



EMPLOYMENT LAW BULLETIN

2008 - Issue 1



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Welcome to this issue of the Employment Law Bulletin produced by the Employment Law team at 3 Hare Court.

We have a growing reputation for our efficient and unstuffy approach, aiming to provide sensitive and commercial advice for both employers and employees. We particularly benefit from the breadth of experience within chambers and regularly advise and act as advocates in cases which intersect with personal injury, human rights, professional disciplinary and administrative proceedings as well as commercial actions in the High Court. At all times we strive to provide practical advice.

With this in mind, this edition deals with two topics in which illness and injury of employees often impacts in an employment context. First, Sara Ibrahim reviews the recent decision of the Court of Appeal in *McAdie v Royal Bank of Scotland* and considers the effect of the outcome for employers who are contemplating dismissal or lesser action against an employee who claims that her misconduct or incapacity is caused or contributed to by the employer's acts or omissions.

Secondly, and closely related with such cases, especially where mental illness and work-related stress are factors, are claims pursuant to the Disability Discrimination Act. My article summarises recent developments in this area, including the perennial question of the burden of proof, but also the latest pronouncements as to an employer's knowledge in disability-related discrimination and the requirement to particularise allegations of failure to make reasonable adjustments.

Age Discrimination is the new kid on the discrimination rights block. Tom Poole takes a look at the legislation following its first anniversary and considers its impact both in the workplace and before the tribunal.

Where senior employees are concerned, and restrictive covenants are either conspicuous by their absence from the contract of employment or are unenforceable as restraints of trade, it has become increasingly important to establish whether such employees owe fiduciary duties to act solely in the interests of their employer company. Richard Samuel considers the current state of the law.

Dan Clarke contemplates the increasing burden for employers imposed by the Information and Consultation of Employees Regulations 2004 and highlights the benefits of pre-emptive action by well-advised employers.

Finally, Tom Roe reviews the arrangements (including bonuses and incentives to remain) which many workers, especially in the City, have with their firms, and the legal problems to which these arrangements can give rise.

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We hope that you find this Bulletin interesting. As ever, we would welcome your feedback.

Sarah Crowther
Editor

STRESSED OUT?

By Sara Ibrahim



A common difficulty in employment disputes is the feature of stress-related illness of an employee pursuing a grievance or subject to disciplinary or capability procedures. To what extent does the presence of such illness affect the duties of the employer?

The recent decision of the Court of Appeal in *McAdie v Royal Bank of Scotland plc* [2007] IRLR 895 has clarified the duties of an employer contemplating dismissal of an employee on grounds of capacity in relation to an illness or injury which was caused or contributed to by the employer's conduct.

The appellant ('M') raised a grievance concerning her transfer to another branch operated by her then employer. Before the grievance procedure was completed, M was signed off sick from work on grounds of stress. It was found by the employment tribunal that the Respondent's mishandling of the grievance procedure had led to M's illness which was described as a 'severe adjustment disorder' by an occupational health doctor, which he noted had arisen from alleged workplace issues including harassment. M's illness was such that she had no prospects of returning to work and had stated to her former employer that she would never return to work there.

The tribunal found that M had been unfairly dismissed, as although it was a potentially fair reason to dismiss M on the grounds of capacity, 'no reasonable employer would have dismissed in these circumstances because no reasonable employer would have found themselves in these circumstances.'

On appeal to the EAT it was found that the tribunal had erred in focusing on the Respondent's responsibility for

having caused M's illness. Instead the EAT stated the tribunal should have posed the question if it was reasonable of the bank to dismiss M, in the circumstances as they then were, including the fact that their mishandling of M's grievance led to her illness. In view of M's declaration that she would not return to work for the Respondent the EAT found that there was in fact no alternative to dismissal.

The Court of Appeal were in agreement with the findings of the EAT. It was unsustainable to submit that because of the Respondent's contribution to the incapacity of M that as a matter of law the Respondent was unable to fairly dismiss M. Further they adopted the reasoning of the EAT on the conflicting authority at EAT level of *London Fire and Civil Defence Authority v Betty* [1994] IRLR 384 with the subsequent cases of *Edwards v Governors of Hanson School* [2001] IRLR 733 and *Frewin v Consignia plc* [2003] All ER (D) 314 (Jul). In *Betty* it was found that as a matter of principle if the former employer had caused the incapacity that it should be ignored when determining if the reason for the dismissal was fair. However, the Court of Appeal favoured the reasoning in *Edwards* and *Frewin* where it thought as a matter of common sense it was relevant to determining if the dismissal was fair if the Respondent had contributed to their former employee's incapacity.

In cases where the Respondent had materially contributed to the incapacity of their employee then it might be incumbent on the Respondent to take extra steps help the employee. Such an employer might look at alternative employment or accept periods of extended sick leave that may not be acceptable in other cases. However, it could not therefore be implied that the contribution of an employer to the employee's incapacity would render any dismissal unfair. In view of M's declaration that she would never return to work for the Respondent, supported by medical evidence, her dismissal by the Respondent was a reasonable one.

The Court of Appeal has therefore, in line with previous decisions of the appellate courts, re-emphasised that

claims based on allegations that psychiatric injuries have been caused by acts or omissions of an employer should be pursued in the civil courts (see for example *Eastwood v Magnox Electric plc* [2004] IRLR 733).

At one level this decision might be considered a triumph for the economic right of self-determination of employers. On the other hand, those advising employers will need to bear in mind any obligations arising to make reasonable adjustments pursuant to the Disability Discrimination Act 1995. It would also seem that even those whose illness does not qualify as a disability for DDA purposes would potentially be entitled to 'reasonable adjustments' following the decision in *McAdie*. There is accordingly still a need for employers to proceed with considerable caution.

Stop Press!

From 1st December, Employment Tribunal Chairmen become known as Employment Judges (under the Tribunals, Courts & Enforcement Act 2007, Sch 8, para 36).

A REASONABLE QUESTION?

By Sarah Crowther



For many, including experienced practitioners in other areas of discrimination law, disability discrimination has traditionally been a murky and unclear area. Fortunately in recent months, the EAT and Court of Appeal have taken various opportunities to get to grips with the Disability Discrimination Act 1995 (DDA 1995)

One particular cause for complication was the distinction between s 3A of the DDA 1995 - what is known as disability-related discrimination - and liability for breach

of the duty imposed by section 4A - the duty to make reasonable adjustments.

Much had been made of the difference in wording between s 3A 'related to the Claimant's disability' and that of other comparable discrimination statutes which refer to discrimination having to be 'on grounds of' the prohibited criterion such as race or sex. Did this mean that an employer had to have (actual or constructive) knowledge of an employee's disability in order to be in breach of the s3A duty or could liability be imposed in situations where the effect was discriminatory although the employer was wholly ignorant of the fact? Could a badly-behaved employer be liable in factual circumstances related to a claimant's disability, even if a tribunal was satisfied that it would have behaved in exactly the same manner to a non-disabled employee?

The Court of Appeal in *Taylor v OCS Group Ltd* [2006] ICR 1602 has taken the opportunity to clarify this point. Smith LJ stated that undoubtedly the disability must have an effect on the mind of the discriminator either consciously or otherwise. As with other claims for discrimination, an employer who behaves reprehensibly towards a disabled employee, even if negligent, is not necessarily discriminating under s3A unless it can be shown that the disability formed a reason for the behaviour. Therefore if an employer responds inadequately to a problem which is related to a disabled person's disability this, of itself, does not amount to s3A(1) discrimination. Nor does unjustifiable behaviour towards a disabled employee, even if the factual context which gives rise to that behaviour would not have existed 'but for' the disability.

That, is not, however, the end of the story. In a disability discrimination claim, the duty to make reasonable adjustments pursuant to s4A comes into play. Whilst again, the employer must have actual or constructive notice of the disability (s 4A(3)(b)), in this instance, the mental processes of the employer (or those for whose conduct the employer is vicariously liable) have no bearing on the question of breach of duty.

This was made clear in the EAT in its recent judgment in HM Prison Service v Johnson. As propounded by Elias P in Tarbuck v Sainsburys [2006] IRLR 664, liability under s4A is established by a tribunal first identifying what would have been a reasonable adjustment to allow a disabled person to overcome a disadvantage and secondly whether it was made or not.

Accordingly, mental processes of those deciding why certain adjustments were or were not made or offered are irrelevant. Equally otiose is an allegation of failure to consider making adjustments. That of itself cannot lead to a breach of duty in the absence of evidence that a reasonable adjustment existed which should have been made.

In practice, this leaves an important question unanswered. Whose responsibility is it to identify the 'reasonable' adjustment? It is clear from the decision in Cosgrove that an employee need not have made a reasonable adjustment clear to an employer at the time of the alleged discrimination. It is also clear that if an employer had given proper consideration at the material time, a particular adjustment would have been obvious and commended itself, then the employer cannot escape liability on the basis that it did not conduct that investigation.

But what about the case where nobody thought of the answer until later? This was effectively the position in Latif v PMI [2007] IRLR 576. A student who was registered blind wished to sit an examination offered by the Respondent. Although some (but not all) adjustments were made, in the course of the tribunal hearing it was suggested by Counsel for the claimant that a further adjustment could have been made. This had not been suggested at the time and was not part of the claimant's requested adjustments.

The EAT explained that the language of the burden of proof shifting in reasonable adjustment cases is not always helpful. However, in order to find for a claimant the tribunal needs evidence of an adjustment which is reasonable on the face of things, before any burden can

be said to 'shift' to the respondent to show that it was not reasonable. A respondent is entitled to know the case it is to meet, even if this comes up in the course of the tribunal hearing. It cannot prove a negative without particularisation.

So how particular does a claimant need to be? The answer is, apparently, it depends. According to the EAT in Johnson the degree of specificity would depend on the nature of the evidence and the issues. Although a claimant does not have to identify a precise adjustment with every detail considered, it must be more than in general terms. For example, in Johnson itself, the allegation of 'redeployment to a non-hostile environment' was not enough – presumably particular posts or roles should have been identified.

It appears therefore that there will be plenty of litigation still to come as to what is sufficient pleading, particularity and evidence of a potential reasonable adjustment so as to shift the burden. The vagueness of the test propounded by the EAT clearly leaves many questions unanswered.

Age Discrimination: one year young by Tom Poole



It is now just over a year since the Employment Equality (Age) Regulations 2006 ("the Regulations") came into force. The Regulations outlaw age discrimination in the workplace and are an important and all-encompassing addition to anti-discrimination legislation. The Regulations are important as age discrimination is one of the most wide-spread (and arguably the most accepted) form of discrimination in the workplace. The Regulations are wide-reaching because they are not limited to protecting only one particular group, but every employee (at one time or another).

So what impact have the Regulations had in their first year? Well, not as great an impact as predicted. Figures from ACAS show that in the first six months following the enactment of the Regulations a total of 739 claims were made to employment tribunals and very few have reached the appellate courts. However, if we take our lead from Ireland, where they have lived with age discrimination legislation for a few more years, recent reports show that over 50% of all discrimination claims are now age related. In the circumstances, employers ignore the Regulations at their danger, as compensation for a successful claim is uncapped and can include an award for injury to feelings.

This article looks at two recent decisions on age discrimination and the steps that employers should take to avoid facing a claim themselves.

Bloxham v Freshfields

Mr Bloxham, a former partner at Freshfields Bruckhaus Deringer ("Freshfields"), claimed that he had been discriminated against either directly or indirectly on grounds of his age contrary to the Regulations. The alleged act of discrimination was that Freshfields had changed its pension scheme. Under the old scheme partners were allowed to retire with consent from the age of 50 years old but only partners who were 55 years old or over were entitled to retire on a full pension. The significant characteristic of the scheme was that the cost incurred by one generation of partners in paying the pensions of retired partners was rewarded by a pension paid to them by the next generation of partners. However, the partners decided that the old scheme should be modified and that a transitional scheme should apply to those partners who had pension entitlements under the old scheme. Mr Bloxham did not support the proposed reforms and chose to retire on the cut-off date, taking a 20 per cent cut in his pension entitlement as a result of retiring after 54, rather than at the full entitlement age of 55. Mr Bloxham contended that the implementation of the new scheme forced him to retire at the age of 54 and that by retiring at that age he was discriminated against

contrary to the Regulations when compared to those partners who were 55 years old and whose pension entitlements were not discounted.

The Tribunal found that the reform of the old scheme was a proportionate means of achieving a legitimate aim (namely to redress an unfairness to younger partners and to provide a more financially sustainable scheme), therefore any less favourable treatment suffered by Mr Bloxham, as a result of the implementation of the transitional scheme, was not unlawful under the Regulations.

Mandatory retirement

The European Court of Justice has also started to consider age discrimination claims and has recently delivered its decision in *Palacios de la Villa v Cortefiel Servicios SA* [2007] All ER (D) 207.

In this case the ECJ found that the Equal Treatment Framework Directive 76/207/EEC does not preclude member states from introducing mandatory retirement ages for its citizens, despite this being a discriminatory provision. The ECJ considered this step to be justified on the grounds that it could, in certain circumstances, promote employment opportunities.

The effect of this decision is likely to mean that the default retirement age in the UK of 65 will remain, despite the challenge by Heyday (an organization backed by Age Concern) whose assault on compulsory retirement at 65 was referred to the ECJ last December.

Retirement procedures

As well as making direct and indirect discrimination on the grounds of age unlawful (unless it can be justified) and prohibiting harassment (which can never be justified), the Regulations also set out retirement procedures that employers must follow before dismissing an employee on retirement. In short, employers must follow this statutory procedure, which includes a right for

employees to continue working beyond the retirement age, before they can terminate an employee's employment on retirement grounds. Failure to follow the procedure can result in a successful claim for unfair dismissal, and in some cases the dismissal will be automatically unfair.

Summary

Although the Regulations have not yet had the impact some employment practitioners expected, the number of claims is growing and employers must take action to ensure that practices, policies and procedures comply with the Regulations. Preventative action at this stage will stand employers in better stead when it comes to defending claims that inevitably will arise in the next few years.

FIDUCIARY INCIDENTS TO THE EMPLOYMENT RELATIONSHIP

by Richard Samuel



This article summarises the current state of the law concerning how fiduciary incidents to the employment relationship can arise in relation to senior employees who are not statutory directors and in relation to employees as a whole.

The starting point is Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18 A-C:

"The distinguishing feature of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; not place himself in a position where his duty and his interest may conflict; he may not

act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. *They are the defining characteristics of a fiduciary ... he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary*" (my emphasis).

Any fiduciary will owe Millett LJ's duties, what he calls the "defining characteristics" of a fiduciary (barring valid exclusion by contract). The issue in all cases is the scope which those duties extend to on any particular set of facts.

Of course a company director who is also an employee will owe fiduciary duties to the employer company. A senior employee who is not a statutory director may also owe such duties, if, on the facts of the situation, she can be said to be a *de facto* director. The requisite test is again taken from a decision of Millett LJ in *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 and requires proof that the employer undertook functions with the company which could only properly be discharged by a director and was held out by the company as if he were validly appointed as such. Mere proof of managerial responsibility which could be performed below board level is insufficient.

An example of the application of this principle in practice is found in the decision of Etherton J in *Shepherds Investments Limited v Walters* [2006] EWCH 836 at §§73-81. Having cited to him *Canadian Aero Services v O'Malley* (1973) 40 DLR (3d) 371, and on the basis that there was no English authority for the proposition that a senior management employee can without more be considered as owing fiduciary duties on the basis of submissions on *Nottingham University v Fishel* [2000] IRLR 471, Etherton J came to the simple conclusion that D was a *de facto* director, and as a result owed fiduciary duties.

In fact, *Shepherds* was apparently decided without reference to *Tesco Stores v Pook* [2004] IRLR 618, where

Smith J in a passage held at §64:

“...I accept that there is no duty on an employee to disclose breaches of contract, which do not involve a fiduciary element... [§65] Having considered all the authorities I am of the opinion that directors have a positive duty to disclose breaches of their fiduciary duty. I am of the opinion also that senior employees (of the kind identified in *Sybron*) have a similar duty” [§66] “Mr Pook to my mind was just below the board level in Tesco and he was of such seniority that he would have been obliged for example to disclose the other breaches of duty of fellow employees. It would be an odd thing if he were under an obligation to disclose such breaches but not under an obligation to disclose his own breaches”

In *Fishel* Elias J analysed the issue of how fiduciary incidents to employment relationships arise as a whole in much greater detail than in the above brief passage in *Pook*. Having cited the passage in *Mothew* above, he considered the position of employees. He began by reminding himself at §86 that:

“As Fletcher-Moulton observed in *Coomber v Coomber* [1911] 1 Ch 723 at 728, even an errand boy is obliged to bring back my change, and is in fiduciary relations with me”.

At § 91 he held that fiduciary duties,

“Arise not as a result of the mere fact there is an employment relationship. Rather they result from the fact that within a particular contractual relationship there are specific *contractual* relationships which the employee has undertaken which have placed him in a situation where equity imposes these rigorous duties in addition to the contractual obligations. Where this occurs, the scope of the fiduciary obligations both arises out of, and is circumscribed by, the contractual terms; it is circumscribed because equity cannot alter the terms of the contract validly undertaken” (my emphasis).

At §92 Elias J observed that in the passage in *Mothew* above,

“Lord Millett was applying the concepts of loyalty and good faith to circumstances where a person undertakes to act *solely in the interests of another* [a fiduciary relationship of good faith]. Unfortunately, these concepts are frequently used in the employment context to describe situations where a party merely has to *take into consideration the interests of another* [a contractual relationship of good faith]” (my emphasis).

As a result, a fiduciary relationship between employer and employee would only be established where, (§ 1494),

“...in all the circumstances he has placed himself in a position where he must act solely in the interest of his employer.”

Fishel and its relationship to other leading authorities is considered in Goulding, *Employee Competition* 2007 1st ed at §§2.48-2.59. Goulding considers that in *Fishel* Elias J found the Defendant liable for breach of fiduciary duty at §115f because he had put himself in a position where his *contractual duty* to place work with the university’s embryologists might conflict with his *interest* in benefiting from them by payment for their services.

An example of the practical application of the approach in *Fishel* is the judgment of Moses LJ in *Helmet Integrated Systems v Tunnard* [2006] EWCA Civ 1735 in which a middle-ranking manager (§7), also described as a senior salesman (§1), who had a contractual duty to “advise on competitor activity and pricing structures” (§18) was a fiduciary in relation to the information he received about such competitor activity (§44). He was so because he held that information *exclusively* for his employer. The fiduciary incident to the employment relationship arose because the employer had no control over how the employee received or passed on such information (§45). The employer depended entirely on the good faith of the employee to

use that information *exclusively* in the employer's interests, just as Fletcher-Moulton's hypothetical employer relies entirely on the errand boy to bring back his change.

As Lord Millett said in *Mothew* some ten years ago, it is not good enough to simply plead that an employee is a fiduciary. Rather, great care has to be taken as to how they are framed, including their nature, their scope, their duration, and the contractual and factual circumstances which give rise to them.

INFORMATION AND CONSULTATION OF EMPLOYEES REGULATIONS 2004: A BRIEF GUIDE

By Dan Clarke



The final phase of the bringing into force of the Information and Consultation of Employees Regulations 2004 (SI 2004/3426) ("the ICER") takes place on 6 April 2008. The ICER transpose into UK law the provisions of EC Directive 2002/14/EC on informing and consulting employees. The Government opted for a phased introduction of the ICER because it was thought that small businesses, in particular, would need time to prepare for their introduction. This article outlines their effect.

Scope

The ICER apply to "undertakings", which are defined as "public or private undertaking[s] carrying out an economic activity, whether or not operating for gain".

The term undertaking clearly has a very broad reach. In many cases it will be obvious whether or not an employer is an undertaking. However, there are some areas where the application of the test is as yet unclear. In January 2006 the DTI published guidance (available on its website) designed to explain the policy intentions behind the ICER.

The guidance expresses some doubt about whether the ICER applies to schools, colleges, universities, NHS Trusts, and central and local government bodies, since they do not obviously carry out an "economic activity".

Assistance can be derived from existing ECJ case-law on the meaning of undertaking (which is identically defined under the Acquired Rights Directive (Council Directive 2001/23/EC)). In this context the ECJ has generally interpreted "economic activity" broadly. For example, it has been held to cover the provision of healthcare services (*Porter* [1993] IRLR 486) and the provision of assistance to drug addicts (*Bartol* [1992] IRLR 366). However, the ECJ has also held that organizations whose principal role is to carry out purely administrative functions, or to exercise public authority, are not carrying out an economic activity where it is merely "ancillary" to these main purposes (*Henke* [1996] IRLR 701). Ultimately, parties will be able to have recourse to the Central Arbitration Committee ("CAC") which exercises a supervisory jurisdiction over the provisions of the ICER and can be required to resolve the issue in a particular case.

To be covered, the undertaking must have its registered office, head office, or principal place of business in Great Britain and must employ the relevant number of employees at the relevant date. For employers with at least 150 employees this meant 6 April 2005; for employers with at least 100 employees it was 6 April 2007. The forthcoming application of the ICER to employers with at least 50 employees from 6 April 2008 increases their impact considerably. Undertakings with fewer than 50 employees will not be covered.

Initiation of the obligations under ICER

The obligations imposed by the ICER do not apply automatically, but have to be initiated either by the employer or the employees.

Employers may initiate negotiations by giving notice in writing, which must be brought to the attention of all the employees of the undertaking, so far as is reasonably practicable.

In order for employees to initiate the application of the ICER, at least 10% of the workforce (subject to a minimum of 15 and maximum of 2,500 employees) must have requested that the employer negotiate an agreement in respect of information and consultation. An example of a situation where employees might wish to initiate the application of the ICER is where they are dissatisfied with the operation of an existing agreement or practice which governs how the employer consults on matters such as redundancy or restructuring.

Negotiated agreements

Where a valid employee request has been made the employer is obliged to initiate negotiations by, as soon as is reasonably practicable, making arrangements for the employees to elect or appoint negotiating representatives, informing the employees in writing of their identity and inviting them to enter into negotiations to reach a negotiated settlement. There is a 6-month time limit on negotiations, although this may be extended by agreement.

The ICER do not prescribe the substance of the arrangements. The only requirements are that: any agreement must cover all the undertaking's employees; set out the circumstances in which the employer must inform and consult the employees; be dated and in writing and be approved by the employees. The agreement can be approved either by signature of the negotiating representatives or by at 50% of the employees in a ballot.

The standard provisions

An incentive for compliance has been built into the ICER: where no arrangements are agreed, standard provisions on information and consultation will apply automatically from 6 months after the date on which negotiations should have started (if they did not start) or on which the negotiating period ended (if agreement was not reached).

These standard provisions are onerous. They require the employer to provide the employees with information on

the following: (a) the recent and probable development of the undertaking's activities and economic situation; (b) the situation, structure and probable development of employment within the undertaking; (c) any anticipatory measures envisaged, in particular, where there is a threat to employment within the undertaking; and (d) decisions likely to lead to substantial changes in work organization or contractual relations.

They also impose an obligation on the employer to consult the employees on the above matters and to ensure that the timing, method and content of the consultation are appropriate and that a reasoned response is given to any opinion expressed by the employees.

Pre-existing agreements

An employer may avoid having to negotiate an agreement under the ICER by having in force a pre-existing agreement ("PEA"). A PEA is subject to the same requirements as to content as a negotiated agreement. When the employer receives a request by the employees to initiate negotiations under the ICER and a valid PEA is in place, the employer may, instead of being compelled to initiate negotiations under the ICER, hold a ballot of the employees to decide whether the employee request is endorsed by them. If it is not then endorsed by them the employer is not compelled to proceed with negotiations. The employer may only take advantage of this procedure where the employee request has not been made by as many as 40% of the employees (in which case the employer must proceed with the negotiations).

Moratorium

Broadly speaking, neither the employer nor the employees may request negotiation (or re-negotiation) of an agreement within 3 years of it being concluded or endorsed (or from the date the standard provisions begin to apply).

Enforcement

The ICER provide that an employee representative may present a complaint to the CAC where he considers that an employer is not acting in accordance with a

negotiated agreement or with the standard arrangements. The complaint must be brought within 3 months of the date of the failure. The CAC may make a declaration of failure to comply and order the employer to comply. Following such a declaration an application may be made to the EAT for a penalty notice to be issued, under which the employer may be fined a maximum of £75,000.

Comment

Those advising employers should be particularly aware of 2 points. First, there may be considerable advantages in concluding a PEA (even before 6 April 2008). This could protect them from any sanctions for breach of a negotiated agreement or the standard provisions. Further, the onerous terms of the standard provisions can be avoided and areas where the wording of the standard provisions may lead to uncertainty and litigation can be avoided by specific provision.

Secondly, the sanctions for non-compliance with the regulations or the terms of a negotiated agreement or the standard provisions can be severe and worth avoiding both in terms of economics and publicity. This was recently illustrated by the EAT decision in July 2007 to fine Macmillan Publishers Ltd £55,000 for an admitted breach of the obligation under the ICER to hold a ballot to elect employee representatives, *Amicus v Macmillan Publishers Ltd* (Lawtel 30/7/2007).

CITY WORKERS – INCENTIVES TO REMAIN AND DOMICILE ISSUES

By Thomas Roe



Three features recur in the arrangements which many workers, especially in the City, have with their firms: substantial reliance on bonuses; restrictive covenants;

and, in many cases, an employer which is in substance a foreign company. The legal problems to which these arrangements can give rise have been considered in two recent cases.

In *Samengo-Turner v J & H Marsh & McLellan (Services) Ltd* [2007] EWCA Civ 723 the claimants had contracts of employment with a British subsidiary, MSL Ltd, of the American company Marsh & McLellan Companies Inc (M&M Inc). They also agreed an 'Incentive Plan' directly with M&M Inc. This provided 'incentives to remain with' M&M Inc or any of its subsidiaries, collectively defined as 'the Company'. It provided for bonus payments, subject to the claimants' continued employment by 'the Company'. There were non-solicitation covenants in favour of 'the Company'. The bonus was repayable in the event of defined 'detrimental activity'. The 'Incentive Plan' was agreed to be subject to the exclusive jurisdiction of the courts of New York.

The claimants left to work for a rival. M&M Inc, alleging detrimental activity, sued on the Incentive Plan in New York, seeking repayment of the bonuses and injunctive relief. The claimants applied in England for an anti-suit injunction.

Section 5 of Council Regulation (EC) No. 44/2001 ('the Judgments Regulation') applies to 'matters relating to individual contracts of employment' (article 18(1)). By Article 20(1) '[a]n employer may bring proceedings only in the courts in the Member State in which the employee is domiciled.' The Regulation applies to defendants domiciled in a Member State, regardless of where the claimant is domiciled: see *Owusu v Jackson* [2005] 1 QB 801, ECJ. So the issues were (i) whether M&M Inc's claim was a 'matter relating to an individual contract of employment' and (ii) whether M&M Inc was the claimants' 'employer.' There was no authority from the ECJ and no one appears to have thought a reference to that slothful institution sensible in this urgent case.

At first instance the court decided both questions in the negative. The Court of Appeal (Tuckey, Longmore and

Lloyd LJ) disagreed. On the first issue, Tuckey LJ put it shortly: ‘ ... I cannot see how it can be said that the claimants’ bonus agreements do not relate to their contracts of employment.’

The second issue was more difficult. M&M Inc was not in law the claimants’ employer: its English subsidiary, MSL Ltd, was. But Tuckey LJ had various reasons for finding M&M Inc to be the ‘employer’ under the Judgments Regulation: the question had ‘to be considered together with’ the fact that the claim related to a contract of employment; this was ‘an employment claim against the employees and one would expect such a claim to be made by an employer’; M&M Inc had ‘only been able to sue in the right of and as if they were employers because of the wide definition of “the Company”’; M&M had ‘an economic interest’ in the claimants’ terms of employment and ‘should be subject to the same jurisdictional restraint as MSL.’ Moreover, this construction was consistent with the Judgments Regulation’s aims of certainty and avoiding multiplicity of proceedings.

Although there is scope for argument about some these assertions, this is surely the expansive reading of section 5 which the ECJ would eventually have given, had it been asked. But one must wonder how much ‘certainty’ has really been achieved. Were all of the factors identified by the court necessary to the result? Would it have been different if the Incentive Plan had been more simply drafted? Suppose for example that it had done no more than make a bonus available at M&M Inc’s discretion and repayable on the occurrence of certain events. Could M&M Inc still sensibly have been said to be the claimants’ employer? On what basis? There will need to be more law on when a non-employer is an employer for the purposes of section 5.

Whose law should apply to agreements such as these? Under the Rome Convention, the basic rule is freedom of choice. But again this is not unrestricted. Article 6.1 removes the right, in a ‘contract of employment’, for the employee to contract out of ‘the protection afforded to him by the mandatory rules of the law’ in the jurisdiction

where he works. And Article 16 permits the court to refuse to apply the law of a foreign state if this would be ‘manifestly incompatible with the public policy (“ordre public”) of the forum.’ In ***Duarte v Black & Decker Corporation*** [2007] EWHC 2720 (QB) there was a plan similar to the ‘Incentive Plan’ which was agreed to be governed by the laws of Maryland. The claimant argued that its non-compete provisions were too wide as a matter of English law. Thus, he argued, they were unenforceable in England even if they were binding in Maryland law: first, because the English rules requiring restrictive covenants to be reasonable constitute ‘protection’ under Article 6.1; secondly, because if they were too wide in English law, it would be contrary to public policy to enforce them here.

Field J referred to ***Samengo-Turner*** and held that the plan was a contract of employment for the purposes of the Rome Convention. He dismissed the suggestion that Article 6.1 was relevant: the ‘protection’ referred to there, he held, was health and safety and similar legislation (‘the Factories Acts’, as he somewhat out-datedly put it). But, rightly in the author’s respectful view, he upheld the claimant’s argument under Article 16: if the non-compete obligations were too wide in English law, they would not be enforced here even though they were valid in Maryland law.



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