



# Employment Bulletin

October 2006

## Introducing new restrictive covenants

The loss of staff and confidential information to competitors is an ever-present problem for some companies. In a recent case concerning a recruitment company in the health sector the company tried to stem its losses by introducing restrictive covenants into the contracts of a number of employees. The restraint clauses in question prohibited employees from poaching the company's employees for 12 months after termination of employment and prevented employees from working for a competitor for 6 months after the end of employment.

When a number of employees refused to sign the new contracts the company dismissed them. The employees brought claims of unfair dismissal. The Court of Appeal held that the employer did have a potentially fair reason for dismissing the employees. However, the employer failed at the second hurdle as it had not acted reasonably in dismissing the employees and so the

dismissals were unfair.

The Court noted that in some cases it was necessary to consider the reasonableness of the restrictive covenants themselves to assess whether the employer had acted reasonably. But in this case the reasonableness of the covenants was not the key. It was the manner in which the employer had sought to impose the changes that made the subsequent dismissals unfair.

The Court found that the employees were given little chance to consider the covenants and little time to take professional advice. In addition, the employer did not warn the employees that they would be sacked if they refused to sign the new terms. The case highlights that it is not enough to ensure that the new restraints are drafted in a reasonable and fair manner. The employer must also make sure that the procedure followed to introduce the new terms of employment is fair.

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## Discrimination laws come of age

The new age discrimination legislation comes into force on 1 October 2006 and looks set to have an enormous impact. The Employment Equality (Age) Regulations outlaw direct and indirect discrimination in employment, victimisation and age harassment. Similar legislation has been in place in Ireland for a number of years and has generated a large body of case law.

We noted a number of action points for employers in the

last Bulletin, taking into account the ACAS Guidance 'Age and the Workplace'.

In general terms employers need to examine their workplace culture and attitude towards age - whether younger or older workers. Concrete steps need to be taken to incorporate the new legislation into equal opportunities policies and into all other relevant areas from recruitment to dismissal.

Clearly employers will need to familiarise themselves with the provisions of the legislation. For example, the new law accepts that age may be a genuinely relevant factor in certain aspects of employment. Direct discrimination may be lawful if the treatment at issue is a 'proportionate means of achieving a legitimate aim'. When discrimination can be justified in this manner is likely to be debated hotly in the first tribunal cases under the legislation.

The legislation contains a number of exemptions. For example, there is a general exemption making it lawful for an employer to discriminate in relation to benefits related to length of service. This would mean that an employer may be able to give higher pay or greater holiday entitlement to workers with longer service.

There is also an exemption allowing employers to offer redundancy payments varying according to the employee's age as long as they are based on the statutory multipliers. Employers who feel they come

within any of the exemptions should check that they are completely covered as there are some restrictions on their general application.

Employers also need to be confident that they have taken reasonable steps to prevent harassment on the grounds of age. Much 'normal' workplace banter has an ageist edge, which could now result in liability attaching to the employer.

In addition, the retirement procedure in the legislation enables a retirement dismissal at the default retirement age of 65 to be lawful provided the correct procedure has been followed. This includes notifying an employee, between 6 and 12 months before the date of dismissal, of the employee's right to request not to retire on the intended date of retirement.

Employers should note that the implementation of the provisions in the legislation relating to access to pension schemes has been delayed to 1 December 2006 to allow for further consultation.

## Stress claims abundant

In recent months there have been a number of reported cases concerning claims by employees to damages for psychiatric injury caused by stress at work. In perhaps the most dramatic example the High Court has awarded compensation in excess of £800,000 to an employee of a bank following a campaign of bullying by fellow female employees.

The employee claimed that the main cause of her psychiatric injury was the bullying meted out by her fellow employees. She claimed the employer was negligent on two fronts. First, she claimed that the employer was directly liable as it had failed to take reasonable steps to protect her from bullying. Secondly, she claimed that the employer was vicariously liable for the acts of bullying carried out by her fellow employees.

The employee alleged that she had been subjected to a daily catalogue of hostile and childish behaviour. This included excluding her from conversations and making abusive remarks such as "What's that stink in here?" Despite complaining to her manager no steps were taken to deal with the problem. The employee also alleged that a male peer had conducted a campaign of undermining and humiliating her. All of the allegations were corroborated by other employees.

Following one breakdown the employee returned to work but had a subsequent breakdown as she could not cope with seeing her harassers at work. She

claimed that her employers were vicariously liable in negligence for the acts of staff bullying which had resulted in her psychiatric injury. The High Court upheld the employee's claim, finding that both the female employees and the male employee had conducted a concerted and deliberate campaign of bullying. Their behaviour also amounted to harassment under the Protection from Harassment Act 1997.

The Court also found that the employer was directly liable in negligence for the employee's psychiatric injury. It had failed to take adequate steps to protect her amounting to a breach of its duty of care. It had been reasonably foreseeable that the employee would suffer psychiatric injury as a result of the bullying. The employer was aware that the employee had suffered from depression in the past and was vulnerable to injury.

The Court awarded £35,000 general damages, £25,000 for disadvantage on the labour market, £128,000 for lost salary and bonuses and £640,000 for future loss of earnings. The Court commented that bullying was a long-standing problem and that steps such as disciplinary action or relocation of individuals should have been taken. Employers with similar problems should also consider the introduction of a bullying and harassment policy, training of employees and an effective complaints procedure.

# Whistle blown on references

The potential liabilities for employers do not cease when an employee leaves employment. A recent case has confirmed that employers must remain as vigilant to detrimental treatment after termination of employment, in particular in the provision of references, as they are during employment.

The case concerned a whistleblower who left employment and subsequently requested a reference. The ex-employer refused to provide a reference and was held to be potentially liable under the whistleblowing provisions in the Employment Rights Act 1996 even though the detriment had occurred after the employment had ended.

This brings the law in this area into line with the discrimination legislation, which applies post-employment. Procedures to ensure post-employment detriment does not occur should be extended accordingly.

## New maternity rights

We flagged up proposed changes to the maternity legislation in the February Bulletin. These changes came into force on 1 October 2006 and apply to parents whose children are expected to be born on or after 1 April 2007. Changes to note include:

- The removal of the six-month service requirement to claim additional maternity leave so that all women will qualify for both ordinary and additional maternity leave (i.e. a total of 52 weeks).
- The payment period for statutory maternity pay (currently £108.85 per week) will be increased to 39 weeks.
- The amount of notice an employee must give to return early from additional maternity leave is doubled from 28 days to eight weeks.
- Optional 'keeping in touch days' are to be introduced enabling a woman to work for up to 10 days during maternity leave without such work bringing her leave to an end.
- The removal of the small-employers exemption to ensure that all women have the right to return to the same or a similar job regardless of the size of her employer.

These enhanced maternity rights will also be extended to adoption leave insofar as is possible. Additional family-friendly changes are in the pipeline and we will report on these in future editions of the Bulletin.

## Taxing PILONs

It is often seen as preferable to give a departing employee a payment in lieu of notice (known as a PILON) rather than allowing them to work out their notice period. However, the tax treatment of such payments often causes a headache.

The customary distinction drawn by HM Revenue and Customs is between:

- **Non-contractual PILON:** payments in lieu not provided for in the contract, which are seen as damages for breach of contract and treated as ex-gratia payments. The first £30,000 of such payments are accordingly tax exempt.
- **Contractual PILON:** payments in lieu provided for in the contract, which are seen as part of the terms on which the employee accepted employment and are deemed to be 'emoluments' and taxable as earnings in the normal way.

It is not always clear whether a payment has been made under the contract or in breach of it. In a recent case the contract gave the employer the option of asking the employee to accept short notice where the employee's contract was terminated by reason of redundancy, in which case the employee would receive a PILON.

The Special Commissioner held that this fell into the second category of a contractual PILON. The employee's agreement to leave on short notice varied the terms of the original employment contract so as to give the employer the right to dismiss lawfully on short notice and the payment in lieu arose from the contract as varied, not as damages for breach of the contract. Accordingly, the payment was liable to tax and national insurance.

This is a very complex area and the advice to employers unsure of their ability to make a tax-free payment is to seek specialist advice.



# Working time

Just prior to going to press the European Court of Justice rebuked the United Kingdom for failing to implement properly the European Working Time legislation. The Court held that the UK had failed in its obligations by publishing DTI Guidance telling employers that they were not under an obligation to ensure that workers actually took their minimum weekly and daily rest periods.

The ramifications of this judgment remain to be seen but it seems clear that employers should take reasonable steps to ensure that workers do take the breaks to which they are entitled under the working time legislation. Such steps could include notification of the workers' rights to breaks and systems to ensure breaks are taken. It is to be hoped that revised guidelines from the DTI will give further advice as to the action to be taken.

## Part-time workers' holiday

Is a part-time worker who works on Wednesdays, Thursdays and Fridays entitled to pro-rata time off for bank holidays falling on a Monday? Following the introduction of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations in 2000 it might have been thought that the answer to this question was an unequivocal 'yes'. However, in a recent case the nature of the business and the terms of employee's contract led to the opposite conclusion.

The case concerned a call centre, open seven days per week. All the call centre employees, whether full or part-time, were subject to the same term in their employment contract stating that they were only entitled to the benefit of public holidays where these fell on their normal working days. The employee in question worked Wednesday to Friday and complained that by not receiving time off in lieu of bank holidays falling on a Monday he had been treated less favourably than a comparable full-time worker.

The employment appeal tribunal held that in fact the reason for the employee's treatment was not his part-time status. The employer did not distinguish between full-time and part-time employees. The employee's line manager worked full time Tuesdays to Saturdays and was accordingly in the same position.

Whilst the part-time employee in this case failed in his claim, it is probable that an employee working in a more traditional five-day-a-week Monday to Friday business may have succeeded. Employers would be well advised to consider bank holiday entitlement for part-time workers as part of their overall policy of ensuring that part-time workers are treated in the same way as full-time workers.

# Contacts

This Bulletin is designed to provide a summary of the subject matter. It does not purport to be comprehensive or a substitute for specialist legal advice in individual circumstances.

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