SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

QUICK LINKS

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NEW EMPLOYER BREACHED EQUITABLE DUTY OF CONFIDENCE

Summary: An employer that had received confidential information from employees who moved from a competitor was liable to the former employer. The new employer had an equitable duty of confidence to the former employer because it knew or had notice that the information was confidential (*Travel Counsellors Limited v Trailfinders Limited*).

Key practice point: If an employer receives information from ex-employees of another employer, it may have a duty to make enquiries about the confidentiality of that information.

Facts: Two employees left Trailfinders and entered into franchise agreements with a competitor (TCL). TCL encouraged the ex-employees to bring across their customer contact lists. The High Court found that the ex-employees were in breach of implied contractual and equitable obligations of confidence. The Court also found that TCL was in breach of an equitable duty of confidence to Trailfinders because it had received information from the ex-employees which it knew, or ought to have known, was regarded as confidential and had used the information for the benefit of its business. TCL appealed, arguing that it did not know that the information received was confidential to Trailfinders.

Decision: The Court of Appeal rejected the appeal. The equitable duty of confidence arises where the recipient knows, or is on notice, that the information is confidential. Whether a person has notice is assessed objectively, by reference to a reasonable person in the position of the recipient. The High Court had correctly found that TCL was on notice that at least some of the information it had received from the ex-employees was likely to be confidential to Trailfinders, not least because TCL treated its own customer contact lists as confidential. A reasonable person in TCL's position would have made enquiries as to whether the information was confidential.

The quantity of client information disclosed by the ex-employees also supported the conclusion that TCL was on notice that at least some of the information was likely to be confidential. One list contained details of over 300 individuals. TCL must have appreciated that the ex-employee could not have carried all that information in his head, which made it probable that he had copied at least some of it from his former employer's client database.

Analysis/commentary: Employers need to ascertain whether information brought across by new employees is confidential, to minimise the risk of being exposed to claims for breach of confidence or inducing breach of contract.

TRIBUNAL MADE INCORRECT COMPARISON WHEN CONSIDERING DISCRIMINATORY IMPACT OF POLICY

Summary: The Employment Appeal Tribunal found that, in concluding that a family leave policy was not indirectly discriminatory, the Tribunal had failed to consider whether women with childcare responsibilities were put at a particular disadvantage by the policy.

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Key practice point: In order to assess whether a policy creates a disadvantage for employees with a protected characteristic, the pool of employees chosen for comparison should include, and be limited to, those who are impacted by the policy.

Facts: The employer had a policy that, where staff took three days of unpaid parental leave in a month, they automatically lost one day of paid rest leave. (The policy was designed to avoid a perceived unfairness, which could result from an employee taking parental leave and having the remaining days in the month rostered as paid rest days.) The claimant argued that this policy was indirectly discriminatory against women, as a higher proportion of women take parental leave. She relied on statistics that showed that 24.2% of the women in the workforce took parental leave as compared to 11.9% of the men. The Employment Tribunal rejected the claim on the grounds that all staff who took parental leave would lose the paid rest days and there was no particular disadvantage to women.

Decision: The EAT held that the Tribunal had made the wrong comparison when concluding that there was no disadvantage to women. Although it was true that all staff (male or female) who took parental leave would suffer the same disadvantage of losing paid rest days, it was more complicated than that because not all those with childcare responsibilities took parental leave. The statistics for the workforce (and in the population generally) showed that more women than men took parental leave. Consequently, the proportion of female staff put at a disadvantage by taking parental leave would be greater than the proportion of male staff doing so. The Tribunal should have looked at all staff with children of a relevant age (and, therefore, childcare responsibilities) and compared the impact of the policy on women with childcare responsibilities with the impact on men with childcare responsibilities. The EAT sent the case back to a new Tribunal to make this comparison and, if it found that women in the pool of comparators were at a particular disadvantage as compared with men, whether the employer's policy was justified as a proportionate means of achieving a legitimate end.

ENGAGING IN GRIEVANCE PROCEDURE WAS NOT AFFIRMATION BY EMPLOYEE

Summary: The EAT found that an employee had not affirmed his employment contract by engaging in the employer's grievance procedure. He did not therefore lose the right to claim constructive dismissal (*Gordon v J & D Pierce (Contracts) Ltd*).

Key practice point: In order to bring a claim of constructive unfair dismissal, the employee must have accepted the employer's breach of contract. An employee who affirms the contract is taken to have waived the right to accept the breach. This decision shows that bringing a grievance is not, of itself, likely to amount to affirmation.

Facts: G resigned and brought a claim of constructive dismissal after his working relationship with his manager deteriorated. The Employment Tribunal concluded that there had not been a breach of the obligation of trust and confidence as there was fault on both sides and held that, even if there had been a fundamental breach of contract entitling him to resign, he could not succeed with his constructive dismissal claim because he had affirmed his contract by engaging in the grievance procedure. G appealed.

Decision: The EAT rejected the appeal on whether there had been a breach of trust and confidence but disagreed with the Tribunal on affirmation of the contract. Reliance on one contractual right does not necessarily signify an acceptance that all other contractual rights are intact. Grievance or disciplinary appeal provisions could survive, even though the rest of the contract was terminated as a result of the breach. The EAT commented that it would be unsatisfactory if an employee was unable to accept a repudiation by the employer because of a wish to seek resolution through a grievance procedure.

EMPLOYEE HAD SUFFICIENT CONNECTION WITH GB TO BRING UNFAIR DISMISSAL CLAIM

Summary: The EAT decided that a US resident captain of a super yacht, operated by a Guernsey company, could bring an unfair dismissal claim under the Employment Rights Act 1996 in the UK Employment Tribunal. The fact that the claimant's instructions came from a UK resident individual was relevant, even though that person was not his employer (*Crew Employment Services Camelot v Gould*).

Facts: G was employed by Crew, a company based in Guernsey with no UK office, as the captain of a super yacht registered in the Cayman Islands. G's employment contract was subject to Guernsey law. Sailings were directed by a wealthy individual, B, resident in the UK. G was resident and taxed in the US. The yacht (and hence G) spent about 50% of its time in UK waters. All decisions in respect of G's employment were made by B, albeit he was not the employer. G was dismissed and brought a claim of unfair dismissal in the Employment Tribunal. The Tribunal concluded that it had jurisdiction to hear the claim; Crew appealed.

Decision: The EAT upheld the Tribunal's decision. There was a "sufficiently strong connection" between the employment and UK law, as required by the *Lawson v Serco* territorial jurisdiction test for unfair dismissal cases. Case law has established that, where a claimant works outside GB, the case has to be "truly exceptional" for there to be jurisdiction under the Employment Rights Act 1996. In this case, however, the claimant had lived or worked at least part of the time in GB, so there merely had to be a "sufficiently strong" connection with GB and British law. In determining this, the Tribunal had correctly focussed on the employment relationship rather than G's personal circumstances. Real control over G emanated from a source that indicated a strong connection with GB. The other entities involved in running the yacht did not play a significant part in the employment relationship; they had no material input into G's day-to-day work. Other relevant factors were that G spent more time working in England than anywhere else, and that his last place of work was in the UK. There was also very limited connection with other jurisdictions; the choice of Guernsey governing law was not definitive.

Analysis/commentary: The decision illustrates the difference in approach to territorial jurisdiction between cases where an employee works abroad and those where the employee's time is split between GB and overseas. In the latter scenario (as in this case), the employee does not have to show that the facts are so exceptional as to displace the assumption that the overseas jurisdiction will apply.

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 women were protected as a philosophical belief); *City of London Police v Geldart* (Court of Appeal: whether sex discrimination claim based on pay during maternity leave requires a male comparator); *Lee v Ashers Baking Co* (European Court of Human Rights: whether refusal to provide cake supporting gay marriage is discrimination in provision of goods and services)

- **Redundancy:** *Gwynedd Council v Barratt* (Court of Appeal: whether restructuring selection procedure was fair)

- **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).

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