SLAUGHTER AND MAY/

NEWSLETTER

JANUARY 2021

EMPLOYMENT BULLETIN

QUICK LINKS

One Bunhill Row
London EC1Y 8YY
United Kingdom

T: +44 (0)20 7600 1200

RESTRICTIVE COVENANTS FOR FINANCIAL ADVISER WERE UNENFORCEABLE

Summary: The High Court declined to enforce restrictive covenants in the employment contract of a financial adviser because they were drafted too broadly and were therefore in restraint of trade (*Quilter Private Client Advisers Limited v Faulkner*).

Key practice point: The decision confirms several established principles on the enforceability of non-compete covenants, notably the relevance of the length of the employee's notice and probation period to the reasonableness of duration of the covenant. The Court left open the possibility that restrictive covenants in the financial services sector that breach the "clients' best interests" rule could be void as not being in the public interest.

Facts: The employee, a financial adviser, had a contract of employment containing post-termination restrictions (PTRs), including:

- A non-compete clause preventing her, for nine months, from competing in providing services with which she was materially concerned in the 12 months prior to termination. There was a carve-out for geographical areas where the employer did not operate.
- Non-dealing and non-solicitation covenants for 12 months following termination, covering services with which she was materially concerned in the 12 months prior to termination and in relation to customers in respect of whom she was materially concerned during the 18 months before termination.

Within a few months of joining the employer in January 2019, the employee met representatives from a competitor and subsequently attended an induction and assessment. After she resigned in early July, she was put on garden leave during her two-week notice period. During that time she made contact with customers. Her employment with the competitor started a few days after her notice period expired. The employer brought claims against their former employee and the competitor.

Decision: The High Court decided that the employee was in breach of clauses in her employment contract and her duties of fidelity, trust and confidence and confidentiality. However, the PTRs were all invalid restraints of trade and unenforceable as a result. In particular:

- The non-compete clause was unreasonable given the employee's short notice period. She was subject to a six-month probation period during which the employer could terminate her employment with just two weeks' notice. After that, she was entitled to receive two months' notice. It was unreasonable to be prevented from being employed by a competitor for nine months in circumstances when she might have been employed for only a short period and would only have had time to build a very short-term relationship with any clients. The fact that the employee had inherited a portfolio of clients from her predecessor did not change this.

- The clause purported to prevent the employee from having dealings with non-Quilter clients. The employer had no legitimate business interest in a pure covenant against competition.
- The contract of employment appeared to be a "one size fits all" contact used for more senior employees. For example, the head of the business, who had access to far more confidential information than the employee did, was subject to covenants lasting only six months.
- As it was a nationwide business, the geographical carve-out was of little practical effect.
- The evidence suggested that non-competition covenants for those at the employee's level/lack of seniority were not industry standard. Neither the company where the employee had previously worked nor the competitor had such covenants in their adviser contracts.
- The employer did not seek injunctions for over four months after learning of the employee's engagement by the competitor. This suggested that the covenant was not necessary to protect its legitimate business interests.
- The non-dealing and non-solicitation covenants, in seeking to protect information which might have lost its confidentiality or become stale after 18 months, appeared to go much further than was necessary. There was no explanation as to why the 18-month "backstop" was required.

The Court also decided that the validity of the PTRs could not be saved by the fact that they contained a proviso stating that the restrictions applied "*unless the employee has the prior written consent of the employer, which shall not be unreasonably withheld or refused*".

The claim against the competitor for inducing a breach of contract was also dismissed. In order to be liable for inducing a breach of contract, a defendant has to know that they are (not that they might be) inducing a breach. Knowledge that the employee was still employed when she attended the induction course was not the same as knowledge that her doing so would involve a breach of contract.

Analysis/commentary: The employee put forward a novel argument that, in the financial services industry, non-competition and non-dealing covenants are unenforceable as not in the public interest, because they act as a fetter on the clients' ability to instruct the adviser of their choice, in breach of regulatory obligations to act in the best interests of the client. The judge said that, whilst he could see the force of the argument, he was not entirely persuaded by it. He commented that if the restrictions were found to be reasonable as between the parties, it was likely that this would outweigh the consideration of clients' best interests. This discussion is a reminder that restrictive covenants are enforceable only if they go no further than reasonably necessary to protect the employer's legitimate interests, taking into account not only the interests of the parties but also the public interest. This aspect may become more prominent in the light of the current Government consultation on non-compete covenants (see our Employment Bulletin December 2020).

EMPLOYER UNABLE TO JUSTIFY DETRIMENT RELATED TO UNION ACTIVITIES

Summary: The Employment Appeal Tribunal (EAT) confirmed that an employer who gave the claimant a formal oral warning for refusing to take down an email list he had created for trade union communications had subjected him to a detriment, in breach of Section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992, despite the employer contending that the warning was given for insubordination (*University College London v Brown*).

Facts: UCL decided to end a 14-year arrangement under which a departmental email account allowed unmoderated emails to be sent to all staff in the IT department. The claimant, a union member, set up a new mailing list with the same members and refused to delete it. He was given a formal oral warning for refusal to follow a management instruction.

Section 146 provides that a worker has the right not to be subjected to a detriment if the employer's action is for the "sole or main purpose" of preventing or deterring the worker from taking part in the activities of an independent trade union or penalising the worker for doing so.

Decision: The EAT upheld the Tribunal's decision that UCL's action was an act of trade union detriment within Section 146. The employer's "sole or main purpose" is a subjective question, to be judged simply by enquiring into what was in

the mind of the employer at the time. The question of whether the employee's activities qualify for protection under Section 146 is an objective question, to be decided by the Tribunal. Although the employer had claimed that the disciplining officer had given the warning for "insubordination" – in other words, for the manner in which the claimant acted rather than the activity itself – the EAT confirmed the Tribunal's decision that the main motive was to discipline him for refusing to delete the list. The Tribunal had decided that his actions were a union activity and therefore the claim of detriment succeeded.

Analysis/commentary: The EAT noted that the principle that the employer's motive is assessed subjectively applies in the same way to whistleblowing detriment. This decision confirms that, in both cases, it may be difficult to establish that the employee's treatment was because of the manner of the disclosure/union activity, rather than the disclosure/activity itself. However, this is a short judgment and the Tribunal's finding on the employer's motivation was accepted without any detailed analysis.

AUTOMATIC TRANSFER OF POLICE OFFICER WAS PREGNANCY DISCRIMINATION

Summary: The EAT confirmed that the automatic transfer of a pregnant officer from an operational to a non-operational role, causing her stress, was pregnancy discrimination and indirect sex discrimination (*Chief Constable of Devon and Cornwall Police v Town*).

Facts: The claimant was transferred from her Response Team to the Crime Management Hub after she became pregnant. A risk assessment indicated that she could remain with the Response Team if certain adjustments were made but this was ignored because the Devon and Cornwall Police had a general policy that officers on restricted duties would be transferred to the Hub. The new role and removal from a supportive working environment caused her stress, anxiety and migraines. The Employment Tribunal found that the Police had discriminated against her (a) on grounds of pregnancy and (b) indirectly on grounds of her sex, on the basis that women were more susceptible to enforced transfer from operational role to a non-operational role under the policy because pregnancy (as well as ill health) would lead to the application of the policy.

The Police appealed on the basis that, in relation to (a), the treatment was removing her from danger and was not therefore unfavourable and, on (b), that any disadvantage was suffered by pregnant women and not women in general.

Decision: The appeal failed on both grounds:

a) The treatment was not that the claimant had been removed from danger but that she had been transferred to the Hub against her wishes, making her ill. The Tribunal had found that this treatment was unfavourable and that it was because she was pregnant.

b) It was not necessary that all women suffered from the disadvantage if women as a group were more likely to be subject to an enforced transfer because of the policy.

PARTNERSHIP NAMED IN EMPLOYMENT CONTRACT WAS THE CORRECT EMPLOYER

Summary: The EAT held that an employee's legal employer was the UK partnership named in her employment contract and not a Cayman Islands entity which had applied for her work permits (and was named as her employer on the permits). The employee had not seen the work permit documentation until the litigation and had been unaware that a Cayman Islands entity had been used to apply for her work permits (*Clark v Harney Westwood & Riegels*).

Facts: The claimant was dismissed from her job with a Cayman Islands legal partnership, HWR. Without her knowledge, HWR had obtained a work permit for her in the name of a different, locally owned firm, HB (in order to comply with Cayman law). She brought a breach of contract claim in a UK Employment Tribunal out of time, without going through early conciliation. The Tribunal dismissed the claim on several grounds, including finding that she was employed by HB, not HWR.

Decision: The EAT found that HWR was the employer:

- The employment contract drawn up at the start of the relationship provided clear and unequivocal evidence as to the parties' intention. The vast majority of the written documentation (and certainly almost everything the

employee saw) showed that she was employed by HWR. Nothing happened between the parties after that to suggest that the position had changed.

- All interactions with the employee, from the initial offer through to her termination, were consistent with HWR being the employer.
- The reliance on the work permit documentation was misplaced. The employee did not see this at the time and it did not provide any evidence as to her intentions.
- The fact that it was a legal requirement in the Cayman Islands for an entity with a substantial element of local ownership to be an employer did not preclude a non-compliant entity from being an employer.

The employee could bring a claim in the UK, as three partners of HWR were domiciled here. However, the claim remained dismissed as the Tribunal correctly held that it was out of time and there had been no early conciliation.

Analysis/commentary: The use of service companies in corporate structures can lead to an employee signing a contract with one company and then working for another. This case is a reminder that if the arrangements do not reflect the parties' true agreement, the employer named on the contract may not be found to be the actual employer.

EAT GUIDANCE ON TREATMENT OF AGENCY WORKERS ON VACANCIES AND WORKING CONDITIONS

Summary: The EAT held that agency workers' rights to be informed of internal vacancies by the hirer, under the Agency Workers Regulations 2010 (AWR), did not give a right to apply for and be considered for vacancies on the same terms as directly recruited employees. The EAT also held that there was no breach of equal treatment in working conditions in relation to shift lengths, first refusal of overtime, training sessions, pay slip information and scheduling of breaks. However, the EAT found that there could be a breach in the late payment of pay rises (*Angard Staffing Solutions Ltd v Kocur*).

Key practice point: The EAT's guidance on the AWR is broadly helpful to hirers but emphasises that in order to establish whether there has been a breach of the right to the same basic working and employment conditions, it is necessary to identify the express and implied terms that would have applied had the agency worker been recruited directly.

Facts: Under Regulation 5 of the AWR, agency workers are entitled to the same "basic working and employment conditions" as if the hirer had recruited them. Under Regulation 13, agency workers have the right to be informed by the hirer of any relevant vacant posts with the hirer, to give them the "same opportunity as a comparable worker to find permanent employment with the hirer".

An employment agency provided agency workers to a third party. The third party prevented agency workers from applying for vacancies unless they were advertised externally. The Employment Tribunal found that the employment agency and the hirer were in breach of Regulations 5 and 13.

Decision: The EAT overturned most of the Tribunal's findings, holding that:

- The right to be informed of vacancies does not mean that the agency worker is entitled to apply for, and be considered for, internal vacancies on the same terms as directly recruited employees. It is a right to be notified of the vacancies on the same basis as directly recruited employees and to be given the same level of information about the vacancies.
- There was no breach of Regulation 5 arising from the fact that the agency workers' shift lengths were 12 minutes longer than they would have been if they had been recruited directly. The disparity arose because the weekly working hours for direct recruits were 39 hours, whereas agency workers were given shifts based on a 40-hour week. Agency workers were paid for the extra time that they worked. As the Court of Appeal established in a previous case involving the same parties, agency workers are not entitled to work the same number of contractual hours as a comparator directly recruited worker (see our Employment Bulletin dated

August 2019). The reference to equal treatment in relation to "the duration of working time" has a more limited meaning: if the hirer sets a maximum period when a comparable employee could be required to work, the hirer could not set a different maximum for agency workers.

- There was no breach of Regulation 5 in relation to other work conditions:

  i. Direct employees were provided with weekly half-hour training sessions at a time when agency workers were expected to carry on with their normal work. There is no requirement for equality of treatment in relation to the content of working time.

  ii. Direct employees were given first refusal of overtime opportunities, in preference to agency workers. The right to equality of treatment in relation to overtime does not extend to a right to equal treatment in relation to opportunities for overtime.

  iii. The payslips provided a less detailed breakdown of pay information than those of direct employees. The right to equal treatment in relation to pay did not extend to a right to the same pay information on payslips.

  iv. The short breaks in each shift were scheduled in advance for direct employees, but not for agency workers. The timing of breaks did not concern "the duration of working time".

  In any event, the Tribunal had been entitled to find that, if they had been directly recruited, the agency workers would not have had a contractual right to the working conditions in (ii) to (iv).

However, the EAT found that the Tribunal should not have rejected the agency workers' claim in relation to the payment of a pay rise six months after it had been implemented for comparable direct employees. Although both groups of workers were, eventually, paid at the same rate for the relevant period, the EAT held that there could, potentially, be a breach of Regulation 5. Equality of treatment in relation to "pay" extends to terms relating to the timing of payment. The EAT remitted the matter to the Tribunal to determine whether there had been a breach of Regulation 5 on the facts.

HORIZON SCANNING

What key developments in employment should be on your radar?

3 March 2021	Budget 2021
4 April 2021	Deadline for reporting 2020 gender pay gap data
6 April 2021	Extension of off-payroll working rules to private sector – client rather than intermediary will be responsible for determining whether IR35 applies
6 April 2021	Changes to income tax treatment of some post-employment notice payments on termination
30 April 2021	End of the Coronavirus Job Retention Scheme

We are also expecting important case law developments in the following key areas during the coming months:

- **Employment status:** *Uber v Aslam* (Supreme Court: whether drivers are workers for employment protection, minimum wage and working time purposes); *Addison Lee v Lange* (Court of Appeal: whether private hire drivers

were workers); *IWGB v CAC* (Court of Appeal: whether couriers are workers for trade union recognition purposes); *Smith v Pimlico Plumbers Ltd* (Employment Appeal Tribunal: claim for arrears of holiday pay following Supreme Court decision on worker status)

- **Discrimination / equal pay:** *Asda Stores v Brierley* (Supreme Court: whether workers in retail stores could compare themselves with those working in distribution depots for equal pay); *Efobi v Royal Mail Group* (Supreme Court: test for shift of burden of proof); *Page v Lord Chancellor* (Court of Appeal: whether magistrate was discriminated against for expressing faith-based views in media); *Forstater v CGD Europe* (Employment Appeal Tribunal: whether views on transgender were protected as a philosophical belief)

- **Working time:** *Chief Constable of the Police Service of Northern Ireland v Agnew* (Supreme Court: backdated holiday pay claims); *East of England Ambulance Service v Flowers* (Supreme Court: whether holiday pay must include regular voluntary overtime).

CONTACT

- PADRAIG CRONIN
- PARTNER
- T: +44 (0)20 7090 3415
- E: Padraig.Cronin@slaughterandmay.com

- PHIL LINNARD
- PARTNER
- T: +44 (0)20 7090 3961
- E: Phil.Linnard@slaughterandmay.com

- LIZZIE TWIGGER
- SENIOR COUNSEL
- T: +44 (0)20 7090 5174
- E: Lizzie.Twigger@slaughterandmay.com

- KATHERINE FLOWER
- SENIOR COUNSEL
- T: +44 (0)20 7090 51
- E: Katherine.Flower@slaughterandmay.com

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650