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Insights

UK HR TWO MINUTE MONTHLY: APRIL 2022

NON-COMPETE COVENANTS, SERIAL TRIBUNAL LITIGANTS, STATUTORY PAY INCREASES AND RIGHT TO WORK CHECKS

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SUMMARY

Our April update considers key employment law developments from March 2022. It includes a new case on non-compete covenants, increases to statutory pay limits, changes to right to work checks and a case looking at the factors considered by the tribunal in granting a restriction of proceedings order.

NON-COMPETE RESTRICTIONS – 12-MONTH NON-COMPETE AGAINST SOLICITOR UPHELD

The High Court has upheld a covenant which restricted a solicitor from joining a competitor for 12 months following termination of her employment.

Saira Ali was employed by Law by Design (LBD), a Manchester-based firm which focused heavily on NHS employment law work. In May 2021, after eight years with LBD, Ms Ali resigned to join a national law firm. Around the same time, Ms Ali prepared a seven-page business plan in which she referred to 'transitioning' clients generating annual fee revenue of around £250,000 from LBD to her new employer. This constituted over a third of LBD's annual turnover.

Earlier that same year, Ms Ali had entered into a service agreement and a shareholder agreement with LBD both of which contained 12-month non-compete covenants. Ms Ali received a substantial pay rise at the time of agreeing to the new terms. The non-compete covenant in the service agreement prohibited Ms Ali from undertaking any work in competition with the parts of LBD in which she had been materially involved in the 12 months preceding the termination of her employment. The covenant applied in particular to NHS employment work across the North West of England (exactly the kind of work covered by Ms Ali's business plan).

The shareholder agreement contained a wider restriction, prohibiting Ms Ali from competing with any other part of LBD's business.

On Ms Ali's departure, LBD applied for an interim injunction seeking to enforce both the 12-month non-compete covenant in her service agreement and the wider restriction in the shareholder agreement.

The High Court applied the four-stage test in *FS Derivatives Ltd v Morgan* [2004] which requires the court:

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

The High Court awarded the injunction to enforce the 12 month covenant. Taking into account various factors, including the nature of LBD's business, the value of that business Ms Ali could take with her to her new employer, her business plan and the facts and circumstances surrounding the covenant, the court was satisfied that LBD had legitimate business interests to protect and was entitled to protect the customer connections built up by LBD employees providing legal services to NHS clients in the North-West of England.

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.

Whilst the duration of the 12-month non-compete covenant was at the top end of what might be enforced, the type of specialist work and the geographical scope covered were highly specific. 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 geographical area.

Ms Ali's case was not assisted by her business plan, which made clear her intention to remove more than 30% of LBD's client base and fee income.

However, the court considered that the non-compete covenant in the shareholder agreement was too wide and therefore void. It prohibited competition with any other commercial business operating in the same territory as LBD, being on its face England and Wales, and this included work Ms Ali was not involved in. This broader restriction was held to be wider than was reasonably necessary for LBD to protect its legitimate business interests.

WHY THIS MATTERS

LBD was successful in enforcing the restrictions in the service agreement because the non-compete covenant was tightly drafted, with close reference to the specific business interests to be protected. The case reinforces the importance of good practice in drafting restrictive covenants. Non-compete clauses in particular, which can have a more onerous impact on departing employees, are carefully scrutinised by the courts. Employers should consider the scope of the restriction with regard to practice areas, location and duration, and limit these so that the restriction goes no further than necessary. The issue of consideration for the new covenants had also been addressed by LBD.

This case indicates that there are circumstances in which a carefully drafted 12-month non-compete covenant will be reasonable and, most of all, will be upheld.

Law By Design Ltd v Ali

SERIAL LITIGANT PREVENTED FROM WEAPONISING THE TRIBUNAL PROCESS

The Attorney General applied for an indefinite restriction of proceedings order (RPO) against David Taheri, who had made 44 claims in the Employment Tribunal in less than 10 years. Mr Taheri resisted the application on the basis that the order would violate his rights under Article 6 of the European Convention of Human Rights and the Equality Act 2010.

Mr Taheri brought numerous claims with very similar allegations after being unsuccessful in job applications with various employers. The claims involved allegations that he had been subjected to discrimination because of his age, race and disability, as he was over 50 years old, of Iranian ethnicity and had prostate cancer. After issuing proceedings, Mr Taheri sought settlement and often make threats of adverse publicity or complaints to regulators.

At the EAT, the 3 conditions for granting an RPO were considered, with the Judge noting that an individual must have:

"(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."

Noting that Mr Taheri had lodged as many as 44 claims in less than 10 years, consistently with limited bases for his allegations, even filing up to 3 claims in one day in February 2018, the EAT concluded that all 3 conditions had been met and granted an indefinite RPO under s33 of the

Employment Tribunals Act 1996. According to the EAT Mr Taheri had abused and 'weaponised' the employment tribunal process.

The EAT did not diminish the possibility of an individual of Mr Taheri's age (and with the medical problems) being faced with discrimination but concluded there was no infringement of his rights. The EAT therefore ruled that granting an RPO was:

"necessary for public protection against abusive claims and to ensure that the administration of justice is not impaired by the persistent pursuit of unmeritorious proceedings'.

WHY THIS MATTERS

This is an interesting decision which serves as a reminder of the factors considered by the EAT when granting an indefinite restriction of proceedings order. Employers must bear in mind that an RPO obligates the individual to obtain permission from the tribunal to make a claim by demonstrating the proceedings are not vexatious and there are reasonable grounds. It is does not bar an individual completely from bringing a claim.

HM Attorney-General v Taheri

VICTIMISATION UPDATE: MEANING OF DETRIMENT BECAUSE OF A PROTECTED ACT

The EAT has reiterated that, when considering whether a claimant has suffered a detriment, the correct test is whether the treatment complained of is such that a reasonable worker would or might take the view that, in all the circumstances, it was to his detriment. It is not necessary to establish any physical or economic consequence for the claimant. However, whilst detriment is a word to be interpreted widely in this context, an unjustified sense of grievance would not pass the test.

The EAT also reiterated the principle that, when considering whether the reason for a detriment was 'because of' a protected act, the test is whether the protected act had a significant influence on the outcome.

In this case, the Tribunal found that the Respondent police force had put the Claimant's job application on hold because of ongoing Employment Tribunal proceedings with another police force, but 'more importantly' because of the failure of that police force to provide the information requested from them as part of the vetting process.

The EAT held that the Tribunal had taken the wrong approach and its reasoning was insufficiently clear when it found that the failure to progress the application did not amount to a detriment under the Equality Act 2010. The Tribunal had also failed to apply the correct legal test after analysing

the reasons for putting the vetting on hold. The case was remitted for rehearing by a different Tribunal.

WHY THIS MATTERS

The EAT's decision indicates that detriment is a word to be interpreted widely in this context. As such, consideration of the reason for the detriment is increasingly relevant and often the focus of the evidence before the Tribunal, particularly where there may be a number of reasons for the treatment complained of. Some of these reasons may be genuinely separable from the protected act. Employers can help reduce the risk of unmeritorious claims by keeping careful records of the reasons for their decisions and actions, which can be relied on in the case of later challenge.

Warburton v The Chief Constable of Northamptonshire Police

ROUND UP OF OTHER DEVELOPMENTS

RIGHT TO WORK CHECKS

The Immigration (Restrictions on Employment and Residential Accommodation) (Prescribed Requirements and Codes of Practice) and Licensing Act 2003 (Personal and Premises Licences) (Forms) Regulations 2022 (SI 2022/242) comes into force on 6 April 2022. Rather than manually carrying out a right to work checks, the new regulations enable employers to use identification document validation technology (IDVT) service providers to digitally verify the identity of British and Irish citizens with valid passports. Biometric Cards will no longer be acceptable documents for right to work checks. The Home Office online right to work checking service should be used to evidence the right to work in the UK.

INCREASES TO STATUTORY LIMITS

The government has accepted the Low Pay Commission's recommendations on the national living wage and national minimum wage rates in full. On April 2022, the rates will increase 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, taking 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.

GOVERNMENT CONSIDERS RESPONSES TO CONSULTATION ON REFORM OF NON-COMPETE CLAUSES IN EMPLOYMENT CONTRACTS

The Parliamentary Under-Secretary of State for BEIS, Paul Scully MP, has provided confirmation that the government is analysing data and responses to the consultation on reform of non-compete clauses in employment contracts. Any decision taken by the government to proceed with reforms to non-compete clauses requires consideration of the benefits and risks before implementation. Paul Scully did not comment further on the government's plans.

This article was co-written with Trainee Solicitor Gin Kynigos.

RELATED CAPABILITIES

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