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Work Matters

Employment Law News

In this issue

Increase in Compensation Limits

For dismissals that take place after 1 February 2008:

- a week's pay (for the purposes of calculating the basic award in unfair dismissal cases and statutory redundancy payment calculations) is capped at £330; and
- the maximum compensatory award for unfair dismissal is capped at £63,000.

The previous limits were £310 and £60,600 respectively.

Unfair Dismissal and Ill-Health Retirement

In *First West Yorkshire Limited v Haigh* the EAT held that, where an employer provides an enhanced pension on retirement through ill-health, it must consider whether an employee is entitled to the benefit of such scheme prior to dismissal for long-term sickness.

Mr Haigh was a bus-driver for First West Yorkshire Limited ("the Company"). He worked for the Company for almost 30 years. Following a suspected stroke, he was signed off sick from work in June 2005, and his driving licence was suspended for 12 months. Mr Haigh had a second attack in October 2005, and it was unlikely that he would reclaim his licence before his 60th birthday in October 2006.

Mr Haigh was dismissed on notice in November 2005. He appealed, and his final appeal was held on 24 February, despite the fact that the Company had not yet received the specialist medical report sought by its own occupational health adviser.

At his appeal, Mr Haigh was given an ultimatum — either his dismissal would be upheld, or he could remain an employee (albeit unpaid save for a short period of sick pay) until his "voluntary" retirement at age 60. However, this was on the proviso that Mr Haigh agreed to not make any application for an ill-health pension (which would have required the Company to make an additional payment to the pension fund). Mr Haigh rejected the Company's terms and was dismissed.

The Employment Tribunal held that Mr Haigh was unfairly dismissed. It repeatedly criticised the Company for its failure to properly consider the medical evidence before holding that the dismissal was unfair "quite simply [because] it appears that the company wanted to avoid the cost of the Claimant taking ill-health retirement".

The EAT upheld the Employment Tribunal's decision. It held that, where an employee is absent on long-term sick, dismissal will generally be fair provided that the employer:

- took reasonable steps to consult the employee;
- obtained appropriate medical evidence as to the nature and prognosis; and
- considered alternative employment.

BUT where an employer provides an enhanced pension on retirement through ill-health, it will also be expected to take reasonable steps to determine whether the employee is entitled to the benefit of ill-health retirement before deciding to dismiss.

Accordingly, where an employee is long-term sick, employers must not only consider whether dismissal may deprive the employee of his or her rights under any permanent health insurance policy (as to dismiss in such circumstances could lead to a substantial damages claim for loss of PHI benefits). They must also consider whether the employee may be eligible for ill-health retirement. Otherwise, an employer risks a finding that the dismissal is unfair together with a potentially significant award of compensation.

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Retirement of Partners Not Unlawful Age Discrimination

Whilst the Employment Equality (Age) Regulations 2006 allow for the compulsory retirement of employees, they do not provide for the retirement of partners (including members of an LLP) or directors. Accordingly, there has been significant debate as to how (if at all) an organisation may lawfully retire such persons.

However, the Employment Tribunal, in *Seldon v Clarkson, Wright and Jakes*, has held that the compulsory retirement of a law firm's former senior partner at 65 was not unlawful discrimination.

In common with many partnerships, Clarkson, Wright and Jakes ("the Firm") had made express provision in its partnership deed for the retirement of partners. However, whilst the Employment Tribunal took account of the fact that all partners (including Mr Seldon) had agreed to the terms of the partnership deed, it held that this was not conclusive in demonstrating (as required by the Regulations) that compulsory retirement was not unlawful age discrimination by virtue of being a "proportionate means of achieving a legitimate aim".

The Employment Tribunal therefore considered various factors put forward by the Firm as justifying compulsory retirement. It accepted the following factors as legitimate aims:

- associate retention;
- long-term partnership and departmental planning;
- limiting the need to expel partners by way of performance management (**but** this aim is likely to be limited to smaller, more collegiate firms where performance management is not appropriate); and
- encouraging employees and partners to make adequate financial provision for their retirement (albeit that, on the facts, this did not apply in this particular case).

The Employment Tribunal found that there was no non-discriminatory alternative to compulsory retirement and concluded that compulsory retirement was a proportionate means of achieving associate retention and limiting the need for performance management.

This case provides some comfort to partnerships and LLPs seeking to retire their partners even though each case must be considered on its own particular facts. However, it also highlights the need to objectively justify any compulsory retirement age. We strongly recommend that any discussions regarding retirement age be carefully documented and the reasons justifying compulsory retirement clearly set out.

Competing Ex-Employees Breach Employer's Database Right

In *Crowson Fabrics Limited v Rider and Others*, the High Court held that two ex-employees who copied and retained information that their employer regarded as confidential during their employment had not breached their duty of confidentiality, because the information was obtainable in the public domain. However, the High Court also held that, by extracting that information from their employer's database, the employees had breached their employer's database right.

The Copyright and Rights in Databases Regulations 1997 introduced the concept of the "database right" in the UK. A database right exists if there has been "a substantial investment in obtaining, verifying or presenting the contents of the database". The employer will usually be the first owner of the database right in a database that it has created. A person infringes a database right if, "without the consent of the owner of the right, he extracts or re-utilises all or a substantial part of the contents of the database".

Mr. Rider and Mr. Stimson (the defendants) were employees of Crowson Fabrics Limited (Crowson). The defendants left Crowson in June 2007 to set up a competing company, Concept Textiles Limited (Concept). During their notice periods, they took various steps to set up Concept, and Mr Stimson emailed Crowson's customers to solicit custom. On leaving Crowson, the defendants took with them various information including, most importantly, a "Supplier Bible" which contained the names, addresses and contact details for most of Crowson's suppliers. Mr. Stimson also emailed a number of email addresses from Crowson's Outlook system to his Concept email account.

Neither of the defendants was subject to any post-termination restrictive covenants or any express duty of confidentiality.

Crowson claimed that, in taking that information, the defendants were in breach of their duty of fidelity and their implied duty not to copy, remove or misuse any of Crowson's confidential business information with a view to using it in a competing business. It also claimed that the defendants had breached its database right by transferring information from Crowson's database onto Concept's computer system.

For the most part, the defendants did not dispute Crowson's allegations but instead argued that what they had done was not actionable because:

- the information that they had taken was not confidential as it was in the public domain;
- they had acquired this information during the course of their employment and, it now being part of their own knowledge and expertise, Crowson could not therefore prevent them from using it post-termination;
- they were entitled to do the preparatory acts whilst serving out their notice; and
- there had been no copying of Crowson's database, as it had made minimal use of the data.

The High Court held that, although the information was not confidential, the defendants had breached their duties of fidelity (and Mr. Rider, as a director, had breached his fiduciary duty) by making illegitimate use of that information. More importantly, it also held that the defendants had infringed Crowson's database rights by:

- transferring information from Crowson's database onto Concept's computer system; and
- sending email addresses from Crowson's Outlook account to a Concept email address.

The High Court saw no merit in the defendants' argument that it was the extent to which Concept had used the information that was relevant. Instead it held that it was the "extraction" of this information which breached the database right.

This case illustrates the importance of ensuring that employees who are exposed to confidential information are subject to express duties of confidentiality and post-termination restrictive covenants preventing competition where possible and appropriate. It also highlights the potential scope for employers to rely on database rights, where ex-employees have extracted or used information which is not strictly confidential.

Changes to Immigration Rules

As of 29 February 2008, the penalties for illegally employing foreign nationals significantly increased. The measures, which are contained in the Asylum and Nationality Act 2006, include:

- a new system of civil penalties for employers who employ illegal migrants — the penalty for each illegal worker is £10,000; and
- a new criminal offence for employers who knowingly employ illegal migrants, which carries an unlimited fine or a maximum two year prison sentence.

In addition, for those employees with a time-limited immigration status, employers have an ongoing obligation to review their entitlement to work in the UK. Accordingly, whilst employers have a statutory defence from conviction if certain document checks are conducted prior to employment, for those employees with time-limited immigration status the defence is only available if the checks have been conducted on, at least, an annual basis. More information on these requirements and the imminent changes is available from the Border and Immigration Agency website http://www.bia.homeoffice.gov.uk/employers/.

Sickness Absence and the Holiday Bonanza

In 2005 the House of Lords (in the case of *Commissioners of the Inland Revenue v Ainsworth & Others*) decided that employees who have been absent on sick leave:

- for an entire leave year; or
- have not attended work in any part of the leave year

are not entitled to holiday leave under the Working Time Regulations (WTR). The basis for the House of Lords' decision was that an employee on long term sickness absence should not be entitled to leave (or to be paid in lieu) because, if absent from work throughout a holiday year, he or she had nothing to take leave *from*.

Whilst an employer friendly decision, this still left a number of questions unanswered. In particular, the House of Lords did not consider the interaction of contractual holiday and the employee's WTR holiday entitlement. Accordingly, where an employee's contract does not state that holiday ceases to accrue during sickness absence, he or she may assert a contractual entitlement to holiday throughout the sick leave period. That said, the effect of this argument can be significantly reduced where an employee is not permitted to roll over holiday (or has a limited right to do so).

Unfortunately, however, it seems that the tide might be about to turn. This is because the House of Lords in *Ainsworth* chose to refer the question of holiday leave accrual during sickness absence to the European Court of Justice (ECJ). The reference was made because the right to minimum holiday is derived from European law.

The judgment of the ECJ (in the re-named case of *Revenue and Customs v Stringer and others*) has not yet been handed down. However, in accordance with the ECJ's practice, prior to its formal decision an independent lawyer (the Advocate General) delivers an opinion on the case. On 24 January 2008, the Advocate General's opinion was published and, rather surprisingly, she came to the opposite conclusion to the House of Lords. In her view:

- employees' right to holiday does continue during sickness absence;
- however, employees cannot designate a period of their sickness absence as holiday;
- as a result, employees must be able to take that leave when "their capacity for work is restored". Alternatively, when the employment relationship is terminated, the accrued holiday entitlement should be replaced by a payment in lieu;
- consequently, whilst the point is not explicit in the Advocate General's opinion, employees would, if her opinion is accepted, be able to "carry over" their holiday (despite the contrary position in the WTR). Employees would therefore effectively store up their holiday whilst absent due to sickness and, on returning to work, would have the right to take all the holiday which has accrued. Alternatively, if the individual's employment is terminated, he or she would be entitled to be paid in lieu of the "outstanding" entitlement.

Whilst the Advocate General's opinion is not legally binding and might not be followed by the ECJ, it is nevertheless troubling news for employers.

The Advocate General's opinion also has implications for those on maternity leave. She makes it clear that holiday leave, maternity leave and sick leave are distinct periods of leave that cannot overlap. Whilst the Advocate General is not explicit on this issue, it could therefore follow that employees are entitled to take holiday they have accrued whilst on maternity leave upon returning to work. This would presumably be the case even if the employee is then able to roll holiday over. Furthermore, the fact that it is not possible to pay in lieu of WTR holiday could well then present practical problems for employers.

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