SLAUGHTER AND MAY/

NEWSLETTER

SEPTEMBER 2020

EMPLOYMENT BULLETIN

QUICK LINKS

EMPLOYEE WHO RESIGNED DURING RESTRUCTURING WAS CONSTRUCTIVELY DISMISSED

Summary: The Employment Appeal Tribunal confirmed that an employee who resigned after the employer sought to "map" her into a new role, rather than treating her as redundant, was constructively dismissed (*Argos Ltd v Kuldo*).

Key practice point: This decision is a reminder of the importance of following a proper process where an employee resigns in a restructuring situation, even if they have been offered a role in the new structure on the same terms and conditions. This is particularly relevant where the job content changes.

Facts: The employer's finance department was being restructured and a number of employees, including K, were placed at risk of redundancy. K was informed that she was to be pooled with a colleague and that they would both be considered for a newly created costs manager role. However, after the colleague resigned, K was told that she was to be "mapped" into the new role. The employer applied a 70:30 mapping metric and the difference between her old role and the new one was assessed as being less than 30%. Although she was no longer at risk of redundancy, K considered that the new role had lower status, fewer responsibilities and different job content. She resigned when her grievance and subsequent appeal were rejected and brought an unfair dismissal claim.

The Employment Tribunal found that the absence of consultation with K over the mapping, the failure to assess properly the differences between the two roles and the failure to conduct a proper assessment for K's appeal were all breaches of the implied term of trust and confidence entitling K to resign. The employer appealed.

Decision: The EAT allowed the appeal in part. The Tribunal had been entitled to find that K had been dismissed. It had identified three breaches of the implied duty of trust and confidence, each of which were sufficiently serious to be repudiatory (therefore entitling K to resign) and had found that K had resigned in response. However, the EAT decided that the case had to be sent back to the Tribunal because it had not considered the issue of fairness directly; it had wrongly assumed that because K had been constructively dismissed, the dismissal was necessarily unfair.

Analysis/commentary: Although it may be unusual for an employee to refuse a new role in a redundancy situation, employers must follow fair procedures, even where it is clear that their intention is for the employee to remain in employment.

CYCLE COURIERS WERE WORKERS DESPITE CHANGE IN TERMS

Summary: An Employment Tribunal found that, despite a change in contractual terms designed to show that cycle couriers were self-employed, the couriers were still "workers" and were able to bring holiday pay claims (*O'Eachtiarna v CitySprint (UK) Ltd*).

Facts: The Employment Tribunal had found in 2017 that a courier engaged by CitySprint was a "worker" as defined in Section 230 Employment Rights Act 1996. In new contractual terms, introduced from November 2017, there was a statement that there was no

One Bunhill Row
London EC1Y 8YY
United Kingdom

T: +44 (0)20 7600 1200

obligation to provide or accept any work. There was also a lengthy substitution clause. The couriers could send a substitute in their place and, if they did, they had to pay the substitute themselves. The couriers agreed that the substitute would not have any contractual or financial relationship with CitySprint. Originally, any substitute had to be pre-registered with CitySprint, but later this was changed so that substitutes did not have to be registered. The new terms also included a rolled-up holiday pay clause stating that any fees paid would be deemed to include holiday pay at the minimum statutory rate if the cycle couriers became entitled to holiday pay.

For the period before November 2017, CitySprint conceded that the cycle couriers were workers but argued that they were not entitled to holiday pay. For the period from November 2017 onwards, they argued that the new terms defeated any claim for holiday pay. The cycle couriers maintained that the new terms had no practical effect on their engagement and therefore they were still workers post-November 2017.

Decision: The Tribunal decided that, even after November 2017, the couriers were workers. The Tribunal Judge did not accept the couriers' argument that, as CitySprint had conceded worker status prior to November 2017 and little had changed in practice, they had worker status in the subsequent period. That argument overlooked the significance of the contract in the statutory definition of "worker". In most respects, the new terms reflected reality and were clear. Even recognising the imbalance of power between the parties, the terms could not simply be disregarded.

However, the Tribunal Judge concluded that the dominant feature of the new contract remained personal performance by the couriers. They were not in business on their own account - although they earned other income elsewhere, that was not as a cycle courier for other firms. As for the right of substitution, it was a theoretical right only and had never been exercised.

The Judge also noted that, while a rolled up holiday pay clause might be effective, it needed to be drafted sufficiently clearly in order for it to work. Here, there was no amount specified as referable to the holiday pay or the holiday pay period, and no formula set out under which the amount would be calculated. The wording was not sufficiently transparent or comprehensive to be a valid rolled-up holiday pay clause.

Analysis/commentary: Unsurprisingly, the Tribunal found that amending contractual terms was insufficient to defeat a worker status claim in the absence of evidence of a change in the way the arrangements operated. Although only a tribunal decision, the analysis of the substitution clause is of interest. It was not regarded as sufficient to prevent worker status, despite the fact that the couriers were allowed to use anyone to perform their jobs. A key factor was that no courier had in fact ever used a substitute. The Tribunal found that the onerous conditions (such as making sure that the substitute had the courier's handheld tracker device and wore the CitySprint uniform if required by the client) were such that it was simply not practical for the couriers to use substitutes.

We are awaiting the decision in a key worker status case, *Uber v Aslam*, heard by the Supreme Court in July.

NO REQUIREMENT FOR FINANCIAL COMPENSATION IN ORDER TO CLAIM UNFAIR DISMISSAL

Summary: The EAT upheld a claim for unfair dismissal despite there being no possibility of financial compensation for the employee (*Evans v London Borough of Brent*).

Facts: E, a deputy head teacher, was dismissed for alleged financial misdemeanours. He had requested a postponement of his disciplinary hearing in order to have more time to study the 800 pages of paperwork and so that he could be accompanied by his sister who was on holiday on the scheduled hearing date. His request was refused and he claimed unfair dismissal. The claim was stayed pending the outcome of a criminal case, where E pleaded guilty to false accounting. Shortly after, the employer issued High Court proceedings for repayment and the Tribunal claim was again stayed. The High Court found that the employer had proved its case on the allegations against E in the disciplinary proceedings and also that E had received more than £250,000 in overpayments. When the stay on the Tribunal claim was lifted, the employer applied for the unfair dismissal claim to be struck out.

The Tribunal held that, while the employer had failed to follow correct procedures for dismissal, the High Court's finding had shown that E had contributed to his own dismissal to such an extent that there was no prospect of E being awarded any compensation. The Tribunal therefore dismissed the unfair dismissal claim because there was no obvious remedy.

Decision: The EAT overturned the Tribunal's decision. Noting the value to E of a finding of unfair dismissal, the EAT decided that the unfair dismissal claim could go ahead despite there being no possibility of monetary compensation.

Analysis/commentary: This decision is a warning that even if on the facts a dismissal appears inevitable, a fair procedure must be followed. An unfair dismissal claim will not be struck out simply because there is no prospect of the claimant obtaining compensation. Employees may want to pursue claims purely to establish that a dismissal was unfair.

CONFIDENTIALITY CLAUSE TOO WIDELY DRAFTED TO BE ENFORCEABLE

Summary: The High Court held that a confidentiality clause was too widely drawn to be enforceable. The clause purported to run indefinitely and to cover not just trade secrets but confidential information relating to the company's "*business, products, affairs and finances*". Those words could not be severed to save the clause (*P14 Medical Ltd v Mahon*).

Key practice point: When drawing up terms in employment contracts to protect confidential information, employers should avoid the natural temptation to draft very widely. They should consider carefully what they actually need to protect and how that protection is best achieved in drafting terms, given the background law.

Facts: M was a sales director for P14, a company supplying medical equipment. He resigned and joined a competitor. P14 applied for an interim injunction to restrain M from breaching restrictive covenants in his employment contract: non-solicitation, non-competition and non-supply restrictions (which were valid for six months) and a confidentiality term which continued indefinitely. Confidential information was defined as "*information… relating to the business, products, affairs and finances of the [Company] for the time being confidential to the Company and trade secrets including, without limitation, technical data and know-how relating to the business of the Company or any of [the Company's] business contacts*".

Decision: The application for an injunction was granted. P14 was likely to succeed in establishing that the non-solicitation, non-competition and non-supply restrictions were enforceable. However, the confidentiality term was unenforceable. Whilst it was clear that M had access to trade secrets, the express restriction was too wide because it ran indefinitely and covered information "*relating to the business, products, affairs and finances*" of P14. The restriction purported to protect information which was "merely confidential", rather than trade secrets. Under the test set out in the *Faccenda Chicken* case, this type of confidential information cannot be protected after termination of employment.

The Court was unable to save the clause by severing the part of the confidential information definition which dealt with trade secrets from the part referring to mere confidential information. Under the "blue pencil" test, reaffirmed by the Supreme Court in *Tillman v Egon Zehnder Ltd* last year, severance of parts within a single contractual term can take place only where the employer can establish that removal of the severed words would not generate any major change in the overall effect of all of the post-employment restraints in the contract. In this case, the reduction of the scope of the confidential information term from covering all confidential information to applying only to trade secrets would have been a major change in the overall effect of the post-employment restraints.

Analysis/commentary: The case shows the importance of ensuring that confidentiality obligations are tightly drafted, based on the specific needs of the business and making very clear what material is confidential.

HORIZON SCANNING

What key developments in employment should be on your radar?

31 October 2020	Closure of the Coronavirus Job Retention Scheme
31 December 2020	Transitional arrangements under UK-EU withdrawal agreement expected to end unless extended
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

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)
- **Discrimination / equal pay:** *Ravisy v Simmons & Simmons* (Court of Appeal: territorial jurisdiction); *Asda Stores v Brierley* (Supreme Court: whether workers in retail stores could compare themselves with those working in distribution depots for equal pay); *Royal Mail Group v Efobi* (Supreme Court: test for shift of burden of proof)
- **Trade unions:** *Jet2.com v Denby* (Court of Appeal: refusal of employment)
- **Unfair dismissal:** *Awan v ICTS UK* (Court of Appeal: dismissal while employee entitled to long-term disability benefits).
- **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

Published to provide general information and not as legal advice. © Slaughter and May, 2020.
For further information, please speak to your usual Slaughter and May contact.

www.slaughterandmay.com

900873928