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Briefing Note – August/September 2019

UK: EMPLOYMENT UPDATE

The summer holidays have begun so once again the Government has cleared its desk and published various consultation papers and responses to earlier consultations; it has excelled itself this year with the sheer volume. This Briefing examines the hints, commitments and consultations on declaring criminal convictions, employer transparency about flexible working practices and family leave policies, the use of confidentiality clauses, and redundancy protection for pregnant women. In addition, we consider covert recordings by employees and whether this is gross misconduct justifying summary dismissal as well as the implications of the Supreme Court's decision on whether and when the offending parts of restrictive covenants can be deleted by the courts.

Key issues

- Disclosure of criminal records: reforms in the pipeline
- Good Work Plan: proposals to support families
- Extending redundancy protection for women and new parents
- Confidentiality clauses in settlement agreements and employment contracts
- Covert recordings of disciplinary meetings not an automatic breach of trust and confidence
- Non-compete covenants: when judicial blue pencils can be used

Disclosure of criminal records: reforms in the pipeline

The Ministry of Justice has announced that it will introduce new legislation that will permit some non-violent offenders to not disclose their sentences to employers when applying for jobs. In addition under the new legislation, some custodial and non-custodial sentences of over four years will no longer have to be disclosed to employers after a specified period of rehabilitation.

No detail has been provided other than that the reforms will be implemented when parliamentary time becomes available and will not apply to sensitive job roles or to those convicted of serious offences.

Further consultation is expected later in 2019.

Good Work Plan: proposals to support families

Amongst the multitude of consultations published this summer is a consultation paper (CP) setting out various proposals to support families. It is clear from this CP that the Government is giving very active consideration to a wholesale reform of the current family leave regime made up of maternity, paternity and shared parental leave, possibly replacing it with a brand new regime rather than tweaking piecemeal the existing forms of leave. It is clear that something will change but how and when is as yet unclear.

Clearer, however, is that the Government is serious about requiring employers to be more transparent with job applicants on their flexible working arrangements and parental leave and pay policies to enable them to make more informed decisions about the job.

The CP contemplates that large employers (250+ employees) should publish their family related leave and pay policies on their website.

Also in contemplation is that information should be made available on:

- whether flexible working may be available from the start;
- the employer's approach to place, hours and times of work; and
- the approach to informal flexible working (such as later starts to accommodate medical appointments).

One possibility being mooted is that this information should be made available alongside the gender pay gap (GPG) information in the GPG Reporting Portal as part of the annual GPG reporting cycle. If this route is adopted, employers may also be required to record whether they have advertised jobs as open to flexible working.

Views are sought on whether this reporting should be mandatory or voluntary.

The CP contemplates imposing a requirement on employers to say whether jobs may be open to flexible working in job adverts. This obligation (unlike the proposed obligation to publish flexible working policies) appears to be applicable to employers of all sizes.

Timeframe: No specific timetable is indicated for implementation of any new legislation or further consultation.

Good Work Plan: Proposals to support families: can be found here

Extending redundancy protection for women and new parents

In January the Government launched a consultation on extending redundancy protection for women and new parents. It has now published its response.

Currently, statutory 'redundancy protection' requires employers, before making an employee *on maternity leave* redundant, to offer the employee (not just invite them to apply for) a suitable alternative vacancy, where one is available with the employer (or an associated employer). In effect, this bumps the woman to the head of the 'vacancy' queue ahead of other employees who are also at risk of redundancy. The alternative vacancy must be both suitable and appropriate for the woman to do in the circumstances, and the terms and conditions must not be 'substantially less favourable' than her previous role.

In the response the Government commits to:

- ensuring the redundancy protection period applies from the point the employee *informs* the employer that she is pregnant, whether orally or in writing;
- extending the redundancy protection period for six months once a new mother has returned to work. It is anticipated that this protection period will start immediately once maternity leave is finished (even if the employee tags on additional leave such as holiday or unpaid parental leave).

In addition, the Government will also extend redundancy protection for those taking and returning from adoption leave, thus mirroring the approach for those returning from maternity leave.

It is also proposed that some sort of extended redundancy protection will apply for parents returning from shared parental leave (SPL) but the precise approach has not been finalised as the Government wants to ensure that the protection is proportionate to the amount of SPL taken, and, at the same time, ensure that the legislation does not produce the unintended consequence of dissuading mothers from taking SPL because they will not be as protected.

It will be interesting to see whether the Government clarifies the position in relation to which employee takes precedence in a scenario where a maternity returner and an SPL returner are simultaneously at risk of redundancy and both are in a redundancy protected period; who should be offered the single suitable vacancy?

The Government also commits to consulting on extending employment tribunal time limits for claims relating to discrimination, harassment and victimisation, including on the ground of pregnancy and maternity from 3 to 6 months (or some other timeframe).

Timeframe: No indication as to the timeframe for implementing these changes is given.

Extending redundancy protection for women and new parents can be found: here

Confidentiality clauses in settlement agreements and employment contracts

The Government has published its response (including proposed action points) to its March consultation on the use of confidentiality clauses in employment contracts and settlement agreements. In summary the Government will:

- legislate to ensure that a confidentiality clause cannot prevent an individual disclosing to the police, regulated health and care professionals or legal professionals;
- legislate so that the limitations of a confidentiality clause (in employment contracts and settlement agreements) are clear to those signing them;
- legislate to improve independent legal advice available to an individual when signing a settlement agreement;
- produce guidance on drafting requirements for confidentiality clauses; and
- introduce new enforcement measures for confidentiality clauses that do not comply with legal requirements.

Who can be disclosed to? New legislation will provide that no provision in an employment contract or settlement agreement can prevent someone from making any kind of disclosure to the police or to regulated legal and health and care professionals. Disclosures to therapists and counsellors will only be permissible if they have voluntarily joined a register accredited by the Professional Standards Authority so that they are bound to observe to observe confidentiality.

Content: Employers will not be forced to use a prescribed form of wording in employment contracts and settlement agreements, however, legislation will require confidentiality wording to be clear and specific, to address what information cannot be shared and with whom; and to contain a clear, plain English explanation of the effect of the clause and its limits, for example in relation to whistleblowing.

Mandatory independent advice: At present employees must receive independent legal advice on the effect of a settlement agreement on their ability to pursue statutory employment claims, such as discrimination or unfair dismissal, in order for any waiver in the agreement to be valid. This requirement will be expanded so that the employee will be required to receive independent legal advice on the nature of the confidentially requirement and on the limitations of a confidentiality clause in a settlement agreement, failing which the clause will be void in its entirety.

Written statement of employment particulars: There will be a new legislative requirement to be clear on the limits of any confidentiality clause in a written statement of employment particulars. If a statement does not meet the new requirement, a worker can apply to an employment tribunal for a declaration as to what the particulars should have been. In addition, in the event the worker brings another claim before the employment tribunal he/she can bolt on a claim in relation to a non-compliant statement which if upheld will entitle them to additional compensation of 2 or 4 weeks' pay.

Timeframe/next steps; The Government is rather opaque on the timing of these new legislative provisions stating: "*We will legislate to implement the relevant commitments we are making in this response when Parliamentary time allows".* Given that it has also committed to taking into account the responses to its separate sexual harassment consultation which closes on 2 October, realistically, it is unlikely that the new legislative regime will be implemented until (early) 2020.

Response to the Government consultation on confidentiality clauses can be found here.

Covert recordings of disciplinary meetings not an automatic breach of term of trust and confidence

Implied into every employment contract is a term of mutual trust and confidence; if a party conducts itself without reasonable and proper cause in a way that is calculated or likely to breach that term, it will amount to a fundamental breach of contract that the other party is then free to accept should they so wish (the contract does not automatically terminate).

The Employment Appeal Tribunal (EAT) has considered whether an employee who covertly recorded a disciplinary meeting necessarily committed a breach of the implied term of trust and confidence, which would permit the employer to dismiss for gross misconduct.

The EAT acknowledged that as technology has evolved the workplace has now moved on from a time when an employee had to go to a great deal of trouble to record a meeting covertly. In times gone by, the EAT considered that it would be straightforward to draw the conclusion that the recording had been undertaken to entrap or otherwise gain an unfair advantage.

The workplace has evolved; the EAT recognised that now most people carry a mobile which is capable of making a recording; and it is the work of a moment to switch it on; as such, it is now not uncommon to find that an employee has recorded a meeting without saying so.

The EAT recognised that such a recording is not necessarily undertaken to entrap or gain a dishonest advantage. It may have been done to keep a record; or protect the employee from any risk of being misrepresented when faced with an accusation or an investigation; or to enable the employee to obtain advice from a union or elsewhere.

The EAT held that the covert recording of a meeting does not invariably undermine the trust and confidence between employer and employee to the extent that an employer should no longer be required to keep the employee. It will depend on all the circumstances. There are clearly differences between recordings taken by a highly manipulative employee seeking to entrap the employer and one made by a confused and vulnerable employee seeking to keep a record or guard against misrepresentation. It considered that it might also be relevant to the question of fundamental breach that an employee has specifically been told that a recording must not be kept, or, has lied about making a recording as compared to an inexperienced or distressed employee who has scarcely thought about the blameworthiness of making such a recording.

The EAT considered that it is good employment practice for an employee or an employer to say if there is any intention to record a meeting, save in the most pressing of circumstances; and it will generally amount to misconduct (albeit not necessarily gross misconduct) not to do so.

Practical implications

- Employers should give some thought to what their policy on recording disciplinary, grievance and other meetings is.
- Is a blanket "one size fits all" policy appropriate or should a decision be taken on a case by case basis as to whether it is desirable to record a meeting and if so how?
- The policy should be made absolutely clear to staff; for example, if there is an absolute prohibition then this should be included in the list of examples of misconduct or gross misconduct (if that is how the employer wishes to categorise it); equally if employees are to be permitted to make recordings it should be made clear to them that they must make their intention known at the outset of the meeting in question.

[*Phoenix House v Stockman*]

Non-compete covenants: when judicial blue pencils can be used

At common law, post-termination restrictive covenants (such as non-solicitation of clients or key employees and non-compete provisions) are prima facie void unless the employer can demonstrate that it has a legitimate interest to protect and the covenant is no wider than necessary to protect the interest in question. Duration, geographical application and nature of restraint are all factors that will go the reasonableness, or otherwise, of a covenant.

The first restrictive covenant case to reach the Supreme Court for many years has been widely reported; the key issues under consideration were whether an absolute prohibition on holding shares in another company amounted to an unlawful post termination restraint of trade and, if so, whether the courts could delete the offending wording (colloquially known as 'blue pencilling') from the employment contract.

The offending clause in this case read:

"[the employee shall 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 or any Group Company which were carried on at the Termination Date or during the period of 12 months prior to that date and with which you were materially concerned during such period."

The Supreme Court held that the words "*or interested in*" had the effect of preventing the ex-employee from holding even a minor shareholding in a competing business and that it was accordingly void as an unlawful restraint of trade unless the offending part of the clause could be severed.

Reviewing the authorities, the Supreme Court held it was permissible for the courts to 'blue pencil' a restrictive covenant if the unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains provided that the removal of the provision would not generate any major change in the overall effect of all the post-employment restraints in the contract.

Applying this test, the Court held that the words "*or interested in*" were capable of being removed from the clause without the need to add to or modify the wording of the rest of the clause and would not generate any major change in the overall effect of the post termination restraints.

The Supreme Court's clarification that it is permissible for the courts to 'blue pencil' restrictive covenants and the test for doing so is welcome. However, employers should be wary of adopting the approach that they can rely on the judicial 'blue pencil' if they have got the drafting wrong. The Supreme Court hinted very strongly that the employer was likely to pick up the costs in any case where a restrictive covenant was severed by the courts after its enforceability is challenged; it is not likely to be a very cost effective approach on the part of the employer.

More importantly, employers should not be tempted to include language in their contracts that invites the court to rewrite the covenant if it finds it to be unenforceable; an approach that is permissible in some jurisdictions but one that the Supreme Court reiterated is not available in the UK until such time that there is legislation to that effect.

Although the focus of this case was on the restrictive covenants in an employment contract, the approach of the court may well have implications for non-compete covenants in LLP agreements, Shareholders/Investment Agreements and other fund documents.

In all cases it might be prudent to audit the restrictive covenants in such documents to ensure that the restraint is not too broad, having regard to the interest that it is seeking to protect and that the drafting facilitates any judicial blue pencilling.

[Tillman v Egon Zehnder]

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