Employment Law Newsletter - July 2019

In this issue ...

The Summer break means that very little happens in August, so the newsletter will also take a break and our next issue will be at the end of September.

Severance in restrictive covenants

Earlier this year we ran a short seminar, 'Restrictive covenants in Employment Law: do you need them, making them work'. One topic was the blue pencil test, whereby courts remove offending words from a clause that would otherwise render it unenforceable. The Supreme Court has ruled on the correct test.

In Tillman v Egon Zehnder Limited the Supreme Court held that a six-month non-compete clause was enforceable because the unenforceable part of the clause was capable of severance.

Ms Tillman, joint global head of the company's financial services group, left in 2017. Her contract said that, for six months after leaving, she should not 'directly or indirectly engage or be concerned or interested in any business carried on in competition with any of the businesses of [Egon Zehnder]'. Ms Tillman said that the clause was unreasonable because the words 'interested in' prohibited her from holding even a minor shareholding in a competing business.

The Supreme Court held that the words 'or interested in' could be removed from the clause, which otherwise would be impermissibly wide and be in restraint of trade. Ms Tillman was bound by the redrafted clause.

The two criteria were:

- The unenforceable provision must be capable of being removed without the necessity of adding to or modifying what remains. This is the so-called "blue pencil" test.
- The removal of the unenforceable provision must 'not so change the character of the contract' that it becomes 'not the sort of contract' that the parties entered into at all.

So, what does this tell us?

Drafting

Courts cannot rewrite a poorly drafted clause or add words to overcome any ambiguity, so ensure that your restrictive covenants are drafted with due care and attention.

Limited circumstances

Removing offending words will only be possible in limited circumstances and where the two criteria are satisfied.

Timing

The reasonableness of a restrictive covenant is judged at the time you agreed it with your employee, not when you seek to enforce it.

Review

Regularly review your restrictive covenants, particularly where circumstances change, or an employee moves jobs.

Life Leave

The last time you moved to a new house, how much annual leave did you use? What about when (the last time) you got married? Perhaps next time you won't need to use your valuable holiday.

Molson Coors Brewing Company launched a new leave benefit for its more than 2,000 employees based in the UK and Ireland, providing an additional two weeks of paid leave for the purpose of aiding wellbeing.

The benefit, named ‘life leave’, was introduced in July 2019, and enables employees to take up to two weeks of paid leave for significant personal situations, such as settling in a new pet, moving, studying for exams or preparing for a wedding.

Good employee wellbeing is shown to reduce sickness absence and staff turnover, and to improve performance. A creative approach may help you get a return on your investment in your wellbeing strategy.

A four-day week could save £billions

On a similar theme, a survey by Henley Business School, has revealed that British businesses could save £104 billion annually if they change to a four-day working week. This is because of the productivity gains and improved employee wellbeing. Half of those that offered a four day week had seen benefits. This would not suit all and you would need to balance the benefits of a flexible working arrangement against the value of ensuring that your customers have access to your employees when they need it.

Posting an offensive image on Facebook was not done 'in the course of

employment'

In Forbes v LHR Airport Limited the Employment Appeal Tribunal (EAT) held that an employer was not vicariously liable for racial harassment when an employee, Ms Stevens, a security officer for LHR, posted an image of a golliwog on her Facebook account. The image was accompanied by the message: 'Let's see how far he can travel before Facebook takes him off.'

The image was shown to a colleague, Mr Forbes, who complained to his line manager that racist images were being circulated in the workplace. Mr Forbes's grievance was upheld, and Ms Stevens was given a final written warning for breaching the employer's dignity at work policy. Mr Forbes brought, among other claims, a racial harassment claim against his employer.

The employment tribunal rejected Mr Forbes's harassment claim because Ms Stevens was not at work when she added the Facebook post, made no reference to any employees in the post, and did not use the employer's equipment to add the post.

However, there are circumstances in which you could be held vicariously liable for your employee's inappropriate social media activity, even if it occurs outside the course of employment.

So how can you protect your business?

Policy

Remind staff members, in a social media policy, of the standard of behaviour you expect from them when they are posting on social media in a private capacity.

How much is too much?

Decide whether you want a strict ban, to limit its use to authorised breaks or whether employees' use of social media is acceptable provided that it does not interfere with their other duties.

Monitoring

Reserve the right to monitor employees' use of social media on your equipment so that you can check whether they have been using social media when they should be working or acted in a way that is in breach of your policy.

Personal life

Recognise that employees will use social media in a personal capacity but explain that, while they are not acting on behalf of your business, they can damage it if they are recognised as being one of your employees.

VE Day

To commemorate the 75th anniversary of VE Day, the early May bank holiday will move from Monday 4th May to Friday 8th May 2020 as the anniversary falls on this date. The second May bank holiday remains unchanged on the last Monday of the month.

This applies to England, Wales and Northern Ireland. Bank holidays are a devolved matter in Scotland, but the Scottish government has indicated on its website that it will also be moving Scotland’s early May bank holiday to 8th May 2020.

Why does this matter?

This change could cause you problems. Your employees may assume that this is an additional bank holiday. It's not. Also, you will need to consider any part timers whose usual day off is either Monday or Friday.

If an employee submits an annual leave request for Monday 11 May to Friday 15 May 2020

inclusive, they can have a ten-day break using just five days' holiday. So, you may find that you have several competing holiday requests or employees wanting time off on overlapping or consecutive dates in May.

Although we're not cynics, we find that short term sickness absence often arises on the dates preceding and following bank holidays so be prepared.

What can you do about it?

You can blackout dates for annual leave and refuse holiday applications over certain dates.

You're also entitled to deal with holiday requests on a first-come first-served basis or only permit a certain number of requests. If you intend to do this, or wish to impose any other restrictions, advise staff about your rules sooner rather than later.

Are agency workers entitled to the same number of hours as permanent staff?

No, according to the Court of Appeal in Kocur v Angard Staffing Solutions Limited and another

An agency worker who works for a hirer for 12 weeks is entitled to the 'same basic working and employment conditions' as if they had been employed directly by the hirer.

Mr Kocur was employed by Angard Staffing Solutions Limited (ASS) as an agency worker. ASS supplied agency workers to Royal Mail to supplement its permanent staff. Mr Kocur was typically allocated fewer than 20 hours' work per week whereas permanent staff members worked 39.

The Court of Appeal held that the Agency Workers Regulations 2010 do not entitle agency workers to be given the same number of contractual hours as a directly employed comparator.

The aim of the Temporary Agency Work Directive is to ensure the equal treatment of agency workers when compared with permanent employees while at work, but there is nothing in the Directive to suggest that it is intended to regulate the amount of work that agency workers are given.

So, what does this mean for you?

Although you are not required to give agency workers the same number of hours' work as permanent staff, you should be careful that agency workers' working time does not exceed the working time that ordinarily applies to permanent employees.

For example, if permanent staff on night shifts normally work for eight hours at a time, agency workers should not be required to work 10-hour shifts.

If you would like to discuss these or any other issues facing your organisation please speak to your usual contact at Watershed or Keith Morgan on +44 161 703 5611

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