EMPLOYMENT NEWS HEADLINES APR-JUN 2022 ISSUE 36

ENFORCEABILITY OF NON-COMPETE CLAUSES IN CONTRACTS OF EMPLOYMENT – LAW BY DESIGN LIMITED V ALI (HIGH COURT – QUEEN'S BENCH)

There has been much debate in employment law circles in recent years about the value of post-termination restrictions, specifically, non-compete clauses in employment contracts. The Courts must always balance the reasonableness and, therefore the enforceability, of such provisions between the need to protect the former employer's legitimate business interests and the restraint on the exiting employee's ability to seek another role in his or her field of expertise.

This case is a case, which highlights the need for tight drafting and for the restriction to be '*no wider than necessary'* for it to be upheld by the Courts.

Ms Ali was a solicitor working for a Manchester based niche firm supporting NHS clients in the North West region. Ms Ali had entered into a 12 month non-compete restrictive covenant in exchange for a substantial increase in salary. She was also a shareholder of the firm and had non-compete restrictions in her shareholder's agreement. Ms Ali resigned on notice to join a larger national firm in the area to work in the same field of expertise. Her employer, Law by Design Limited (LBD), sought interim injunctive relief. Granting the injunction, the Court considered the following:

- Was the restriction clearly and concisely drafted so as to be easily understood and interpreted;
- Was the restriction drafted to be no wider than necessary, i.e., drafted tightly enough for the specific interests that needed protection;
- Was there sufficient evidence to support the need to protect the legitimate interests for which the injunction was sought.

In determining the above, the Court granted the injunction on the following facts:

- Whilst the restrictions in the shareholders' agreement were too wide and therefore, void, the restrictions in the employment contract were sufficiently tight to be enforceable. Specifically, they only covered the work that Ms Ali was responsible for in the preceding 12 months and was restricted in geography e.g., NHS clients in the North West of England;
- The Courts also found that Ms Ali had prepared a business plan for her new employer which clearly indicated a substantial transition of her previous firm's clients to the new employer;
- The niche nature of NHS client work that Ms Ali did and her seniority in the firm were also considered relevant in this case.

The Court concluded that there was substantial risk of damage to the legitimate business interests of LBD and accordingly granted the interim injunction preventing Ms Ali from breaching her restrictions.

UPDATE ON AUTOMATIC UNFAIR DISMISSAL CLAIM DUE TO COVID-19 FEAR – RODGERS V LEEDS LASER CUTTING LIMITED (EAT)

Regular readers of Maxlaw Global news will recall that during the height of the pandemic we published a first instance ET case (Issue 32) where an employee, Mr Rodgers, was found to be fairly dismissed for refusing to return to work at a laser cutting warehouse due to his fear of exposure to the Covid-19 virus as he had vulnerable dependents at home. The Employment Appeal Tribunal (EAT) has now upheld the ET's finding confirming that Mr Rodgers was fairly dismissed. It has stated that whilst, in principle, is may be reasonable for someone to believe that there is 'serious and imminent' danger of exposure to the virus in certain circumstances, on the facts of Mr Rodgers situation, the EAT did not accept that Mr Rodgers truly believed he was in 'serious and imminent' danger in the workplace or elsewhere. Specifically, in this case, due to the following:

- Mr Rodgers had left his home to drive a friend to the hospital during the first national lockdown period;
- He also was found to be working part-time at a pub during this period so any concern could not be said to be attributable to the workplace alone;
- The employer's workplace had undergone a thorough external Covid risk assessment and protections had been put in place (see Maxlaw Global Employment News Issue 32 for details);
- It was also necessary for Mr Rodgers himself to take mitigating steps to avert any danger and protect himself such as wearing a mask, practising social distancing and frequently washing and sanitising his hands - all of which were available for him to do.

In the circumstances, the EAT upheld that Mr Rodgers dismissal was ***not*** automatically unfair as there was no real belief that the threat of the virus was 'serious or imminent' for him or his dependents but more a general concern. This is a helpful appeal tribunal ruling for employers, however, any assessment of the dismissal being fair will always be based on the "range of reasonable" responses open to the employer on the full facts of the situation in question and steps taken by both parties. This should always be assessed on the individual facts at the time of the dismissal.

BAN ON EXCLUSIVITY CLAUSES FOR LOWER PAID WORKERS

Exclusivity clauses are clauses in employment contracts which prevent employees or workers from working for multiple employers at any given time. Readers may be aware that such clauses were legally banned in what is known as 'zero hours' contracts in 2015. The Government has announced that it will now extend this ban to contracts where the employee or worker is earning a guaranteed income of less than £123.00 a week which is the current Lower Earnings Limit (LEL) for national insurance purposes.

The practical effect of this is that lower paid workers will now be in a position to work for more than one employer in order to increase their weekly income and employers will no longer be able to include an exclusivity clause in their contracts preventing them from doing so if they wish. This move will also widen the talent pool in the wider labour market for employers seeking workers on flexible hours especially in industry sectors such as hospitality or retail. This is a welcome proposal with the rapid

rise in inflation and the cost of living hitting the lowest income families the hardest. This proposed change will benefit an estimated 1.5 million workers in the UK. Employers should look to review their contract templates and other policy documents where this provision was previously applied. The Government press release can be found at: Lowest paid workers to be given flexibility to top up their pay under government reforms - GOV.UK (www.gov.uk)

A ROAD MAP ON EMPLOYMENT TRIBUNAL REFORMS

Employers will be well aware of the revised procedures that were applied throughout the Court system during the lockdown periods due to the pandemic. Litigants and legal advisors have been used to a different way of working over the past couple of years. With the return to 'in person' proceedings a new "road map" has been published for Employment Tribunal proceedings for the coming year. As a part of the 'HMCTS reform programme', it is not proposed that things will return to exactly pre-pandemic processes with some highlights of the changes, aside from a move to more digitisation, to be aware of are set out below:

- Preliminary hearings - in private for case management purposes, in public to determine a straightforward preliminary issue or an application for strike out or deposit order will default to video conference and for case management even telephone conference;
- Interim relief applications, judicial mediations, applications for reconsideration or costs and expenses will default to video conference;
- For other hearings the President of the ET aims to move as much as possible back to in person hearings as resources permit which include hearings for complex preliminary issues, short track hearings with substantial disputed evidence, standard track hearings and final hearings for open track claims.

An Employment Tribunals FAQ guide has been published by the HMCTS for Tribunal users.

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