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Injunctive Relief and Implied Terms in *USDAW v Tesco*

The English High Court granted an injunction to prevent UK retailer Tesco from dismissing certain employees only to rehire them on contracts that removed their entitlement to a previously negotiated contractual benefit. The benefit had been described by the employer as a "permanent feature" of the employees' employment contracts. The High Court also held that an implied term in the employment contracts prevented the employer from exercising its right to terminate the contract on notice if the termination was for the purpose of removing the benefit.

Between 2007 and 2009, during a restructuring of Tesco's distribution network, Tesco and the Union of Shop, Distributive and Allied Workers (USDAW) — recognised by Tesco for collective bargaining purposes — negotiated a new compensation package as an alternative to redundancy for certain Tesco employees. The collectively agreed terms offered employees a new compensation package (Retained Pay) and the employees were assured that it would remain a "permanent" feature of each individual's employment contract. In January 2021, Tesco announced its intention to remove Retained Pay and terminate workers who refused the compensation plan's removal, but then offer those terminated employees new employment agreements with the amended terms. Some employees refused the removal of the benefit, and their union sought injunctive relief in the High Court.

In accordance with English law, in certain limited circumstances where there is a good business reason for change, and provided they follow a fair process including consultation with the affected employees and any applicable representatives, employers may dismiss and immediately rehire employees on amended terms and conditions of employment without giving rise to unfair dismissal claims. Tesco announced its intention to conduct a fair process, including consultation with USDAW as the employees' representative. However, USDAW attempted to preempt the dismissal by applying to the High Court for an injunction.

In *USDAW and others v Tesco Stores Ltd,* the High Court characterised the unusual facts of this case as "extreme." It concluded that (i) "permanent" must be construed to mean for as long as the employee is in employment in substantively the same role; and (ii) it was necessary to imply a term into each of the affected employees' contracts such that Tesco's right to "terminate the contract on notice could not be exercised for the purpose of removing or diminishing the right of that employee to Retained Pay." Following *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and another* and subsequent confirmatory case law on contractual terms implied by fact — and noting the need to "tread warily in this area [of law]" — the court held this implication was necessary to give the contract business efficacy to provide Retained Pay on a "permanent basis," and that an officious bystander would consider the implication to be obvious. The court was satisfied that this was consistent with the parties' intention and the case's unusual factual background. The court noted that Tesco could have set a longstop date for the employees' entitlement to Retained Pay to expire or to clarify that entitlement to Retained Pay only subsisted under the affected employees' current contracts, but that Tesco had not taken these or any similar steps when it made the "permanent" commitment to the employees.

The court was clear that nothing in its interpretation of the affected employees' contracts, its implication of a term in the contracts or its injunctive relief restrained Tesco from terminating the employment of an employee for good cause, despite the fact that this would bring an end to that employee's entitlement to Retained Pay.

In order to avoid a similar situation, employers should ensure that they agree on precise and time-limited terms in any collective bargaining or contractual benefit negotiation, and that these terms are communicated clearly to the recognised union and any affected employees.

Fragmentation: Practical Solutions When a Contract for Services Is Split Among New Providers

In this article, we review the law on the application of TUPE in the UK when a service provider is replaced by multiple providers.

There are specific UK provisions under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) that protect employees who perform a service for their employer's client when that client changes their service provider. This is known as a "service provision change TUPE transfer" and typically applies to the provision of services that are ancillary to the client's main business — such as catering, cleaning, security and IT — when a service is outsourced by a client, the client changes their third party service provider (for example, on a re-tender) or the client brings the service in-house. It can also apply when a transitional service agreement expires.

In order for a service provision change TUPE transfer to occur, the client must (i) receive services from an organised employee group whose principal purpose is to carry out that activity; and (ii) intend the same services to be provided by the new provider.

Those employees who are assigned to perform the relevant services will automatically transfer to the new provider with their terms and conditions of employment intact, and they are protected from dismissals in connection with the transfer. The new employer will inherit any existing employment liabilities (*e.g.*, accrued holiday or unpaid wages) and the current service provider will be required to inform and consult with the affected employees' appropriate representatives.

UK service providers have long anticipated that employees will transfer to them when they contract to provide a service, but also that they will move on to the new service provider when that service contract ends. It is typical to see contract indemnities for managed services to protect the incoming service provider from employment liabilities that it either inherits from the outgoing provider in accordance with TUPE or might incur if the replacement provider does not comply with the law (and take on the employees) at the end of the term, or if TUPE does not apply at the time so that the service provider incurs redundancy or other severance costs. Similarly, the client for the services will want protection upon the contract's termination that it can pass on to the replacement provider (*e.g.*, for employment liabilities that arise during the term) as well as provisions that will enable it to provide information about the current employees, and their employment terms and conditions, that it can share with bidders when they tender for the replacement contract.

TUPE applies where the incoming provider is to provide the same services, but it might not apply if the replacement services are to be performed in a different way or divided among numerous providers. As a result, the employees are unable to show that they are assigned to any of the replacement contracts. Until recently, the UK employment tribunals would find that in that case, there would be no TUPE transfer and the employees would remain employed by the outgoing contractor, who is unlikely to have a role for them after losing the contract. This split in services is referred to as "fragmentation."

European Case Law

ISS Facility Services v Govaerts

In March 2020, the European Court of Justice (ECJ) ruled that, in principle, a transferring employee's employment contract can be split among multiple replacement service providers, reflecting the time spent supporting the portion of the service that transfers to them.

McTear Contracts Ltd v Bennett and others and Mitie Property Services UK Ltd v Bennett and others

The UK Employment Appeal Tribunal (EAT) followed this principle in *McTear*. In that case, a contract to install kitchens in Lanarkshire council homes was re-tendered and geographically split between contractors McTear and Mitie — one to install kitchens in the north of the county and the other in the south. Prior to the re-tender, one contractor had provided the kitchen installation service across the county but did not allocate the installation teams on a geographic basis. Most of the employees worked across both north and south Lanarkshire. The EAT had to decide whether TUPE applied. If the employees could not show that they were assigned to either contract as the case law stood at the time, they would not transfer and would likely lose their jobs.

The EAT chose to protect the workers' employment and determined, following *Govaerts*, that after the re-tender they would be employed by both new contractors in proportion to the time they spent working in north and south Lanarkshire, respectively. As a result, employees would have two separate contracts, one with each employer. However, the EAT did not address the practicalities or desirability of splitting their employment this way and remitted questions to the employment tribunal, including whether and how each employee's contract should be split between the employers and whether there might still be some employees who did not transfer at all. The more practical outcome would have been to allocate employees by cost and head count as opposed to splitting individual roles between the incoming contractors.

Practicalities

Further practical issues include how split contracts might be managed in practice. When would each employee work for either employer? What if the employers are competitors? Would the work be split on an even or predictable basis between the employers?

The real outcome of the *McTear* case is that the cost of transferring employees and related employment liabilities will be allocated between incoming contractors when service contracts are split. This will encourage employers to agree on the allocation of employees, ensuring that as many as possible retain their roles and that severance costs are kept to a minimum. For example, in the *McTear* case the new contractors could have agreed to allocate employees by head count as opposed to splitting the contracts of individual employees. That might require employee consent where individual employees are not clearly assigned to a certain service, resulting in a potential risk of employees asserting detrimental changes to their roles, which would enable them to claim unfair dismissals.

Service sector employers and their clients will need to conduct thorough diligence to identify how employees' time is split among the different services to transfer and agree on how these costs will be allocated on a commercial basis. This will include potential severance and be reflected in the terms and price for the new contract(s).

Post-Termination Covenants: One Restriction Too Far

The English High Court recently considered the enforceability of noncompete provisions in a shareholders' agreement and an employment contract. The decision serves as a reminder of the importance of well-drafted restrictive covenants in both.

In *Law by Design Ltd v Ali,* a boutique employment law firm sought an injunction to prevent a former director from joining a direct competitor. The law firm argued that the former director's decision to join a competitor breached the restrictive covenants in her employment agreement and the restrictions in a separate shareholders' agreement. Both agreements included a 12-month noncompete provision. The noncompete in the shareholders' agreement was broad in scope and prevented the former director from being engaged or interested in a business that competed with the law firm, whereas her employment agreement's noncompete was drafted by reference to specific business areas in which she was materially involved during the 12 months prior to her termination.

Under English law, different principles apply to restrictive covenants in an employment agreement and covenants that parties enter into in a shareholder (or similar) capacity. For post-termination restrictive covenants in employment agreements to be enforceable, they must go no further than reasonably necessary to protect the employer's legitimate business interests. This is a relatively high threshold, and the onus is on the employer to demonstrate this test is met. Courts will often, when assessing the reasonableness of a covenant, take into account whether (i) the employer's trade secrets or confidential information require protection post-employment (including the nature of such information, its shelf life and the potential risk if passed on to a rival); (ii) the covenant is necessary to help the employer maintain a stable and trained workforce, or protect its business while it finds or trains a replacement; and (iii) the employer's legitimate interests can be protected by a shorter (*e.g.*, six months instead of 12 months) or less far-reaching restriction (*e.g.*, limited to a specific part of the business in which the employee was involved). If so, the covenant will be deemed too broad and, as a result, unenforceable.

Conversely, where restrictive covenants are entered into by an individual in their capacity as a shareholder (or similar), courts are less willing to intervene. In this context, the employee is more akin to a seller of the business, and there is usually greater equality of equal bargaining power than between employees and their employer. The courts have acknowledged that it is not in the public interest to strike down clauses that have been freely negotiated between equal parties. The focus in this context is usually on the protection of the business' goodwill, for which the shareholder is likely to receive valuable consideration when they sell their shares. This can lead to differential treatment of restrictions that are entered into as a shareholder.

However, in *Law by Design Ltd v Ali*, the High Court determined in February 2022 that the restrictions in the shareholders' agreement were broader than required to protect the law firm's interests. In particular, the court found the restrictions were not sufficiently limited in geographical scope and captured parts of the business where the former director's involvement was minimal. The High Court also distinguished the case's facts from circumstances where a shareholder enters into restrictive covenants as part of the sale of a business (*i.e.*, where they benefit from the sale's proceeds and it is in the buyer's interest to stop the shareholder from immediately competing with the business the buyer has just acquired). Where individuals do not have material shareholdings (*e.g.*, where their shareholding is the result of participation in a share plan and merely incidental to their employment), courts are less willing to treat them as sophisticated parties freely entering into commercial restrictions. Instead, they will generally apply a similar approach to the enforceability of shareholder restrictions as to employment restrictions.

Noncompete clauses and similar restrictive covenants will continue to feature prominently in employment agreements since they are often considered a practical way of protecting an employer's interests. Often, parties are not willing to rely solely on confidentiality provisions or nonsolicitation clauses since it is difficult to prove that a former employee has disclosed confidential information or actually solicited a customer or client.

There are currently wider discussions about the use and enforceability of restrictive covenants, including a government consultation on the use of noncompete provisions and whether they should be banned altogether. For now, decisions like *Law by Design Ltd v Ali* illustrate that the enforceability of restrictive covenants will depend on their scope and whether they are properly considered at the time they are entered into. While the court upheld a 12-month covenant in this case (usually considered the maximum period courts will allow under English law), employers should continue to assess what restrictions they need in each instance to protect their interests.

Trending: Pay Gap Reporting

On International Women's Day, a "Gender Pay Gap Bot" highlighted employers who had poor gender pay gap records while celebrating women's achievements. The Bot's coverage highlights the pitfalls for employers in this area from a public relations perspective and prompts further debate on the UK's pay gap reporting regimes.

On International Women's Day (8 March 2022), many employers used social media to highlight women's achievements at their organisations. At the same time, a Twitter account began sharing tweets by employers that were using the platform to post about their female employees' accomplishments and adding a comment highlighting the gender pay gap at each place of employment. Tweets from the "Gender Pay Gap Bot" are estimated to have had hundreds of millions of views, and the account has over 254,000 followers.

Since 2017, employers with 250 or more employees have been required to publish specific gender pay gap information. The UK Government Equalities Office defines a gender pay gap as a "measure of the difference between men and women's average earnings across an organisation or the labour market as a whole over a period of time." The UK government gender pay gap service makes this information available to the public, including to the Gender Pay Gap Bot's creators.

The Gender Pay Gap Bot's tweets and "deeds not words" motto serve as a reminder of the continued interest in pay gap reporting; the strong corporate, employee and public interest in average earning differentials; and the importance of employers considering the gender pay gap in their business, retention and recruitment strategies. While the UK government's gender pay gap reporting framework gives an opportunity for employers to add a supporting narrative and action plan, the Gender Pay Gap Bot and other similar social media tools make no such provision. These platforms may post and share women's and men's median hourly pay differences without explanation.

Although gender pay gap reporting is compulsory for thousands of employers, ethnicity pay gap reporting is currently voluntary. BEIS issued a consultation on ethnicity pay gap reporting in October 2018 but has yet to report on the outcome. Meanwhile, the number of employers that have voluntarily published their ethnicity pay gap is low and, according to an analysis by HR DataHub, has dropped from 129 in 2020 to just 64 in 2021.

The UK Parliament's Women and Equalities Committee, which called on the government to bring into force gender pay gap reporting regulations in 2017, recently called for ethnicity pay gap reporting to be made mandatory on similar terms. The committee highlighted the importance of ethnicity pay gap reporting as "an indicator for employers to identify, understand and address trends in ethnic disparities" in their workforce, and it recommended that the government introduce mandatory ethnicity pay gap reporting by April 2023 for all organisations that currently report their gender pay gap. The UK government has acknowledged that ethnicity pay gap reporting should be mandatory but has not committed to a timetable or framework for implementation. More recently, it has indicated that it does not wish to place additional burdens on employers recovering from the COVID-19 pandemic's economic effects and does not intend to propose legislation mandating ethnicity pay gap reporting in the near future.

Update: Tax-Advantaged Share Schemes

New HMRC guidance confirms the end of easements for two tax-advantaged share schemes that were put in place as a result of the COVID-19 pandemic, and sets out information and reminders on the operation of tax-advantaged share schemes.

UK tax authority Her Majesty's Revenue and Customs (HMRC) has published new employment-related securities (ERS) bulletins throughout March 2022 (Bulletins 40, 41 and 42). The bulletins provide updates and guidance on tax-advantaged employee share schemes and other employment-related securities.

The most significant information is in Bulletin 41, confirming the termination of modifications to the Save as You Earn (SAYE) and Enterprise Management Incentive (EMI) rules put in place in response to the COVID-19 pandemic.

In June/July 2020, as set out in ERS Bulletins 35 and 36, HMRC introduced modifications to the SAYE prospectus, allowing furloughed employees or employees on unpaid leave due to COVID-19 to postpone saving contributions for an unlimited period. In response to the "living with COVID-19 plan" and the Coronavirus Job Retention scheme's closure, this change will now cease to apply to savings contracts entered into on or after 6 April 2022. It will remain in force for the duration of current savings contracts. HMRC will issue a new prospectus applying to savings contracts entered into from 6 April 2022.

In summer 2020, HMRC similarly introduced modifications to the EMI legislation, stating that option-holders who no longer met the working time commitment requirements due to the COVID-19 pandemic would remain entitled to the tax advantages and reliefs that would have been available had they continued to work for their employer. ERS Bulletin 41 confirms that the EMI COVID-19-related easement also ends on 5 April 2022. From that date, all employees participating in an EMI plan must meet the working time requirements provided in Schedule 5 ITEPA of at least 25 hours per week or, if less, at least 75% of their working time. If the working time requirements are not met by an employee holding EMI options at any time on or after 6 April 2022, existing EMI options will no longer qualify, and new EMI options cannot be granted to the employee.

Other Updates

Bulletins 40 and 42 set out information and various reminders on the operation of tax-advantaged share schemes and employment-related securities more generally:

- The deadline for registration of new schemes and filing of annual returns for the 2021-22 tax year is 6 July 2022;
- Companies must regularly review tax-advantaged share schemes to ensure legislative requirements continue to be met, and that any modifications are in line with applicable legislation and have been notified to HMRC;
- Bulletin 26 includes a list of more common employment-related securities issues and top reminders for companies; and
- ERS online service only accepts submissions up to six years after 6 April following the end of the relevant tax year, after which late registrations, returns and notifications must be made through a special process set out in Bulletin 40.

Update on Reform of UK Tax-Advantaged Share Schemes

We previously reported on UK tax-advantaged share schemes in our article "A New Focus on UK Tax-Advantaged Scheme Schemes." In March 2021, the UK government published a call for evidence on the EMI scheme, seeking reviews on how EMI schemes are operating, and whether and how participation should be expanded to ensure EMI schemes provide support for high-growth companies in recruitment and retention of the best talent. They also requested examining whether more companies and employees should be able to access this type of tax-advantaged equity arrangement. The government's Spring Statement 2022 notes the government concluded that the current EMI scheme remains effective and appropriately targeted, but also that the review's scope will be expanded to consider if the other discretionary tax-advantaged share scheme in the UK, the Company Share Option Plan, should be reformed to support companies as they grow beyond the scope of EMI schemes.

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