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Insights into the latest employment news

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Clarifying the 'Blue Pencil' Test for Noncompete Clauses

In an employer-friendly decision, the Supreme Court of the United Kingdom has clarified the use of the "blue pencil" test to sever an unenforceable element from a post-termination noncompete clause.

As a matter of public policy, the English courts enforce a post-termination restrictive covenant against an employee only if it goes no further (assessed at the time that the covenant is entered into) in terms of scope, duration and connection to the employee than is absolutely necessary to protect the employer's legitimate business interests — namely, confidential information, goodwill, customer connection and the stability of the workforce. The Supreme Court's July 2019 decision in *Tillman v Egon Zehnder [2019] UKSC 32* was the first time in a hundred years that the highest court in the UK had considered the law of post-employment restraints and when they may amount to an unreasonable restraint of trade. The English courts will not rewrite an unenforceable restriction.

Background

Ms Tillman was a recruitment consultant at Egon Zehnder, a headhunting firm. Her contract of employment including a noncompete clause that provided that she should not for six months after the termination of her employment "directly or indirectly engage or be concerned or interested in any business carried on in competition with any of the businesses of the Company or any Group Company which are carried out at the Termination Date or during the period of 12 months prior to that date and with which you were materially concerned during such period."

Ms Tillman left Egon Zehnder to join a competitor in breach of this restriction, and Egon Zehnder sought an injunction to prevent her from working for the competitor until the covenant expired.

At the original hearing, the High Court accepted Ms Tillman's argument that the requirement in the noncompete that she not have "any interest in" a competitor made the noncompete too wide to be enforceable because it would prevent her from owning any shares or interest in a competitor, even as a passive investor, and that was an unreasonable restraint of trade. Ms Tillman appealed to the Court of Appeal which refused to sever the offending words.

Supreme Court Decision

Ms Tillman then appealed to the Supreme Court, which clarified that the "blue pencil test" can be used to sever offending parts of a restriction as long as the rest of the restriction is enforceable.

Key elements of the decision included:

- The Supreme Court interpreted "interested in" to cover any shareholding, regardless of size. It was an unlawful restraint of trade to prevent Ms Tillman having a passive minor shareholding in a competitor. Accordingly, to enforce such a provision, the employment agreement must include a carve-out for minority shareholdings.
- The court can strike out the offending part of the covenant and enforce the rest, provided the employer can show that:
  - The offending words can be deleted without the need to add or modify the wording that remains; and
  - The removal of the unenforceable words does not generate any major change in the overall effect of the remaining post-termination restrictions in the contract (for example, any nonsolicit provisions).

This is a positive decision for employers, with one word of caution: Employers may be required to bear the costs of enforcing a restriction to the extent it is necessary to ask the court to "clear up" any unenforceable provisions by severing them from the covenant. The Supreme Court suggested that employers should cover the cost of clearing up their mistake.

To the extent that employers are minded to review their post-employment restraints in the light of this decision, they should do so when an employee changes roles and the amendment can be linked to considerations such as an increase in the employee's pay or the offer of a new benefit.

Court of Appeal Rules on Pay for Parental Versus Maternity Leave

The Court of Appeal has determined that employers are not required to offer fathers taking shared parental leave the same amount as the enhanced maternity pay they provide to new mothers. Mothers on maternity leave can be distinguished because special protection is afforded to mothers after childbirth.

In the UK, a mother is entitled to a period of up to 52 weeks maternity leave:

- during which she is protected from detriment at work and entitled to statutory maternity pay for up to 39 weeks. The first six weeks are paid at 90% of her normal weekly pay and the balance at a basic statutory rate of £145.68 or her weekly pay, if less; and
- at the end of which she is entitled to return to work.

Since April 2015, parents have been able to share this entitlement as statutory parental leave, such that a father (or certain other carers of a newborn or adopted child) can take part of the mother's maternity leave if she chooses to return to work before her statutory maternity leave period and entitlement to statutory maternity pay has expired. The father is afforded the same rights to the basic rate statutory pay if the leave falls within the first 39 weeks after his partner's maternity leave began. Effectively, this means he can take the balance of her statutory maternity pay. A mother who has returned to work can take shared parental leave at any time in what would have been the balance of her maternity leave period but will have broken her maternity leave. A father (or the secondary carer) is also entitled to two weeks paternity leave at the time of the child's birth or adoption.

Many employers offer a contractual enhancement to the statutory minimum maternity pay and have had to consider whether they should offer the same enhancement to fathers taking shared parental leave. Considerations include whether it is potentially discriminatory on the basis of sex or equal pay to offer fathers a lesser amount and, from a public policy perspective, whether employers should be encouraged to enable fathers to take up the opportunity to assist with child care by taking parental leave.

In two cases heard together, *Ali v Capita Customer Management Ltd* and *Hextall v Chief Constable of Leicestershire Police*, the Court of Appeal confirmed that legally, employers need not offer fathers taking shared parental leave the equivalent of enhanced maternity pay.

Mr Ali took his two weeks paternity leave when his child was born and then asked to take shared parental leave when his wife returned to work. Capita offered 14 weeks full pay to mothers taking maternity leave but gave Mr Ali only the basic statutory parental pay in this period. He claimed direct discrimination on the ground of his sex.

Similarly, Leicestershire Police paid 18 weeks enhanced maternity pay to new mothers but offered only the basic statutory rate to those taking shared parental leave. Mr Hextall brought a claim for equal pay, meaning that a sex equality clause should be implied in his contract of employment to give him the same contractual terms as a mother in the period after becoming a parent.

The Court of Appeal found that:

- There was no direct or indirect discrimination in either case because the correct comparator for a man taking shared parental leave is a woman taking the same leave (for example, a woman who is in a same-sex partnership and shares the leave with the mother). In that situation, a woman taking shared parental leave would have received the same payment as a man.
- The purpose of maternity leave and shared parental leave is not the same: Women on maternity leave are afforded special protection in the period immediately after birth to enable the mother to recuperate from the birth and develop a "special relationship" with her newborn.
- An equal pay claim brought by the father would fail because the Equality Act 2010 expressly excludes contractual terms that give women special treatment in connection with pregnancy or childbirth.
- Further, in the Hextall case, the court reaffirmed that a claimant cannot seek the same remedy by claiming equal pay and indirect discrimination. Having classified the claim as an equal pay claim, Mr Hextall could not also claim indirect discrimination.

The minimum period of maternity leave under European Union law is 14 weeks, although that is extended to 52 weeks in the UK. The Court of Appeal's decision is expected to be appealed and is open to being challenged by the argument that the longer 52-week period of statutory maternity leave that is provided in the UK is longer than is necessary to protect the mother and child.

While helpful for employers, this decision does not address the wider issue that use of shared parental leave is still low among fathers, largely due to the differential in pay rates. In an attempt to address this issue, the European Commission has published a proposal for a wide-ranging directive on work-life balance for parents and carers. It is likely that policy change in this area in the future will shape the shared parental leave system to encourage more men to take it up.

European Court of Justice Requires System To Record Actual Working Time

The European Court of Justice has held that all EU member states must set up a system to record employees' actual working time.

In May 2019, the European Court of Justice (ECJ) held in *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE* that EU member states must require employers to implement a system to record the daily working time of each worker to ensure compliance with working time rules.

The case was brought by Spain's largest trade union, CCOO, which sought a declaration that a bank was under an obligation to establish a system to accurately record the number of hours its staff worked each day. The Spanish court referred the case to the ECJ for a preliminary ruling.

The ECJ ruled that in order to ensure the effectiveness of the rights provided for in the Working Time Directive (WTD), member states "must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured."

In the UK, the Working Time Regulations 1998 (UK Regulations) require employers to keep "adequate" records to demonstrate that workers are not working more than 48 hours a week. The UK Regulations do not include an explicit obligation for employers to record data to show that daily and weekly rest periods are observed.

In light of Brexit, it is unclear if the UK Regulations will be amended as a result of this decision. Commentators are doubtful that there will be any immediate modifications following the extensive raft of holiday pay decisions that have so far failed to elicit any legislative changes.

From a practical perspective, UK employers are not required to do anything differently in the immediate future, as long as they continue to comply with the UK Regulations.

Notwithstanding Brexit, although the UK may now be technically in breach of the WTD, individuals may not be able to rely on the ECJ's decision to require their employer to keep more detailed records of working time. This is because the UK Regulations do

not allow an individual to bring a claim for his or her employer's failure to keep adequate records of working time. This breach of the UK Regulations is a criminal offence, enforceable only by the Health and Safety Executive.

Nonetheless, sophisticated employers, such as those with existing online time recording systems, may be able to rely on their existing technology to capture accurate working time and may therefore already satisfy the "objective, reliable accessible system" criteria.

ICO Gets Tough With Fines for Data Breaches

The UK Information Commissioner's Office has issued its first significant fines for data breaches, indicating that the UK regulator is prepared to use its powers under the GDPR to take strong action against companies that breach their data protection obligations.

On 8 July 2019, the UK Information Commissioner's Office (ICO) announced its intention to fine British Airways £183.39 million for infringements of the General Data Protection Regulation (GDPR). This is the largest-ever fine proposed by the ICO.

The proposed fine relates to a cyber incident that compromised the personal data of approximately 500,000 British Airways customers that the airline notified the ICO about in September 2018. The incident involved a diversion of user traffic from the British Airways website to a fraudulent website, from which customer information was stolen.

The fine signals the importance that the ICO places on data security and that it is not afraid to use its enhanced enforcement powers under the GDPR to ensure companies have adequate measures in place to safeguard the security of their systems.

The ICO has also announced its intention to fine Marriott International, Inc. more than £99 million for a cyber incident impacting 30 million residents of 31 countries in the European Economic Area.

The vulnerability in Marriott's systems is suspected to have begun when the systems of the Starwood hotels group were compromised in 2014. Marriott acquired Starwood in 2016 but did not discover the vulnerability until 2018.

In a cautionary tale to all organisations involved in a corporate transaction, the ICO found that Marriott failed to undertake sufficient due diligence when it bought Starwood, directly leading to failure to deal with the vulnerability in the Starwood system.

Information Commissioner Elizabeth Denham has emphasised the importance of carrying out proper due diligence on all aspects of data protection compliance on corporate acquisitions to avoid this kind of enforcement action in the future. She also has recommended treating data security as an important and valuable asset, just like any other asset, during a corporate acquisition or disposal.

The Path To Achieving Gender Diversity in the Boardroom

Representation of women on the boards of UK-listed companies has been a priority on the corporate agenda for a number of years, but companies have only recently begun to meaningfully adopt the measures and initiatives initially introduced by the government to combat gender inequality at the board level. Despite mostly encouraging developments, there is still a long way to go for companies on the FTSE to meet government-backed targets to achieve gender diversity in the boardroom, although the UK continues to outperform other countries in this area.

In its 2018 annual report, the Hampton-Alexander Review[1] (Hampton Review) reported that:

- the number of women on FTSE 100 boards had exceeded 30% for the first time;
- the number of women on FTSE 100 executive committees was at about 21%; and
- 76 FTSE 100 companies had three or more women on their boards.

However, KPMG's "Executive Remuneration in AIM Listed Companies" report identified that the gender diversity of the boards of AIM-listed companies pales in comparison to their FTSE counterparts. As of April 2019, women accounted for just 7% of board positions in AIM companies.

FTSE 350 companies are also struggling to keep pace. The Hampton Review identified that the number of women in FTSE 350 chair roles has not changed from 22 in 2017, and there are even fewer women in CEO positions: 12 in 2018 compared to 15 in 2017. Five FTSE 350-listed companies have no female board members at all, and 75 companies have just one.

[1] The Hampton Review is an independent review body that has continued to build on the U.K. government's 2015 Davies Review to increase the number of women on FTSE boards.

Cranfield University's "Female FTSE Board Report" (Cranfield Report) found that the proportion of women on FTSE 350 boards is starting to catch up with the FTSE 100, but there is urgent work to be done if FTSE companies are to meet government-recommended targets of 33% of all board positions being filled by women by 2020. To meet those targets in the next 12 months, almost half of all available board appointments will need to be filled by women.

Notwithstanding these figures, the UK has still come a long way. For example, the number of all-male boards across FTSE 350 companies has fallen from 152 in 2011 to just four in 2019.

In addition, the UK figures on female representation on boards are consistently near the top of the global rankings. Only a limited number of other European countries (such as France, Italy and Sweden) outperform the UK in terms of gender board diversity.

Targets aside, the most recent version of the UK Corporate Governance Code (Code) (which applies to premium listed companies), from July 2018, introduced a new focus on board diversity that moved beyond purely gender diversification. The Code's aim is to strengthen the role of the relevant nomination committees on succession planning to establish and maintain diverse boards.

According to the Cranfield Report, a paradigm shift in board composition (and for filling other senior executive and nonexecutive roles) requires existing leadership to appoint and promote women for substantive rather than symbolic reasons. This requires a cultural move away from promoting women for ostensibly box-ticking and tokenism reasons. Instead, there must be meaningful engagement with, and recognition of, the fact that equal representation on boards can lead to longer-term and sustained business growth. Changes to retention and promotion practices will necessitate better education of the workforce and implementation of policies that allow women to succeed in the workplace.

Although companies' reputations only are at stake for failing to meet the government's targets, sanctions or government-mandated quotas — which other European countries have introduced — may ultimately be required to effect real change.