UK: Employment Update

Welcome to the summer edition of Employment Update. Although the summer is traditionally a quiet(er) time of year this has not stopped both the Court of Appeal and the ECJ from handing down significant decisions. This briefing reviews the Court of Appeal's decision on the enforceability of exclusive jurisdiction clauses in share option arrangements and the implications of the ECJ decision for expanding the potential pool of claimants in indirect discrimination claims. Finally, we look at the proposals to simplify the current tax treatment of termination payments and an EAT decision concerning the right of agency workers to be informed of vacancies.

Exclusive jurisdiction clauses: Are they of any use?

It is fairly typical in many employment relationships for employees to participate in bonus or share option schemes which are operated by a different group legal entity to the legal entity that is technically their employer. Very often the entity in question is the parent company which may be based outside the United Kingdom. A typical provision in such arrangements is that if the individual is a "bad leaver" any entitlement to share options or bonus etc will fall away. Typically a bad leaver situation will include when the individual joins a competitor within a defined timeframe. It is also a common feature of such schemes that they include a governing law clause that provides that disputes will be determined in accordance with the law of the jurisdiction in which the parent company is based (or another jurisdiction) and an exclusive jurisdiction clause also in favour of the courts of that country.

Key issues

- Exclusive jurisdiction clauses: Are they of any use?
- Tax treatment of termination payments: all change
- ECJ provides a platform for associative indirect discrimination claims
- EAT rules on agency workers' right to be informed of vacancies

The Court of Appeal recently considered the extent to which it was appropriate to grant an anti-suit injunction to prevent proceedings continuing in the courts of the jurisdiction provided for by the exclusive jurisdiction clause in a share option agreement.

P was employed by E Europe at a very senior level. E Europe's parent company was a Massachusetts company (EMC). P was a member of EMC's stock option plan which provided for Massachusetts' governing law and exclusive jurisdiction of the Massachusetts courts. The plan provided for the rescission of any awards if a recipient engaged in detrimental activity; the definition of which also included not competing for a period of 12 months following the termination of employment. By signing and accepting the restricted stock unit (RSU) agreement under which the options were granted, P formally acknowledged that he was bound by its terms.

P left to join a competitor and a dispute arose over whether EMC was entitled to cancel his stock options. EMC sued P in Massachusetts and he counter-sued EMC in England. EMC made an application in the English courts challenging their jurisdiction and P applied to the English courts for an anti-suit injunction to restrain EMC from continuing the proceedings in Massachusetts.

The Court of Appeal had to consider whether the claims were disputes "in relation" to P's contract of employment for the purposes of the Brussels I (Recast) Regulation (the Brussels Regulation). In essence the Brussels Regulation provides that an employer (whether or not domiciled in a Member State) may be sued in relation to disputes in relation to an employment contract in the courts of the place where the employee habitually carried out his work.

The Court considered that the RSU agreement between P and EMC gave rise to a contractual relationship which was not one of employee/employer in the sense that that term is generally used in English law. However, it considered that the expression "employer", "employee" and "employment" as used in the Brussels Regulation has a meaning which is broader than that used in domestic law.

It held that the disputes in relation to the RSU agreement were "matters relating to individual contracts of employment" for the purposes of the Brussels Regulations. In "reality and substance" the dispute about the stock plan was "intrinsically bound up with his contract of employment" because the stock units had been made available to P as an important employee and were intended to act as a reward for past efforts and an incentive to make efforts in the future. The dispute was "a dispute of a kind" in which P could be described as the "weaker party" and therefore entitled to the protection of the Brussels Regulation. Accordingly the court unanimously held that the Brussels Regulation applied; the court was therefore bound to disregard the Massachusetts' exclusive jurisdiction clause and assume jurisdiction over EMC in relation to the issues raised by P's claim. It therefore granted P an anti-suit injunction to stop the US proceedings against P.

Multi national employers need to be aware that in light of this decision where an employee is based in the UK (or another EU country) the UK courts (or courts of the EU country where the employee works) will disregard any exclusive jurisdiction clause in favour of the courts of another jurisdiction. This will be the case in relation to such clauses in both the employment contract and any ancillary contractual arrangements related to the employment relationship such as bonus, stock option and other benefits schemes.

A UK based employee will therefore be in a position to apply for an anti-suit injunction to ensure that any dispute is heard in the English courts even if the English courts then have to consider the dispute in the context of the relevant governing law clause.

[*Petter v EMC Europe Ltd & anr*]

Tax treatment of termination payments: all change

The Government has launched a consultation on simplifying the tax and national insurance treatment of termination payments. The following are amongst the Government's proposals:

- all payments in lieu of notice (whether contractual or not) will be treated as earnings and subject to income and national insurance contributions (NICs);
- the introduction of a new exemption from income tax and NICs for redundancy payments to be available to employees once they have 2 years' service with the same employer or with an associated employer. The level of tax and NIC exemption would increase at a set rate with each year of service up to an as yet unspecified maximum amount. Voluntary redundancy would qualify for exemption;
- redundancy payments would become taxable and NIC'able if the employee is re-engaged to do a similar job for the same company or an associated company within a 12 month period;
- the current foreign service exemption that exempts a termination payment (in full or in part) from income tax if it relates to employment that includes a period of foreign service will be removed;
- the exemption from tax in relation to legal fees incurred in connection with the termination of employment will be removed; and
- two new exemptions will be introduced for payments made in connection with unfair or wrongful dismissal and discrimination.

Timeframe

The consultation closes on the 16 October 2015. In terms of when employers will have to apply any new rules it is unlikely that any changes will be implemented before the 2016 Finance Bill.

The consultation paper can be found here.

ECJ provides a platform for associative indirect discrimination claims

A recent decision of the European Court of Justice (ECJ) relating to a discrimination claim arising out of the supply of goods and services has potentially significant ramifications in relation to indirect discrimination claims in the context of an employment relationship.

N ran a grocery shop in a district of a Bulgarian town which was inhabited mainly by persons of Roma origin. In that district, X, an electricity company installed its electricity meters for all consumers at a height of between 6 and 7 metres on pylons, whereas it installed electricity meters in other districts at a height of 1.7 metres usually on the consumer's property.

N complained that she was unable to check her electricity meter for the purposes of monitoring her own consumption. N claimed that the reason for the practice of installing meters at such a height was that most of the inhabitants of the G district were of Roma origin and that she accordingly suffered direct or indirect discrimination on the grounds of nationality, even though she was not of Roma origin.

The ECJ held that the indirect discrimination provisions of the Race Directive were intended to benefit persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffered less favourable treatment, or a particular disadvantage, on the grounds of race or ethnicity. It was enough that a person suffers the same disadvantage alongside those of a certain ethnic origin provided the treatment stems from a measure based on the ethnic origin.

The ECJ acknowledged that the practice was capable of objective justification; ensuring security of electricity supply and providing consumers with the ability to properly monitor electricity consumption were legitimate aims. The national courts, however, had to determine whether the measures used by the electricity company to pursue those legitimate aims were appropriate and necessary. The prejudice suffered by the people living in the district would have to be weighed in the balance.

This interpretation of the scope of indirect discrimination protection has implications in the employment law field. At present the Equality Act 2010 (EQA) which implements the Race Directive only gives a claimant a right to claim indirect discrimination in relation to the provision of goods and services and in the context of employment if the claimant shares the protected characteristic of the group that is disadvantaged by the provision, criterion or practice (PCP) in question. This ECJ decision, however, has interpreted the Directive as meaning that for the purpose of a "goods and services" claim it is enough for a claimant to show that the PCP gives rise to a group disadvantage based on a protected characteristic and the claimant is also suffering alongside the protected group. Accordingly even if an employee does not possess the protected characteristic of the disadvantaged group they can claim to be a victim of indirect discrimination if they also suffer.

As the EQA applies the same test to employment and goods and services indirect discrimination claims arguably the interpretation advocated by the ECJ should be adopted for both types of claim.

One example of how this might work is where the employment contracts of employees at manager level all have mobility clauses requiring the individual to relocate at the employer's request. The mobility clause is arguably a PCP that puts female employees at a disadvantage because a greater proportion of women than men are secondary earners and it would therefore be more difficult for them to comply with the relocation provision.

Although a male employee is likely to struggle to establish that he belongs to a disadvantaged group (as more women than men are secondary earners), the ECJ's decision suggests that such a male employee could bring a claim of indirect discrimination as a person suffering the same disadvantage alongside the disadvantaged female group. It would, however, still be open to the employer to objectively justify the mobility clause.

Going forward it remains to be seen how the tribunals and courts will consider indirect discrimination claims as a consequence of this decision in light of their obligation to give effect to fundamental principles of EU law.

[*CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*]

Agency workers: right to be informed of vacancies but no priority to be given the job

The Agency Workers Regulations 2010 (the Regulations), provides that agency workers have the right to be informed of vacancies in the end-user company in which they work. The Employment Appeal Tribunal (EAT) recently considered the extent of this right.

C was an agency worker supplied to work for the MoD as a technical liaison officer. In 2013 the MoD started a restructuring exercise, as a result of which 530 permanent MoD employees were placed into a redeployment pool. The permanent employees were to be given priority consideration for vacancies at their existing grade.

Subsequently, a post at the site where C was working became available. It was advertised internally and C would have been able to see the advertisement, had he looked for it, but he did not apply for it. An employee in the prioritised redeployment pool applied for the vacancy and was appointed. Three months later the MoD having no further need for C's services gave notice that his assignment would terminate.

C complained to a tribunal that the MoD had failed to allow him access to details of the vacancy and had denied him the opportunity of applying for it. C's central argument was that under the Regulations he had a right not only to be informed of any vacancies but also to be considered for such vacancies on an equal footing with permanent employees.

On appeal, the EAT upheld the Tribunal's decision that the Regulations do not prevent a company giving preference for vacant posts to permanent employees in need of redeployment. The Regulations only provide a right to information – they do not grant agency workers any preferential treatment in relation to opportunities for permanent employment.

The EAT clarified that the information about vacancies in the permanent workforce must be provided to agency workers in as useful a form, and at as convenient a time as that provided to the end-user's other workers.

The EAT also clarified that the obligation to notify agency workers applies even if there is a headcount freeze with vacant posts being ring-fenced for redeployment purposes at the end-user contrary to suggestions in the Government Guidance on the Regulations.

Although employers may draw comfort from the EAT's clarification that agency workers need not be prioritised for job vacancies employers may wish to review their processes for advertising vacancies to agency workers to ensure the timing and format give them the 'same opportunity' as the permanent workforce.

[*Coles v Ministry of Defence*]

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