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EUROPEAN EMPLOYMENT LAW BRIEFING

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CASES

Breach of a no show clause in an employment contract may entitle the employer to liquidated damages, provided it is not a penalty clause.

In *Tullett Prebon Group Limited v Ghaleb El-Hajjali*, the employee entered into a contract of employment with Tullet Prebon, a leading inter-dealer broker. The contract had been negotiated over a period of 6 months. Based upon detailed discussions and assessments between Mr El-Hajjali and Tullet Prebon remuneration figures were negotiated.

The contract contained a "no show" clause providing for a fixed amount of damages to be paid ("liquidated damages") if the prospective employee failed to start work. The no show clause was drawn to Mr El-Hajjali's attention and he also received independent legal advice. Before starting work Mr El-Hajjali decided to remain with his original employer. Tullet Prebon attempted to replace him but was unsuccessful.

Tullet Prebon sued for liquidated damages under the no show clause. The issue for the court to determine was whether or not the no show clause was a liquidated damages clause or a penalty clause: if a penalty it would be void and unenforceable. Tullet Prebon's lost profit was estimated to be between £2.5 million and £3.7 million and the amount due under the no show clause was £300,000.

The court held that the clause was enforceable, and not a penalty. Only if the amount stipulated was unconscionable in comparison to the greatest loss that could conceivably follow a breach should it be construed as a penalty. On the facts the stipulated sum was not unconscionable: Tullet Prebon suffered loss of profit in excess of the sum stipulated in the no show clause. Even though the no show clause was designed to deter employees from breaching their obligations this alone would not be enough to render the clause a penalty.

What do employers need to consider?

Employers using no show clauses should ensure that the damages which can be claimed are not excessive compared to the likely loss to be suffered.

A springboard injunction may be granted to prevent mass poaching of employees and customers pending a full trial.

In *UBS Wealth Management (UK) Ltd and another ("UBS") v Vestra Wealth LLP and others* ("Vestra") Mr Scott, an employee of UBS, resigned and UBS sought to enforce restrictive covenants. It was agreed that Mr Scott was bound by the restrictive covenants which were due to expire four months later. Shortly after the expiration of the restrictive covenants Mr Scott founded a new business, Vestra. A year after resigning from UBS Mr Scott gave UBS 52 letters of resignation from employees of UBS. In the following months a further 23 employees of UBS resigned and accepted employment with Vestra.

UBS commenced proceedings against Vestra and others for unlawful conspiracy and sought an interim injunction from the High Court pending trial. The court granted a springboard injunction against Vestra until the trial. It held that it was likely that UBS would be able to establish a strong case against Vestra. There was evidence to suggest that the mass resignation encouraged by Mr Scott was discussed amongst the former employees and was, in breach of their implied duty of fidelity, an attempt to sabotage UBS's business. The court added that the mass poaching was likely to be found to be "an unlawful conspiracy dressed up as lawful competition". This matter has now been settled between the parties.

What do employers need to consider?

A springboard injunction prevents employees (or their new employer) from making use of their earlier wrongdoing to gain a head start in competition with the former employer. It has mainly been used where confidential information has been misused, but here it protected UBS by preventing Vestra from doing business with certain UBS clients until trial of the action not because of misuse of confidential information, but because of the alleged conspiracy and breaches of the duties of fidelity.

A criterion of length of service in a redundancy assessment is not unlawful age discrimination.

In *Rolls Royce Plc v Unite the Union*, Rolls Royce entered into a collective agreement relating to redundancy. The agreement provided for a redundancy matrix with an assessment process for the purposes of selecting the employees for redundancy. There were five measured criteria and each employee received a point for every year's continuous service. Unauthorised absences produced a negative point which was deducted from the employee's total. Those with the least points were selected for redundancy.

The employer and the union brought proceedings to determine whether the length of service criterion in the redundancy matrix was unlawful age discrimination pursuant to the Employment Equality (Age) Regulations 2006, because it treated older employees more favourably.

The High Court held that it was a legitimate business aim and in both parties' interests that a redundancy exercise should be carried out in a way which was perceived as fair and could be executed 'peaceably'. The criterion of length of service had respected the loyalty and experience of older members of the workforce. For those reasons the court ruled that the length of service criterion in the redundancy matrix did not amount to unlawful age discrimination: it was a proportionate means of achieving a legitimate aim.

What do employers need to consider?

Since age discrimination became unlawful in 2006 most employers have abandoned "last in first out" as a redundancy selection criterion. This case shows that there can be circumstances where length of service may be taken in into account.

National rules on retirement ages are subject to age discrimination provisions and must be objectively and reasonably justified.

In *R (on the application of the Incorporated Trustees of the National Council on Ageing)("Heyday") v SS for Trade & Industry*, Heyday commenced proceedings in the High Court seeking judicial review of the Employment Equality (Age) Regulations 2006 ("Regulations"). Heyday sought a declaration that the Regulations fail to conform to the UK's obligations under the Council Directive 200/78/EC establishing a general framework for treatment in employment and occupation ("Directive"). The claim concerns Regulation 30 of the Regulations, which enables an employer to forcibly retire an employee aged 65 or over, prohibiting such employees from claiming unlawful age discrimination.

The court decided to stay the proceedings and refer to the European Court of Justice ("ECJ") for a preliminary ruling on the interpretation of the Directive. The Advocate General has delivered his opinion, stating that national rules on retirement ages do fall within the scope of the Directive and are therefore subject to age discrimination. In addition, he advised that there is no requirement for national law to list types of treatment which may amount to justification. The Advocate General also stated that

there is no significant difference between the test for justification in respect of direct and indirect discrimination. If the ECJ agrees with the Advocate General it will be for the English court to determine whether Regulation 30 is, in fact, objectively and reasonably justified.

What do employers need to consider?

Until this matter is finally decided by the English court all similar cases under Regulation 30 of the Regulations referred to employment tribunals will be stayed.

Less favourable treatment or harassment of an individual on the grounds of associative discrimination is unlawful.

In *Coleman v Attridge Law and Law,* Ms Coleman was employed as a legal secretary. During her employment Ms Coleman gave birth to a disabled son who required her specialised care. Ms Coleman accepted voluntary redundancy and shortly after lodged a claim in the Employment Tribunal alleging unfair constructive dismissal and less favourable treatment on the grounds that she was the primary carer of a disabled child.

The Tribunal decided to stay proceedings and refer to the European Court of Justice for a preliminary ruling on the interpretation of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ("The Directive"). The question referred to the court was whether the Directive and its principles apply equally to "associative" disability discrimination.

The court ruled that the purpose of the Directive is to combat all forms of discrimination on the grounds of disability. The court held that whilst the Directive includes several provisions which only apply to disabled individuals this alone does not preclude the principle of equal treatment and prohibition of direct discrimination applying equally to protect employees against associative discrimination. The effectiveness of the Directive would be undermined if these principles did not protect an individual who had suffered less favourable treatment on the grounds of associative disability discrimination. The court ruled that the Directive also prohibits harassment on the grounds of associative discrimination.

What do employers need to consider?

This case shows the broad scope of the disability discrimination and harassment provisions in the Disability Discrimination Act 1995.

Employers who fail to address problems of employee ill health and stress at work may be held responsible for psychiatric injury subsequently suffered by that employee.

In *Dickins v O_2 PLC* ("O_2"), Ms Dickins was promoted to regulatory finance manager but received no training. She began to suffer from irritable bowel syndrome caused by stress. Ms Dickins became increasingly stressed and requested a less demanding job but was told that there were no vacancies. Subsequently, she was signed off work with anxiety and depression. She did not return and her employment was terminated.

Ms Dickins commenced proceedings in the County Court against O_2 for psychiatric injury negligently caused by O_2. The court held that O_2 was liable for negligently causing psychiatric injury by putting her under excessive stress.

O_2 appealed to the Court of Appeal which held that where an employer is faced with a clear warning of impending illness it is under a duty to act accordingly. The court found that there was sufficient evidence to prove that O_2 were aware of Ms Dickins' health problems. The mere fact that O_2 had suggested Ms Dickins receive counselling was not an adequate response. The court held that Ms Dickins' problems could only

have been dealt with through management intervention, which O_2 had failed to do. The court added that since Ms Dickins had warned O_2 of her impending ill-health she had passed some responsibility to them. The court concluded that O_2 was negligent in failing to address Ms Dickens' ill health and dismissed the appeal.

The exclusion of certain employment benefits for part time support cabin crew may indirectly discriminate against women.

In *British Airways Plc ("BA") v Grundy*, Mrs Grundy was one of a predominantly female group of flight attendants known as support cabin crew. Mrs Grundy was employed only on days for which she volunteered and on which BA needed her. Support cabin crew received different and less favourable treatment and were excluded from pay rises, accrual of seniority, holiday pay, sick pay and pension rights.

Mrs Grundy commenced a claim for indirect discrimination in the Employment Tribunal. The tribunal held that there was indirect discrimination because the practice of excluding certain employment benefits from support cabin crew was a detriment to a larger proportion of women than men. BA appealed and their appeal was rejected on the grounds that there was indirect discrimination which was not justified.

LEGISLATION

	Effective from	**Legislative Change**
Employers Liability Insurance	01/10/2008	Employers no longer need to keep their employer liability insurance certificate for 40 years Employers can make their liability insurance certificate available electronically as long as it is reasonably accessible to relevant employees
Maternity & Adoption Leave	01/10/2008	Employees on maternity and adoption leave are entitled to receive all contractual non-remuneration based benefits throughout the full term of their maternity or adoption leave
Sick Pay: Agency Workers	27/10/2008	Agency workers with contracts of not less than 3 months will now be entitled to statutory sick pay

EMPLOYMENT BILL 2008

The Employment Bill 2008 is currently being debated and is scheduled to reach the report and third reading stage in the House of Commons on 4 November 2008. The Bill, as originally published, will make the following amendments to the Employment Act 2002:

- Repeal the statutory dismissal and grievance procedures contained in the Employment Act 2002.
- Repeal section 98A of the Employment Rights Act 1996 concerning procedural fairness.
- Give employment tribunals discretion to increase or decrease awards by up to 25% if an employer unreasonably fails to comply with a Code of Practice.

- Amend the employment tribunal's powers to reach a determination without a hearing.
- Extend ACAS's powers of conciliation and remove the fixed conciliation periods.
- Amend methods of enforcing national minimum wage and calculating arrears.
- Make changes to the employment agency standards enforcement regime.
- Amend trade union membership law to ensure UK law enables trade unions to exclude current or former members of particular political parties from membership.

If you have any questions concerning the material discussed in this client alert, please contact the head of our European employment team:

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