Employment Law Update

Innes Clark and Carrie Mitchell* continue our regular digest, last at 2019 SCOLAG 159

Over the past few months a lot has been going on in employment law, primarily on the back of the Good Work Plan. In particular, we have seen a flurry of activity in terms of the publication of new consultations and Government responses to consultations that closed earlier in the year. In addition, there have been a number of interesting court and tribunal decisions, details of which are set out below.

A. Legislative Update

Employment Law Reform timeline

July

Good Work Plan: establishing a new Single Enforcement Body for employment rights is a consultation on the case for a new single labour market enforcement body and whether this could deliver:-

- extended state enforcement (in addition to the National Minimum Wage, holiday pay and other enforcement already carried out);
- a recognisable single brand so individuals know where to go for help;
- better support for businesses to comply with rules;
- co-ordinated enforcement action to tackle the spectrum of non-compliance;
- pooled intelligence and more flexible resourcing; and
- closer working with other enforcement partners such as immigration enforcement, benefit fraud and health and safety.

Views are also sought on the core remit of a new body, interaction with other areas of enforcement, the approach to compliance and the powers such a body will need. The consultation closes on 6 October 2019.

This consultation is timely as the Women and Equalities Committee has also published a report on enforcement of the Equality Act 2010 suggesting that it is no longer fit for purpose. The report calls for the burden of enforcement of the Act to be shifted away from the individual, and criticises the effectiveness of the Equality and Human Rights Commission, calling it timid and recommending that it be bolder in the use of its enforcement powers.

Good Work Plan: Proposals to support families is actually three separate consultations in one paper, all dealing with proposals to help working parents. The first consultation is on parental leave and pay. It aims to look at the costs and benefits of different options for reforming parental leave in order to achieve greater equality in parenting and at work. There is also a consultation on neonatal leave and pay looking at how new leave and pay entitlements can support parents of sick and premature babies. The final consultation is on transparency and considers whether large employers should be required to publish their family-related leave and pay policies and how that could be done. It also looks at whether employers should make clear when advertising a vacancy whether flexible working might be available and how that could be achieved. The first consultation on parental leave and pay is open until 29 November 2019. The other consultations are open until 11 October 2019.

One sided flexibility, where the flexibility in a worker/employer relationship is beneficial only to the employer and detrimental to the worker, was identified in the Taylor Review. Good Work Plan: Consultation on measures to address one-sided flexibility seeks views on providing a right to reasonable notice of working hours, providing workers with compensation for shifts cancelled without reasonable notice, and what guidance the Government can provide to support employers and encourage best practice to be shared across industries. The consultation also closes on 11 October 2019.

The Consultation on sexual harassment in the workplace considers re-introducing protection from third party harassment, extending protections to volunteers and interns, extending the 3 month time limit for making a sexual harassment claim to an employment tribunal and the possibility of a new legal duty on employers to prevent harassment, something that campaign groups have been calling for. The consultation closes on 2 October 2019.

Health is everyone's business: proposals to reduce ill health related job loss was also published in July. The Government describes the proposals as supporting and encouraging early action by employers for their employees with long term health conditions. Amongst other things, it seeks views on employers having to support those with health conditions who are not covered by the Equality Act to stay in employment and the introduction of a right for employees to request workplace modifications in circumstances where they are not covered by the Equality Act. It also looks at reviewing the current system of statutory sick pay and encouraging a significant increase in occupational health specialists and an improvement in standards. The consultation closes on 7 October 2019.

A response to the consultation on measures to prevent the misuse of confidentiality clauses in situations of workplace harassment and discrimination was published in July and the final proposals include:-

- legislating so that no provision in a confidentiality clause can prevent disclosures to the police, regulated health and care professionals and legal professionals;
- legislating so that limitations in confidentiality clauses are clearly set out in employment contracts and settlement agreements;
- producing guidance for solicitors and legal professionals responsible for drafting settlement agreements;
- legislating to enhance the independent legal advice received by individuals signing confidentiality clauses; and
- enforcement measures for confidentiality clauses that do not comply with any legal requirements in written statements of employment particulars and settlement agreements.

The Government response to the consultation on Pregnancy and Maternity Discrimination was published on 21 July. The response confirms that the Government is committed to:-

- extending the redundancy protection period so that it begins when the employee informs her employer of her pregnancy and ends 6 months after she returns to work;
- extending the protection for adoptive parents for a period of 6 months after the return from adoption leave;
- extending protection for those taking shared parental leave

taking into account the legal differences between shared parental leave and maternity leave, the need for the protected period to be proportionate to the amount of shared parental leave that is taken and the consequential threat of discrimination, and ensuring a mother who curtails her maternity leave and subsequently takes shared parental leave is no worse off; and

- creating a taskforce of employer and family representative groups who will make recommendations on improvements to the information available to employers and families on pregnancy and maternity discrimination. The taskforce will also develop an action plan on what steps the Government and other organisations can take to make it easier for pregnant women and new mothers to stay in work.

It is intended that further consultation will take place over the coming months on the protection for those taking shared parental leave.

While the timescale for implementation is somewhat vague, it should be assumed that these new rights will become law at some point over the next year or two.

August

With the possibility of Brexit at the end of October, section 1 of the European Union (Withdrawal) Act 2018 was brought into force on 16 August. This repeals the European Communities Act 1972 on exit day (currently defined as 11pm on 31 October 2019). The repeal removes the Government's power to implement EU obligations by way of secondary legislation and also the legal mechanism through which EU law has effect in the UK.

September

The Ministry of Justice published its annual employment tribunal award statistics for 2018/2019 in September. As expected, the number of claims made between April 2018 and March 2019 has increased, although not as significantly as it did in 2017/18. The total number of claims made is up from 109,685 to 121,111. The highest award of the year, £947,585, was, once again, made in an unfair dismissal claim (bear in mind that the usual statutory cap of £86,444 for unfair dismissal claims does not apply in certain circumstances). The average and median awards for successful unfair dismissal claims were £13,704 and £6,243 respectively. The highest award in a discrimination claim was £416,015 and this was made in a disability discrimination claim. The number of costs awards made this year has reduced to 209, having remained static at 479 for the previous two years. As with last year, the majority of costs awards were made to respondents rather than claimants. The highest costs award was £329,386.

B. Judicial Developments

Restrictive Covenants

***Tillman* v. *Egon Zehnder Ltd* [2019] UKSC 32**

In *Tillman v Egon Zehnder Ltd*, the Supreme Court has considered when it is appropriate to sever words from within a restrictive covenant in circumstances where, if the words were to remain, the covenant would be void as an unreasonable restraint of trade.

Ms Tillman, who had been promoted quickly during her employment with Egon Zehnder Ltd, was subject to a number of restrictive covenants which lasted for 6 months following the termination of her employment. The non-compete clause was the one at issue before the Supreme Court. It said that Ms Tillman could not "directly or indirectly engage or be concerned or interested in any business carried on in competition with any of the businesses of the Company…".

Within a week of her employment terminating Ms Tillman indicated she intended to start work for a competitor. When Egon Zehnder applied for an interim injunction preventing Ms Tillman from taking up her new employment, she argued that the non-compete clause was an unreasonable restraint of trade and thus void. This argument focused on the words "or interested in any business" which Ms Tillman said prevented her from holding even a minor shareholding in a competitive business. Mr Justice Mann, in the High Court, did not accept this and granted the injunction.

However, the Court of Appeal allowed an appeal, agreeing that the words "interested in" unreasonably prevented Ms Tillman from holding even a minor shareholding in a competitor. This was despite the fact that Ms Tillman's arguments were theoretical only - she had no intention of taking a minor shareholding in a competitor - her intention was to go and work for a competitor and she simply used this argument as a means to an end. Egon Zehnder, having lost on the principal point, argued that the words at issue could be severed from the terms of the non-compete clause rendering it enforceable, however the Court of Appeal did not accept this.

The Supreme Court agreed that the words "interested in" did preclude even a minor shareholding rendering the clause, as drafted, an unreasonable restraint of trade. However, it disagreed on the issue of severance of those words. Two approaches to severance were considered by the Court. The first approach set out in a Court of Appeal case dating from 1920, *Attwood v Lamont*, limited severance to situations where the covenant was "not really a single covenant but [was] in effect a combination of several distinct covenants". The second, again set out in a Court of Appeal case but this time in *Beckett Investment Management Group Ltd v Hall* in 2007, used three criteria for severance. The criteria were:-

- whether the unenforceable provision can be removed without the need to add or modify the wording that remains;
- that the remaining terms continue to be supported by adequate consideration; and
- that the removal of the unenforceable provision does not so change the character of the contract that it becomes not the sort of contract the parties entered into at all.

The Supreme Court preferred the use of the three criteria in the Beckett case and overruled the Court of Appeal in Attwood. The third criteria was the crucial one in the view of the Supreme Court, and was better expressed as "whether the removal of the provision would not generate any major change in the overall effect of all the post-employment restraints in the contract".

On that basis, the words "or interested" could be removed from the non-compete clause and the injunction granted by the High Court could be restored. This case provides a useful clarification of when unreasonably broad words can be severed from the remaining reasonable parts of a restrictive covenant.

Disability Discrimination based on perception

***Chief Constable of Norfolk* v. *Coffey* [2019] EWCA Civ 1061**

Here Ms Coffey was a police officer employed by Wiltshire Constabulary who suffered from hearing loss and tinnitus. On paper this meant she did not meet the standard required to join the force, but the Constabulary arranged for a practical functionality test. Ms Coffey passed this test and she subsequently undertook front line duty without there being

any issue in relation to her hearing. Two years later, when she applied to transfer to Norfolk Constabulary, she disclosed the hearing problem and the report on the functionality test. Despite Norfolk Constabulary being told her hearing was not deteriorating and that it could be assumed she would pass a further practical test, her application to transfer was refused. One reason for the refusal was that Ms Coffey may need to be put on restricted duties at a later date if the condition deteriorated.

Both the employment tribunal and the Employment Appeal Tribunal (EAT) upheld her claim for discrimination based on Norfolk Constabulary's perception of her condition. The Court of Appeal agreed, dismissing the appeal by the Norfolk Constabulary.

In a claim for perceived disability discrimination, the putative discriminator (the Constabulary) must believe that all elements in the statutory definition of disability are present. This did not depend on the Constabulary having knowledge of disability law, rather it depended on whether Ms Coffey was perceived by the Constabulary to have an impairment with the features set out in the legislation - i.e. an impairment that has a substantial and long term adverse effect on the claimant's ability to carry out normal day to day activities. As their concern was about her ability to carry out frontline policing, it therefore needed to be established whether or not the activities involved in frontline policing were "normal day to day activities".

Before the Court, the Constabulary argued that the activities of a frontline police officer were not "normal". However, there had been no evidence before the employment tribunal that front-line officers need to have particularly acute hearing and the Court concluded that the activities involved in the role were normal day to day activities for the purpose of the Equality Act 2010. What is more, the belief that Ms Coffey's hearing loss would render her unable to perform the duties of a frontline officer in the future was a perception that it would have a substantial adverse impact on her ability to carry out normal day to day activities.

The Court then had to consider whether refusing someone employment because of a perception of a risk of future inability to work fell within the terms of the Equality Act. The employment tribunal had found that it did because the Constabulary, in effect, believed Ms Coffey was suffering from a progressive condition. Under the Equality Act a progressive condition is to be treated as having an immediate substantial adverse impact on the ability to carry out day to day activities even if that is not yet the case at the date the discrimination takes place. The Court were therefore satisfied that Ms Coffey was protected by the Equality Act.

Holiday Pay - voluntary overtime

***East of England Ambulance Service NHS Trust* v. *Neil Flowers and Others* [2019] EWCA Civ 947**

Here Mr Flowers and his colleagues were employed in a range of roles concerned with the provision of ambulance services. They brought a claim alleging unlawful deduction from their holiday pay, arguing that holiday pay should take account of overtime in two categories - non-guaranteed overtime, which occurs where an employee is carrying out a task that must be completed after the end of a shift, and voluntary overtime. The claim was based both on a contractual right based on clause 13.9 of the Agenda for Change NHS terms which state that holiday pay will include "regularly paid supplements" and "payments for work outside normal hours" and, in the alternative, under Article 7 of the Working Time Directive ("WTD").

The employment tribunal decided the claimants were not entitled to have voluntary overtime included in the calculation of their holiday pay. However, the EAT then handed down their judgement in *Dudley Metropolitan Borough Council v Mr G Willetts and Others* (the "*Willetts* case") and on the back of that decision the claimants appealed to the EAT.

In respect of the contractual claim, the EAT decided that voluntary overtime should be included in the calculation of holiday pay. The EAT also found that the WTD required voluntary overtime payments to be included in the calculation of holiday pay, following the EAT judgement in the *Willetts* case.

Before the Court of Appeal, the Trust argued that overtime payments should only be included where there was a contractual requirement to perform overtime and it was broadly regular and predictable. However, the Court rejected this argument finding that it would contradict the European Court of Justice's finding in *Williams and others v British Airways plc* that "workers must receive their normal remuneration" during their holidays. It held that there was no requirement for the overtime to be contractual, and that, while the overtime did need to be broadly regular and predictable, it was wrong to suggest that voluntary overtime was always exceptional and unforeseeable. The appeal therefore failed.

The Court was also clear that clause 13.9 of the Agenda for Change terms meant that Mr Flowers and his colleagues had a contractual entitlement to have voluntary overtime taken into account for the purposes of calculating holiday pay so the Trust's appeal on that point also failed.

This means there is now both EAT and Court of Appeal authority that voluntary overtime should be included in the calculation of holiday pay, when it is paid regularly enough

to qualify as "normal pay". The *Willetts* case found that payment every four or five weeks was enough to meet the threshold, if it was paid over a sufficient period of time, but each case will turn on its own facts. There also still remains the possibility of a further appeal to the Supreme Court.

Holiday Pay - break in series of deductions

***Chief Constable of the Police Service of Northern Ireland & Another* v. *Agnew and others* [2019] NICA 32**

In this case the Northern Irish Court of Appeal ("NICA") has cast doubt on whether a 3 month or more break in a series of deductions will result in that series being broken. The case related to failures by the police service to pay appropriate amounts of holiday pay and subsequent claims brought under the unlawful deduction provisions of the Employment Rights (Northern Ireland) Order 1996. There were six grounds of appeal considered by NICA but it is their judgement on the meaning of a series of deductions and whether the series was ended by a gap of more than 3 months that is of particular interest.

NICA considered that in order to establish a series of deductions it was necessary to identify the series. There did need to be "a sufficient similarity of subject matter such that each event is factually linked with the next". When the series is identified as "a series in relation to holiday pay" then the link in the series is the failure to pay the correct amount of holiday pay. The fact that there would have been appropriate payments in between the various holiday payments which were not subject to unlawful deductions will not interrupt the series of payments in relation to holiday pay. A series is not ended by a gap of more than 3 months between unlawful deductions. On the facts of this particular case, NICA also found that the fact that on some occasions the correct amount of holiday pay may have been paid did not break the series of unlawful deductions either.

As this was Northern Irish legislation being considered by a Northern Irish court, the outcome is not binding on tribunals in Great Britain - the EAT decision in *Fulton v Bear Scotland Ltd* (which decided a break of 3 months or more would break a series of deductions) remains the binding authority here. However, the terms of the unlawful deduction of wages provisions in the Northern Irish legislation is identical to that set out in the Employment Rights Act 1996 and this judgement provides strong persuasive authority for arguing that the EAT was wrong in *Fulton v Bear Scotland Ltd*. Taken together with the Opinion of the Advocate General and the subsequent judgement of the European Court of Justice in the case of *King v The Sash Window Workshop Ltd & Another*, which both indicate that The Deduction from Wages (Limitation) Regulations 2014 may be incompatible with EU law, this case suggests employers may need to re-consider what liabilities they might have for unpaid holiday pay.

Provision for diligence on the dependence in the employment tribunal

***AA* v. *The Secretary of State for Business, Energy and Industrial Strategy and The Commission for Equality and Human Rights* [2018] CSOH 54**

***Anwar* v. *Advocate General for Scotland* [2019] CSIH 43**

Following these cases, those representing claimants, particularly in Scotland, will have no excuse for not considering how to prevent a respondent from disposing of funds to avoid payment of a tribunal award and taking the necessary action to prevent it.

Both cases arise from an employment tribunal claim brought by Anela Anwar for harassment on the grounds of sex, race and religion. She was successful in her claims and the respondent was ordered to pay her £75,000 in compensation. Ms Anwar's representative got wind of the possibility of her former employer's business being shut down and its funds being transferred to another entity after the employment tribunal judgement was issued and obtained an interim interdict in Glasgow Sheriff Court. However, the bank account was so depleted that she did not receive any of the compensation.

Ms Anwar petitioned the Court of Session (*AA v BEIS and CEHR*), arguing that by failing to make statutory provision for the granting of diligence on the dependence by an employment tribunal, the UK was in breach of its EU law obligations to provide her with a remedy for her harassment claim that was compliant with the principles of effectiveness and equivalence. The EU principle of effectiveness is that procedural requirements for raising actions to enforce EU rights cannot be so excessively difficult as to render exercise of that right practically impossible. The principle of equivalence is that rules put in place to implement the EU law should be no less favourable than those governing similar domestic actions.

The petition was dismissed by the Outer House of the Court of Session. The court found that an action could have been raised for diligence on the dependence in either the Sheriff Court or the Court of Session at the time employment tribunal proceedings were commenced. Raising those proceedings was not excessively difficult or impossible. Nor had the principle of equivalence been breached on the basis that the opportunity to raise an action of diligence on the dependence would have been available whether her claim had been based on EU or domestic rights (such as an unfair dismissal claim).

Anwar v Advocate General for Scotland was an appeal against that decision - Ms Anwar now being named as a party as the Inner House of the Court of Session (who heard the case) no longer felt the anonymity order previously imposed by the Outer House was justified. The Court considered four grounds for appeal. The first ground was that the Outer House had been wrong to find it was possible to obtain diligence on the dependence of an employment tribunal claim. That argument was rejected by the Inner House, but only on a majority basis. Although the majority agreed with the findings of the Outer House that diligence on the dependence could be obtained for an employment tribunal claim via a separate action to either the Court of Session or Sheriff Court, Lord Carloway dissented. In his judgement, jurisdiction for matters concerning discrimination or harassment in the context of work was given exclusively to an employment tribunal and an action raised in either the Court of Session or the Sheriff Court would be "fundamentally incompetent".

The second ground of appeal was also rejected, again by a majority. They agreed with the Outer House that the procedures for claiming diligence on the dependence provides an effective remedy and does not breach the EU principle of effectiveness. An action for diligence on the dependence is relatively straight forward and inexpensive, and the ordinary courts are more familiar with the issues that routinely arise in such actions (concerning property and insolvency). However, once again Lord Carloway dissented. He felt failure to pay awards was most commonly because an employer simply refused to do so and were not primarily as a result of insolvency. Further, a claimant in a tribunal may well not instruct a lawyer whereas they would almost certainly need to do so to deal with diligence

- this significantly impacted on costs, convenience and accessibility when compared to a tribunal claim rendering an effective remedy excessively difficult or practically impossible for many.

The third ground of appeal was dismissed unanimously by the Inner House. The Outer House had used the correct comparator when deciding if the principle of equivalence had been complied with. The final ground of appeal was that the EU laws had been inadequately transposed as they did not provide fully effective interim remedies. Given the Inner House had found that this was not the case, this ground was also dismissed.

The outcome of this case does not sit entirely comfortably with the findings of the Taylor Review which recommended that the process of enforcing awards should be simpler. In the Good Work Plan, the UK Government announced the Employment Tribunal Project and the Civil Enforcement Project, both of which aim to simplify the process for enforcing unpaid awards. One of the aims of the projects is to signpost at the relevant time all of the enforcement options available so that "more people are paid what they are entitled to quickly and with the minimum of effort".

Given the dissenting opinion by Lord Carloway, the Lord President, it is possible that this matter could still make its way to the Supreme Court. In the meantime, lawyers representing claimants should consider whether it is necessary to take protective measures in the civil courts when raising an employment tribunal claim.

Agency workers regulations

***Kocur* v. *Angard Staffing Solutions Limited & Royal Mail Group Limited* [2019] EWCA Civ 1185**

Here Mr Kocur was employed by Angard, a wholly owned subsidiary of Royal Mail Group ("RMG") that supplied workers to RMG. He worked most weeks for RMG but was typically allocated less than 20 hours per week. About 10 months after starting work, Mr Kocur brought proceedings in the employment tribunal alleging various breaches of the Agency Workers Regulations. His claim was upheld in part, but claims that he did not receive the same rest breaks as RMG employees and that he was entitled to be allocated equivalent hours of work to comparable employees were dismissed. The EAT allowed an appeal as regards the rest breaks, but dismissed the claim based on equivalence of hours.

The equivalence of hours claim then went before the Court of Appeal. Mr Kocur's position was that terms and conditions relating to duration of working time refers to any term dealing with the amount of time that a worker works and accordingly covers the term in a contract that specifies the amount of work that the worker is both entitled and required to work. In short, that meant that his argument was that if the comparator's contract specified a 39-hour week then Mr Kocur was entitled to that number of working hours also.

The Court of Appeal found no difficulty in dismissing this argument. The purpose of the relevant EU Directive and the Regulations is to ensure the equal treatment of agency workers and permanent employees while at work, and in respect of rights arising from their work. They are not intended to regulate the amount of work which agency workers are given.

Disciplinary hearings - covert recordings

***Phoenix House Limited* v. *Mrs Tatiana Stockman*, UKEAT/0284/17/OO & UKEAT/0058/18/OO**

In 2015 an employment tribunal upheld a claim of unfair dismissal, whistleblowing detriment and victimisation made by Tatiana Stockman against her employer Phoenix House Limited. Following an appeal to the EAT and a further tribunal hearing the parties found themselves back in front of the EAT in January 2019. One of the issues for the EAT related to the amount of compensation awarded by the tribunal and the fact it had been reduced by 30%.

It had emerged during the tribunal proceedings that Mrs Stockman had made a covert recording of a meeting. At the remedy hearing, Phoenix had argued that had they been aware of the covert recording at the time it was made they would have dismissed Mrs Stockman for gross misconduct and accordingly it was not just and equitable for any award of compensation to be made. The covert recording was, in the submission of Phoenix, a breach of trust and confidence.

The tribunal found that Mrs Stockman did not make the recording for the purpose of entrapment, she appeared flustered when the recording was made, she did not use it during the internal proceedings with Phoenix and she had supplied a transcript of it as part of the tribunal's disclosure process. The tribunal also noted that the making of covert recordings was not specifically referred to in the disciplinary policy as amounting to gross misconduct and the policy had not been amended by the time of the remedy hearing. Prior to considering the covert recording, the tribunal had decided to reduce the compensation by 20% for other reasons. They reduced it by a further 10% in light of this issue, finding there was only a low percentage chance that Phoenix would have fairly dismissed her had they known of the recording prior to her actual dismissal.

In the appeal judgement - *Phoenix House Limited v Mrs Tatiana Stockman* UKEAT 0284/17/0507- the EAT rejected Phoenix's arguments. A tribunal is not bound to find that a covert recording undermines trust and confidence and it is entitled to make an assessment of the circumstances. The purpose of the recording, the employee's blameworthiness and what is recorded will all be relevant factors, as will the attitude of the employer to such conduct. Recording a meeting that the employee is not in attendance at where confidential matters may be discussed will be a different matter from recording a meeting the employee attends where minutes are taken in any event.

However, for employers looking for support for arguments against covert recordings, the EAT went on to say that it is good employment practice for an employee (or employer) to say if there is any intention to record a meeting, save in the most pressing of circumstances. So, while it may not amount to a breach of the implied term of trust and confidence not to do so, it will, according to the EAT, generally amount to misconduct.

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