LEGAL NEWS

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> ***Non-compete clauses must be no wider than reasonably necessary to protect the employer's legitimate business interests.***

Tribunal wrongly considered discrimination which occurred after dismissal decision

Citizens Advice Merton and Lambeth Ltd v Mefful [2022] is a long-running piece of employment litigation involving allegations of unfair dismissal and disability discrimination. The case is unusual for many reasons, one being the very long gap between the facts of the case taking place (2012) and the judgment (2022).

The employee in question, Mr Mefful, was dismissed because of redundancy. Before joining the employer, he had been in a personal relationship with its chief executive. During his employment, he continually raised complaints about his pay and treatment, which culminated in an allegation that the chief executive had sexually harassed him. The employer began suffering very serious financial difficulties and engaged an interim chief executive to carry out a restructuring.

In March 2012, Mr Mefful's role was placed at risk of redundancy. He disputed this, continued to raise concerns about his pay and, finally, went off sick. He was ultimately dismissed because of redundancy on 15 August 2012. The key issue for the Employment Appeal Tribunal (EAT) was exactly when the decision to dismiss Mr Mefful was taken and the consequences of the timing of that decision on his claims, including his claim for disability discrimination.

The EAT upheld the employment tribunal's finding that the interim chief executive's decision to dismiss Mr Mefful was 'set in stone' on 19 March 2012. This was considerably earlier than the date Mr Mefful was notified of his dismissal and was also at an early stage in what proved to be a protracted consultation. The EAT found that this necessarily meant any matters which occurred after 19 March could not be relied on as part of the reason for dismissal. This had significant consequences for Mr Mefful's disability discrimination claim. He was not a disabled person before April 2012 and the matters on which the tribunal had relied in finding that the dismissal was related to disability discrimination all occurred between April 2012 and July 2012. This was when Mr Mefful was absent and, more importantly, after the decision to dismiss was made. Accordingly, his disability was irrelevant to his dismissal.

Key takeaways

While this case has relatively unusual facts, there are two key points for employers.

First, it confirms that the decision to dismiss an employee is not necessarily or always contemporaneous with the formal notification of the decision. The related argument (highly relevant in this case) that a dismissal is pre-judged or a foregone conclusion is common, not just in redundancy situations but also where there is misconduct or poor performance. Where there is documentary evidence to support this, it can make it very difficult for an employer successfully to defend an unfair dismissal claim as any procedure it followed is either flawed or disregarded because the employer had already made up its mind.

Secondly, it shows that an early decision to dismiss can, in rare cases, actually assist the employer where an employee who is subject to a termination process goes off sick. If the decision to dismiss has already been taken, even where the employee's sickness subsequently leads to a finding of disability, any attempt to argue that the dismissal was because of or related to that disability will fail.

Serial litigant prevented from weaponising the tribunal process

In *HM Attorney General v Taheri* [2022], the EAT granted an indefinite restriction of proceedings order (RPO) against Mr Taheri, who brought more than 40 employment tribunal claims in ten years, all relating to unsuccessful job applications.

Many of the 43 claims were withdrawn before they could be determined, others were settled, four were struck out and the two cases that proceeded to a full hearing were dismissed, with orders of costs against Mr Taheri. In 2018, Mr Taheri was lodging at least one claim every month (apart from August), even filing three claims in one day in October 2018. There was also evidence to suggest, unsurprisingly perhaps, that Mr Taheri had used the employment tribunal process to put pressure on potential employers to enter into low-value settlements.

In each claim, Mr Taheri's allegations were very similar. He relied on the protected characteristics of age (as he belonged to an older age group), race (as he described himself of Iranian ethnicity) and disability (as he was diagnosed with prostate cancer).

At the EAT, Eady J noted that under the current legal framework, an RPO can be made where the judge is satisfied that the individual has:

> *… (1) habitually and persistently, and (2) without any reasonable ground, (3) instituted vexatious proceedings or made vexatious applications in any proceedings, whether in an ET or the EAT, and whether against the same person or different persons. If the conditions are not met, no order can be made. If the conditions are met, I have a discretion whether to make an order, I am not obliged to do so.*

Mr Taheri resisted the application, claiming it was vexatious and an attempt to breach his rights under Art 6 of the European Convention on Human Rights and under the Equality Act 2010. He stated the proceedings were:

> *… just another attempt by an unfair system to silence an older disabled person who is finding it impossible to find work.*

Eady J, however, concluded that Mr Taheri's actions involved a 'weaponisation' of the tribunal process. He had habitually, persistently and without any reasonable grounds pursued proceedings with minimal to no legal basis. This subjected potential employers to disproportionate disruption, harassment and cost, which outweighed any likely injustice or gain to Mr Taheri.

Eady J noted that the likelihood of someone of Mr Taheri's age and with his medical problems experiencing discrimination should not be diminished but that in his case there was no infringement of his rights. She therefore granted an indefinite RPO under s33 of the Employment Tribunals Act 1996 (ETA).

Key takeaways

This decision is a useful reminder of the factors the EAT will consider when dealing with s33 ETA and serial litigants. It is important to note that an RPO under this section does not completely prevent an individual from bringing claims. Rather, the tribunal will only permit the individual to bring proceedings if it finds the matter does not amount to an abuse of process and there are reasonable grounds to go ahead.

PILON did not turn resignation into a dismissal, holds EAT

In *Fentem v Outform EMEA Ltd* [2022], the EAT held there had been no dismissal under s95 of the Employment Rights Act 1996 (ERA) when an employer relied on a payment in lieu of notice (PILON) clause following an employee's resignation. Although the EAT had misgivings about this decision, it held it was bound by a previous EAT decision in *Marshall (Cambridge) v Hamblin* [1994].

Mr Fentem was an employee at Outform from October 1990 until he resigned in April 2019, giving nine months' written notice as required by his employment contract. The contract had a PILON provision, which Outform exercised in December 2019. Mr Fentem's employment ended immediately and he received the remainder of his salary but not a bonus to which he was about to become entitled. Mr Fentem claimed unfair dismissal.

Outform argued there was no dismissal where an employer invoked a PILON provision after an employee resigned. A dismissal under s95(1)(a) ERA 1996 includes the situation where:

> *… the contract under which [the employee] is employed is terminated by the employer (whether with or without notice).*

However, relying on *Marshall,* Outform successfully submitted that this did not apply to Mr Fentem because he, not Outform, terminated the contract.

Mr Fentem appealed to the EAT. He argued that *British Gas Trading Ltd v Lock* [2016] (in which the EAT considered when it can depart from its own previous decisions) meant it was not bound to follow its decision in *Marshall.* He submitted that *Marshall* was *per incuriam* – which is where a tribunal fails to consider a relevant legislative provision or binding decision. The EAT disagreed that the *per incuriam* principle applied because the decision supposedly overlooked in *Marshall* was not directly concerned with the specific point in issue.

Mr Fentem's other main ground of appeal, which found far more traction, was that under the rules established in *British Gas,* the decision in *Marshall* was 'manifestly wrong', so the EAT could depart from it. The question the EAT had to consider was *how* wrong the previous decision needed to be and what the test was for a previous decision to be 'manifestly wrong' as opposed to being just 'wrong'.

The EAT was clear that *Marshall* was 'problematic' and possibly even wrong. HHJ Auerbach was particularly troubled by the fact that Outform carried out the early termination unilaterally without any agreement or consultation. How could this not be a dismissal?

However, HHJ Auerbach said that a decision could not be 'manifestly wrong' if a coherent and plausible argument in its favour could be maintained. He took seriously Outform's argument that the contract had been terminated by way of resignation and it was only exercising a contractual right to end the notice period early. This might be a termination of the contract but it was not a dismissal – the employee's resignation still held good as the reason for termination. It was not manifestly wrong to say that there can be no dismissal if the employee has resigned. Mr Fentem's appeal therefore failed.

Key takeaways

This case confirms that *Marshall* remains good law for now – although the EAT is considering whether to grant permission to appeal to the Court of Appeal. If an employee's contract has a PILON clause that can be used during a notice period caused by resignation, an employer can unilaterally bring forward the date of resignation and it will continue to be a resignation rather than a dismissal. This case is also a useful reminder of the thresholds in *British Gas* that must be met for the EAT to depart from a previous decision and just how high those thresholds are.

High Court upholds lengthy non-compete clause

In *Law By Design v Ali* [2022], the High Court held that a 12-month non-compete covenant in a service agreement legitimately prevented a solicitor from joining a direct competitor.

Law by Design (LBD), a Manchester-based firm focusing heavily on NHS employment law work, brought the claim against solicitor Saira Ali after she resigned in May 2021 and left LBD to join a national firm.

In 2021, after eight years of employment at LBD and following a substantial pay rise, Ms Ali entered into a service agreement and a shareholder agreement. Both contained 12-month non-compete covenants. The non-compete covenant in the service agreement prohibited Ms Ali from undertaking any work in competition with parts of LBD in which she had been materially involved in the 12 months preceding the termination of her employment. The covenant applied across the North West of England for 12 months after her employment ended. The shareholder agreement contained a wider restriction, which prohibited Ms Ali from competing with any other part of LBD's business.

At around the time she left LBD, Ms Ali prepared a seven-page business plan in which she discussed 'transitioning' clients generating a total of around £250,000 a year from LBD to her new employer. This figure constituted more than a third of LBD's annual turnover.

The High Court applied the four-stage test from *TFS Derivatives Ltd v Morgan* [2004]. This requires the court to:

- decide what the covenant means when properly construed;
- consider if there is sufficient evidence of legitimate business interests requiring protection;
- ensure the covenant is no wider than is reasonably necessary; and
- decide whether to exercise its discretion to grant an injunction to enforce the covenant.

The High Court ruled in LBD's favour, stating that the firm had legitimate business interests to protect and was:

> *… entitled to seek to protect the customer connections built up by the LBD employees providing legal services to NHS clients.*

The non-compete covenant in the service agreement was held to be 'no wider than [was] reasonably necessary' to protect LBD's legitimate business interests.

However, the court held that the non-compete covenant in the shareholder agreement failed the proportionality test and was void. It prohibited competition with any other commercial business in England and Wales, and this included work Ms Ali was not involved in. This was held to be wider than was reasonably necessary for LBD to protect its legitimate business interests as it did not have the specificity and limitation (to NHS employment clients in the North West of England) of the other covenant.

Accordingly, the court granted an injunction in relation to the non-compete clause in the service agreement but not the shareholder agreement.

This might be seen as a draconian decision for Ms Ali. However, although a 12-month non-compete covenant may be harsh, it was very specific about the type of specialist work it covered and the geographical area concerned. The court accepted that LBD would need 12 months after Ms Ali's departure to re-establish its legal and commercial relationships with its NHS clients in that area. Ms Ali's case was also not assisted by her business plan, which made clear her intention to remove more than 30% of LBD's client base and fee income.

Key takeaways

The case reinforces good practice around drafting restrictive covenants. Non-compete clauses in particular – which can have a much more drastic effect on departing employees than non-solicitation and non-dealing clauses – must be no wider than reasonably necessary to protect the employer's legitimate business interests. Employers must therefore carefully consider the scope of the restriction with regard to practice areas, location and duration and limit the impact as far as possible. Regarding duration, this case seems to establish, depending on the circumstances, that a carefully drafted 12-month non-compete covenant will be reasonable and will be upheld.

Increases to statutory limits confirmed

The Employment Rights (Increase of Limits) Order 2022 has been published. This confirms that a week's pay for the purposes of redundancy pay and calculating the basic award for unfair dismissal will increase from £544 to £571. The maximum compensatory award for unfair dismissal will increase from £89,493 to £93,878. The new limits apply to dismissals from 6 April 2022 onwards.

The government has accepted the Low Pay Commission's recommendations on the national living wage and national minimum wage rates in full. The rates will therefore increase on 1 April 2022 from:

- £8.91 to £9.50 for workers aged 23 and over (the national living wage);
- £8.36 to £9.18 for workers aged 21 or 22;
- £6.56 to £6.83 for workers aged 18 to 20;
- £4.62 to £4.81 for workers aged under 18 who are no longer of compulsory school age; and
- £4.30 to £4.81 for apprentices under 19, or over 19 and in the first year of the apprenticeship.

The weekly rates of statutory maternity, adoption, paternity, shared parental leave and parental bereavement pay will increase to £156.66, up from £151.97. The increases take effect on 3 April 2022. The weekly rate of statutory sick pay will also increase from £96.35 to £99.35 with effect from 6 April 2022.

Cases Referenced

- British Gas Trading Ltd v Lock & anor [2016] UKEAT/0189/15/BA
- Citizens Advice Merton and Lambeth Ltd v Mefful [2022] EAT 11
- Fentem v Outform EMEA Ltd [2022] EAT 36
- HM Attorney General v Taheri [2022] EAT 35
- Law By Design v Ali [2022] EWHC 426 (QB)
- Marshall (Cambridge) v Hamblin [1994] ICR 362
- TFS Derivatives Ltd v Morgan [2004] EWHC 3181 (QB)