Employment Round-Up

December 2014

Our monthly review of key cases and new law affecting employers

Consideration isn't just for Christmas, it's for covenants too...

This recent High Court case considered a number of claims, including whether a senior employee with many years' service was bound by post-termination restrictive covenants agreed by him during the course of his employment. The decision is a reminder for employers, as it is a reminder that even if an employee signs up to restrictions, they will not be binding unless some form of consideration is given by the employer in return for the employee's agreement to the restrictions.

The background

Mr Sendall worked for a glass recycling business, which had been the Sendall family business since 1922. In 2000, it was bought by Re-Use and the business left the Sendall family's control as a result of the buyout. However, Mr Sendall continued to work for Re-Use following the sale.

At the end of 2012, Mr Sendall was asked to sign a new employment contract. He had not previously had a contract of employment with Re-Use and this contract included post-termination restrictions preventing competition and misuse of confidential information. Mr Sendall did not sign the employment contract in 2012 and a number of discussions were had before he finally did agree to sign it, in February 2013.

Whilst employed by Re-Use in January 2013, Mr Sendall was involved in setting up a competing business with his two sons, May Glass Recycling Ltd. In March 2013, Mr Sendall gave three months notice of resignation. However, in April 2013, Re-Use claimed that Mr Sendall was in regular contact with clients who he actively involved in his plans to set up the competing business. Mr Sendall, on the other hand, states that all that he had agreed to do was to provide finance to enable his sons to establish this competing business. He argued that his sons were perfectly entitled to do this, especially since they had no restrictions on their post-employment conduct (they had already left Re-Use's employment).

Re-Use began an investigation into Mr Sendall's activities and suspended him with immediate effect pending the outcome of the disciplinary proceedings. In May 2013, Re-Use's solicitors wrote to Mr Sendall setting out its case and seeking his undertakings to:

(a) abide by his express post-termination obligations; and

(b) not operate May Glass or contact Re-Use's customers, whether by himself or by his sons, for a period of 12 months, failing which it would apply for an injunction.

Mr Sendall argued that his post-termination contractual restrictions did not bind him.

The decision

The court had to consider a number of issues, including whether Mr Sendall had breached his fiduciary duties and/or his contractual duties. However, for the purposes of this update, the focus will be on the restrictive covenants and what constitutes proper consideration for post-termination restrictions to be enforceable.

Re-Use argued that the restrictive covenants contained in Mr Sendall's employment contract were supported by consideration, as Mr Sendall received both a pay rise and a bonus in connection with agreeing the restrictions. In addition, Re-Use argued that the restrictive covenants were introduced as part of a package under which various benefits were conferred upon Mr Sendall. Re-Use also contended that Mr Sendall's continued employment amounted to valid consideration.

Mr Sendall argued that the pay rise he received was not linked to the restrictive covenants contained in his employment contract. Re-Use were unable to provide any evidence that the pay rise offered to Mr Sendall was contingent on him accepting the restrictive covenants and signing his employment contract. In fact, the evidence was to the contrary – the pay rise was not actually referenced in the employment contract offered to Mr Sendall. There was no reference, express or implied, that the pay rise was conditional upon him entering into the new contract of employment. Similarly, Re-Use's new enhanced bonus structure was not presented to Mr Sendall as being only payable if he signed up to the new contract. Consequently, the court determined that neither the pay rise nor the bonus could be said to constitute valid and proper consideration to support the new restrictive covenants.

Mr Sendall also argued that many of the other 'new' benefits that Re-Use argued constituted consideration in the employment contract were benefits that he already enjoyed prior to signing the new contract. The court held that, although the employment contract did contain an addendum of benefits, most were indeed already enjoyed by Mr Sendall and could therefore not amount to substantial new consideration. The court was also not receptive to Re-Use's continued employment argument. The court concluded that continued employment is not sufficient consideration where a long-serving employee is being asked to accept new, substantial contractual restrictions. Given that Mr Sendall was unlikely to be dismissed – or subject to any other disciplinary action – were he to refuse to sign the new contract, the court determined that continued employment could not constitute adequate consideration. The court held that it is an established principle that where an employer seeks to impose substantial new obligations on an employee, it will be required to show *"some real monetary or other benefit (promotion for example) conferred on the employee for the purpose of causing the employee to agree the restrictive covenant and that it must be substantial and not nominal"*.

The impact

This case highlights the importance of providing substantial consideration when asking employees to sign up to restrictive covenants or indeed during any re-contracting exercise. It also serves as a useful reminder of the need to expressly tie any such consideration to the employee's acceptance of the new contract and/or restrictive covenants. An employer should establish a clear link between any benefit offered (be it promotion, salary increase, bonus etc) and the restrictive covenants, ideally by making the consideration conditional upon the acceptance of the covenants.

Employers must not assume that by merely signing the employment contract, the employee will be bound by its terms. As this case demonstrates, it is quite the opposite. Although promotions and pay rises both offer the ideal opportunity to get new contracts signed up, this decision shows how important it is to directly link these benefits to, and make them contingent on, the employee signing up to the new covenants.

As to the argument in this case of continued employment amounting to proper consideration, this can be a useful argument for an employer to run where they do not propose to offer any new benefits or consideration to the employee in return for their acceptance of the covenants. However, to be successful in this approach, the employer would have to be prepared to dismiss the employee if they objected to signing up to the new restrictive covenants. For many employers, this will be quite an unappealing approach to ensuring their restrictive covenants are enforceable. Ultimately though, whatever route the employer decides to take, this case highlights the significance of documenting the basis of any consideration that the employer is seeking to rely on. The employer will always need to be able to demonstrate the link between the consideration offered by the employer and the acceptance of the new contractual restrictions by the employee.

Re-Use Collections Limited v Mr Keith Sendall & May Glass Recycling Ltd [2014] EWHC 3852 (QB)

Employment legislation timetable

2014 ONWARDS

2014/2015 tax year	**Pension reform and rise in personal allowance** The Chancellor announced major changes to the way that members of defined contribution pension schemes can access their pensions savings. From April 2015, members at normal retirement age will be able to access their pension fund in full without the need to purchase an annuity. The personal allowance for those born after 5 April 1948 will rise from its previously announced level of £10,000 for 2014-15 to £10,500 for 2015-16. At the same time, the basic rate limit will be reduced from £31,865 to £31,785. However, this represents a tax saving for all taxpayers, as the higher rate threshold will increase by 1% in each of those two years.
31 January 2014	**Proposal to change TUPE Regulations** Having previously proposed to completely remove the service provision change rules, the Government has now confirmed that the current rules will remain in place. However, an amendment to TUPE will be made to make clear that the activities carried on after the change in service provision must be "fundamentally or essentially the same" as those carried on before it. The majority of changes came into force on 31 January 2014 with others taking effect at a later date: • the 14 day time limit to provide employee liability information was extended to 28 days from 1 May 2014; and • since 31 July 2014, micro-businesses are allowed to inform and consult affected employees directly when there is no recognised union or representatives.
6 April 2014	**Financial penalties for employers for breach of employment rights with 'aggravating features'** Employers who lose an employment tribunal case will pay a financial penalty if the breach of the employment right in question has "one or more aggravating features".
6 April 2014	**Early conciliation to be required before claim can be made** ACAS introduced its new mandatory early conciliation process. The new system was brought into force under provisions contained in the Enterprise and Regulatory Reform Act.
6 April 2014	**Discrimination Questionnaires to be abolished** Section 66 of the Enterprise and Regulatory Reform Act 2013 repealed section 138 of the Equality Act 2010 to abolish statutory discrimination questionnaires.

6 April 2014	**Unfair dismissal and redundancy payments to rise** The maximum compensatory award for unfair dismissal rose from £74,200 to £76,574. The maximum amount of a week's pay, used to calculate redundancy payments or various awards has risen from £450 to £464.
7 April 2014	**Increase to the levels of statutory maternity, paternity and adoption pay** The standard rates for statutory maternity pay, statutory paternity pay, additional statutory paternity pay and adoption pay went up from £136.78 to £138.18.
6 May 2014	**Early conciliation made mandatory** The mandatory early conciliation provided for in the Enterprise and Regulatory Reform Act came into force.
30 June 2014	**Extension of the right to request flexible working** The Flexible Working Regulations came into force on 30 June 2014. Under the new Regulations a request for flexible working must be made in writing, be dated and state whether the employee has previously made a request. A request is made on the day it is received by the employer. There is a requirement for 26 weeks' continuous service to make a request. The right to flexible working has been extended to all employees (with the requisite service). The employer must notify the employee of its decision within three months, unless an extension is granted.
Autumn 2014	**Extreme tactics in industrial disputes review** On 4 April 2014 the government launched an independent review into the law governing industrial disputes (alleged use of extreme tactics and the effectiveness of current law preventing inappropriate or intimidatory actions in trade disputes). A report will be published in Autumn.
1 October 2014	**National minimum wage increases** The government accepted the recommendations of the Low Pay Commission and announced increases in the national minimum wage. The standard adult rate (for workers aged 21 and over) will rise by 3%, the youth development rate (for workers aged between 18 and 20) by 2% and for young workers (for workers aged under 18 but above the compulsory school age who are not apprentices) by 2% as well.
1 October 2014	**Compulsory pay audits following breach of equal pay law** The Government will introduce regulations giving tribunals the power to order an employer to carry out an equal pay audit where it is found to have breached equal pay law.
1 October 2014	**Children and Families Act 2014.** This Act will create rights for eligible employees and agency workers to take unpaid time off work to accompany a pregnant woman to two antenatal appointments, up to a maximum of six and a half hours for each appointment.

To be introduced late 2014	**Fit For Work** The government will introduce the Health and Work Service on a phased basis from late 2014. It is expected to be fully up and running by May 2015 and provide a state funded assessment by occupational health professionals for employees who are off sick for four weeks or more. It will also provide case management for employees with complex needs to facilitate their return to work.
20 November 2014	**Deregulation Bill 2014-15** The key employment-related provisions in this Bill involve: • amendments to the Health and Safety at Work Act to exempt the self-employed from health and safety law if they have no employees and do not conduct a "prescribed undertaking".; • amendments to the Equality Act to remove the employment tribunals' power to make wider recommendations in successful discrimination cases; and • the introduction of the concept of an "approved English apprenticeship" under an "approved English apprenticeship agreement". These will replace "apprenticeship agreements" introduced under the Apprenticeships, Skills, Children and Learning Act 2009.
2014-2015	**Childcare payments** The Childcare Payments Bill introduces a new tax-free childcare scheme to support eligible parents with childcare costs. It was mentioned in the Queen's Speech 2014. Key areas include: • The Government would provide 20 per cent support on costs up to £10,000 per year for each child via an online account. • The Government would top up any payments made into the account, capped at a maximum Government contribution of £2,000 a year for each child. The government published draft guidance on its tax-free child care scheme on 16 October and it and the scheme is scheduled to commence in Autumn 2015.
7 January 2015	**Draft Small Business, Enterprise and Employment Bill 2014-2015.** This covers a number of areas of legislative reform, the stated aim of which is to reduce the barriers that can hamper the ability of small businesses to innovate, grow and compete. The committee stages of the Bill will take place on 7 January 2015 and the Bill covers a number of key employment areas: • Whistleblowing: annual reporting (gives the Secretary of State the power to make regulations requiring "prescribed persons" to produce annual reports of whistleblowing disclosures, but without identifying the workers or employers or other person whom the disclosure was made); • Enforcement of tribunal awards and settlements; • Postponement of tribunal hearings; • Penalty for underpayment of the national minimum wage; • Zero hours contracts; • Directors: Companies Act amendments; and • Public sector exit payments.

16 January 2015	**Low Pay Commission (National Minimum Wage) Bill 2014-15** A Private Members' Bill to require the Secretary of State to: • Set a target for the Low Pay Commission to increase the minimum wage during the term of a Parliament. • Require the Low Pay Commission to write to the Secretary of State if this target cannot be met. • To require the Secretary of State to ensure that the Low Pay Commission has the power to set up taskforces in certain sectors; and for connected purposes • Second reading on 16 January 2015
23 January 2015	**Zero Hours Contracts** It is not clear yet whether this Zero Hours Contracts Bill 2014-15 replicates the terms of the 2013-14 Bill that aimed to prohibit the use of zero-hours employment contracts but failed to complete its passage through Parliament before the end of the 2013/2104 session and did not progress. The Second reading of the 2014/15 Bill began on 21 November 2014 but was adjourned and is expected to resume on 23 January 2015.
5 April 2015	'Flexible' maternity and paternity leave to come into force The Children and Families Act 2014 inserts new sections into the Employment Rights Act 1996 to introduce a new system of shared parental leave, the detail of which is to be set out in regulations. Eligible employees will be entitled to a maximum of 52 weeks' leave and 39 weeks' statutory pay upon the birth or adoption of a child, which can be shared between the parents. The new statutory provisions are due to come into force on 1 December 2014 and the SPL Scheme will apply to babies due on or after 5 April 2015.
5 April 2015	**The Draft Paternity and Adoption Leave (Amendment) Regulations 2014** These Regulations will amend the Paternity and Adoption Leave Regulations 2002, partly as a result of the forthcoming right to Shared parental leave. The key changes are: • Removal of the 26-week qualification period for entitlement to adoption leave. All employed adopters will be eligible to take paid leave from day-one of employment, just like maternity leave. • Rights not to suffer detriment for individuals who exercise the right to time off for antenatal or adoption appointments. • Employees will not be able to take paternity leave if they have exercised a right to take paid time off to attend an adoption appointment in respect of that child. • Employees will not be able to take paternity leave in relation to a child if they have already taken shared parental leave in relation to that child from 1 December 2014.

Summer 2015	**Caste Discrimination** Section 97 of The Enterprise and Regulatory Reform Act amended the Equality Act 2010 to enable the government to provide that caste is an aspect of race, therefore making caste discrimination unlawful. However, the Government Equalities Office announced in July 2013 that before this power is implemented, there would be a full public consultation in order to make sure that the legislation is appropriate and fit for purpose. It is anticipated that a draft order will be introduced by the summer of 2015.
6 April 2016	**Minimum pay threshold for migrants wanting to settle in the UK** The Government plans to introduce a minimum pay threshold of £35,000 a year for skilled workers under the Tier 2 (general) and Tier 2 (sportsperson) immigration routes who want to settle in the UK
November 2018	**Equalisation of state pension age for women** The state pension age for women will be equalised with the state pension age for men by November 2018. The equalisation timetable for women started increasing from 6 April 2010 in order to account for this change.
March 2019	**State pension age rises to 66 years** The Pensions Act raises the state pension age from 65 to 66 years to reflect the ageing nature of the population. The rise in the state pension age to 66 for men and women begins gradually from March 2019 until September 2020.

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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