GIBSON DUNN

UK Employment Update – January 2021

Client Alert | January 20, 2021

In this update, we look back at the key developments in UK employment law over the course of 2020 and look forward to anticipated developments in 2021.

A brief overview of developments and key cases which we believe will be of interest to our clients is provided below, with more detailed information on each topic available by clicking on the links.

1. **Coronavirus Job Retention Scheme ("CJRS")** (click on link)

In this update we describe the current offering under the CJRS, which is set to remain operational until 30 April 2021.

2. **Vicarious Liability** (click on link)

We consider two decisions of the UK Supreme Court in 2020, which consider vicarious liability in relation to: (i) the actions of a doctor who was found to be an independent contractor; and (ii) the criminal actions of an employee who leaked the personal data of almost 100,000 employees. The "employer" was not held to be vicariously liable in either case.

3. **Transfer of Undertakings** (click on link)

We consider two important decisions from the last year related to the operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) ("**TUPE**") which protect the rights of employees in situations such as the sale of a business as a going concern.

4. **Post-termination Restrictive Covenants** (click on link)

We consider two decisions looking at the enforceability of post-employment restrictive covenants, including a Court of Appeal decision which considered the circumstances in which a new employer would be liable for inducing a breach of contract by a new hire.

We also consider a recent High Court decision which considered the enforceability of restrictive covenants against a recent joiner who left during her probationary period.

5. **Forthcoming Changes** (click on link)

We briefly outline changes to the off-payroll and IR35 system, designed to prevent workers from avoiding tax by operating as contractors, and report on developments in gender and ethnicity pay gap reporting and racial and ethnic diversity in business as well as notable government consultations for employment contracts.

APPENDIX

1. **Coronavirus Job Retention Scheme ("CJRS")**

We have addressed the introduction of and updates to the UK government's CJRS

Related People

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mechanism to support employment levels through the COVID-19 pandemic in past publications; these updates are available on the Gibson Dunn website – March 20, 2020, March 27, 2020, May 18, 2020, June 2, 2020, and webcast of December 1, 2020.

If employers cannot maintain their UK workforce because their operations have been affected by COVID-19, they can put their employees onto "furlough", a temporary leave of absence, and apply for a government grant to cover a portion of the usual wages. There have been various alterations to the finer detail of the CJRS (including the level of contribution to be made by employers as opposed to under grant, changes which took place between August and October 2020) but the essential position at the time of writing is:

- Employees can be put on full-time furlough or "flexible furlough", when employees work part-time and are regarded as being on furlough when they are not working.
- Employers have to pay for hours worked but can claim the grant for hours not worked.
- The grant amounts to the lower of 80% of wage costs or £2,500 per calendar month for those hours.
- Employers must pay for employer national insurance contributions and employer pension contributions on all amounts paid to the employee, including the amount paid by the grant.
- Employers are still free to top up wages, above the level of the grant, if they wish.
- Since 1 December 2020, the CJRS cannot be used for employees who are under notice of termination.

The CJRS is set to run until 30 April 2021. This month the government is due to determine whether employers should contribute more towards employee costs. The government will shortly begin publishing information about employers who claim under the CJRS, in order to deter fraudulent claims.

2. Vicarious Liability

As reported previously, the boundaries to the law on vicarious liability, which determines the circumstances in which an employer will be deemed liable for the acts of its officers and employees, have been expanding. However, two decisions of the UK Supreme Court in 2020 signal limits to this expansion and some helpful clarity for employers.

2.1 Vicarious Liability and Employment Status

In *Barclays Bank plc (Appellant) v Various Claimants (Respondents)*, a bank had engaged a doctor to conduct medical examinations of prospective employees as part of the bank's recruitment process. The Supreme Court held that the doctor was acting as an independent contractor rather than an employee, therefore the bank was not vicariously liable for sexual assaults he was alleged to have committed during these examinations.

The key question for the court was whether the doctor was acting as an independent contractor, carrying on business on his own account, or if his relationship to the bank was akin to employment. In circumstances where the doctor had other clients, remained free to refuse examinations, did not receive a retainer from the bank and carried his own medical liability insurance, it was clear that he was an independent contractor.

2.2 Vicarious Liability and Data Protection

In *WM Morrison Supermarkets plc (Appellant) v Various Claimants (Respondents)*, the UK Supreme Court held that Morrison was not liable for data breaches by an employee who leaked the personal data of almost 100,000 employees.

The employee was authorised to transmit payroll data for Morrison's workforce to its external auditors. He did so, but kept a copy of the data on a USB stick, which he later shared online. The employee has since been criminally convicted for his actions. Some of the affected individuals brought claims against Morrison for misuse of private information, breach of confidence and breach of its statutory duty under the Data Protection Act 1998, for which they alleged Morrison was either primarily or vicariously liable.

The question for the Supreme Court was whether the employee's wrongful disclosure of the data was so closely connected with the task(s) that he was authorised to do that it could fairly and properly be considered to have been done whilst acting in the course of his employment. The Court found that this was not so and that, as a consequence, the employer was not vicariously liable for his actions: the disclosure was part of a personal vendetta by the employee, and the employee was not furthering his employer's business when he committed the wrongdoing.

What this means for employers

Employers will take some comfort from these Supreme Court decisions. The *Barclays Bank* decision confirms that employers are unlikely to be held vicariously liable for the actions of true third party contractors.

The *Morrison Supermarkets* decision also makes clear that employers are unlikely to be held liable for employees' wrongful acts where they are the result of a personal vendetta; the mere opportunity to commit wrongful acts, provided by employment, is insufficient alone to render employers vicariously liable. However, employers should continue to be mindful of the potential vicarious liability under data protection legislation for employees' activities that do satisfy the "close connection" test. Safeguarding personal data and keeping risk of data breaches to a minimum should remain a priority.

3. Transfer of Undertakings

The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("**TUPE**") protect: (i) employees working in a business or undertaking that is in the UK, that is sold or transferred; (ii) employees in Great Britain who carry out activities that are subject to insourcing, outsourcing or transfer to a different outsourced contractor (a so-called "service provision change"); and (iii) those employees who are otherwise affected by that sale, transfer, insourcing or outsourcing. In essence, these employees' contracts of employment are transferred to the recipient of the business, undertaking, or service provision change, who steps into the shoes of the previous employer and must, generally speaking, continue to employ them on their pre-transfer terms and conditions of employment. TUPE also provides other protections for affected employees, including the right to be informed and consulted in advance of a transfer.

3.1 Contractual Changes

Under regulation 4(4) of TUPE, variations to a contract of employment for which the sole or principal reason is the relevant transfer are void (unless certain specific exceptions apply). In *Ferguson and others v Astrea Asset Management Ltd*, the Employment Appeal Tribunal ("**EAT**") held that regulation 4(4) applies to such variations, irrespective of whether they are beneficial or detrimental to the employee. In this case, two months prior to the transfer by way of service provision change from one property management company to another, the owner-directors of the first company varied their own employment terms to their advantage (in particular, guaranteed bonuses of 50% of salary, termination payments of a month's salary for each year worked, and enhanced notice periods). The EAT held that regulation 4(4) rendered these variations void; the second company was not bound by them.

In arriving at its decision, the EAT cited the aim of the Acquired Rights Directive (2001/23/EC) (on which TUPE is based) as safeguarding employees' rights, rather than

improving them, and distinguished earlier case law on the bases that the variation occurred post-transfer and before regulation 4(4) was in force, and the Court of Appeal had not said that advantageous changes could not be declared void.

What this means for employers

In the context of TUPE transfers, the EAT decision provides helpful clarity to transferees on the enforceability of transfer-related contractual changes, confirming that where senior executives attempt tactical pre-transfer changes to their own terms and conditions, transferees will not be bound by the new terms. Difficult questions about whether such a variation is to the benefit or detriment of the employee are not necessary. However, outsourcing agreements should continue to contain provisions to render void any changes to terms and conditions made by the service provider once notice has been served to terminate the contract.

3.2 Long-term disability benefits

In *ICTS (UK) Limited v Visram*, the Court of Appeal considered whether an employee was entitled to benefit from a long-term disability benefits ("**Disability Benefit**") policy when he could not restart his old job, as opposed to taking another appropriate role.

Under the terms of an insurance-backed Disability Benefit scheme, during periods of illness the employee was entitled to two thirds of his salary, with payment being conditional on the employee remaining employed, and to continue until the earlier of his return to work, death or retirement. The Court held that on closer inspection of the terms of the scheme, "return to work" was properly construed as return to the work the employee did before he became sick; had the parties intended that the benefit be available until the employee could return to *any* remunerated full-time work they could have specified this in the terms.

The case also raises the issue of liability for Disability Benefit where an employee has transferred to a new employer under TUPE. The claimant in this case had transferred to a new employer during his long-term sick leave; since employees who transfer under TUPE do so on their existing terms and conditions, including contractual benefits, the transferee employer was liable to provide the benefit until the employee's return to his prior role, his death, or his retirement.

The transferee employer had dismissed the employee during his sickness absence. The employee then succeeded in claims for unfair dismissal and disability discrimination, hence the Employment Tribunal awarded compensation on the basis that benefits under the Disability Benefit plan should have continued until death or retirement. The EAT and Court of Appeal both upheld this finding.

What this means for employers

This case serves to remind employers and their advisors of the importance of specificity in drafting contractual benefit entitlement provisions, and the need to consider the nature of employee's benefits and impact any termination may have on them prior to taking action. It is also a reminder of the full reach of contractual burden transferee employers take on in the context of TUPE transfers and the need to conduct full due diligence to identify potential liabilities around employees off sick and Disability Benefit.

4. Post-Termination Restrictive Covenants

4.1 Restrictive Covenants and Breach of Contract

Post-termination restrictive covenants are commonly included in the contracts of employment of senior and other key employees. Should that employee commit a breach of their restrictive covenants, for example, by joining a competitor in breach of a non-

compete covenant then the new (competitor) employer will not ordinarily be liable to the former employer in respect of that employee's breach. However, should that new (competitor) employer induce that employee to breach the terms of their former contract of employment then both the new (competitor) employer and employee may be liable to the former employer. To bring a claim for inducing a breach of contract, a claimant must show that the third party knowingly and intentionally induced and procured the breach without reasonable justification. The Court of Appeal in *Allen t/a David Allen Chartered Accountants v Dodd & Co,* held that an accountancy firm was not liable for inducing breach of contract when it recruited a tax adviser in breach of his 12-month contractual post-termination restrictions, where the firm had received legal advice in advance of the recruitment that the employee's restrictive covenants were unlikely to be enforceable. The firm was advised that the covenants were unenforceable due to lack of consideration and an unreasonably long duration and that the non-solicitation and non-dealing restrictions "probably" and "on balance" failed, allowing the tax adviser to contact the clients of David Allen, his former employer.

In the High Court the judge found that parts of the restrictive covenants were enforceable and the employee had breached them. However, the accountancy firm had been entitled to rely on the legal advice it had received. David Allen appealed on the grounds that the legal advice received by the accountancy firm had been equivocal, and therefore the new employer was aware that there was a risk that the restrictive covenants would turn out to be enforceable.

In reaching its decision to dismiss the appeal, the Court of Appeal noted that the fact that the legal advice had been equivocal did not prevent the firm from honestly relying on it. It acknowledged that lawyers rarely provide unequivocal advice, and therefore responsibly sought legal advice should be able to be relied upon, even if it later turns out to be incorrect. Further, the required level of knowledge for inducement was that of knowledge of a legal outcome, not just knowledge of a fact. This level of knowledge could not be proven where the numerous breach of contract cases in the courts have shown that it is often difficult to predict legal outcomes. The Court did not opine on legal advice that merely states that it is arguable no breach will be committed, but advice that states it is more probable than not that there will be no breach is enough to rely upon.

What this means for employers

Employers can take comfort in this decision which confirms that they are entitled to rely on legal advice even where it is equivocal. Unless it can be proven that they knew their actions *would* breach the contract, as opposed to "might" breach the contract, liability for inducement to breach will not be made out.

4.2 Restrictive Covenants as Unlawful Restraint of Trade

Post-termination restrictive covenants will only be enforceable in the UK to the extent that they protect a legitimate business interest (such as an employer's trade connections with customers or suppliers, confidential information and maintaining the stability of its workforce) and do so in a manner which is reasonable (lasting no longer and being no wider in scope than is reasonably necessary to protect the employer's legitimate business interest). Restrictive covenants commonly take the form of "non-competes" (the most onerous form of restrictive covenant, which prevent the employee from working in a competing business for a restricted period of time), "non-solicit" and "non-dealing" restrictions which prevent an employee from soliciting and/or dealing with certain clients or customers of the business during a restricted period after leaving and "non-poaching" restrictions which prevent an employee from poaching or attempting to poach former colleagues during a restricted period after leaving.

In *Quilter Private Client Advisers Ltd v Falconer and another*, the High Court found that the non-compete, non-solicitation and non-dealing clauses in a financial adviser's employment contract were an unreasonable restraint of trade and therefore invalid. Whilst

the Court did find that the adviser had breached her employment contract in a number of ways, including via misuse of confidential information, her 9-month non-compete was unreasonable in the context of leaving employment within a six month probation period. In addition, her 12-month non-dealing and non-solicitation clauses, which covered anyone who had been a client of the employer at any time in the 18 months prior to termination, were held to be unreasonable and excessive given the nature of her client relationships during her period of employment.

What this means for employers

This case serves to highlight the importance of tailoring the drafting of restrictive covenants to both the circumstances of the business and the restricted employee. Particular care should be taken as to the scope and duration of restrictive covenants which an employer would seek to enforce against an employee who leaves during their probationary period.

5. Forthcoming Changes

5.1 Off-payroll working and IR35

We have previously reported that changes to the IR35 legislation (which governs the payroll tax arrangements for certain individuals who supply services through an intermediary, usually a personal service company ("**PSC**")) were due to take place in April 2020 *(link)*. However, these changes have been postponed until April 2021 in recognition of the COVID-19 disruption. On 1 July 2020, MPs voted against a proposed amendment to the Finance Bill to delay the changes until 2023-2024. Should the changes now go ahead as expected in a matter of months, medium and large sized end-user clients will take over responsibility from the intermediary for assessing whether, but for the intermediary's presence, the individual would be deemed an employee of the end-user client for tax purposes and, if so, for paying such taxes.

5.2 Gender Pay Gap

Similarly to the IR35 postponement, as we previously noted in March 2020 (*link*), the Government Equalities Office and the Equality and Human Rights Commission (EHRC) suspended enforcement of the gender pay gap deadlines for the reporting year 2019/20 due to the pressures of the COVID-19 pandemic. The requirement to report for 2020/21 has not yet been suspended, and on 14 December 2020 the government published a new set of guidance for employers, though the reporting requirements remain unchanged.

5.3 Ethnicity Pay Gap and racial and ethnic diversity in the boardroom

Amid a global surge in debate on racial equality, a petition to the UK Parliament calling for mandatory ethnicity pay gap reporting for UK firms with 250 or more staff has obtained enough signatures to mean it ought to be debated in Parliament. The government had said it would respond by the end of 2020 in light of the consultation it ran between 2018 and 2019, but we still await a response. In a leaked report obtained by the BBC in December from the government's 2018 pay gap reporting consultation exercise, three quarters of employers (of 321 responders) wanted large firms to be forced to release ethnicity pay gap data.

Whilst gender pay gap reporting was enacted through regulations, the government would need to pass a new Act of Parliament to create any new ethnicity pay reporting scheme. Despite reporting not yet being mandatory, two in three UK companies surveyed recently by PwC (*link*) are now collecting data on ethnicity, with over one fifth now calculating their ethnicity pay gap; those not collecting data or calculating were concerned about data protection, systems capabilities, low response rates, or unease about posing the questions. Given how multifaceted information about ethnicity can be, it is not yet clear exactly what information would need to be provided under any new mandatory scheme.

Legal and General Investment Management ("**LGIM**") has urged FTSE 100 boards to include at least one black, Asian or other minority ethnic member by January 2022 or suffer "voting and investment consequences" – LGIM would vote not to re-elect their nomination committee chair. It will also demand more transparency around race and ethnicity data, including ethnicity pay data and inclusive hiring policies. LGIM is the largest fund manager in the UK, holding an interest in most FTSE 100 companies.

Meanwhile, the Confederation of British Industry has announced a new campaign, "Change the Race Ratio", in partnership with a number of firms and charitable and academic organisations. This incorporates commitments: (i) to ensure FTSE 100 and 250 boards have at least one racially and ethnically diverse member (by end 2021 and by 2024 respectively); (ii) to increase racial and ethnic diversity in senior leadership, by setting and publishing targets; (iii) to increase transparency, via published target action plans and progress reports and with ethnicity pay gaps disclosed by 2022; and (iv) to create an inclusive, open and supportive environment through recruitment, development and support processes, more diversity in suppliers/partners, and use of data. The campaign offers support to businesses to sign up to the commitments and thereby increase inclusion in business.

In December, Liz Truss MP, Minister for Women and Equalities, gave a speech at the Centre for Policy Studies setting out the government's new approach to tackling inequality, consisting of the "biggest, broadest and most comprehensive equality data project yet", to look across the UK and identify where people are held back and what the biggest barriers are. This will not be limited to the Equality Act 2010's nine protected characteristics (which include sex and race). While Ms. Truss acknowledged that people in these groups suffer discrimination, she suggested that the focus on protected characteristics has led to a narrowing of the equality debate that overlooks socio-economic status and geographic inequality. Initial findings will be reported this summer.

5.4 Government consultations for employment contracts

On 4 December 2020, the government launched two consultations, both of which are expected to close on 26 February this year. One pertains to measures to extend the ban on exclusivity clauses in employment contracts for employees under the Lower Earnings Limit (currently £120 per week), which would prevent employers from contractually restricting low earning employees from working for other employers – it appears this stems from the fact low earners have been particularly adversely affected by the COVID-19 pandemic and many employers are currently unable to offer their employees sufficient hours. The second consultation relates to measures to reform post-termination non-compete clauses in employment contracts (previously discussed at section 4 of this update), including proposals to: (i) require employers to confirm in writing to employees the exact terms of a non-compete clause before their employment commences; (ii) introduce a statutory limit on the length of non-compete clauses; and (iii) ban the use of post-termination non-compete clauses altogether. We will report in due course on any developments following the government consultations.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these and other developments. Please feel free to contact the Gibson Dunn lawyer with whom you usually work or the following members of the Labor and Employment team in the firm's London office:

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