SLAUGHTER AND MAY/

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EMPLOYMENT BULLETIN

QUICK LINKS

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Horizon scanning

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PROPOSED THREE-MONTH LIMIT ON NON-COMPETES AND CHANGES TO TUPE AND THE WORKING TIME REGULATIONS

The Government has published a policy paper: *Smarter regulation to grow the economy*, on proposed changes to three specific areas of employment law. The Government intends to limit the length of non-compete clauses to three months and to make some changes to the consultation requirements under the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) and to the Working Time Regulations (WTR). The Government followed this up with a consultation, closing on 7 July 2023, on the proposed changes to TUPE and the WTR. No target dates for any of the proposed changes have been announced.

Meanwhile, the Government has announced a significant change to the EU Retained Law Bill currently going through Parliament. An amendment to the Bill will remove the "sunset" clause - the automatic expiry on 31 December 2023 of all EU-derived legislation that was preserved in our domestic legislation at the end of the Brexit transition period unless the Government legislated to incorporate it into UK law. This could potentially have affected TUPE, the WTR and Regulations protecting part-time, fixed-term and agency workers. Instead, the Bill will contain a list of the retained EU legislation that the Government intends to revoke on 31 December 2023. That list is being drawn up; as yet the list does not include any of the above-mentioned employment legislation. However, the ability for the Government to make changes to EU-derived law in the future will be maintained in the amended Bill.

Non-compete clauses: proposed three-month limit on duration

The policy paper, and the accompanying response to the Government's 2020 consultation on restriction of non-compete clauses, say that the Government will legislate "when parliamentary time allows" to apply a statutory limit of three months to non-compete clauses. The Government's rationale for the legislation is to make it easier for individuals to start new businesses and find new work, and for businesses to fill vacancies and attract better candidates. In the response to consultation, the Government confirms that:

- The proposed statutory limit on non-competes will not affect the ability of employers to use (paid) notice periods or gardening leave, or to use non-solicitation clauses or confidentiality clauses.
- The restriction will apply to contracts of employees and "workers" (as defined under Section 230(b) of the Employment Rights Act 1996) and will not extend to non-compete clauses in workplace contracts such as partnership agreements, Limited Liability Partnership agreements and shareholder agreements.
- If a non-compete clause does not exceed three months in duration, existing principles will continue to apply; in other words, the non-compete will be unenforceable unless shown to extend no further than is reasonably necessary to protect the employer's legitimate business interests. (Please see the item below for discussion of a recent case on this point.)

The consultation had asked about measures to enhance transparency where non-compete clauses are used. However, given that for a non-compete clause to be enforceable, it should

already be clearly set out in writing, the Government is not persuaded that legislating to require employers to disclose the terms of the non-compete agreement again in a separate form would contribute to the policy objectives. Instead, the Government will produce guidance.

Analysis/commentary: The Government's response to consultation indicates that the choice of a three-month limit is intended to reduce the average length of non-compete clauses for the majority of workers while maintaining flexibility for employers to use them where appropriate. Although research indicated that the most common duration was six months, followed by 12 months, a frequently cited concern in the consultation response was that employers might use a statutory limit as a default, leading to longer periods than otherwise may have been the case. This may be what led it to propose a relatively short maximum period. However, the Government appears to accept that employers will use other methods of post-termination restriction, saying that the proposed legislation will not affect the ability of employers to use (paid) notice periods or gardening leave, and will not restrict the duration of non-solicitation or confidentiality clauses.

Extension of the ability to consult employees directly under TUPE

Currently, under TUPE, micro businesses (with fewer than 10 employees) may inform and consult affected employees directly if there are no existing appropriate representatives. Larger businesses cannot consult employees directly where they do not have employee representatives in place; instead, there is a requirement to elect new employee representatives. Businesses with 10 or more employees are also required to arrange elections for employee representatives regardless of the number of employees affected by the transfer.

The Government is proposing to extend the ability of employers to consult directly with employees to include small businesses (fewer than 50 employees) and to businesses of all sizes where a transfer of fewer than 10 employees is proposed. Direct consultation with employees would be allowed only if no existing employee representatives were in place. If employee representatives were already in place, then the employer would still be required to consult with them. Businesses with 50 employees or more would still be required to arrange elections for representatives, if they are not already in place, unless they were involved with a transfer of fewer than 10 employees.

Amendments to the Working Time Regulations

The Government is consulting on proposals to:

- Clarify that employers do not have to keep a record of daily working hours of their workers. The intention is to remove the effect of a decision of the European Court of Justice (ECJ) that required member states to impose obligations on employers to record daily working time.
- Allow the use of "rolled-up holiday pay" so that workers can receive an additional amount or enhancement with every payslip to cover their holiday pay, as opposed to receiving holiday pay only when they take annual leave. This is currently unlawful following an ECJ case, due to concerns that workers may not be incentivised to take leave as they could earn more holiday pay by staying at work. In practice, rolled-up holiday pay is heavily used in the recruitment sector and the gig economy. The proposal would give employers a choice, in calculating holiday pay for workers with irregular hours, between (i) paying holiday pay while the worker is on holiday using the existing 52-week holiday pay reference period and (ii) paying rolled-up holiday pay on top of their normal hourly wage. Employers could also choose to use rolled-up holiday pay to calculate and pay the holiday pay of their workers with regular hours. Rolled-up holiday pay would be paid at 12.07% - the proportion of statutory annual leave in relation to the working weeks of each year. Employers would need to make their workers aware if they chose to start paying rolled-up holiday pay and this payment would have to be clearly marked on a worker's payslip as their holiday pay (12.07% of pay on each payslip).
- Merge the basic (four weeks) and additional (1.6 weeks) statutory annual leave into a single entitlement. The consultation also asks about introducing a single rate of holiday pay for the entire 5.6 weeks of entitlement. Currently, the four weeks is paid at a worker's normal pay rate (which may include overtime, commission, and allowances in addition to salary), and the 1.6 weeks at basic pay rate.
- Make changes to the method for calculating leave in the first year of employment, by providing that workers would accrue their annual leave entitlement at the end of each pay period.

- Remove the Working Time (Coronavirus) (Amendment) Regulations 2020 that allow workers to carry over up to four weeks of leave due to the effects of COVID.

The Government has not yet responded to its consultation (see our Employment Bulletin January 2023) on calculating holiday entitlement for part-year and irregular hours workers, following the Supreme Court's confirmation in *Harpur Trust v Brazel*, that a permanent part-year worker was entitled to 5.6 weeks' holiday and her entitlement should not have been pro-rated to reflect actual hours of work, even though this meant that she was entitled to proportionately more holiday than other workers.

NEW GUIDANCE ON VOLUNTARY ETHNICITY PAY GAP REPORTING

The Government has published guidance for employers on voluntary ethnicity pay gap reporting. The background is the Government's confirmation last year that it would not be legislating for mandatory ethnicity pay reporting; it promised instead to publish guidance for employers who want to report voluntarily. The Government says that the aim of the guidance is to develop a consistent, methodological approach to ethnicity pay reporting, which can then lead to meaningful action, while remaining proportionate and without adding undue burdens on business. Much of the guidance mirrors the approach in the guidance for gender pay gap reporting, although it acknowledges that comparing pay across more than two groups of employees is more complex. Reflecting that complexity, the guidance suggests that, before seeking to tackle any identified disparities, employers should assess whether there are reasonable explanations or if there are any areas of concern. It lists a number of questions to consider, such as whether some ethnic groups are more likely to be recruited into lower paid roles and the reasons (internal and external to the organisation) why an ethnic group might be underrepresented. Other issues addressed by the guidance include:

- In **collecting ethnicity data**, the guidance suggests that employers follow the gender pay gap reporting statutory guidance on who counts as an employee (in summary, this includes anyone who is treated as an employee or worker for employment law purposes) and use questions from the 2021 Census (which had five main ethnic groups). It also reminds employers that an employee's ethnicity is regarded as special category data under the UK GDPR, so that, before employees are asked to disclose their ethnicity, the employer must provide them with a description of how the ethnicity data will be used and how it will be kept secure, including how the employer will ensure that it will not be possible to identify an individual from published data or analysis.
- The guidance suggests that employers should **report** the following measures:
  - Percentage of each ethnic group in each hourly pay quarter.
  - Mean and median ethnicity pay gap using hourly pay. Where bonuses make up a large proportion of employee pay, employers should also calculate the percentage of each ethnic group receiving bonus pay in the 12 months ending on the snapshot date and the mean and median ethnicity pay gap for bonus pay.
  - Percentages of employees in different ethnic groups.
  - Percentage of employees whose ethnicity is unknown or who responded "prefer not to say".

  To ensure statistical robustness, employers should set a minimum category size; if information is published, the guidance recommends a minimum category size of 50 employees. This may mean that data for some ethnic groups has to be aggregated; the guidance recognises the risk that this may hide pay differentials between different ethnic groups.
- Employers who publish data should also publish an **action plan** explaining how they intend to remedy pay gaps, by reference to clear measurable targets that can be achieved within a specified time frame. These targets can be aimed at better understanding pay statistics and addressing any unfair disparities. Rather than setting arbitrary targets for reducing any pay gaps, the action plan should commit to addressing specific issues that have been identified as likely causes. The guidance recommends that employers should consider providing a supporting narrative explaining the figures, the reasons for any pay disparities (but only if there is robust analysis to support this), wider workforce statistics, and the steps already taken to understand and address any pay disparities. The guidance notes that producing reports annually in a consistent form is an important way to identify how disparities change.

NON-COMPETE COVENANT ENFORCEABLE WITH WORDS SEVERED

Summary: The Court of Appeal decided that the High Court had been entitled to sever parts of a 12-month non-compete covenant in the employment contract of a senior employee, on the basis that the original covenant was too wide, and then to grant an interim injunction to restrain breach. The Court found that, provided a non-compete clause is valid in all ordinary circumstances within the parties' contemplation, the fact that it also covers unlikely or improbable circumstances does not prevent its validity (*Boydell v NZP Limited*).

Key practice point: Under the proposals outlined in the first item above, a non-compete clause in an employment contract with a duration longer than three months would not be upheld by a court. However, the Court of Appeal in this case was not concerned with the length of the restriction and the decision illustrates the wider point that all post-termination restrictions need careful drafting to minimise the risk of being found to be wider than reasonably necessary to protect the employer's legitimate interests and therefore unenforceable as a restraint of trade. Non-compete covenants should prohibit only direct competition, via activities of a kind that the employee carried on with the former employer, as part of core duties. It was the inclusion of group companies in the non-compete clause that caused the lower court to cut down the scope. It is also helpful to refresh restrictions to reflect any changes in the employee's role; whether they are no wider than reasonably necessary is assessed at the time they are entered into.

Facts: B was responsible for group global sales and marketing for NZP in a niche area of the pharmaceutical industry involving the sale of bile acid derivatives to pharmaceutical companies. He had resigned with the intention to work for NZP's main competitor. Clause 3.1 of his employment contract provided that he would not, for 12 months after termination, be involved in any activity for the benefit of a third party that carried out any competing business activity of the company, its affiliates or group companies, including collection, processing or conversion of bile for pharmaceutical use, and any activities relating to the supply chain. The employer obtained an interim injunction to enforce Clause 3.1 but the High Court judge, applying the principle established by *Egon Zehnder v Tillman,* that wording can be severed provided the process of severance does not cause any major change in the overall effect of the covenants, cut out the reference to affiliate or group companies and the supply chain. B appealed.

Decision: The appeal was dismissed. The Court of Appeal agreed that Clause 3.1, as severed by the High Court judge, was not too wide to be enforceable.

The Court rejected the argument that the offending words could not be severed and that Clause 3.1 went beyond what was reasonably necessary to protect NZP's legitimate interests. In particular, B had contended that, although NZP was a highly specialised business, other companies in the group were less specialised. One of these, for example, produced general pharmaceutical products such as nasal sprays. B complained that he would therefore have been prohibited for 12 months from working for any company which sold pharmaceutical products, including large chains such as Boots or Superdrug. However, the Court of Appeal decided that the case fell within the principles established in a 1970 case, *Home Counties Dairies Limited v Skilton*: "*If a clause is valid in all ordinary circumstances which can have been contemplated by the parties, it is equally valid, notwithstanding that it might cover circumstances which are so "extravagant", "fantastical", "unlikely or improbable" that they must have been entirely outside the contemplation of the parties*". The Court of Appeal was confident that, at the time of signing the covenant, the parties would have agreed that, after leaving his employer, B would be able to go to work for a large chain. The clause was directed at the specialist activities of the employer, which it listed at some length. The High Court was entitled, at least at the interim injunction stage, to sever the words from the clause and grant an injunction on a more limited basis.

As to whether the clause was too wide even after severance, the Court noted that decisions in this field are highly fact sensitive. Where the employer is, for example, a large public company covering a variety of fields of business activity, it may be very difficult to justify a covenant of anti-competition of the kind in Clause 3.1 even on the basis of the senior employee's knowledge of the company's commercial secrets. However, this is far less obvious where, as in the case of NZP, the employer had a highly specialist or niche business. The Court made a comparison with *Ashcourt Rowan Financial Planning v Hall,* where the High Court struck down as unenforceable a six month non-compete restrictive covenant in the contract of a wealth management director. That clause was not limited to the type of activities which the director had carried out for the former employer as part of his core role, and the effect was to exclude him altogether from the financial services sector.

The Court also rejected B's argument that the injunction should not have been granted because of NZP's delay. B had attempted to rely on the Court of Appeal's 2022 decision in *Planon v Gilligan,* where the seven months that had elapsed since the employee had joined a competitor was a significant factor in the decision not to grant an injunction to uphold a non-compete covenant. The Court of Appeal in *Boydell* pointed out that the facts were very different from *Planon v Gilligan*. When B first informed NZP of his intentions there was a period of just under a month during which the parties were in negotiation to see whether a compromise could be reached. There was then open correspondence, including a request from B's solicitors for more time in which to respond. B had not started work for the new employer when proceedings were issued, and gave an interim undertaking not to do so for the brief period until a hearing of the injunction application could take place.

Another aspect of the decision in *Planon v Gilligan* was that the Court of Appeal had found that damages would not be an adequate remedy if an injunction was granted but was proved at trial to have been an unenforceable restraint of trade. The likely effect of an injunction would be to deprive the employee of his income until and unless he could find a new job. However, in *Boydell*, the Court noted that, in accordance with B's contract, NZP had from the start offered to pay his full salary during any period prior to trial during which he was restrained from joining his new employer. There was no evidence that in this situation he would suffer any financial loss.

HORIZON SCANNING

What key developments in employment should be on your radar?

2023-2024	Strikes (Minimum Service Levels) Bill: minimum service levels on specified services
2023-2024	Private Members' Bills with Government support: • Worker Protection (Amendment of Equality Act 2010) Bill (to come into force one year after Royal Assent): duty to take reasonable steps to prevent sexual harassment of employees; protection from harassment by third parties • Protection from Redundancy (Pregnancy and Family Leave) Bill: extension of circumstances in which employers must offer suitable alternative employment to parents at risk of redundancy • Workers (Predictable Terms and Conditions) Bill: right to request a more predictable working pattern • Carer's Leave Bill: entitlement to one week's unpaid leave for employees who are carers • Neonatal Care (Leave and Pay) Bill: right to paid leave to care for a child receiving neonatal care • Employment Relations (Flexible Working) Bill: amendments to the flexible working request process; separate secondary legislation to make the right to request a "day one" right
May 2024	Employment (Allocation of Tips) Act 2023, providing for obligations on employers to deal with tips, gratuities and service charges, expected to come into force
2023/24	Proposed removal of the bonus cap applicable to banks, building societies, and PRA-designated investment firms
Date uncertain	• Proposed three-month limit on non-compete clauses in contracts of employees and workers

- Proposed amendment of TUPE to allow small employers, and businesses of all sizes where a transfer of fewer than 10 employees is proposed, to consult directly with employees if there are no employee representatives
- Proposed amendments to the Working Time Regulations, including to provide that employers do not have to keep a record of daily working hours, to allow the use of rolled-up holiday pay and to merge the basic and additional statutory annual leave into a single entitlement
- Statutory Code of Practice on Dismissal and Re-engagement
- Economic Crime and Corporate Transparency Bill: failure to prevent fraud offence

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

Employment status: *Griffiths v Institution of Mechanical Engineers* (EAT: whether a trustee of a professional body is a worker for whistleblowing protection); *HMRC v Professional Game Match Officials Ltd* (Supreme Court: whether referees were employees for tax purposes)

Discrimination / equal pay: *Higgs v Farmor's School* (EAT: whether a Christian employee's gender critical beliefs were protected under Equality Act 2010); *Kocur v Angard Staffing Solutions Ltd* (Supreme Court: whether agency workers were entitled to same treatment on vacancies as directly recruited employees); *Element v Tesco Stores* (Court of Appeal: whether an evaluation exercise that had rated the claimants and their comparator jobs as equivalent amounted to a Job Evaluation Study for the purposes of an equal pay claim)

Redundancies: *USDAW v Tesco Stores Ltd* (Supreme Court: whether implied term prevented employer from dismissing and re-engaging employees); *R (Palmer) v North Derbyshire Magistrates Court* (Supreme Court: whether administrator could be prosecuted for failure to notify Secretary of State of collective redundancies); *easyJet plc v easyJet EWC* (Court of Appeal: whether CAC has jurisdiction to hear European Works Councils complaints post-Brexit where central management is situated in the UK); *Olsten (UK) Holdings Limited v Adecco Group EWC* (Court of Appeal: whether the EAT erred in finding that collective redundancies in two countries did not have to share a common rationale to be "transnational" and imposing a penalty for the employer's failure to comply with a requirement to inform and consult its EWC)

Industrial action: *Mercer v Alternative Future Group Ltd* (Supreme Court: whether protection from detriment for participating in trade union activities extends to industrial action); *UNISON v Secretary of State* (High Court: whether removal of the restriction on employment businesses supplying temporary workers to cover striking staff was lawful); *Independent Workers of GB v CAC* (Supreme Court: whether Court of Appeal was correct to find that Deliveroo riders did not fall within the scope of the trade union freedom right under Article 11 of the European Convention on Human Rights because they were not in an employment relationship)

Unfair dismissal: *Fentem v Outform* (Court of Appeal: whether bringing forward the termination date on payment of a contractual PILON was a dismissal); *Hope v BMA* (Court of Appeal: whether dismissal for raising numerous grievances was fair); *Accattatis v Fortuna Group (London) Ltd* (EAT: whether it was automatically unfair to dismiss for concerns about attending the office during lockdown)

Working time: *Chief Constable v Agnew* (Supreme Court: whether a gap of more than three months in a series of unlawful deductions from holiday pay breaks the series)

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