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Employment law brief

Quiet summer? Think again! Ian Smith ventures off the beaten track to explore the latest (& most unusual) cases

IN BRIEF

- When should a court directly enforce a valid restraint of trade clause against an ex-employee?
- Defining an 'employee' for tax and employment law purposes.
- Can an employee dismissed due to their fear of coronavirus claim protection under the laws on health and safety dismissals?

In what has seemed a relatively quiet month generally for employment law cases, we have nonetheless had three decisions on quite unusual topics, which always deserve further consideration: namely, when a court should enforce directly a valid restraint of trade clause against an ex-employee; the relationship between tax law and employment law on that most basic of questions, 'who is an employee?'; and whether an employee having a fear of coronavirus and being dismissed because of it, can claim the protection of the laws on health and safety dismissals.

When will a restraint clause be directly enforced?

Cases on restraint of trade in the employment sphere, including on injunctive relief, are often only factual illustrations of longstanding principles. However, the decision of the Court of Appeal in *Planon Ltd v Gilligan* [2022] EWCA Civ 642, [2022] All ER (D) 18 (Jun) goes beyond this and explores the application of the well-known *'American Cyanamid'* rules on interim injunctions. These concentrate on three elements:

(1) was there a serious issue to be tried;
(2) would damages be an adequate remedy rather than direct enforcement; and
(3) where does the balance of convenience lie?

In the case, the first question was clear and so arguments concentrated on the second and third elements.

The defendant had worked at a senior level for the claimants' tech firm. He was subject to several restrictive covenants in his contract of employment, including one stating he could not join a competitor for 12 months after leaving. He left on 22 August 2021 and joined a competitor on 2 September. The claimants issued legal proceedings to restrain him from continuing to do so two months later. When the case came before the first instance judge for an interim injunction, he declined to issue one in relation to the non-compete element. This was largely on the ground that to enforce this relatively long period would mean that the defendant could not obtain other comparable employment in the meantime.

The claimants appealed, but the Court of Appeal unanimously dismissed the appeal. Elisabeth Laing LJ gave the principal judgment, accepting that there may have been some errors in the first instance judgment (allowing for the pressures in giving an extempore judgment in an interim case), but this was still not a case for enforcement. Nugee LJ agreed, as did Bean LJ who also gave a judgment. The key points emerging were as follows.

(1) Contrary to the argument of the claimants, there is no rule of law that once a restraint is prima facie reasonable, there is a presumption that an injunction should be granted, except in exceptional cases; the court retains a complete discretion.
(2) Damages may not be an adequate remedy for a defendant employee if the restraint is ultimately not upheld, where the effect of an injunction would be to deprive the defendant of earning their living. On this important point, Bean LJ at [111] said:

'In this case it is not disputed that there is a serious question to be tried as to the validity or otherwise of the covenant against competition. But... it is quite unrealistic to argue that (since the Claimants have the resources to honour the cross-undertaking) damages would be an adequate remedy for the Defendant if an injunction against competition was granted at the interlocutory stage, but was proved at trial to have been an unenforceable restraint of trade. Except in cases of very wealthy defendants, or where the claimant employer is offering paid garden leave for the whole period of the restraint, this argument has no traction. Mr Gilligan's evidence is that he has a wife and child, a mortgage and other family commitments. It is by no means clear that his current employers would be able and willing to transfer him to work which had no connection with facilities management software; indeed it would be risky for them to do so in the face of a non-competition injunction breach of which would be a contempt of court. The likely effect of such an injunction would be to deprive him of his income until and unless he can find a new job.'

The reference to paying out the period of restraint by garden leave is interesting.

(3) Delay by an employer in bringing proceedings (and/or pressing for early resolution) may count against it when applying the balance of convenience. As here, a delay in bringing proceedings (which meant that, when added to court delays, there were only four months left of the year restraint when the case was heard) could raise doubts as to how important the alleged breach really was to the employer.

IR35 law: meaning of 'employee'

It is argued in *Harvey* at AI [12] ff that for some time now, care has had to be taken with employee status cases arising in tort when deciding on that point for employment law purposes, because of the different background/policy factors operating in these two areas. It seems from the decision of the Court of Appeal in the tax case of *Revenue and Customs Commissioners v Atholl House Productions Ltd* [2022] EWCA Civ 501, [2022] All ER (D) 21 (May) that we may be seeing a similar divergence between employment and tax law.

The case arose in the now familiar IR35 context, with HMRC arguing that an individual providing services through a service company should be deemed to be an employee for tax purposes under s 49 of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003), which depends on finding a notional contract of employment (had there not been the intermediary company). HMRC raised an 'employee' assessment on the media performer taxpayer. The First-tier Tribunal (FTT) allowed her appeal; the Upper Tribunal queried some of its reasoning but upheld its decision; but the Court of Appeal allowed HMRC's appeal and remitted the case for reconsideration. From this process alone, it can be seen how difficult these cases can be.

The court took the opportunity to give a general reconsideration of the substantial case law here. Key to this was the foundation case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 and McKenna J's threefold test which has been regularly cited ever since: namely, if there is mutual obligation and sufficient control, are the other provisions of the contract consistent with it being a contract of employment? In spite of that regular citation, this decision raised questions as to the exact meaning of this third test. First, HMRC had argued that once the first two requirements are present, there is a presumption of employment status, which the taxpayer must disprove. That view was rejected by the court.

Second, however, and of more complication, was the wording of the third test, namely whether other *provisions of the contract* are consistent with employee status. It was argued that the case law differed on this, in particular the subsequent cases of *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 and *Hall (Inspector of Taxes) v Lorimer* [1994] 1 All ER 250. Not only did these cases (and others) seem to reformulate the test as 'were they in business on their own account?' but also had taken into account other background factors in taking an overall view of the relationship, whereas *Ready Mixed Concrete* on a literal view only looked at other terms of the contract itself. On this fundamental point, the court in the instant case held that these cases are *not* in conflict and do not pose different, alternative tests. The 'business' reference is just another way of posing the ultimate question and the case law generally has not restricted itself to an 'uber-contractual' approach (excuse the pun).

So far, on first reading, this seemed to be going the taxpayer's way, but it must be remembered that the eventual result was a win for HMRC. What happened was that the court proceeded to narrow its approach in two ways.

(1) It considered *what* background factors can be taken into account when applying the third test. Its answer was based on classic contract law—'facts or circumstances that existed at the time that the contract was made and which were known or reasonably available to the parties'. On the facts here, that meant that the taxpayer's previous history of freelancing could be taken into consideration, but not what had happened in later tax years.

(2) It then considered the decision of the FTT to disregard certain contractual clauses potentially acting against the taxpayer's arguments for self-employment, on the basis that they did not reflect the reality of the arrangement overall. This had been done under the well-known employment law case of *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] All ER (D) 251 (Jul) but here the court held that that case is *not* applicable in tax law. The reason was that *Autoclenz* was subsequently explained in *Uber BV and others v Aslam and others* [2021] UKSC 5, [2021] All ER (D) 89 (Feb) as being based on the protective intent of the *statutory* employment rights being claimed, justifying a wider, anti-avoidance approach. No such policy considerations apply in tax law, where it is what was referred to as the 'common law' of employment status that has to apply (ie *Ready Mixed Concrete*, as explained).

What is the effect of this overall? In tax law, there can be some wider enquiry as to the contractual issues, but it is probably more limited now, given that the argument about 'inconvenient' terms that 'oh, that's not what we actually did' may now carry little weight and it is clear that this cannot be ameliorated by reliance on *Autoclenz*. What about employment law? The court's interpretation of the third test in *Ready Mixed Concrete* presumably applies here too. A wider consideration of background factors (rather than just the other terms of the contract itself) remains appropriate *but* the temporal limitation to those known or knowable at the time of contracting can be seen as a limitation not present in the case law hitherto. In any employment case dependent only on the 'common law' in *Ready Mixed Concrete*, this limitation will be capable of curtailing arguments as to how the arrangements later worked out in practice. However, where the issue is a mismatch between realities and clauses put into the contract in a case concerning statutory rights, it is equally clear that *Autoclenz* remains very much in issue, and indeed may now have to be used more often.

Health & safety protection & coronavirus fears

There has been much speculation whether an employee dismissed for leaving work or, more particularly, refusing to come back to work, because of fears of contracting coronavirus could claim automatically unfair dismissal under the health and safety provisions of s 100(1)(d)–(e) of the Employment Rights Act 1996 (ERA 1996). The decision in *Rodgers v Leeds Laser Cutting Ltd* [2022] EAT 69 is the first reported appellate decision on the point. Perhaps unfortunately, it turned out to be based on rather weak facts and the result was that the Employment Appeal Tribunal (EAT) upheld the decision of the employment tribunal (ET) on the facts that the case for the statutory protection had not been made out. However, it does seem that the decision does accept that the section *can* apply in law. What would be useful to see now is a case that *succeeded*, in order to have guidance as to the strength of facts necessary, in particular as to the necessary work connection with the employee's fears.

The claimant had one medically vulnerable child and a new baby. He was dismissed when he refused to return to work during the pandemic. He lacked two years' continuity of employment for an ordinary unfair dismissal action, and so

invoked s 100, ERA 1996. The ET found against him, saying that his version of events was 'confusing and contradictory'. By contrast, the employer had shown that the workplace was large with a small staff so that social distancing was possible, there had been risk assessments leading to other measures being put in place, and the staff had been consulted. The ET accepted that the claimant had had genuine fears about the virus, but these had been general ones, insufficiently connected with his work. Thus, within s 100(1)(d), ERA 1996 it had not been shown that there had been circumstances of danger which the employee *reasonably* believed to be serious and imminent, justifying him staying away.

Dismissing his appeal, the EAT held that this was a conclusion on the facts that was open to the ET. At [49] the judgment states:

> 'I accept that an employee could reasonably believe that there is a serious and imminent circumstance of danger that exists outside his place of work that could prevent him from returning to it, and that such circumstances could potentially fall within section 100(1)(d) ERA. However, the fact that the claimant had genuine concerns about the Coronavirus pandemic, and particularly about the safety of his children, did not mean that he necessarily had a genuine belief that there were serious and imminent circumstances of danger, either at work or elsewhere, that prevented him from returning to work.'

The judgment concludes:

> 'Despite the topicality and the potential importance of employment issues arising from the Judgment approved by the court for handing down, the sympathy that one necessarily has for the concerns that the claimant had about the safety of his children, and the careful and well presented arguments advanced on behalf of the claimant, I conclude that no error of law has been established. The employment judge accepted that the Coronavirus pandemic could, in principle, give rise to circumstances of danger that an employee could reasonably believe to be serious and imminent, but this case failed on the facts.'

There were two points of detailed interpretation of s 100, ERA 1996 that arose in argument but were not requiring resolution and so may arise in a future case.

(1) Are s 100(1)(d) (leaving or refusing to return) and (e) (taking appropriate protective steps) mutually exclusive, or could both be relied on in any given case? The arguments both ways are set out, but by this stage in the appeal the claimant was restricting his case to head (d).

(2) Under head (d), is it the case that there is a first requirement that there must *objectively* exist circumstances of danger, with the second requirement being that the employee must *subjectively* reasonably believe to be serious and imminent (as Stacey J favoured in *Hamilton v Solomon & Wu Ltd* UKEAT/0126/18), or is there just one subjective requirement that the employee must reasonably believe there to be serious and imminent circumstances of danger (as argued at one point here)?

The end result seems to be that s 100, ERA 1996 is potentially applicable, but there is scope for further exploration as to exactly how. NLJ

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