EMPLOYMENT NEWS HEADLINES JULY-AUG 2019 ISSUE 22

SIGNIFICANT RULING ON RESTRICTIVE COVENANTS – TILLMAN V EGON ZEHNDER (SUPREME COURT)

The Supreme Court in the first ruling in almost a century in this area of employment disputes has clarified in the case of *Tillman v Egon Zehnder* that it will be possible for Courts to order restrictive covenants to be severed for the purpose of enforceability, provided:

- The severing of the word or words will not require modifications or additions to the words that remain for the reasonableness of the covenant to work;
- The removal of the word or words would not result in a major change to the overall legal effect of the restrictive covenants in the contract as a whole that protect the legitimate business interests of the employer;
- Any remaining restriction is supported by adequate consideration as ordinarily required.

The case involved a senior ranking employee, Ms Tillman, of a global recruitment consultancy, Egon Zehnder who on leaving argued that her 6 month non-compete restrictive covenant was unenforceable as it was too widely drafted. It included the words "*…directly or indirectly engage or be concerned or interested in any business carried on in competition with …..*" Ms Tillman argued that the wording "*be concerned or interested*" would restrict her from even having a small shareholding in any competing business and was, therefore, too wide, unreasonable and a restraint of trade. Whilst the Supreme Court did not disagree with this, it ruled that subject to the application of the above principles, it was possible to apply the "blue pencil test" without detracting from the legitimate business interests the employer was originally seeking to protect. It reinstated the restriction with the necessary severance of words overturning the Court of Appeal's ruling.

Although welcome news and clarity for employers, in order to avoid the courts having to take this decision, it is worth employers now revisiting their standard employment contract restrictions to examine (i) whether they do achieve the purpose for which they are drafted and (ii) whether wording can be rephased so as to avoid the issue faced by Egon Zehnder. It is important to add the Courts will *not* rewrite a restriction to make it work.

VOLUNTARY OVERTIME AND CALCULATION OF HOLIDAY PAY - UPDATE – FLOWERS V EAST OF ENGLAND AMBULANCE TRUST (COURT OF APPEAL)

Regular readers will recall the ongoing cases on whether or not voluntary overtime should be included for the purpose of holiday pay calculations. (see Maxlaw Global news issues 5 and 11). The Court of Appeal has clarified that voluntary overtime should be included for the purpose of holiday pay calculations. Consideration was given to the following:

- Case law had already established that compulsory non-guaranteed overtime pay, for example, when a shift runs over time but work must be completed, should be included for the purpose of holiday pay calculations. A distinction was made between this and what would be considered *voluntary* overtime;

- The Court of Appeal has ruled voluntary overtime should be included in the calculation provided it is sufficiently regular and worked over a sufficient period to be considered part of "normal remuneration" as required under the Working Time Directive interpreted in the UK under the Working Time Regulations that govern overtime. What this means in practice will need to be assessed in each case;

- As mentioned in previous articles this applies to the EU statutory 4- week holiday entitlement as a case brought under the Working Time Directive.

Employers should be aware that as of 6 April 2020, the holiday pay reference period will increase from the current 12- week reference period to 52 weeks, a change originally designed to protect seasonal and zero contract workers. (see Maxlaw Global news Issue 19 Good Work Plan highlights).

EFFECTIVE USE OF PROBATIONARY PERIODS

In recent months Maxlaw Global has dealt with a number of matters relating to issues arising due to the improper or less than effective use of probationary periods. Readers may find the key points below a helpful refresher.

It is generally common practice is most workplaces to have a probationary period which is a period at the start of the employment relationship where both employer and employee can assess if the "fit" and requirements of the role meets with the expectations of each party. The usual expectation is that the probationary will pass successfully and the employee will become a permanent member of staff. However, statistics[1] indicate that approximately one in every five new employees may not get past the probationary period or indeed have the initial period extended for further review by the employer.

In order to avoid disputes later on or unwittingly have a situation arise where the employee is deemed to have passed the probationary by default, it is worth employers reviewing their practices and taking the correct measures before the problem occurs, specifically:

- Be clear in the contract of employment that a probationary period does apply to the employment by expressly stating this in the terms of employment;

- Probationary periods permit either party to terminate the contract on a shorter than usual notice period if the expectations are not met. A common notice period is one weeks' notice in writing by either party during this time which should also be set out in the terms;

- Ensure that the duration of the probationary period is stated in the contract. In general, this should not extend beyond 6 months and many employers choose to start with a three-month probationary with the right to extend for a further three months. This ensures that the period does not extend more than 6 months in total;

Whilst such provisions are common in contracts, less consideration is given to the following and, it is here where problems often arise. It is, therefore, worth investing time in setting out the following at the outset:

- Employers should expressly clarify the standards of performance and conduct that the employee is expected to meet during the probationary period;

[1] Federation of Small Businesses and other general data sources.

- There should be clear performance measuring and monitoring mechanisms in place. It is always advisable for employers to have a performance review mid-way through the probationary and before the end of the probationary. This will manage the employee's expectation as to likely outcome and promote open dialogue. It will also help the employer in assessing if an extension is necessary;

- Whilst diarising assessment meetings is helpful, to ensure that confirmation deadlines are not accidentally overlooked, employers should expressly set out that an employee will not pass their probationary unless and until this has been confirmed in writing by the employer;

- This will also provide for the employer to make a proper assessment of the probationary period and the employee's performance and discuss the reasons with the employee where he or she has not been successful in passing the probationary. This should be retained on file in the event of any potential legal claim.

GOVERNMENT LAUNCHES HEALTH IN THE WORKPLACE CONSULTATION

Looking ahead, the Government has launched a consultation aimed at proposed changes which are designed for employers to take action in order to prevent job losses through ill-health reasons. The Government reported that figures indicate that those with a disability or ill-health condition are not only more likely to be out of work than someone who is not disabled or suffering from ill-health but also less likely to remain in work after a long-ill health absence. In order to stem the loss of this workforce the Government is seeking views on whether:

- measures should be introduced to allow for employees with ill-health who may not necessarily be captured by the disability protections under the Equality Act 2010 (see Maxlaw Global news Issue 21) to request modifications to their working arrangements or workspace;
- changes should be made to the Statutory Sick Pay (SSP) scheme so that a phased return to work after a sickness absence would allow for SSP to be paid for the time the employee is not working during the phased period;
- reforms to SSP should include entitlement to SSP for lower paid employees that do not currently qualify for SSP;
- there should be a stricter regime of enforcement of SSP with fines for employers who are not complying with their duty to pay SSP;
- changes should be introduced to improve accessibility and quality of Occupational Health services, at a reasonable cost, to encourage employers to seek medical input on improving employee ill-health conditions early.

The consultation closes on 7th October 2019.

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