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UK: Employment Update

This July Update examines the options open to an employer that discovers an employee's gross misconduct after exercising its right to terminate by making a payment to the employee in lieu of their notice. In addition we review a case on the "worker" status of an LLP partner and the FSA's decision to issue a prohibition notice as a consequence of the judge's findings in a high profile team-poaching case. Finally, we take a look at the Government's proposals in relation to settlement agreements, collective redundancy consultation and compulsory equal pay audits.

Key issues

- Gross misconduct discovered after the event does not remove PILON obligations
- Whistleblowing: an LLP Partner is entitled to protection
- Settlement agreements: latest Government proposals
- Tribunals to have power to order equal pay audits
- Collective redundancy regime consultation
- Team poaching judgment prompts FSA prohibition notice

Gross misconduct discovered after the event does not remove PILON obligations

Many employment contracts contain a provision allowing the employer to make a payment in lieu of notice (a "**PILON**") on termination rather than the employee working out his notice either at home in the "garden" or actively in the workplace. At a senior level, it will often be prudent to remove the individual from the workplace as soon as possible because of the potential for the individual to damage client relationships and/or remove confidential information. However, in the absence of an express PILON clause, simply terminating the individual's employment and making a payment equal to their notice period would place the employer in breach of contract and thereby unable to rely on any post-termination restrictive covenants.

In a case considered by the Court of Appeal, an employer exercised its right to make a PILON payment to the managing director whose role was redundant. However, after writing to the MD, the company discovered that he had been guilty of gross misconduct and therefore decided not to make the payment in lieu of notice.

The MD successfully sued for the PILON as a debt under his employment contract. The Court of Appeal held that the company's letter to the MD was an express exercise of its contractual right to make a PILON and, at that point, the debt under the contract crystallised. The company was not released from this contractual liability on the grounds that after it terminated the contract in accordance with its terms it acquired knowledge that the MD had been guilty of gross misconduct. The consequence of the lawful termination was that the company became contractually bound to the MD for the PILON.

It should be emphasised that this case was decided very much on its own facts and the way the case was pleaded. In similar circumstances, an employer might have a number of alternative grounds for arguing that it was not liable to make the payment in lieu of notice. Where the employee is either a director or a senior employee it is arguable that by failing to disclose their own misconduct, they acted in breach of the fiduciary duty owed to the employer and the employer can sue for an account of profit arising from such a breach and for damages arising from the breach. Alternatively, it is possible to argue that such a PILON is voidable on the grounds that it had been paid under a unilateral mistake.

From a practical perspective, employers should consider whether a specific provision should be included in service agreements to the effect that no payments will be made following the exercise of a PILON clause and/or any payments made will be clawed back in the event that the employer discovers any pre-termination misconduct that would have given it grounds to terminate lawfully.

[*Cavenagh v William Evans Ltd*]

Whistleblowing: an LLP Partner is entitled to protection

A worker has the right not to be subjected to any detriment by his employer on the grounds that the worker has made a protected disclosure (i.e. blown the whistle). A worker who succeeds with such a claim is entitled to be awarded compensation for any financial loss and, in addition, may recover compensation for injury to feelings. There is no cap on the amount that may be awarded. Detrimental treatment for these purposes can include termination of the working relationship. A worker is therefore better protected than an employee who is dismissed because they have made a protected disclosure as the employee is only entitled to financial loss compensation and no compensation for injury to feelings is payable.

The Employment Appeal Tribunal ("**EAT**") recently considered whether an equity partner ("**W**") in a limited liability partnership ("**LLP**") was a "worker" for the purposes of bringing a whistleblowing detrimental treatment claim.

Under the terms of the LLP agreement between W and C & C LLP, W was required to devote her full time attention to C&C's business. W also had an employment contract with a Tanzanian law firm, as such a contract was necessary to permit her to work in Tanzania. W reported to C & C that the managing partner of the Tanzanian firm had admitted to paying bribes in order to secure work and the outcome of cases. Shortly afterwards she was dismissed by the Tanzanian law firm and then expelled from the C & C Partnership. W claimed that her expulsion was a detriment on the grounds that she had made a protected disclosure.

The legislation defines a "worker" as someone employed under a contract where the individual undertakes to do or perform personally any work or services for the other party to the contract provided the other party is not a client or customer of any profession or business undertaking carried on by the individual. The EAT held that W was a worker. She could not be described as carrying out a professional or business undertaking specifically marketing her services as an independent person to the world in general as the LLP agreement prevented her from offering her professional services to anyone but C & C. W's work was, rather, an integral part of the C & C operation. Accordingly she was a worker for the purposes of pursuing a whistleblowing detriment claim.

This decision is the first addressing the "worker" status of an LLP partner. It highlights that the issue of subordination and the ability of the individual to provide their services to third parties will be key factors in assessing whether the definition of worker is satisfied. This analysis will be equally applicable to partners in non-law LLP's.

[*Bates van Winkelhof v Clyde & Co LLP*]

Settlement agreements: latest Government proposals

Vince Cable, the Business Secretary has outlined the Government's plans to increase the use of compromise agreements (which will be known as settlement agreements) to resolve workplace disputes without resorting to the Employment Tribunal.

The Government is proposing that an employer who wishes to bring an employment relationship to an end, may offer the employee a payment in exchange for concluding a settlement agreement. The employee will not be obliged to accept the settlement offer and may elect to continue in the employment relationship, however, the settlement discussion will not be admissible in any subsequent unfair dismissal proceedings (subject to the exceptions outlined below). The intention is that this will provide a quicker, non-litigious means of ending an unproductive employment relationship. Obviously from a personnel relations perspective, the employment relationship is likely to be somewhat strained if the employee rejects a settlement agreement offer.

At present employers do have such "settlement discussions" with employees, however, the danger is that the conversation is not without prejudice if there is no "live" dispute" between the employee and the employer. A dispute would typically be evidenced by a formal or informal grievance, an appeal against a disciplinary decision or correspondence from the individual's legal representative. If the conversation is not protected by the veil of without prejudice the employee can adduce the discussion in evidence in any subsequent Employment Tribunal proceedings. The risk is that the employee may point to the fact that the conversation has occurred as evidence that the employer has acted in breach of the implied term of trust and confidence thereby giving the employee the grounds to claim constructive unfair dismissal.

Existing legislation is to be amended so that a settlement discussion will be inadmissible in non-automatic unfair dismissal claims. A tribunal will however be able to take into account settlement conversations and offers made in the following cases:

- discrimination claims
- mixed claims of discrimination and unfair dismissal;
- automatic unfair dismissal claims (e.g. where an individual asserts that they have been dismissed because they "blew the whistle");
- breach of contract claims;
- where the Tribunal considers that the employer did or said something that was improper or was connected with improper behaviour; and
- where the employer has expressly made the settlement offer on the basis that it can be referred to in the Tribunal for the purposes of assessing whether costs should be ordered if matters do culminate in Tribunal proceedings.

Having regard to the sensitive issue of how to deal with underperforming older employees, these proposals do not provide a an alternative solution to embarking on a performance management process, as any discussion with the employee can be cited in any age discrimination proceedings if the settlement discussion is motivated by the employee's age.

These proposals may tempt individuals to assert that the settlement discussion is tainted by discrimination and therefore should be admissible in relation to both unfair dismissal and discrimination proceedings. Finally, it is as yet unclear how these proposals will operate in the context of a constructive unfair dismissal claim where an individual is asserting that the employer has fundamentally breached the contract culminating in the constructive dismissal.

Model template agreements for employers and employees to use will be published by the Government in due course and employers should review their existing templates at that time.

Tribunals to have power to order equal pay audits

The Government has announced that it will implement its proposal that Employment Tribunals which find an employer has discriminated on the grounds of sex in relation to contractual or non-contractual pay will be obliged to order the employer to conduct a pay audit in cases where continuing discrimination is likely. Tribunals will not order an equal pay audit if one has been completed in the last three years, if the employer has transparent pay practices or if the employer can demonstrate that it has a good reason why an equal pay audit would not be useful. Micro-businesses (that is employers employing fewer than ten people) will initially be exempt from these proposals.

A further consultation will be issued later this year on the details of how such equal pay audits will operate and what publication requirements will apply. This will presumably also clarify what sanction will be imposed in the event of non compliance with an equal pay audit order and the timeframe for implementation of these changes.

The consequences of lack of equality in relation to pay and bonus awards will potentially be much more far reaching if other areas of inequality emerge as a consequence of such mandatory equal pay audits.

The Government's response to the modern workplaces consultation may be found here.

Collective redundancy regime consultation

On 21 June the Government launched a 3 month consultation on proposed changes to the collective redundancy consultation regime. The changes are aimed at creating a more effective regime that will enable employers to restructure more quickly and cost effectively and provide employees with greater certainty.

In summary the Government proposes the following package of measures: reducing the current 90 day consultation period in relation to redundancies involving 100+ employees to either 30 or 45 days; introducing a non statutory Code of Practice; and providing improved Government Guidance.

The intention is that the Code will provide clarity on contentious issues but will also allow sufficient flexibility to allow parties to adapt the consultation process to their specific needs.

The following areas of uncertainty will be covered by the new Code of Practice:

- What is an 'establishment'?
- whether the expiry of fixed term contracts should be treated as redundancies for the purposes of collective redundancy consultation;
- when redundancy consultation should start and end;
- what and who the consultation should cover;
- who should be consulted; and
- consultation in insolvency situations.

The interaction of collective redundancy consultation rules with the legislation applicable to the transfer of undertakings is to be addressed by the Government as part of its review of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

At present if an employer fails to comply with its collective redundancy consultation obligations the Employment Tribunal may make a protective award of up to 90 days' actual pay. The award is intended to be punitive so the Tribunal's starting point is 90 days' pay. The Government has confirmed that it does not propose to reduce the amount of this protective award.

The BIS consultation may be found here.

Team poaching judgment prompts FSA prohibition notice

A large team defection from Tullett Prebon to BGC Brokers prompted extensive litigation between Tullett Prebon and BGC; this attracted much press attention and culminated in a decision of the Court of Appeal last year.

V, had a very senior role at Tullett before he left to join BCG. In the proceedings brought against BGC and a number of individuals, including V, one of the issues before the Court was whether V had conspired to induce other Tullett employees to breach their contracts of employment by leaving to join BGC without giving due notice.

The High Court in its decision held that V had stuck to the truth where he was able to but had equally departed from it when the truth was inconvenient. As a consequence of this, and other findings and comments about V's behaviour during the trial the FSA has decided that V should be banned from working in the financial services industry and has served him with a prohibition notice to this effect. The FSA concluded that V was not fit and proper to be in the UK financial services industry because it was a fundamental requirement that an approved person should act with honesty and integrity.

When a company seeks to recruit one or more individuals from a competitor extreme care must be exercised to ensure that the departing employees will not be acting in breach of any confidentiality obligations and/or post termination restrictive covenants by taking up employment. Failure to do so could give rise to a claim of unlawful means conspiracy. A prospective employer can protect itself against such claims in a number of ways:

- Any offer of employment should be conditional on the individual being free from any contractual restriction to do the work.
- The candidate should be asked to provide details of and/or a copy of any post termination covenants, confidentiality obligations, notice and garden leave requirements.
- Consideration should be given to whether the individual should seek their own independent legal advice.

- Care should be exercised in any correspondence with the individual to avoid any suggestion that the individual is being encouraged or induced to breach any of their contractual obligations.
- If more than one individual is being recruited from a competitor, avoid creating any documentation that suggests or shows that prospective senior employees are being incentivised on the basis of how many junior employees will also join.
- If it becomes apparent that a prospective/new employee has acted in breach of their contractual obligations avoid being seen to condone, or take the benefit of, such breaches.

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