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EMPLOYMENT LAW BULLETIN

JANUARY 2021

Welcome to the Wrigleys Employment Law Bulletin, January 2021.

The start of 2021 has brought continued challenges for employers, poised as we seem to be between hopes for the impact of the vaccination programme, and fears about increasing infection rates. In our first article, we consider the current relevance of the previously little-known protections for employees who take steps, including refusing to attend work, to avoid a serious and imminent danger in the workplace.

We also highlight a recent change to the rules on disclosure of criminal records. The DBS now no longer automatically disclose multiple convictions or youth cautions, warnings or reprimands in a standard or enhanced DBS check.

We consider the EAT judgment in ***Berkeley Catering Limited v Jackson*** which examined whether a reorganisation of work at senior management level led to a genuine redundancy situation, regardless of the CEO's motives for that reorganisation.

In another recent case, ***Angard Staffing Solutions Limited and another v Kocur and another***, the EAT helpfully made clear the extent of an employer's obligations to agency workers, considering whether employers are obliged to allow agency staff to *apply* for internal vacancies, or simply to *inform them* of the vacancies.

We also report on the recent High Court case of ***Quilter Private Client Advisors Limited v Falconer and another***, which provides helpful guidance on when restrictive covenants limiting what employees can do after termination will be found to be unenforceable as being an unreasonable restraint on trade.

The Government are currently consulting on how far employers should be able to restrict ex-employees from working for competitors or setting up their own competitive business. A further Government consultation is looking at the issue of whether employees on low pay with minimum guaranteed hours should be protected from having exclusivity clauses in their contracts to stop them from working for other employers. If you would like to contribute your thoughts on these issues to inform Wrigleys' responses to these Government consultations, please complete our online surveys here.

Our survey on the consultation on extending the ban on exclusivity clauses
Our survey on the consultation on restrictive covenants

We hope to see you at our Employment Brunch Briefing on 2 February (see link below). Following the main briefing, we will be discussing with delegates their thoughts on the two consultations outlined above.

We are always interested in feedback or suggestions for topics that may be of interest to you, so please do get in touch.

Forthcoming webinars:

- **2 February 2021, Webinar**
  Employment Brunch Briefing
  Data protection update for employers
  Speakers: *Ibrahim Hasan, lawyer and director of Act Now Training Limited & Alacoque Marvin, solicitor at Wrigleys Solicitors*
  Click here for more information or to book

Recorded employment law webinars:

- **Employment law update series: Flexible working: Part I - building a balanced society**
  16 June 2020, Webinar
  Click here for more information or to view webinar

- **Employment law update series: Flexible working: Part II - re-organisation and flexible working**
  7 July 2020, Webinar
  Click here for more information or to view webinar

- **Charities & social economy webinar series: Restructuring your organisation from the inside out**
  22 July 2020, Webinar
  Click here for more information or to view webinar

- **Employment law update series: Equality in the workplace - transgender discrimination**
  4 August 2020, Webinar
  Click here for more information or to view webinar

- **Employment law update series: Equality in the workplace - disability and reasonable adjustments**
  1 September 2020, Webinar
  Click here for more information or to view webinar

- **Employment law update series: Equality in the workplace - atypical working, zero hours and ethical issues**
  6 October 2020, Webinar
  Click here for more information or to view webinar

- **Employment Brunch Briefing: What's new in employment law?**
  1 December 2020, Webinar
  Click here for more information or to view webinar

– Alacoque Marvin, Editor **alacoque.marvin@wrigleys.co.uk**

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Refusing to work because of fears about Covid-19 - section 44 of the Employment Rights Act

Article published on 15 January 2021

Employers need to be aware of this increasingly important provision.

The emergence of a reportedly much more infectious strain of the coronavirus in the lead up to Christmas has now led to another national lockdown and raised questions about whether it is safe to come to work. Government guidance has made clear that people should not attend work if they are reasonably able to work from home. In particular, clinically extremely vulnerable people are advised to shield and not to attend work.

In the education sector the latest lockdown has led to partial school closures and a switch to remote learning for many pupils, with children of critical workers and children who are 'vulnerable' being allowed to attend school in person.

Just prior to the new lockdown, teaching and support staff unions advised their members not to attend schools on the grounds of safety and to send 'Section 44' letters to their employers to notify them of this.

This is not just an issue affecting schools. The current infection rates and new strains of the virus are likely to lead employees in all sectors to be concerned about attending work in person. In this article we consider whether employees can refuse to attend work during the latest lockdown.

Section 44 Employment Rights Act 1996

There is a specific protection granted to employees by s.44 of the Employment Rights Act 1996 (ERA). Specifically, s.44(1)(d) and (e) ERA provides that an employee has the right not to be subjected to any 'detrimental' act, or failure to act, by their employer on the basis that the employee left or refused to return to work or took appropriate steps to protect themselves because the employee believed they were in serious and imminent danger.

This protection is qualified in several ways. In order for the protection to apply an employee*:

1) must reasonably believe

2) that they, or other persons, were in serious and imminent danger

3) which the employee could not reasonably have been expected to avert

and so the employee left, proposed to leave, or did not return to, work.

**It is worth noting that recent caselaw supports this protection also applies to workers.*

An employee will also be protected if they take 'appropriate steps' to protect themselves or other persons in these circumstances.

The question of whether an employee had the required 'reasonable belief' is partly subjective as the tribunal will consider what was in the employee's mind at the relevant time. The tribunal will then apply an objective test, considering whether it was reasonable for the employee to hold that belief in the circumstances. We consider below what this might mean in practice.

Importantly, the protection under s.44 is only triggered if an employee can show that they have suffered a 'detriment' either as the result of an action taken or not taken by their employer and that

the action/ inaction was on the ground that the employee took the protected action.

Without all these elements, s.44 will not give an employee protection from the actions of their employer.

Will staff be protected if they refuse to work during the current lockdown?

Whether the s.44 protection applies to a particular employee will depend largely on the specific circumstances of the individual and their work environment. It is therefore difficult for employers to be certain that a tribunal would or would not find the employee's conduct to be protected. There is also very little case law to provide guidance and examples on this issue, and none to date in the context of a global pandemic. This is, quite literally, an unprecedented area of law and therefore it is very difficult to determine with any certainty whether s.44 applies in any one situation.

However, there are some key points which may help employers to weigh up the legal risks if an employee claims protection under s.44.

Reasonable belief of the employee

It is not enough under s.44 for an employee simply to say that they believed they or some other person was in serious and imminent danger which could not be averted. That belief must be reasonable, as determined by a tribunal.

In its assessment, the tribunal is likely to take into account relevant scientific advice about transmission of the virus at the time the refusal to work occurred, the particular risks applying in the workplace, and the risks to the individual who was allegedly in danger (such as any particular vulnerability to the virus). It will also consider any steps the employer has taken to reduce the risks.

In the context of the pandemic, employers are likely to need provide evidence to show that they have followed current advice, performed risk assessments and put mitigation into effect to reduce risks of transmission in the workplace to an acceptable level.

If an employer has rigorously carried out risk assessments, implemented risk mitigation, consulted with their employees / employee representatives about this and taken on board their feedback, it is less likely that a tribunal would find an employee's belief of serious and imminent danger to be reasonable.

Conversely, if an employer has taken steps to mitigate risk but has not informed or discussed this with their employees, an employee's belief in the danger is more likely to be found to have been reasonable.

It is also worth noting that it is not enough for an employee to say there was a danger – it must be serious and imminent and not capable of being averted, for s.44 to apply.

For this reason, it is hard to say if a tribunal would find a particular employee's belief that the danger was imminent to be reasonable. Imminence is likely to require a sufficient closeness in time and possibly space between the employee and the specific risk. We know from related case law that a potential or hypothetical risk is unlikely to be sufficient.

For the risk to be 'serious' it is likely that an employee will need to show that they believed there was more than merely a danger, but that the danger was serious to the person exposed to it. This belief of serious danger will also need to be objectively reasonable. Given the current number of hospital admissions and deaths due to Covid-19, and concerns in relation to the impact of 'long-Covid', it is possible that a tribunal would consider it reasonable to believe the danger was serious.

Applying this reasoning it is easy to see how the seriousness and imminence of danger could be

met. But this will still depend on an individual's circumstances. For example, is the coronavirus both a serious and imminent danger to a 19 year-old employee with no underlying medical conditions when their employer has implemented and communicated the mitigation efforts it has taken at the workplace to make it 'covid secure' in line with government guidance?

Would the same conclusion be met if the individual were older and/ or had underlying health conditions and either were or were not categorised as clinically extremely vulnerable?

It is worth repeating that s.44 also applies to dangers which 'other people' are exposed to, which may mean that employees who have vulnerable family members and refuse to attend work can be protected under s.44.

Detrimental treatment because of a protective act taken by the employee

For the protection afforded by s.44 to apply, an employer must subject an employee to a detriment 'on the ground' of the employee's act to avoid danger. In essence, the employer must be shown to have victimised the employee on the balance of probabilities for an act covered by s.44. In practice, this means the burden is placed on the employer to show that they were not materially motivated by the employee's protected actions. A material motivation is one which is 'more than minor or trivial'.

A detriment is anything which is disadvantageous to the employee and might cover a decrease in pay, the loss of an opportunity or promotion, the withdrawal of certain benefits or being moved to a different role or department. Whatever the detriment is it must be shown to be significantly influenced by an action taken by the employee's protected conduct. It will not be enough for an employee to merely show they suffered a detriment, which means that there may be circumstances in which an employee may suffer a detriment and not succeed with a claim for breach of s.44.

For example, if an employee refuses to attend work because there is an imminent and serious danger of contracting Covid-19 and they are subsequently furloughed on reduced pay, the employee may have grounds to say the employer has breached s.44 if they can show their being placed on furlough on reduced pay was because of their refusal to attend work. An employer may defeat such a claim if it can show, for example, that regardless of the employee refusing to attend work the employer had decided to place the employee on furlough and can provide evidence for this (for example, because they furloughed employees in the same position who did not refuse to attend work on those grounds and there were clear wider business reasons for placing those employees on furlough).

Dismissing an employee for an act covered by s.44 is automatically unfair under s.100 ERA. Employers will therefore need to be careful to document the reason for any dismissal to show that the decision to dismiss was taken for another, potentially fair reason, in the event the employee claims protection under s.44.

Risks for employers

Whilst recent trade union advice to workers in the education sector to not attend work on health and safety grounds has grabbed a lot of headlines, in our view it is not possible to make blanket assertions about whether or not an employee can rely on s.44 ERA to refuse to attend work, not least because meeting the requirements of that protection will depend on the particular circumstances of the individual and the workplace.

Ultimately, the question of whether s.44 protection applies can only be determined by a tribunal or court following what is likely to be a protracted and costly legal process.

Employers should be aware that there is no cap on compensation where an employee is found to have been automatically unfairly dismissed for health and safety reasons under s.100, unlike in

ordinary unfair dismissal claims. It is also possible for an employee to bring an unfair dismissal claim under s. 100 before they reach two years' service.

Tribunals can make financial awards for successful detriment claims under s.44 and in doing so will take into account the nature of the employer's infringement and any loss to the employee attributable to the employer's act or omission. It is possible for tribunals to also make injury to feelings awards based on the distress suffered by the claimant.

Employers will also need to be mindful that employees may alternatively claim protection via a health and safety whistleblowing action which will open up the possibility of injunctive relief (where a court is petitioned to order the employer to do or not do something). This may be tactically beneficial to employees who might otherwise face a lengthy wait to see their s.44 and/or s.100 ERA claim be processed through an employment tribunal, particularly during the pandemic.

Reducing the risks

From an employer's perspective the key actions and priorities to reduce risks of a claim will be the following:

- carry out risk assessments and identify and put into effect mitigation efforts;
- consult on risk assessments and mitigation with employees and their representatives including clear communication of and seeking feedback on risk assessments and mitigation;
- review risk assessments regularly and respond to changes in external and internal circumstances;
- if an employee refuses to attend work, be mindful of the risks of doing or not doing anything that would subject that individual to a detriment where this refusal is one of the reasons for the detriment;
- be clear about why decisions are made which might disadvantage the employee and set out these reasons in writing; this will be vital to evidence that the detriment is not linked to a refusal to attend work on health and safety grounds;
- consider what remote/home working the employee can support, since the refusal to attend work does not mean a refusal to work; and
- if furlough is an option, employees could be furloughed on full pay to avoid the detriment of reduced pay and benefits;
- if furlough is not available or appropriate, consider alternatives such as suspension on medical/health and safety grounds on full pay.

It is important that employers are aware that, due to the broad scope of sections 44 and 100 ERA, their relative infrequency to date, and the lack of case law, a s.44 or s.100 claim could lead to significant management time and attention and legal costs. There are also employee relation issues and reputational risks in facing a tribunal claim based on health and safety concerns.

Criminal record disclosure: changes to the rules on multiple convictions and youth cautions

Article published on 4 December 2020

DBS recommends employers change recruitment questions about convictions and cautions to reflect these new rules.

We reported in February 2019 on the Supreme Court's decision that the rules on disclosing multiple convictions and youth cautions in a standard or enhanced Disclosure and Barring Service (DBS) check were disproportionate and incompatible with the European Convention on Human Rights. See our article, ***Should applicants for work with children or vulnerable adults have to disclose spent convictions?***

Under the old rules, youth cautions, reprimands and warnings were required to be automatically disclosed on standard and enhanced DBS checks. There was also a rule which required the automatic disclosure of all convictions where an individual had more than one conviction, regardless of the nature of the offences or how long ago they took place.

The cases considered by the Supreme Court included an individual seeking work as a teaching assistant who was compelled by the multiple conviction rule to disclose her convictions for two petty offences long after they became "spent" under the Rehabilitation of Offenders Act 1974.

The new disclosure rules

With effect from 28 November 2020, the DBS will no longer automatically disclose multiple convictions or youth cautions, warnings or reprimands in a standard or enhanced DBS check.

Despite the changes to these rules, enhanced DBS checks may still include information relating to a protected caution or conviction where the police consider that the caution or conviction is "relevant to the workforce that the individual intends to work in", for example because they consider that it may indicate a risk where the role includes work with children or vulnerable people. (For more information on the question of how the police decide what information is relevant, please see our coverage of the case of R (on the application of AR) v Chief Constable of Greater Manchester Police and another in our September 2018 Employment Law Bulletin.) Where there are multiple convictions, each individual conviction will be assessed against the appropriate rules to decide whether it should be disclosed.

Employers should check that their recruitment questions reflect these changes

DBS guidance on the new filtering rules has now been published to clarify these changes. The guidance includes template questions for recruitment processes and recommends that employers include the following information in standard application forms:

"The amendments to the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (2013 and 2020) provides that when applying for certain jobs and activities, certain convictions and cautions are considered 'protected'. This means that they do not need to be disclosed to employers, and if they are disclosed, employers cannot take them into account. Guidance about whether a conviction or caution should be disclosed can be found on the Ministry of Justice website."

Redundancy existed where business owner decided to take over managing director's work

Article published on 4 January 2021

EAT: An employer's motive and conduct in making a role redundant is not relevant to determining if a redundancy situation exists.

The statutory definition of redundancy set out in the Employment Rights Act 1996 ('ERA') identifies three sets of circumstances in which a redundancy arises, one of which is where there is a diminished requirement in the business for employees to do work of a particular kind ('diminished requirements').

Employees have the right not to be unfairly dismissed. Dismissal for redundancy is a potentially fair reason, provided the decision to dismiss is fair in all the circumstances. Because of this interaction between redundancy and unfair dismissal, it is not uncommon for employees to bring unfair dismissal claims on the basis that either:

- there was no redundancy situation;

- redundancy was not the real reason for dismissal; and/or

- the dismissal was not fair in all the circumstances.

A recent case highlights that even employment judges can be caught out by confusing these key questions.

Case: ***Berkeley Catering Limited v Jackson***

Mrs Jackson was the Managing Director of BCL. The owner of BCL named himself Chief Executive Officer and began undermining Mrs Jackson's role by taking management decisions and control of wider business operations. The CEO told Mrs Jackson that he intended to take over from her as MD.

BCL sent Mrs Jackson an 'at risk of redundancy' letter and a meeting was held at which Mrs Jackson was told there was no suitable alternative role for her. Mrs Jackson was subsequently made redundant and paid a statutory redundancy payment. Subsequently, Mrs Jackson became aware that the role of Events Director, which she viewed as a suitable alternative role, had been filled by a new employee.

Mrs Jackson brought a claim for unfair dismissal, stating that she had been removed from her position by the CEO and as there had not been a diminished requirement for her role within BCL, there was no redundancy. As an alternative, Mrs Jackson argued that her redundancy procedure was unfair because a suitable alternative to redundancy was available but had not been offered to her.

The tribunal judge ruled that the actions of the CEO were clearly taken with a view to removing Mrs Jackson from BCL, which he did by taking over the MD's functions. The tribunal judge took the view that this did not demonstrate a diminished requirement in work undertaken by the MD because, in effect, the various duties and functions of that role continued to exist. This, the tribunal judge held, meant there was no redundancy, and that Mrs Jackson was unfairly dismissed. BCL appealed.

The EAT directed itself to the definition of redundancy in the ERA and the key cases of Safeway Stores Plc v Burrell [1997] and Carry All Motors Ltd v Pennington [1980] in which the courts had identified the relevant approach to take in respect of 'diminished requirements' redundancy scenarios. In particular, the case of Safeway stressed that the question is not whether there was a decreased amount of relevant work (in this case, the MD role) but whether there is a decrease in the number of employees required to do that work.

In the EAT's view the tribunal fell into the error highlighted in Safeway because the undermining of Mrs Jackson was not relevant to the question of whether a redundancy situation existed. The EAT felt the tribunal judge may have been distracted by the question of whether there was a 'genuine redundancy situation' for the purposes of Mrs Jackson's unfair dismissal claim and pointed out that the definition of a redundancy situation under the ERA either existed or it did not. In addition, the law does not interfere in how an employer chooses to organise itself. If a decrease in the requirement for employees to do a particular kind of work occurs, for example because of recruitment or due to a reorganisation of roles, the motive behind this is irrelevant for the purposes of determining whether a redundancy situation exists.

The EAT made clear that an employer's motives and actions were relevant when considering whether a dismissal is fair in all the circumstances, including whether the decision to dismiss and the process followed were reasonable. Motive is also relevant when considering whether redundancy was the real reason for dismissal.

The EAT found that a redundancy situation arose in respect of Mrs Jackson and remitted the case back to a different employment tribunal to determine if the redundancy was the reason for Mrs Jackson's dismissal and, if so, was the decision to dismiss for redundancy fair in all the

circumstances.

Comment

This case highlights the subtle yet crucial guidance in Safeway that the question needing to be asked is not whether there has been a decrease in the amount of relevant work, but whether there is a decrease in the employer's requirement for employees to do that work. In this case, that distinction was key to determining whether the definition of redundancy was met under the ERA.

Case law has long established that tribunals will not generally interfere with business decisions to reorganise roles or redistribute work leading to redundancies, which the EAT in this case addressed when it said in its judgment that "[I]t is open to an employer to organise its affairs so that its requirement for employees to carry out particular work diminishes."

In this case, it remains open for the reconstituted tribunal to find that the dismissal was unfair based on the failure to offer the employee the apparently suitable alternative role.

Agency worker not entitled to apply for jobs on same terms as directly recruited employees

Article published on 7 January 2021

EAT decision strikes balance between rights and protections created under the Agency Workers Regulations 2010.

One of the core principles of the Agency Worker Regulations 2010 ('AWRs') is equal treatment for temporary agency workers to enjoy basic working and employment conditions at least equal to those that would apply if the agency worker had been recruited directly by the hirer to perform the same job. These rights usually begin after 12 weeks of continuous employment with the agency worker's hirer.

Regulation 13 of the AWRs provides that, during an assignment, an agency worker has the right to be informed by their hirer of any relevant vacant posts, giving the worker the same opportunity as a comparable worker who was hired directly to find permanent employment with the hirer. This right applies from the first day the agency worker works for the hirer.

An interesting recent decision of the EAT has considered the extent to which Regulation 13 AWR means that an agency worker can be treated differently to someone who has been hired directly by the employer in respect of advertising vacancies.

Case: ***Angard Staffing Solutions Limited and another v Kocur and another [2020]***

Two agency workers were employed by Angard and supplied to work in Royal Mail's Leeds mail centre. Whilst working there, they became aware of Royal Mail vacancies posted on the staff noticeboard. When the agency workers attempted to apply for the roles, they were told that they were ineligible and that they could only apply when the vacancies were advertised externally. At this point, if they did apply, they would be in competition with external applicants.

As part of a broader complaint, the agency workers brought a tribunal claim on the basis that being prevented from applying for the advertised positions was a breach of Regulation 13 AWR because they had not been given the same opportunity as a comparable worker who had been hired directly by Royal Mail to find permanent employment with Royal Mail.

At tribunal, the agency workers were successful on this point and Royal Mail and Angard appealed on the basis that the tribunal had misrepresented Regulation 13 AWR by finding that it extended to

an obligation to grant an agency worker the same opportunity to apply for relevant vacant posts as a comparable worker rather than simply conferring the right to be informed about them.

The EAT held that the right under Regulation 13 AWR did not mean that an agency worker had a right to be entitled to apply and be considered for internal vacancies on the same terms as directly recruited employees. Reviewing the regulation wording, the EAT considered that there was a right to be notified of vacancies on the same basis as direct recruits and to be given the same level of information about the vacancies as direct recruits. The EAT found that this provided agency workers with the same opportunity as a comparable worker to find permanent employment with the hirer, which was required by Regulation 13 AWR.

Reviewing the original Directive wording underpinning the AWRs, the EAT also noted that the right being granted went no further than a right to be made aware of any vacant posts with the hirer. In particular, the EAT drew on key wording contained in the Directive suggesting that agency workers must be helped in having 'access to employment' but noting that the Directive was silent on how far that help must go.

The EAT was of the view that the right to be informed of vacant posts was a valuable right in and of itself. This is because the right places agency workers in a better position than the general public and provides them with as much information as direct recruits. Because of this, the EAT dismissed arguments that the right to be informed of vacant posts was ineffective if the workers could therefore not apply for them when they were advertised internally.

The EAT also highlighted that the relevant wording in the original Directive did not specify the class of comparable worker with whom the agency worker must have the same opportunity to find permanent employment with the hirer. As a result, the EAT found that agency workers must have the same opportunity as those employed anywhere else in the hirer's undertaking. In practice, the EAT considered that some directly recruited employees might be 'manifestly unsuitable' for an advertised position, meaning that the provision of information will be of no more benefit to them as it would be to an agency worker who is told that they are ineligible for it. On that basis, the EAT concluded that it is not possible to read into the directive a requirement that an individual who is notified of a vacancy must also be eligible to apply for it.

Finally, the EAT concluded on this issue that the intention of the directive was not to treat agency workers as though they are direct recruits of the hirer, rather the relationship between the agency workers and the hirer is more 'tenuous and flexible' than the relationship between directly recruited employees and the hirer, and commented that this is often to the mutual benefit of the agency worker and the hirer.

For these reasons, the appeal by Royal Mail and Angard was allowed.

Comments

Employers should be aware of the rights of agency workers to have access to the same facilities and broad engagement terms as directly recruited staff, and to be informed of relevant vacancies with the hirer.

On a plain reading of Regulation 13 AWR it is easy to see why the agency workers felt that they were being denied their rights. It seems counter-intuitive to say an agency worker has the same right to be notified of jobs but then to say they are not entitled to apply for them. However, the EAT has clarified that the right does not extend to a right to be able to apply for internally advertised jobs.

In this case Royal Mail did allow agency workers to apply for these roles once they were advertised externally, and in the specific circumstances of the case this meant that the agency workers were being treated no less favourably than anyone that the employer might then engage directly through an external recruitment drive. As noted by the EAT, agency workers who had advanced notice of

job vacancies were put in an advantageous position compared to potential applicants outside the organisation. The fact that directly employed staff could apply for the job whilst it was advertised internally did mean that the agency workers were put at a comparable disadvantage, but this was not unlawful for the reasons explained by the EAT.

The decision of the EAT helpfully clarifies the extent of the hirer's obligations when it comes to informing agency workers of vacancies, including that the employer must give full information about the job, including salary rate, job descriptions and specifications, to the agency worker and not merely inform them of the position's existence.

High Court finds non-compete, non-dealing and non-solicitation restrictions to be unlawful restraint of trade

Article published on 26 January 2021

Decision took account of employee's length of service prior to leaving the organisation.

Employees may find that within their employment contracts they are prevented from carrying out or engaging in certain activities for specified periods of time. Broadly, these usually prevent the employee from working for certain employers, contacting or seeking to take away custom from the employer's suppliers and clients and sometimes also from trying to 'poach' staff to another employer. These types of terms are generally referred to as 'post termination restrictions'.

These restrictions are often used in employment contracts where the employee works in sensitive areas of the business where they will have access to key information and material crucial to its operation. This might also include information which would be invaluable to competitors. For this reason, employers will be concerned that such an employee might leave their organisation, go to work for a rival and use that knowledge to the rival's advantage. Employers in charity sectors may also have reasons to use restrictive covenants. This might be to protect income sources and/or donor information, for example.

Because these restrictions limit an individual's right to work, they will only be enforceable by a court if an employer can show that enforcing them will protect a legitimate business interest and that the restrictions go no further than is necessary to protect those interests.

When considering the reasonableness of a restriction, courts will assess them at the time they are entered into and in light of what may happen in the course of employment, even if those events do not, in fact, happen.

An interesting recent High Court decision considered restrictive covenants in a financial advisor's contract after they left a job following a short period of service.

Case: ***Quilter Private Client Advisors Limited v Falconer and another [2020]***

Ms Falconer joined Quilter as a financial advisor and her employment contract contained a non-compete clause which prevented her from working for any organisation in competition with Quilter in the UK for nine months after her employment ended, although she was able to work anywhere where Quilter did not operate. In addition, the contract contained a non-solicitation and no dealing clause which prevented her from trying to draw away any business or custom from Quilter for 12 months post-employment and not to provide any services to Quilter customers post-employment for 12 months in competition with Quilter.

Ms Falconer was not happy with her role and left Quilter after less than six months in the job. She decided to move to a competitor to work as an independent financial advisor. At the time she left Quilter, Ms Falconer was still in her probationary period and only had to give Quilter two weeks'

notice.

Quilter sought an interim injunction from the High Court to enforce the restrictive covenants in Ms Falconer's contract, which was granted. The case then came to full trial to decide on liability for the purposes of assessing damages and costs.

Reviewing the restrictive covenants, the High Court determined that they were void as unlawful restraints of trade. The court noted that Ms Falconer had a six-month probationary period and could be dismissed on two weeks' notice during that time. The contract therefore envisaged a situation where Ms Falconer could have been employed for a very limited period but would still be bound by a nine-month restriction. The court noted that the length of the period of notice an employee is subject to can be an indication of the unreasonableness of the duration of the restraint; the shorter the notice the less important the employee's services would appear to be to the employer and the less risk there is likely to be of the employee obtaining and using sensitive business information, key business relationships and contacts for their own or a competitor's purposes.

The court highlighted that the purpose of the restrictions in Ms Falconer's contract was predominantly to protect its customers and potential customers and business secrets. The court highlighted the fact that Ms Falconer had only worked for Quilter for a few months, significantly reducing its exposure to risks in these areas. Indeed, Quilter accepted that it would expect staff to take 12 months or more to build the kind of client relationships needed for someone in Ms Falconer's position to pose a risk to these special trade connections. As the court noted, having access to client-related documentation did not in of itself build a strong client relationship.

For these reasons, the court held that the restrictions were unreasonable.

The court also commented on the geographical element of the contract which allowed Ms Falconer to work in any part of the country in which Quilter did not operate. In the court's view this had no practical effect since Quilter was a nationwide business and Quilter had no legitimate interest in preventing Ms Falconer from providing financial advice in an area of the country where she had not had anything to do with Quilter's clients whilst she was employed by them.

Comment

This case highlights the difficulty employers face if they use one size fits all restrictive covenants, and further underlines the importance of tailoring restrictions to the individual and the legitimate interests that a business is seeking to protect.

The case also highlights that restrictions need to be enforceable at the time they are entered into. In this case, the fact that Ms Falconer's notice requirements were so short during her initial probationary period meant it was unsuitable to rely on these restrictions when she left during her probation. The practical effect of this is that if employers are minded to impose restrictions, they should either only come into effect once a probation period ends or are increased from a relatively short restriction to a longer one to align more clearly with increased notice periods once probation is passed.

This logic would also suggest that staff on statutory notice provisions are less likely to see a court uphold restrictions of several months' duration until they have worked for their employer for several years. A follow-on point from this is that employers should ensure they review any restrictions when an employee changes their role to ensure the restrictions are appropriate. For example, an employee may take up a role that changes the degree to which they are exposed to sensitive business information meaning that old restrictions are too harsh, or perhaps not strict enough. If this occurs then any new restrictions will have to be incorporated by some form of consideration, which may take the form of a raise in salary or a one-off payment.

In the not-for profit and charitable sectors, restrictions will still be of use, for example to protect strategic, operational and financial information, but it is likely that restrictions in these situations are only going to be effective in the contracts of the most senior staff in the organisation who have access to such information and/or strong relationships with key contacts.

The specific issue of the use of non-compete clauses is also subject to a current government consultation which is looking at whether they should be unenforceable in their entirety or only enforceable if the individual is compensated for the duration of the restriction. For more information on this consultation, and to have your say on the matter, see the government web page here.

If you would like to contact us please email
alacoque.marvin@wrigleys.co.uk

www.wrigleys.co.uk