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Insights

UK HR TWO MINUTE MONTHLY: POST-TERMINATION RESTRICTIONS; DISCRIMINATION AND VICTIMISATION CLAIMS; RIGHT TO RESPECT FOR PRIVATE LIFE

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SUMMARY

Our January update considers recent developments in employment law, including cases on post-termination restrictions, interim relief for discrimination and victimisation claims, and the right to respect private life. We also outline other points of note, including the government confirming it will no longer review EU-derived employment laws.

Former employer's post-termination restrictive covenants were unlawful restraint of trade

The High Court has held that the non-compete, non-solicitation and non-dealing clauses found in a former employee's contract were invalid because they went further than necessary. The claimant, a financial advisory business, alleged that the employee had breached her post-termination restrictions by working for a competitor. The restrictions included a non-competition restriction which prevented the employee, for a 9 month period, from engaging in any undertaking providing the same kind of financial advisory services she provided (save for geographical areas unrelated to the claimant's business). The non-solicitation and non-dealing covenants sought to prevent the defendant, for a 12 month period, from supplying relevant financial advisory services to customers or solicit customers who had been a client of the claimant during the 18 months prior to termination of her employment.

Aside from ruling in favour of the claimant in relation to other aspects of the claim, the High Court found that the restrictive covenants were an unlawful restraint of trade. The non-competition covenant was too wide for several reasons, including the fact that the restrictions applied irrespective of length of service and irrespective of the defendant's notice period (which was just two weeks during her probation period, and two months after this period). It was found to be unreasonable to prevent her from being employed by a competitor for nine months in the circumstances. The claimant was also unable to justify why the head of the company had less

onerous restrictions than the former employee, who was relatively junior. In relation to the non-dealing and non-solicitation covenants, the "backstop" of 18 months was found to be excessive, especially in light of the fact that many of the claimant's clients benefited from semi-annual reviews, in which case a backstop of 6 months or 12 months could have been reasonable. The claimant was not assisted by the fact that none of these issues were addressed in detail in its evidence.

Why this matters?

This case highlights the importance for employers to examine the reasonableness of their post-termination restrictive covenants under various scenarios. Restrictive covenants are viewed by the courts as unlawful restraint of trade unless they protect a legitimate business interest of the employer. Furthermore, the restraint must be reasonable and not be wider than is reasonably necessary to protect the legitimate interests of the former employer.

Under the particular circumstances of the case, the restrictions were found to be unreasonable given the defendant's length of employment, her relatively junior role, and her notice period. Had the same restrictions been applied to a more senior employee who had been working for a longer period at the firm, the court might have held that these restrictions were enforceable. This is a reminder that post-termination restrictions should be tailored to an employee's particular circumstances.

Quilter Private Client Advisers Limited v Emma Falconer and another

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EAT says absence of interim relief for discrimination claims amounts to violation of European Convention on Human Rights (the "ECHR")

The EAT has granted leave for an appeal to the Court of Appeal, to consider whether to make a declaration of incompatibility for a breach of Article 14 (prohibition of discrimination) of the ECHR arising from the lack of interim relief in discrimination and victimisation claims.

The appellant had appealed against the Employment Tribunal's refusal to permit her to apply for interim relief in a sex discrimination case. Accepting that no such right to interim relief appears in the Equality Act 2010 (the "**EqA**"), she contended that the right should be read into the EqA, based on EU law principles of effectiveness and equivalence, and argued that the absence of interim relief for such cases amounted to a breach of fundamental EU law principles. The failure to grant such relief, it was argued, would infringe Article 14 when read together with Article 6 (right to a fair trial). The EAT held that the appellant had made out the breach of Article 14 and Article 6, as there was no justification for the difference in treatment of interim relief being unavailable in discrimination claims as compared to its availability in whistleblowing claims.

However, the EAT stopped short of making any further finding, noting that the only potential remedy it could grant would be to read words into the EqA to reverse the effect of the breach of Article 14.

Acknowledging that that this would amount to quasi-legislation (and go beyond its jurisdiction), the EAT dismissed the appeal but granted leave to appeal to the Court of Appeal.

Why this matters?

As the judge noted in the case, this is an important appeal; if it succeeds, the legal landscape of remedies available in discrimination and victimisation cases will change significantly. The effect would be that an interim relief not set out in statute and not contemplated by Parliament would become available. As the EAT noted in the case, interim relief for whistleblowing claims under s103A of the Employment Rights Act 1996 can only be brought by employees, whereas if interim relief is granted for discrimination and victimisation claims, the right to apply would extend to workers, which could have strategic and cost implications to employers defending a potential increase in applications in this area.

Steer v Stormsure Limited

Dismissal of teacher for giving classes in Serbian breached Article 8 of the ECHR

The European Court of Human Rights has ruled that a school which dismissed a teacher for teaching classes in Serbian rather than Croatian had breached his right to respect for private life under Article 8 of the ECHR. At the time of his dismissal, the school had considered that the teacher could not be retrained as he could not be taught Croatian, being aged 55. The Court was satisfied that Article 8 was applicable because the reasons for his dismissal were his language (and thus part of his ethnic identity) and alleged inability to adapt due to his age. Although the school's aim was to protect the right of students to be educated in Croatian, the interference with the right was not proportionate to the legitimate aim. The Court noted that the inspection which triggered the dismissal was only carried out to teachers of Serbia ethnic origin and that no alternatives to dismissal were ever contemplated. Accordingly, the Court allowed the application.

Why this matters?

Although the specific facts of this case are unlikely to arise often, this decision provided a useful reminder that an individual's spoken language forms a part of their ethnic identity, and their age forms part of their physical identity, both of which are essential parts of a person's private life. The case also highlights the need for employers to consider alternatives prior to taking a decision to dismiss. Had the school given proper consideration of the possibility of retraining the applicant in this case, the Court may have seen the interference as proportionate.

Novakovic v Croatia

Round up of other developments

Government no longer plans to review workers' rights post-Brexit: Business Secretary Kwasi Kwarteng MP has confirmed that the plans for a post-Brexit review of worker's rights have been cancelled.

Government resists calls for legal right to furlough for parents and carers: Business Minister Paul Scully MP has refused calls to provide a legal right for parents to request paid, flexible furlough. The refusal comes despite a TUC survey of 50,000 women in the UK which revealed that more than 70% of working mothers who asked to be furloughed for childcare reasons since schools shut have been refused. The TUC is calling for a temporary legal right to furlough for parents and carers, along with other measures.

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