CLIFFORD

CHANCE

UK: EMPLOYMENT UPDATE

Although the summer holidays are well underway the courts have been very efficient at 'clearing their desks'. This Briefing explores recent decisions in relation to: restrictive covenant enforceability, compensation for injury to feelings in discrimination cases, different aspects of the whistleblowers' protection regime, who is liable and when is a disclosure in the public interest and the implications of the Employment Tribunal's fee regime being ruled unlawful.

Key issues

- Employment Tribunal fees ruled unlawful: will this lead to a resurgence in claims?
- Discrimination compensation: injury to feelings bands expanded
- Whistleblowing: non executive directors personally liable for dismissal detriment
- Whistleblowing: when is a disclosure in the public interest?
- Restrictive covenants: parts of a single covenant cannot be severed

Employment Tribunal fees ruled unlawful: will this lead to a resurgence in claims?

In July 2013 a new fees regime was introduced in the employment tribunal; this required claimants to pay a fee before they could proceed with a claim unless they qualified for a full or partial waiver. The fee regime had a significant impact on the number of claims pursued which fell by 66-70%. The regime did not, however, appear to deter unmeritorious claims as the proportion of unsuccessful claims was consistently higher than in the pre-fee regime.

In response to the Supreme Court's ruling that the fee regime is unlawful, the government has stated that with immediate effect from 27 July fees will no longer have to be paid. In addition, fees paid over the previous four years will be reimbursed by the Government.

What is less clear is whether employers who have paid a claimant's fee's as part of an Employment Tribunal's compensation order will have a mechanism to recover them. Also unclear at this stage is whether employers who have paid fees to appeal Tribunal decisions in the Employment Appeal Tribunal (EAT) will be able to recover those?

Now that fees no longer have to be paid, there will undoubtedly be an increase in the number of employment claims brought. It remains to be seen whether individuals who were deterred from bringing claims by the fees will pursue them out of time arguing that the usual limitation period should be extended by the Tribunal. In practice it may be a high hurdle for such claimants to persuade the Tribunal that it was not reasonably practicable to bring an unfair dismissal within the normal timeframe or that it would be just and equitable to extend the time limit for a discrimination claim.

To the extent that employers have approached the management and termination of staff on the basis that there was a low commercial risk of a claim being pursued because of the fees regime it is suggested that this should be revisited.

[UNISON v Lord Chancellor]

Discrimination compensation: injury to feelings bands expanded

If a claimant's discrimination claim is successful before the Employment Tribunal it may award compensation for past and future financial loss, injury to feelings and personal injury (injury to health such as psychiatric injury). Interest may also be awarded on each element of any financial compensation awarded. Fourteen years ago the Court of Appeal established three broad bands of compensation for injury to feelings (known as the Vento bands). Over time the Vento bands have been adjusted to reflect inflation.

In a separate development, the Court of Appeal ruled that from 1 April 2013 the level of damages for personal injury should be increased by 10%. Subsequently, there has been a degree of judicial confusion on whether this uplift must also be applied Employment Tribunal personal injury compensation awards even though the rationale for the uplift (too boring to go into here) did not apply in the Employment Tribunal. This judicial uncertainty has now been resolved by the Court of Appeal which has ruled that the 10% uplift does apply to Tribunal awards for personal injury and injury to feelings.

Responding to the Court's suggestion to do so the President of the Employment Tribunal has published guidance setting out new Vento bands to take account of the 10% uplift obligation. This sets out revised Vento bands that take into account both inflation and the 10% uplift obligation as follows:

- Lower band: £1,000 to £8,000
- Middle band: £8,000 o £25,000
- Upper band: £25,000 to £42,000

The new bands will apply to any claim lodged on/after the date of the Presidential Guidance. As the consultation closes on 25 August it is anticipated that the Guidance will be finalised in Q4 2017. Once the Guidance is in place, the 'Vento' bands will be updated every 12 months without any further consultation.

The Judicial Consultation can be found here.

Whistleblowing: non executive directors personally liable for dismissal detriment

An employee who makes a protected disclosure (blows the whistle) is entitled not to be subjected to a detriment by his employer, another worker of the employer or an agent of the employer on the grounds that he has blown the whistle. In addition, if the reason (or principal reason) for an employee's dismissal is that they made a protected disclosure, the dismissal is treated as automatically unfair.

The legislation provides that if a co-worker subjects an employee to a detriment they may be personally liable for any compensation awarded by the Employment Tribunal. There is no cap on the amount of compensation that can be awarded. In most cases, a claimant is likely to pursue the deepest pocket; i.e. the employer, however, a recent decision of the EAT illustrates that individual personal liability can be expensive in a case where two non executives of the employing entity were held to be liable for just over £1.7million.

C was employed as CEO by IPL. T and S were non executive directors of IPL. C made a number of protected disclosures and three days after the final disclosure, C was summarily dismissed in an email from S. The evidence before the Tribunal demonstrated that T had instructed S to dismiss C. Both S and T considered that C's disclosures rendered him "a costly obstacle that needed to be dismissed".

The EAT upheld the Tribunal's decision that T's instruction to S to dismiss C, and S's implementation of it, were actionable detriments on the part of both S and T. As S

shared T's view that C should be dismissed, he was not merely acting as T's messenger. Accordingly, S and T were jointly and severally liable for the compensation awarded in respect of the financial loss flowing from C's dismissal. The fact that C could also pursue an unfair dismissal claim against IPL did not relieve S and T of their liability.

It is quite unusual for individuals to be joined as personal respondents in 'whistleblowing' claims; tactically however, claimants may elect to adopt this approach as a pressure point or where the employing entity is in financial difficulties.

In this case, the two non executive directors were found personally liable for their actions in their capacity as 'workers'. It has always been a grey area whether a non executive director is a 'worker' who can bring a detriment claim in relation to their own whistleblowing. This decision would suggest that they can; it would be odd if non executive directors are regarded as workers who can inflict a detriment but not workers who can be subject to one.

[International Petroleum Ltd &Ors v Osipov]

Whistleblowing: when is a disclosure in the public interest?

In order to bring a whistleblowing claim a worker's disclosure must be 'protected'. To be protected it must, amongst other things, be a disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one of the categories of wrongdoing specified in the statute.

What is in the public interest was the issue considered by the Court of Appeal. N made disclosures related to the alleged deliberate misstating by his employer of between £2 to £3 million of costs and liabilities in the company's internal accounts to reduce the level of commission payable to 100 senior managers, including himself, to the benefit of the shareholders.

The Court of Appeal agreed with the EAT that in circumstances where 100 senior managers were affected by the matters addressed in N's disclosures, they represented a sufficient group of the 'public' so as to meet the public interest test.

How should it be determined whether a disclosure serves only the private or personal interest of the worker or a wider public interest? The Court held that there were no absolute rules; but a number of principles emerge from the decision:

- Just because the matter disclosed by the worker affects the interests of other workers within the same organisation does not mean it is in the wider public interest. Although it will not always be necessary for the interests of individuals outside the workplace to be affected before a disclosure is in the public interest;
- In some cases, the sheer numbers of individuals within the same organisation sharing the same interest may be sufficient to give rise to a public interest;
- The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed are very relevant. The Court distinguished between interests which whilst affecting the same number of individuals, concerned disclosures of wrongdoing affecting a very important interest as compared to disclosures which concern only trivial wrongdoing or the effect of the wrongdoing is marginal rather than significant;
- The nature of the wrongdoing disclosed: was it deliberate or inadvertent? Where there was deliberate wrongdoing affecting the same number of people as inadvertent wrongdoing, the disclosure of the deliberate wrongdoing was more likely to be in the public interest; and

- The larger or more prominent the wrongdoer (by reference to the size of its relevant community, for example staff, suppliers and clients), the more obviously a disclosure of its activities may engage the public interest.

  [Chesterton Global Ltd v Mohamed Nurmohamed]

Restrictive Covenants: Parts of a single covenant cannot be severed

The Court of Appeal has recently reiterated that when considering the enforceability of restrictive covenants, single covenants have to be read as a whole therefore, the courts cannot apply their "blue pencil" to delete part of a covenant.

"The non-compete covenant under consideration provided that the employee would not directly or indirectly engage or to be concerned or interested in any business" in competition with the employer. The court held the words "or interested" prohibited shareholdings (of any size) and was impermissibly wide rendering the covenant enforceable. The offending words could not be severed to render it enforceable.

This decision is a useful reminder of the judicial approach to restrictive covenants; employers may wish to review covenants that have been drafted on the basis that the courts can 'blue pencil' offending language within a single covenant.

[Tillman v Egon Zehnder Ltd]

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