Employment Round-Up

February 2014

Our monthly review of key cases and new law affecting employers

Flexi-hours scheme: no payment in lieu of accumulated hours on termination

Decision: The EAT overturned an Employment Tribunal's decision that an employee, who was not paid on termination of employment for extra hours worked under a flexi-hours scheme, had suffered an unlawful deduction from wages. In a majority decision, the EAT held that in the absence of an express term in the scheme regarding payment on termination, the Employment Tribunal was incorrect to imply a term that the employee was entitled to be paid for accrued hours that he had not taken off in lieu. In the majority's view, it was not necessary for the purposes of business efficacy to imply such a term and it was not a term which both parties would have agreed to when entering into the contract.

Impact: Employment contracts should ideally provide that employees will not permit flexi-hours to build up beyond a certain level, given the obvious difficulties that will arise if the contract is then terminated. More importantly, employers should specify what will happen when the contract ends, and whether flexi-hours will be paid for. This case also serves as a helpful reminder that where the Courts are looking at implying terms into a contract of employment, they can do so only in relatively limited circumstances.

Vision Events (UK) Limited v Paterson

Enforceability of restrictive covenants and guidance on the meaning of 'garden leave'

Decision: The High Court held that a restrictive covenant which sought to prevent a former employee from working for a competitor for six months following the end of his notice period was not enforceable. The covenant was too widely drawn and went beyond protecting the legitimate business interests of the employer. It was therefore in restraint of trade. In reaching this decision, the Court also held that the employee was not on garden leave during his notice period, with the result that a provision in the contract allowing the period of restraint to be reduced by time spent on garden leave did not apply.

Impact: The temptation when drafting a non-competition clause might be to ensure that it is as comprehensive as possible. This case illustrates that this approach may lead to a clause that cannot be enforced at all by the employer. When drafting non-compete restrictive covenants, clauses should focus on activities which would involve the employee directly competing with their old employer. By being drafted more widely than that, as was the case here, an employer risks rendering a non-compete restrictive covenant useless (although it may still be possible to rely on various non-solicitation and confidentiality clauses).

It is a relatively common contractual term to allow an employer to put an employee on garden leave or to give them alternative roles or alternative work during a notice period. Employers are generally well aware that they cannot give an employee manifestly unsuitable or demeaning work as an alternative to garden leave. However, it would be a worrying trend if courts were to start finding that restrictive covenants, which apply in respect of areas of business undertaken by an employee during the last twelve months of employment, are rendered invalid because an employee can be asked to work in a different area of the business during the notice period. Although this case does not go this far, it may be that arguments along these lines are developed in subsequent cases.

Ashcourt Rowan Financial Planning Limited v Hall

Is there a clear dividing line between 'holding' and 'manifesting' a religious belief?

Decision: The EAT dismissed the claim of an employee who alleged unlawful religious discrimination. She was dismissed after holding an unauthorised training session, at which manifestations of her religious beliefs led to various complaints by staff. The EAT agreed with the Employment Tribunal that the Claimant was not treated adversely because of her religion but because of the way she had manifested her faith.

In reaching its decision, the EAT noted that there is no clear dividing line between holding and manifesting a belief. In the past it had been thought that employees could not be treated adversely for holding a belief but that a different approach might apply to manifesting a religious belief at work. This case shows that there is no such clear dividing line. Unjustified unfavourable treatment because an employee has manifested his or her religion may amount to unlawful discrimination.

Impact: This case highlights the fact that both the right to hold a religious belief, and the right to manifest it, are capable of being protected. However, in this case the EAT made it clear that the employee was dismissed because of the way in which she manifested her religion rather than the fact of manifestation of the religion itself.

Employers are not necessarily entitled to prevent employees manifesting their religion at work. However, employers would be well advised, when restricting manifestations of religious or philosophical belief, to tread cautiously to ensure that they are able to justify the interference, even when employees are unable to claim unfair dismissal. However, if on a sensible and objective review, the manifestation of a belief is causing problems for other members of staff, this may form the basis for an employer curbing or otherwise restricting inappropriate manifestations of that belief at work.

Grace v Places for Children

Please speak to your usual contact in the Employment Group if you have any questions on any of the issues in this update.

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