of different jobs.

The EAT held that rule 9 required a three-step approach:

- a tribunal must identify the complaints that are being raised;
- a tribunal must then identify the facts that the complaints are based upon; and
- at this stage a tribunal must determine whether the facts are the same for each compliant.

After applying this approach the EAT found that in relation to all of the cases that the women making claims were doing different work and therefore all had to have different male comparators. Therefore the claims were not based on the same set of facts. The additional claim made by the men in the supermarket cases (essentially "piggy-backing" on the women's claims) was, for the same reason, also not based on the same set of facts. The EAT did go on to provide guidance on a tribunals discretion to strike out a claim or waive the irregularity if it considers it to be just (as provided for by rule 6). The EAT confirmed that tribunals should consider the seriousness of the breach (non-payment of appropriate fees to be deemed as serious), consider the circumstances of the breach (e.g. if done willingly to avoid paying fees), consider the prejudice to the parties in striking out the claim and considering other relevant factors.

Take home points

If claimants are doing different jobs, require different male comparators or bring their claim on a different basis (for example, arguing a job is of equal value and arguing a job is rated as equivalent will be different) their claims will be based on different facts and so cannot be on the same ET1 form. If such equal pay claims are dismissed then some claimants may find themselves out of time to reissue, especially given that there is no discretion to extend time limits in equal pay cases.

Whilst these were equal pay cases the impact of these cases would equally apply to any claim where more than one claimant is named on the same claim form (for example, claims arising from TUPE or collective redundancies).

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