

Employment Update

October 2008

Briefing Note

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Welcome to our October Employment Update.

In this issue we take a look at recent employment-related news and legislation which has come or is coming into force this month including the changes to maternity and adoption rights, the new rates for the national minimum wage and the extension of statutory sick pay to agency workers on short fixed term contracts.

On Immigration the new points-based system for tier 2 comes into force in November with employers who wish to sponsor highly skilled migrants needing to apply now for licences. We take a look at the latest guidance.

Our case law focus this month is on restrictive covenants. There have been a number of cases on this topic recently and it seems that the current economic climate is driving employers to take a harder line in seeking to enforce the covenants. We take a look at the practical points arising from the Courts' decisions.

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NEWS

Heyday Opinion

Age discrimination legislation is now two years old and last week the Advocate General published his opinion on the case brought by Heyday concerning the lawfulness of the retirement provisions in the Age Regulations. His opinion was that a national rule that permits employers to dismiss employees aged 65 or over for retirement can, in principle, be justified which is good news for employers who are retiring employees under the statutory retirement procedure. The stay on all proceedings for age discrimination and unfair dismissal brought by individuals who have been compulsorily retired under the statutory retirement procedure will, however, remain in place until the ECJ has given its decision.

The ECJ does not have to follow the Advocate General's Opinion but usually does. We will continue to keep you informed on the latest developments.

Flexible working

The Government has published a consultation paper seeking views on measures it can take to assist businesses in implementing the extension of the flexible working provisions to parents of children aged 16 and under. The consultation closes on 18 November.

Equal pay claims

In 2007-2008 equal pay claims have more than doubled and overtook unfair dismissal claims for the first time as the most popular tribunal claims passed to ACAS for conciliation. ACAS considers that employers will be less vulnerable to such claims if they have implemented a job evaluation scheme and so it has published a guide on the benefits and risks of undertaking job evaluation and outlines how to build a job evaluation

scheme.

National minimum wage

BERR has published revised guidance on employees' rights and employers' obligations under the national minimum wage legislation. Please [click here](#) to download the document.

LEGISLATION UPDATE

Sex discrimination during maternity leave

As previously reported, the changes to the Maternity and Adoption Regulations come into force so that OML and AML are no longer treated differently under the SDA. The change only affects women whose Expected Week of Childbirth or expected date of placement starts on or after 5 October 2008.

Terms and conditions during maternity and adoption leave

Employees who are due to give birth or adopt on or after 5 October 2008 will have the right to the same terms and conditions during AML and AAL including all non-monetary benefits under their contract, and will continue to accrue annual leave at the rate specified in their contract, throughout the whole of maternity or adoption leave.

There has been considerable debate amongst employment and pensions specialists concerning the position regarding the entitlement to pension benefits during unpaid periods of AML and AAL. Although the Government has taken the view that pensions benefits are not payable for unpaid AML and AAL, this position is arguably narrower than under EU case law. Therefore employers should be aware that there is a potential risk of challenge in the future if they do not pay pension benefits during unpaid maternity and adoption leave.

Companies Act 2006

On 1 October the sections in the Companies Act 2006 relating to the duty to avoid conflicts of interest (s175), the duty not to accept benefits from third parties (s176) and duty to declare an interest in a proposed transaction or arrangement with the company (s177) came into force.

National Minimum Wage

The national minimum wage increases on 1 October 2008 were:

- Standard (adult) rate: £5.73 (rising from £5.52).
- Development rate: £4.77 (rising from £4.60).
- Young workers rate: £3.53 (rising from £3.40).

Agency workers: sick pay

On 27 October 2008 the amendments to the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 come into effect so that agency workers on contracts of less than three months are entitled to statutory sick pay. They are currently the only group of employees who are not eligible for SSP.

IMMIGRATION UPDATE

Points-based immigration

The Government's drive on rolling out the new immigration system in 2008 continues in earnest. Most importantly for employers, from 1 November it will be necessary for businesses to be registered as a licensed sponsor to bring in workers under the replacement for the work permit scheme (Tier 2 Certificates of Sponsorships). The Government has announced that it will only guarantee to process applications submitted by 1 October in time for this. After that, businesses will have to wait for any later application to be processed before being able to bring workers in - which could be a significant setback in expected timings.

To assist businesses, the Government has also been releasing further details of how it will assess employers for the purposes of being a licensed sponsor and revised guidance notes on being a sponsor have also been released. Detailed guidance on how the new system will operate and how specific jobs will be assessed under the new system are also now available.

Additionally, and also relevant to Tier 2 is that a draft list of designated shortage occupations has been released and those involved in the leisure and hospitality industry will be interested to see that skilled chefs have been included. This will make it materially easier to recruit foreign nationals as chefs under the new system.

Finally, the Government has also now unveiled the new foreign national ID cards. The Government's intention is for all foreign nationals on short term visa's in the UK to be issued with such a card but for now they will only apply to students and certain spousal / civil partnerships visas. It is hoped that the new cards will make life easier for employers, as they will be reliable forms of ID and will also make an individual's right to work (or otherwise) clear.

If you need any further information or assistance please contact Michael Bradshaw.

RECENT CASES - FOCUS ON RESTRICTIVE COVENANTS

In this era of the "credit crunch" it seems that a number of employers are increasingly prepared to take a harder line in seeking to enforce the terms of restrictive covenants. There have been a number of cases focusing on various aspects of restrictive covenants and set out below are the main cases and key practical points arising from them.

Team moves

There are inevitably legal issues and practical difficulties involved for employers in taking action when a team moves to a competitor. However, in two recent cases the courts have found in favour of the employer.

Springboard injunction granted - in respect of large-scale poaching of staff

A high profile case in the press over the summer was that of *UBS Wealth Management (UK) Ltd and anor v Vestra Wealth LLP & Ors* which was ultimately settled on confidential terms between the parties and so will not proceed to a full trial.

The High Court granted a springboard injunction against Vestra following a mass poaching of staff from UBS. A springboard injunction prevents one party from taking unfair advantage of breaches of contract. In this case the judge held that it was extremely likely that UBS would be able to establish at trial that the poaching had involved both a breach of the implied duty of fidelity by defecting staff and possibly an unlawful conspiracy. The interim injunction prohibited Vestra from doing business with existing UBS clients or soliciting or enticing any further UBS employees to leave pending full trial.

This case confirms that springboard relief is not confined to cases involving confidential information but can also apply to any serious breach of contract by defecting employees.

Breach of Duty of Fidelity

The High Court's decision in *Kynixa Ltd v Hynes & Ors* is a warning to employees who deliberately mislead their employer about their intentions and those of their fellow employees to join a competitor.

The case involved three employees who went to work for a competitor. In the months before they left each of them had various discussions with senior management about their plans for the future. None of the three informed the company of the approaches made by the competitor but all three did deliberately mislead as to their true intentions and also failed to report what they knew the others were intending to do. The two senior employees were subject to a shareholder agreement that included restrictive covenants but none of them had any post-termination restraints in their employment contracts.

The court found that all three employees were in breach of their duties of fidelity and that the two senior employees, by virtue of their seniority, were in breach of their fiduciary duties and restrictive covenants contained in the shareholders agreement.

The court has refused permission to appeal and has ordered the two senior employees to pay costs on account of £250,000 and £100,000 respectively while a detailed assessment of the company's costs takes place and the third employee was found to be liable for 33% of the company's costs. The company's costs are estimated to be around £1million.

Enforceability of restrictive covenants

Non competition

In *Norbrook Laboratories (GB) Ltd v (1) Adair (2) Pfizer Ltd* the High Court considered the enforceability of non-competition and non-solicitation covenants against a departing sales manager of a pharmaceutical company who went to work in sales for a competitor.

The Court did not uphold the non-competition restriction which prevented her working for a year in a business whose products competed with those of Norbrook and with which she was concerned in the last five years of her employment. However it gave some useful guidance:-

- It confirmed that the level of the employee's salary is not particularly significant in determining the reasonableness of a restriction. Ms Adair earned £25,000 per year.

- It also held that it was reasonable for a non-competition restriction to restrain an employee from working for a competitor in a different capacity because the facts in this case indicated there was a real risk that confidential information could be revealed irrespective of the capacity in which an employee was employed.
- Finally, it is important to ensure that any time periods contained within the restrictive covenants are consistent with each other. The non competition clause restricted Ms Adair from working with products with which she was concerned in the last five years of employment but most of the sales and sales-related information had a limited shelf life which was indicated by the one year restraint. Therefore the restriction was unreasonably wide.

The Court upheld the non-solicitation clause although it "blue pencilled" the terms "direct access to" and "prospective customer" as being uncertain.

Non solicitation and non-dealing - customers

In *WRN Ltd v Ayris* the High Court considered the enforceability of non-solicitation and non-dealing restrictions in relation to customers.

The Court found the covenants to be unreasonably wide because they sought to restrict the former employee from having contact with any of his former employer's customers (not only those with whom he had actually dealt) which is in line with existing authority.

The Court also considered whether the employee was in breach of the restrictions on the use and disclosure of confidential information. He had removed his Rolodex containing customer business cards and copied the addresses from his work email address book to his home email address book. As the company's website contained a comprehensive list of their customers the Court concluded this was not confidential business information and the fact it was on its website suggested that the company did not treat the information as such.

Another important reminder arising from this case is that the reasonableness of restrictions will be considered by reference to an employee's job title at the date of entering into them rather than at the date of termination and will not take into account any subsequent promotions. Employers should therefore review restrictive covenants when an employee is promoted to a more senior role where they may have access to more confidential information or deal with more customers and consider asking them to enter into new covenants.

Definition of "relevant customer"

In *Basic Solutions Ltd v Sands* the High Court considered an employee's restrictive covenants under which he was prevented, after termination of employment, from selling or supplying competing products to relevant customers of Basic Solutions Ltd. "Relevant customers" were defined as limited to those who had negotiated with or been customers of Basic Solutions Ltd for the sale or supply of its products, and with whom Mr Sands had

dealt during his employment.

The High Court held that the meaning of "supply" did not include the provision of samples to a customer for testing purposes, even if the samples were provided with a view to possible sale or supply of that product in the future. Customers who had been provided with samples of products but not bought any did not fall within the definition.

Bad Leaver provisions and Indirect Restrictive Covenants

In *Greck v Henderson Asia Pacific Equity Partners (FP) LP & Ors* the Scottish Court of Session considered "bad leaver" provisions contained in a limited partnership agreement which was linked to employment and whether these could be deleted from the agreement as being in restraint of trade.

The case involved an individual who worked for a subsidiary of the Henderson Group based in Singapore who left to join a private equity company, Archer, in Australia. Under the terms of the limited partnership agreement an individual was to be treated as a bad leaver if he left to join a "competitor" of the Henderson Group. A business was deemed to compete if its business included making, dealing in, managing or advising as to unquoted equity investments. The relevant provision did not include any restriction in terms of location or type of work at the new employer. Mr Greck was treated as a "bad leaver" and received no dividend. He brought an action against the Henderson Group seeking a declarator that he was a good leaver.

The Court considered whether Archer fell within the definition of "competitor" and held that the agreement was clear that a competitor was deemed to include all those engaged in private equity work anywhere in the world. This shows that deeming provisions can be useful to clarify the agreement between the parties and arguably widen the definition. However, this case involved a commercial agreement which was linked to employment and care should still be taken when using such provisions in restrictive covenants in employment contracts because they are less likely to be enforced if they are in wide terms.

The Court made observations on whether the bad leaver provisions were in restraint of trade. Archer had agreed to compensate Mr Greck for some of the entitlement he anticipated losing as an early leaver. The Court queried whether such a clause could be a restriction if a new employer was willing to compensate the employee. Employers should bear in mind that if they place restrictions on bonuses, commission, profit share or other incentive schemes which might dissuade an individual working for a competitor - they could face restraint of trade arguments.

Garden leave and the right to work

We have previously covered the case of *SG & R Valuation Service Co v Boudrais* in our July Update, however, for the sake of completeness we have included a reference to it here as well. This case involved the situation where there is no express garden leave clause and whether the employer could nevertheless prevent two senior employees from joining a competitor by focusing on their right to work.

The employees argued that keeping them at home was a repudiatory breach of contract as they had no garden leave clauses in their contracts. There was evidence that the employees planned to join a competitor, had taken confidential information and had solicited other employees. Following an application for an interim injunction, the employees returned the confidential information and gave undertakings not to solicit fellow employees during the remainder of their notice.

The court upheld the employer's right to put them on garden leave. It found that an employee's "right to work" is on the basis that they are ready and willing to work in accordance with the terms of their contract. In this case that was not the position as the employees had breached their contracts and shown "hostility" towards SG & R, the court therefore granted the injunction.

This case shows that even when there is no specific garden leave clause, the "right to work" is affected where the employee's behaviour makes clear they are not ready and willing to do the work.

WEBINAR

Charles Russell Employment Webinar

Charles Russell's Employment and Pensions Group introduces the first in its exciting new series of Webinars. Like a seminar, these sessions consist of an expert speaker(s) using PowerPoint slides to comment on topical subject matter, but a Webinar is based entirely online. These sessions are available to view whenever is convenient to you and provide informative, concise and regular updates on the changing position of the law.

The first of our Employment Webinar series concentrates on the following:

- Recent employment-related news and legislation
- The Advocate General's decision on Heyday's challenge to the UK's default retirement age
- Changes to benefits on Additional Maternity leave
- The extension of statutory sick pay to agency workers on short fixed term contracts
- Case Spotlight - Kynixa Ltd v Hynes & Ors

The Webinar is free to view and lasts just under 13 minutes. We would welcome your feedback, which can be forwarded to christopher.wilsher@charlesrussell.co.uk.

[CLICK HERE](#) to view the new webinar from Charles Russell LLP.

More Information

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