EMPLOYMENT LAW BRIEFING

OUR PRACTICAL GUIDE TO EMPLOYMENT LAW DEVELOPMENTS MOST LIKELY TO IMPACT YOUR BUSINESS

FEBRUARY 2018

Welcome to our February 2018 edition. We look at the issues likely to be in particular focus this year; equal pay and sexual harassment. We also look at significant case law developments in relation to restrictive covenants and whistleblowing and provide an important reminder regarding GDPR.

KEY ISSUES FOR 2018

EQUAL PAY

We covered the Gender Pay Gap Reporting Regulations ("the Regulations") in May last year. Click HERE to read our May Quick Study.

As we identified then, the interesting issue in the short term deriving from the Regulations is the extent to which gender pay gap reporting, and publicity regarding it, leads to an increase in awareness regarding equal pay rights and, ultimately, an increase in equal pay grievances and claims.

The early evidence is that, as employers continue to report prior to the 4th April deadline, headlines from published reports for major employers are being picked up in the press. This is very much putting, and keeping, the issue of equal pay on the agenda and it seems there is growing momentum; for the Regulations to have more teeth and encouraging the bringing of legal claims.

In particular, the issue seems to have been given added impetus following on from the post Weinstein sexual harassment campaigns (see below) and the very highly publicised case of the BBC international editor, Carrie Grace, who resigned as China editor, in order to protest at what she alleged was a disparity between her pay and those of 2 male international editors, and who, following her resignation, herself became a headline story.

Additionally, the significant multiple applicant equal pay claim against Asda is continuing: the case of *Asda Stores –v- Brierly*. This case involves some 7,000 equal pay claims by supermarket staff (predominately women) based on equal value through comparing their work with that of workers at distribution centres (predominately male). News out today is of Tesco facing a similar £4 billion claim.

Most recently, the EAT upheld an initial employment tribunal decision on the preliminary issue that the equal value comparison between the two sets of staff is appropriate on the basis that Asda board could legitimately be viewed as the single source of pay and conditions for the two sets of staff.

As this case continues, and certainly, ultimately, if the claimants succeed, it is likely to attract significant publicity and provide a further impetus to equal pay claims.

SEXUAL HARASSMENT

The issue of sexual harassment is also very much in the headlines following the Weinstein allegations, the resultant #Metoo campaign and the allegations of sexual harassment at a fundraising dinner held by The Presidents Club.

It has, of course, has been unlawful to sexually harass a colleague in the UK for many years. For these purposes, "harassment" being defined within the Equality Act ("the Act") as where an individual engages,

> *"in unwanted conduct of a sexual nature which has the purpose or effect of violating another's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for another".*

For these purposes, in deciding whether conduct has this purpose or effect, and, therefore, amounts to unlawful sexual harassment, the Act expressly states that the perception of the recipient of the behaviour must be taken into account, as well as the other circumstances of the case and, whether it is reasonable for the conduct to have had that effect.

In essence, this means, firstly, that the fact that the perpetrator did not intend to harass/was not sensitive to the impact of his behaviour, will not of itself prevent the behaviour amounting to harassment. Secondly, prevailing views regarding what types of behaviour are clearly not acceptable (which may, to some extent, change over time) are relevant insofar as they may have a bearing on whether it is "reasonable" for the conduct to have had the necessary effect.

Nonetheless, reported tribunal cases, whilst often receiving publicity, no doubt, because of salacious press interest, have been relatively rare and it may well have been that "low level" harassment, and even serious cases, have frequently not been reported.

It does seem, however, that the Weinstein story may genuinely be a "watershed" and that, as a result, as victims are increasingly emboldened to speak out, there will be an increased risk of complaints/grievances and ultimately, if not properly dealt with, claims and inevitable reputational risk, where this type of behaviour persists.

Key points for employers with a view to mitigating the risk include:

- a firm, unambiguous and understood indication from senior management that harassment will not be tolerated;
- a clear anti-discrimination and harassment or broader dignity at work policy;
- training of management and staff on the policy;
- ongoing vigilance to spot the warning signs and ensure that inappropriate cultures which could lead to a risk of harassment, do not develop or are quickly addressed;
- taking firm action, and being seen to do so, where issues arise.

In that regard, our Locke Lord Labor and Employment Practice Group in the US has partnered with distinguished experts to assist clients to optimize workplace environments by educating business leaders about issues such as sexual harassment. It is undisputable that businesses lose substantial resources, financial and human capital, if their senior leaders do not truly understand workplace misconduct. It is a fact that sexual harassment training as currently conducted is ineffectual. Our experts include Professor Robin Ely from Harvard University, Professor Elissa Perry from Columbia University, Jennifer Berdahl from the University of British Columbia and Professor Peter Glick of Lawrence University, among others. Together with one or more of these distinguished educators, we can provide unique insights and suggestions about workplace misconduct that are designed to enable clients to create the most positive and productive work environment. If you would like to hear more about this program, please contact London Partner Bob Mecrate-Butcher at bob.mecrate-butcher@lockelord.com or Co-Chair of the Firm's Labor & Employment Practice, Richard Glovsky at richard.glovsky@lockelord.com.

SIGNIFICANT DECISIONS – Restrictive Covenants - Enforcement Non-Compete Covenants

Yes courts will enforce

Court decisions in recent years have shown that UK Courts will enforce appropriately drafted restrictive covenants where the covenants are necessary and reasonably drafted to protect an employer's legitimate interests. This includes enforcement of non-compete restrictions, the most draconian form of restrictive covenant as they act to prohibit a former employee from joining a competitor.

The case of *Tradition -v- Gamberoni* provides a further illustration of the courts' willingness to enforce non-competes and is particularly helpful for employers seeking to enforce non-competes in the financial services sector.

The facts in that case involved an interdealer broker who had a notice period of three months and was then subject to a non-compete precluding him from joining a competitor for a period of six months. Having given notice and informed his employer that he intended to join a competitor, rather than being put on garden leave, he was, instead, given altered duties involving back office and research. He sought to join the competitor early and the High Court granted his employer an injunction precluding him from doing so until expiry of the covenant.

Whilst making clear that each individual case needs to be considered on its facts, helpfully, the Judge indicated,

> *"I do not consider that a non-compete clause that keeps a broker of whatever experience or seniority out of the market for between six and twelve months is excessive by the current standards of the industry".*

But careful drafting needed

Key to the enforceability of restrictive covenants, however, is very careful drafting. This point was powerfully illustrated by the Court of Appeal decision in the case of *Tillman –v- Egon Zehnder Limited*.

In this case, the court found a non-compete to be unenforceable because it was drafted so that it precluded the particular individual from being "interested in" any competitive business.

It was held that this particular language would preclude an individual from having any shareholding and, as a result, the court found that this made the covenant too wide and, therefore, unenforceable. Particularly this was because there was not an express caveat making clear that the non-compete did not preclude the individual employee from holding a minor shareholding in a company.

The court also indicated that non-compete restrictions may be necessary where it is difficult to police non-solicitation and non-deal covenants or where there are material disputes as to what information is confidential.

Earlier court decisions provide authority that non-competes may be particularly appropriate in relation to senior executives who have been privy to confidential information relating to business strategy rather than client specific confidential information, which can be protected through less draconian non-solicit/non-deal restrictions.

Practical Implications

Following from the *Tillman* case, it is particularly important that any non-compete covenants are carefully reviewed. Effectively, following the decision, there is a requirement that to ensure enforceability, any non-compete precluding an individual from, "having an interest in", or "being involved with", or "being concerned with" , the business of a competitor must include an express caveat to make clear that the covenant does not preclude the individual from having a minority shareholding.

SIGNIFICANT DECISIONS – Whistleblowing

Key decision on public interest requirement

The end of last year also saw a significant Court of Appeal decision regarding whistleblowing, the case of *Chesterton –v- Nurmohamed*.

The key issue in this case was exactly what must an employee show to meet the public interest requirement in order for a disclosure to be a qualifying disclosure and, therefore, protected. This issue arose following the amendment to the legislation in 2013 which added the public interest requirement.

The facts of the case involved a director at Chesterton, an estate agent, who alleged that Chesterton had manipulated its accounts, thereby, reducing his entitlement to commission as well as the entitlements of over a 100 colleagues.

The court found that his disclosures were protected on the basis that the public interest requirement was met.

The court also gave important guidance regarding the requirements in order for the public interest requirement to be met.

The court indicated that tribunals, when considering this issue, need to consider two questions; firstly, whether the worker believed, at the time that he made the disclosure, that it was in the public interest and, secondly, whether, if so, that belief was reasonable.

The court emphasised, however, that there may be more than one reasonable view as to whether a particular disclosure is in the public interest and, also, that the necessary belief is simply that the disclosure is in the public interest, exactly why the worker believes this not being critical. Additionally, that the worker's belief that the disclosure is in the public interest need not be his or her predominant motive for making the disclosure.

The court indicated that,

> *"the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest".*

Also, that,

> *"the question of whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the number of people that share that interest."*

In short, where a disclosure serves the interests of other workers as well as the individual making the disclosure, whether it is, therefore, in the public interest, is not purely a numbers matter.

The court summarised as follows,

> *"in a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment…… (where the interest in question is personal in character), there may, nevertheless, be features of the case that make it reasonable to regard disclosures as being in the public interest, as well as, in the personal interest of the worker…… example of doctor's hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the tribunal on a consideration of all the circumstances of a particular case".*

The court also put forward the following as potential relevant factors,

- *"the numbers in the group whose interests the disclosure served;*
- *the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if also the effect is marginal or indirect;*
- *the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;*

- *the identity of the alleged wrongdoer – the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest, thought…..this should not be taken too far".*

Practical Implications

This is an important decision. The key practical point coming out of it is that an employer should assume that any disclosure regarding regulatory or health and safety issues, or allegations of discrimination (particularly, those raising issues regarding workplace culture), is likely to meet the public interest requirement.

Employers also need to ensure that their policies on whistleblowing lead to early identification of disclosures likely to lead to whistleblowing protection in order to ensure that appropriate steps can be taken to mitigate against the risk of a future claim.

Other whistleblowing decisions

Two other recent decisions on whistleblowing are *Parsons -v- Airplus International* and *Small –v- Shrewsbury and Telford NHS Trust*.

The first of these, *Parsons*, also involved the public interest requirement. This decision is more helpful to employers, however, as, on the facts in this case, the EAT upheld an employment tribunal's decision that where an employee raised compliance issues purely out of a concern for her own potential liability, she did not obtain whistleblower protection.

In the second case, *Small*, the Court of Appeal held that, on the facts, which included evidence that the claimant,

> *"was suffering a loss extending into the indefinite, and probably long term future, partly (though not only) due to the stigma associated with the circumstances in which he was dismissed and/or his consequent claim",*

the employment tribunal should have considered an award for stigma and long-term career loss.

The case serves as an important reminder that, whilst whistleblowing claims are not straightforward for claimants to pursue and win, if successful, damages can be substantial because of the potential long term impact on a claimant.

GDPR – AN IMPORTANT REMINDER

The General Data Protection Regulation (GDPR) comes into effect on 25 May 2018. It has particularly attracted attention because of its enforcement powers which allow fines at the highest level of up to 4% of annual turnover or 20 million Euros.

In advance of GDPR coming into effect, employers need to audit their employment data processing and the legal bases for that processing. They also need to review and update data protection policies to reflect GDPR and prepare appropriate privacy notices for employees. Contact us if you need assistance.

KEY CONTACT

We hope you find this briefing useful. Please contact us if you have any queries on the issues covered.

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