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Insights

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REMOVAL OF TRIBUNAL PANEL MEMBER FOR BIAS, CPO ORDERS THAT PROHIBIT BRINGING PROCEEDINGS (WITHOUT PRIOR PERMISSION), ENFORCEMENT OF 12 MONTH NON-COMPETE, AND GENERAL NEWS ROUNDUP

May 25, 2023

SUMMARY

Our May update includes cases on the removal of an EAT panel member for bias in a case involving religious belief and the teaching of children about same sex marriage, the effect of a CPO which prevents individuals from bringing civil proceedings without leave from the court, and a finding by the High Court that a 12 month non-compete clause is valid and enforceable. We also feature a news update on government proposals to make important changes to UK employment law.

REMOVAL OF EAT PANEL MEMBER BECAUSE OF BIAS

A Christian school assistant was dismissed for posting on social media matters reflecting her strong religious views, specifically about teaching children about same-sex marriage and gender fluidity.

Amongst other things, the claimant believed it was wrong to teach children that same sex marriage is on the same footing as heterosexual marriage. The respondent's view was that the claimant's posts could be regarded as homophobic and transphobic.

The claimant brought an unsuccessful tribunal claim in 2020. She argued her dismissal was an act of discrimination based on her religious belief. The claimant expressed her view after the tribunal decision - "*I was punished for sharing concerns about relationships and sex education. I hold these views because of my Christian beliefs, beliefs and views which are shared by hundreds of thousands of parents across the UK.*"

She appealed the tribunal's decision to the Employment Appeal Tribunal (EAT). The claimant's appeal was to be heard by an EAT panel, consisting of a Judge and two lay members. In 2022, the claimant successfully removed an EAT lay member for bias, based on his public statements that

individuals should be prohibited from making comments or statements regarding LGBTQ+ ideology, especially transgenderism.

The application in this case was also based on possible bias. The claimant argued that the new lay member, Andrew Morris, was biased because of his previous role as Assistant General Secretary of the National Education Union (NEU). Although Mr Morris had not expressed any views personally, the NEU had consistently taken a strong position in relation to (a) making both relationship and sex education mandatory in primary schools and (b) encouraging teaching children about same-sex relationships and transgenderism.

Although Mr Morris himself had expressed no views, the claimant argued that Mr Morris was guilty of "apparent bias". This is a form of indirect bias, where the issue is not bias in itself, but the appearance of bias. The test for apparent bias is set out in the 2002 case of *Porter-v-Magill*:

> "*The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*."

The underlying principle of apparent bias is that justice must not only be done, it must be seen to be done. A reasonable person might think Mr Morris was at least sympathetic to the views expressed by the union of which he had been a senior officer, and where (broadly) those views were the same as those of the respondent.

The EAT said the test was objective. It looked at the view of "*fair-minded and informed observer*". It also considered the test for removal for apparent bias, being a "*real possibility*" of bias, so less than a probability. There were some other specific points considered:

- All tribunal lay members have to take a judicial oath "*to do right to all manner of people…without fear or favour…*" The Judge's view however was that, even with the oath being taken by Mr Morris as an individual, a reasonable/informed outside observer might still perceive there to be an appearance of bias because of the activities of the NEU;
- Bias includes unconscious bias; and
- One of the grounds of appeal included an allegation of perversity; ie that no reasonable tribunal could reach the conclusion that an individual reading the claimant's posts could believe that she was homophobic or transphobic. The Judge believed this was a particularly sensitive point and possibly required a degree of perceived impartiality that Mr Morris did not reach.

The EAT upheld the application and Mr Morris was removed from the panel.

The Judge gave a very clear explanation of the position:

> "*Whether or not Mr Morris agreed or disagreed with…the pronouncements [of the NEU]…he will inevitably be associated with the views expressed, which were very clearly on the opposite side of the debate to that of the claimant. In determining whether the claimant's posts might be considered to be homophobic or transphobic, the reasonable observer might legitimately perceive that someone who had held office as Assistant General Secretary of the NEU at the relevant time would (even if only unconsciously) seek to maintain the position that had been very clearly adopted by that organisation.*"

The Judge also held that, to avoid any possible further delays, she would hear the appeal alone, with no panel members present.

WHY THIS MATTERS

The removal of a tribunal panel member due to bias is rare. However, the Judge believed the issues raised in this case to be the subject of heated societal and political debate/discussion. The case involves the sensitive matters of teaching of primary school children about same-sex marriage and trans issues. The Judge held there was sufficient evidence to support the appearance of bias.

At the end of the decision the Judge held that, as bias had already led to the removal of two panel members and caused significant delay, she would hear the appeal without a panel. Outside such highly sensitive areas, issues of bias are less likely to arise. That being said, the increase of employment cases involving issues relating to philosophical belief and the trans/gender critical debate, may lead to similar allegations being made, as these issues are also the subject of wide societal and political discussion.

Higgs v Farmor's School (No 2)

EMPLOYMENT PROCEEDINGS A NULLITY BECAUSE OF A "CPO"

This case illustrates how a Civil Proceedings Order ("CPO") made under section 42(1A) Senior Courts Act 1981 works in practice, as well as the rationale behind it.

A CPO is unusual and, when made, it is normally against vexatious litigants who bring multiple claims with very little (if any) merit. The idea of a CPO is to prevent meritless/nuisance litigation. An individual subject to a CPO cannot bring proceedings without prior leave from the court.

The claimant was the Priest-in-Charge at the Parish of St George, Hanworth. He reached the age of 70 in November 2018. Back in 1997 he had been made the subject of a CPO. Despite this, in April 2019 and without obtaining prior leave, he brought an age discrimination claim at the tribunal. After he initiated the claim, the claimant obtained leave retrospectively to continue. In considering the claimant's application for leave, the High Court Judge decided that the claim was not an abuse of

process. The court granted the claimant leave to bring claims for age discrimination and in respect of the termination of his tenure as Priest-in-Charge.

The tribunal disagreed. It ruled at a preliminary hearing that the claim was a "nullity" because it had been issued without prior leave. The High Court could only grant retrospective leave to bring a genuine claim, not a nullity/non-claim. The claimant appealed. However the EAT dismissed the appeal on the basis that it agreed with the tribunal's ruling that the "claim" was a nullity, and that the tribunal's decision was consistent with the power to make, and the rationale behind, a CPO. The EAT said the purpose of a CPO is to prevent the commencement of vexatious legal proceedings that (a) have little or no legal basis, (b) involve an abuse of the court's process and (c) that would subject another party to inconvenience, harassment and costs that are disproportionate to the potential benefit gained by the claimant.

The claimant appealed again.

The Court of Appeal also dismissed the claimant's appeal, following up on the technical point that proceedings instituted in breach of a CPO are a nullity (which cannot be retrospectively approved) and that this finding does not involve any unfair prejudice or disproportionate breach of the right to a fair trial or access to justice. The Court of Appeal also considered the effect that Parliament intended CPOs to have when it drafted the legislation. It held that Parliament's intention was to create a filter, not a barrier, to the commencement of legal proceedings. A CPO regulates a vexatious litigant's access to the courts, rather than barring it, and it does not deny the litigant rights of access to justice. The potential litigant has to demonstrate to the court that the claim has merit to obtain leave to bring it. If the claim has merit, it can proceed. However, if the claim is brought without leave, it is contrary to a CPO and is null and void. Retrospective leave cannot be given – a claim that is a nullity cannot be approved in the future.

WHY THIS MATTERS

This case is a reminder of both:

- the draconian effect of CPOs and of the strict need for anyone subject to them to comply with the requirement to obtain ***prior*** leave of the court before initiating proceedings; and
- Even if a breach of a CPO is somehow validated after the event (as happened in this case with retrospective leave being granted), this will not withstand judicial scrutiny.

Williamson v The Bishop of London & Others

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12 MONTH NON-COMPETE UPHELD

This case deals with restrictive covenants, also known as post-termination restrictions. These are clauses which prevent employees from taking certain action in competition with their former employer for a certain period after termination. For example, an ex-employee may be prohibited for (say) 9 months from contacting or dealing with clients/customers of the former employer. The most draconian type of restriction is a "non-compete" covenant, which prevents an ex-employee from working for any competitor. Because of their draconian effect, non-compete covenants tend to be for relatively short periods. This case concerned a 12-month non-compete.

The case also considered two important cases:

- The 1970 case of *Home Counties Dairies Limited -v- Skilton*. This case established that the court must always look at the effect of a non-compete as originally contemplated by the parties even, if taken at face value, the non-compete could possibly have "fantastical or extravagant" effects. If those fantastical effects do not in reality impact on the individual, the original contemplation of the parties will be preferred. The fantastical effect in this case was the claimant's argument that the non-compete was so wide it would prevent him from working anywhere, even at retail chemists such as Superdrug; and

- The 2019 case of *Tillman -v- Egon Zehnder*, which deals with the effects of "severance". This is a legal principle in restrictive covenants where the court is permitted, under what is known as the "blue pencil" test, to sever/remove parts of a covenant so that, after the offending words have been severed/removed, the covenant may be enforceable. The *Tillman* case established that the court can "sever" but cannot add to or modify wording. Also, when words are severed there must be no major change in the overall effect of the non-compete.

The background to the case is important and explains perhaps why a long non-compete was upheld.

The first respondent operates in a (very) niche area of the pharmaceutical industry, being the development, production and sale of bile acid derivatives. The second respondent is the first respondent's holding company. The claimant was a former, and very senior, employee of the first respondent. He was Head of Commercial – Specialty Products. He was responsible for global sales and marketing for the group, which involved knowledge of trade secrets and a great deal of customer contact. The claimant was also an expert in the area of bile acid derivatives

Given the claimant's seniority, expertise and specialist knowledge, he was subject to a 12 month non-compete that prevented him, after termination of employment, from being involved in any activity for the benefit of a third party/competitor employer that carried out any competing business activity, including its affiliates or group companies. Competing business activities included the collection, processing or conversion of bile for pharmaceutical use, and any activities related to the supply chain. The non-compete also listed several companies which were considered to be competitors.

The claimant resigned. He indicated his intention to work for the first respondent's main competitor in the field of bile acid derivatives, in direct breach of the non-compete. The first respondent applied to the High Court for an interim injunction (pending a full trial) to enforce the non-compete. The injunction was granted. The claimant argued that the non-compete was too wide and unenforceable. It prevented him being involved in any capacity with competitors, whether or not the third party operated in the same field of activity as the claimant did when he worked for the first respondent.

In granting the first respondent's injunction, the High Court severed the wording of the non-compete, removing the reference to "group companies". Although the first respondent's work was highly specialised, other companies within the group produced general pharmaceutical products such as nasal sprays. The judge presumed that this type of "nasal spray" activity would also extend to large retail chains operating in the pharmaceutical industry such as Superdrug, which went beyond what was reasonably necessary to protect the first respondents' legitimate business interests. Removing the reference to group companies reduced the scope of the non-compete.

The claimant appealed to the Court of Appeal. He argued that, even after being severed, the non-compete prevented him from working anywhere in the pharmaceutical industry. The clause was drafted too widely. The claimant argued that the non-compete would prevent him working at High Street retail outlets such as Superdrug. The Court of Appeal disagreed and made the following points, referencing the cases mentioned above:

- With regard to the claimant's argument that the non-compete prevented him from working at *any* company which produced general pharmaceutical products, including Superdrug, the court made reference to *Skilton*. Although the restriction might on the face of it prevent the claimant working at Superdrug, this was not within the contemplation of the parties and it was not a realistic view of the effect of the non-compete. It was (in the words used in *Skilton*) a fantastical, improbable and unlikely consequence of the non-compete. The non-compete was in reality intended for highly specialised activities and sophisticated pharmaceutical companies like the first respondent and the claimant's new employer, not retail outlets like Superdrug; and

- The court can sever but not add to or modify wording. Severance must not cause any major change in the overall effect of the restriction (this was established in *Tillman*). The High Court's decision to sever wording had not significantly changed the nature of the non-compete and was justified under *Tillman*.

It was held that the non-compete clause was long and drafted widely but, given the claimant's role and seniority, and how niche the first respondent's area of work was, it was reasonable.

WHY THIS MATTERS

Although this decision might be seen as one that supports long non-compete clauses, it is important to remember that the case had unusual facts, which were highly relevant to the court's decision. The claimant was very senior, the claimant and first respondent were involved in a very niche field, and the claimant's intentions involved a direct breach of the non-compete which could cause major commercial damage to the firs respondent.

It is interesting that this case is reported the same week that the government has announced its intention to pass legislation that will restrict non-competes to 3 months (see below).

Boydell v NZP Limited, Alice (Luxembourg) Midco S.A.R.L

NEWS ROUNDUP

PROPOSED CHANGES TO EMPLOYMENT LAW

In its 10 May policy paper called *Smarter Regulation to Grow the Economy*, the government put forward a number of proposed changes to employment law, which are now the subject of consultation ending on 7 July. The proposed changes are as follows:

- **Non-compete clauses limited to three months** - Non-compete clauses, which restrict an employee from working for competitors after termination, are only one type of restriction employers may include in employment agreements. There are also, for example, non-solicitation clauses (preventing employees from approaching clients) and non-poaching clauses (preventing employees from luring away former colleagues). Only non-completes are covered by the new proposals. The idea is that this will give flexibility to join competitors or start up rival businesses. However, it does not prevent employers from using other forms of restrictions which can also significantly limit a former employee's actions, including garden leave and non-dealing clauses. It is also unclear how the law will be introduced, particularly in terms of retrospective effect. If the restriction is to apply retrospectively, it might be expressed as a "cap" on a non-compete period so that existing non-competes in excess of 3 months do not become unenforceable overnight;
- **TUPE** - there are some small but important proposed changes to the rules relating to employee representatives for informing and consulting.
- Businesses with fewer than 50 employees will be exempt altogether, so they can inform and consult with employees directly, without the need for representatives;
- Larger business, with 50 or more employees, will also be exempt if the number of employees actually transferring is fewer than 10.

These changes are helpful in removing for example the red tape of employee representative elections, which require secret ballots.

- **Working Time** – the proposals to change the Working Time Regulations fall into three areas:
- Simplifying statutory leave by merging the current entitlement of 4 weeks (from EU law) with the additional UK specific entitlement of 1.6 weeks. This creates a single statutory annual leave entitlement of 5.6 weeks. So just one set of rules, including for the calculation of holiday pay and carry-over. The aim is to remove the burden on employers of distinguishing between two annual leave entitlements;
- Permitting "rolled-up" holiday pay. This enables employers to enhance workers' basic pay to provide an additional amount of 12.07% of pay in each payslip, rather than paying holiday pay at the time holiday is taken. There would be adjustments to cover contractual leave that goes beyond statutory entitlement; and
- Revoking the record-keeping requirements so businesses no longer have to keep a record of workers' daily working hours.
- **Revoking EU retained law –** there has been a significant (if not unexpected) change to the Retained EU Law (Revocation and Reform) Bill. The "sunset" clause, which provided that EU law would be automatically revoked on 31 December 2023 unless expressly retained, has been changed. The reverse now applies, with current laws remaining binding unless and until they are revoked. The government hopes this will provide some certainty for businesses, and while it commits to reviewing and amending EU laws, this new position allows for more time for proper assessment and consultation. The proposed list of EU retained law to be revoked on 31 December 2023 has been published and includes no substantive employment law measures.

This article was written with Trainee Solicitor Meg Royston

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