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EMPLOYMENT

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WHAT YOU MAY HAVE MISSED THIS SUMMER .....

THE ENFORCEABILITY (OR OTHERWISE!) OF RE-ENGAGEMENT ORDERS

Employees unable to force an unwilling employer to re-employ them

COVERTLY RECORDING A MEETING WILL NOT ALWAYS BE MISCONDUCT

Employees should proceed with caution

WHISTLEBLOWING – EMPLOYEE'S REASONABLE BELIEF

The public interest need not be an employee's only motivation for making a disclosure

IN THIS ISSUE

THE ENFORCEABILITY (OR OTHERWISE!) OF RE-ENGAGEMENT ORDERS

In Mackenzie v The University of Cambridge the Court of Appeal considered whether an order for re-engagement was specifically enforceable.

Dr Mackenzie was dismissed by The University of Cambridge (the "University") and, during Employment Tribunal proceedings, the University conceded that her dismissal had been unfair. The Employment Tribunal ordered that Dr Mackenzie be re-engaged by the University.

Where an employer fails to comply with an order for re-engagement, section 117 of the Employment Rights Act 1996 ("ERA") will apply requiring that the employer pay the employee compensation for unfair dismissal and an additional award of up to a further 52 weeks' pay. Rather than comply with the re-engagement order and re-employ Dr Mackenzie in a comparable role, the University paid Dr Mackenzie compensation for unfair dismissal and the maximum possible 'additional award' of 52 weeks' pay.

Dr Mackenzie applied to the Court of Appeal ("CA") for an injunction to enforce the order for re-engagement thereby requiring the University to employ her. The CA dismissed Dr Mackenzie's application. It held that where an order for re-engagement is not complied with, the only remedy for non-compliance is the additional award of compensation under section 117 of ERA. The maximum possible additional award had already been paid to Dr Mackenzie.

Orders for re-engagement are rarely sought by successful claimants: those who have been unfairly dismissed tend to be reluctant to return to an employer who has treated them poorly. However, in those rare cases where an order for re-engagement is made, this judgment confirms that the employee will not, of right, be able to force an unwilling employer to give them their job back.

PERCEIVED DISABILITY

The Equality Act 2010 ("EQA") prohibits employers from discriminating against employees or workers on the basis of a protected characteristic. This wording is wide enough to capture cases where the employer mistakenly perceives the employee to have a protected characteristic. In Chief Constable of Norfolk v Coffey the Court of Appeal ("CA") provided guidance on how Employment Tribunals ought to assess cases where an employee is mistakenly perceived to have a disability. In order for this kind of perceptive discrimination to apply, the alleged discriminator must have believed that the definition of disability in the EQA is met. That is that the employee has a physical or mental impairment which has a substantial and long term adverse impact on their ability to carry out day to day activities.

Ms Coffey worked for the Wiltshire Constabulary. During an initial medical assessment she was found to have suffered some hearing loss which meant that her hearing did not meet the police's national standard for hearing loss. It was recommended that she undergo a functional hearing test which she passed and no adjustments to her role were needed.

In 2013 Ms Coffey applied to transfer to the Norfolk Constabulary. She informed them of her hearing loss and provided a report from the functional hearing test that she had passed. At her first medical with the Norfolk Constabulary a functional hearing test was again recommended. This was not provided and instead a medical opinion was sought. Even though this suggested that Ms Coffey would pass a functional hearing test and Ms Coffey's own specialist confirmed that her hearing was stable her application was rejected on the basis that she had not met the national standard for hearing loss.

Ms Coffey subsequently issued a claim in the Employment Tribunal ("ET") for direct discrimination alleging that her application had been rejected because the Norfolk Constabulary had perceived her to have a disability. The claim was defended as the Acting Chief Constable of Norfolk (who had rejected Ms Coffey's application) did not believe that Ms Coffey's hearing loss met the requirements of a disability under the EQA as at the time of Ms Coffey's application it did not have a substantial impact on her ability to carry out her duties.

In addition, it was claimed that Ms Coffey's application was rejected because of concerns that she might not be fully able to perform the duties required of her in future (i.e. the reason was not because of the perceived disability in any case and so a case for direct discrimination could not succeed).

The ET found in Ms Coffey's favour. An appeal by the Chief Constable of Norfolk to the Employment Appeal Tribunal was unsuccessful and a further appeal to the CA was filed. The CA dismissed the appeal.

The CA found that the Acting Chief Constable of Norfolk had not believed that Ms Coffey was disabled at the time of her application. However, it found that as she had believed that Ms Coffey's condition was progressive and in accordance with paragraph 8 of Schedule 1 to ERA, this meant that the definition of disability in the EQA was met. The CA held that the refusal of Ms Coffey's application did amount to direct disability discrimination and was persuaded in particular as the Acting Chief Constable of Norfolk had, in refusing the application, been significantly influenced by stereotypical assumptions about Ms Coffey's condition.

This case confirmed that claims based on a mistaken perception that a person is disabled can be brought and won. However, it was only on the very specific circumstances of this case that Ms Coffey succeeded in a direct discrimination claim.

SUPREME COURT REMOVES WORDS FROM NON-COMPETE CLAUSE MAKING IT ENFORCEABLE

In Tillman v Egon Zehnder Ltd the Supreme Court overruled a case that has stood for 99 years. A clause which, in effect, restricts a party's ability to trade must go no further than is necessary to protect another party's legitimate business interests. If a clause goes too far (this may be in terms of duration or content) it will be unenforceable. This could be problematic for an employer whose star employee defects to the competition and has sensitive commercial information. The case in question related to these sorts of restrictive covenants and the ability of the Courts to remove offending wording from a clause that would otherwise be unenforceable.

Shortly after her employment with Egon Zehnder Ltd ("Egon") ended Ms Tillman intended to join a competitor. She made it clear that whilst she would comply with all other post termination restrictions in her contract of employment, the non-compete clause was too wide and was unenforceable. This was because the wording of the clause prevented her from being "interested in any business" for the period of the restriction, thus prohibiting her from having even a minor shareholding in a competitor's company. Egon sought an injunction requiring that Ms Tillman comply with the non-compete clause. The High Court granted the injunction, finding that the words "interested in any business" did not prevent the Ms Tillman having a minor shareholding in a competitor. The Court of Appeal disagreed and found that the non-compete clause was too wide and the offending words could not be severed based on the case of Attwood v Lamont (which was decided in 1920). Egon appealed on a number of grounds.

The Supreme Court held that "interested in any business" could include even a minor shareholding as a passive investor. The non-competition clause was, in its original format, void as a restraint of trade.

However, the Supreme Court then looked at the possibility of severing the words "interested in" from the clause, which could render the rest of the non-competition covenant enforceable. The Supreme Court applied three factors that it deemed crucial in severance issues: 1) the application of the blue pencil test (i.e. that no further modification is required once the words are removed); 2) that the parties still receive adequate value for the remaining clauses in the contract; and, 3) the overall effect of all the covenants should not change significantly following removal of the offending wording. The Supreme Court held that the removal of the words "interested in" satisfied all three points. The words could be severed (or removed) and the non-compete clause was enforceable (in theory at least as by this point the restriction had expired).

This case is a positive one for employers who may be able to rely on this case to validate a potentially unenforceable covenant. However, thought should be given as to whether a Court might find that the restriction should have been drafted more narrowly in the first place, in which case, costs may not be recoverable.

COVERTLY RECORDING A MEETING WILL NOT ALWAYS BE MISCONDUCT

Modern technology has made recording meetings much easier. Most people will have easily to hand a mobile phone which can record everything going on around them. Employers are often reluctant to allow employees to record meetings and in response some may seek to do so covertly. They should proceed with caution.

The Employment Appeal Tribunal ("EAT") in Phoenix House v Stockman has confirmed that covertly recording meetings may, but will not always, constitute misconduct. Context is everything and the particular circumstances of each case should be considered. Where an employer is particularly averse to meetings being recorded and instructs an employee that a particular meeting must not be recorded or indicates in its policies that covertly recording meetings will be treated as gross misconduct then a Tribunal may well agree that, by recording a meeting against the employer's express wishes the employee is guilty of gross misconduct. However, this will not always be the case. If the employee is flustered or particularly vulnerable and records the meeting simply for their own reference or to guard against their words being misrepresented later, an employer may well be hard pressed to reasonably consider that taking a covert recording was an act of gross misconduct. Conversely, if the purpose of the recording was to capture remarks that may assist in any future litigation this may point towards an act of gross misconduct.

An employee would be well advised to declare any intention they have to record a meeting from the outset as the EAT indicated that a failure to do so would, in general, be misconduct apart from in exceptional circumstances.

The EAT also observed that few employers include the making of covert recordings as an instance of gross misconduct in their disciplinary policy. It may be prudent for employers concerned about this issue to consider expanding their disciplinary procedures if covert recordings are not already captured.

AGENCY WORKERS ARE NOT ENTITLED TO THE SAME HOURS AS PERMANENT MEMBERS OF STAFF

The Court of Appeal ("CA") has confirmed that an agency worker is not entitled to the same number of working hours as a permanent member of staff in the case of Kocur v Angard Staffing Solutions Limited.

Mr Kocur had been employed by Angard since January 2015 and worked at the Leeds Mail Centre most weeks thereafter. Although his hours varied, he was typically given less than 20 hours of work per week. In November 2015 Mr Kocur brought proceedings in the Employment Tribunal ("ET") against the employment agency, Angard and the end user of his services, Royal Mail alleging various breaches of the Agency Workers Regulations 2010 ("the Regulations").

Part of Mr Kocur's claim was upheld by the ET and a further element of his claim was later upheld by the Employment Appeal Tribunal ("EAT"). However, both of the lower courts dismissed Mr Kocur's claim that he was entitled, under the Regulations to be allocated equivalent hours of work to permanent members of staff working for Royal Mail.

The Regulations make provision for an agency worker with a minimum of 12 continuous weeks in the same role with the same recruiter, to be afforded the same "basic working and employment conditions" as they would have been if they had been hired directly. Further the Regulations provide that as part of this an agency worker is entitled to equal terms relating to "the duration of working time". The CA considered this particular wording and found that it was not natural to describe a term specifying the number of hours in the working week as relating to the "duration" of the "period" during which an individual is working.

The CA confirmed the findings of the ET and the EAT that the basis of the Regulations do not entitle agency workers to work the same number of contractual hours as a permanent member of staff. The CA found that to guarantee hours in such a way would be contrary to the purpose of making use of agency workers which is to offer flexibility to the hirer.

The use of agency workers has significantly increased over the past five years and this case provides welcome clarity, particularly to those employers regularly using the same agency worker.

THE ILLEGALITY DEFENCE REJECTED AS WORKER HAD NOT KNOWINGLY PARTICIPATED IN ILLEGAL WORKING

The Court of Appeal ("CA") dismissed an appeal from an employer wishing to render their former employee's contract of employment unenforceable on the grounds of illegal working in the case of Okedina v Chikale.

Ms Chikale was a Malawian national who provided live-in domestic help to her employer, Mrs Okedina in the UK. Mrs Okedina had obtained a six-month visa for Ms Chikale to come and work in the UK, which expired on 28 November 2013. Ms Chikale's passport was held by Mrs Okedina and when the time came Mrs Okedina assured Ms Chikale that the necessary steps were being taken to extend her visa. It transpired that Mrs Okedina had made an application for a visa extension by forging Ms Chikale's signature and falsely claiming that she was a family member. This application was refused as was the subsequent immigration appeal (filed without Ms Chikale's knowledge).

Throughout her employment Ms Chikale was required to work very long hours for a derisory sum, well short of the national minimum wage. When Mrs Chikale asked for more money, she was dismissed without notice and ejected from the house.

Ms Chikale subsequently brought claims for unfair dismissal, wrongful dismissal and unlawful deduction of wages. In her defence Mrs Okedina argued that as Ms Chikale's visa had expired on 28 November 2013 from that point she was working illegally and that her contract of employment was illegal or illegally performed and accordingly Ms Chikale's claims could not be heard (the illegality defence). Both the Employment Tribunal ("ET") and Employment Appeal Tribunal ("EAT") dismissed the illegality defence and Mrs Okedina appealed to the CA.

The CA agreed with the lower courts and confirmed that as Ms Chikale had not knowingly participated in illegal working the illegality defence put forward by Mrs Okedina was rightly rejected by the ET and the EAT.

The case is unusual as an individual would ordinarily be aware of the status of their visa. Most employers would also have an insight into an employee's visa end date and take steps in order to prevent illegal working.

WHISTLEBLOWING – EMPLOYEE'S REASONABLE BELIEF

In the case of Okwu v Rise Community Action ("Rise"), the Employment Appeal Tribunal ("EAT") held that it is sufficient for an employee to reasonably believe that the information they are disclosing is in the public interest and tended to show a failure to comply with a legal obligation.

Rise extended Ms Okwu's probationary period due to performance issues. Shortly afterwards, Ms Okwu raised a number of concerns with Rise including an assertion that Rise had breached the Data Protection Act ("DPA") by failing to provide her with her own mobile phone and appropriate storage to secure the highly confidential information with which she worked. Rise subsequently terminated her employment and Ms Okwu began Employment Tribunal ("ET") proceedings on the grounds that she was automatically unfairly dismissed for making protected disclosures.

The ET found, amongst other things, that Ms Okwu's concerns were not in the public interest but concerned her own contractual position.

Ms Okwu appealed to the Employment Appeal Tribunal ("EAT"). The EAT held that the ET had failed to ask whether Ms Okwu had a reasonable belief that her disclosure relating to potential breaches of the DPA, was in the public interest. Given the nature of the information involved, the EAT held that it was hard to see how the disclosure could not have been in the public interest.

Further, the EAT reiterated the existing position that the public interest need not be an employee's only motivation for making a disclosure and where an employee has mixed interests in making a disclosure it will be for the ET to rule, as a matter of fact as to whether there was sufficient public interest.

The case has been remitted back to the same ET for reconsideration of this ground and a further successful ground of appeal.

For further information on any of the topics discussed in this briefing or wider employment or data protection issues please contact:

Adele Martins (Partner) adele.martins@magrath.co.uk
Nichola Gallen-Friend (Partner) nichola.gallen-friend@magrath.co.uk
Maria Krishnan (Senior Associate) maria.krishnan@magrath.co.uk