Proskauer

A Month in UK Employment Law - March 2012

March 2012

Case Update

TEAM MOVES AND SPRINGBOARD INJUNCTIONS

In the recent case of *QBE Management Services (UK) Ltd v Dymoke* [2012] EWHC 80 (QB), the High Court granted a springboard injunction to restrain a team of ex-employees competing with their former employer.

A springboard injunction is a form of equitable relief that is intended to deprive wrongdoers of the fruits of their unlawful conduct. It is a court-imposed, non-contractual restraint of trade, prohibiting conduct that might otherwise be lawful. Typically, the relief is used to restrict the ability of a competitor to compete with a wronged party for a set period of time; for example, through prohibiting a competitor and its staff from dealing with clients of the wronged party. It is therefore a powerful remedy in the context of team moves.

In this case, Mr. Dymoke and two other colleagues resigned from QBE, a marine insurance business, with the express intention of setting up a competing business. They were placed on garden leave in accordance with their contracts of employment. Initially, QBE obtained injunctions to enforce the garden leave and restrictive covenant obligations contained in the contracts of employment of Mr. Dymoke and his colleagues. However, a few months later, QBE successfully obtained a springboard injunction preventing Mr. Dymoke and his colleagues from starting up their new business. This was granted on the basis that before their resignations the defendants had committed numerous and serious breaches of their ongoing contractual and fiduciary obligations to QBE, including: actively recruiting employees from QBE; misusing confidential information; soliciting QBE's clients; and failing to disclose their competitive activities to QBE.

The High Court found that these breaches gave Mr. Dymoke and his colleagues an unlawful headstart which enabled them to have their new business up and running before the start of the key renewals season (where the key date in a year was 20 February, a date at which over 70% of relevant renewals takes place) in circumstances where, had they acted lawfully, they would have been unable to do so.

As a result, the Court granted QBE a springboard injunction until the end of April 2012, just over two months after the key renewal date.

Comment

The case is important for a number of reasons.

- *It confirms the availability of springboard relief in the context of team moves. However, it is noteworthy that the judgment does not refer to the High Court decision in the case of Vestergaard Frandson A/S v Bestnet Europe [2009] EWHC 1456 in which Arnold J held that springboard relief should only be available, if at all, in very limited circumstances.*
- *It contains very helpful guidance on determining the period and scope of any springboard relief. Amongst other things, it was held that: the appropriate measure for the length of a springboard injunction is " the length of time that it would have taken the wrongdoer to achieve lawfully what he in fact achieved unlawfully, relative to the victim"; while it is relevant to look at the period of time over which the unlawful activities have in fact taken place, "the relationship of this period with the length of any springboard relief is...kinetic, not linear"; and that "the nature and length of the springboard relief should be fair and just in all the circumstances".*
- *It confirms that the scope of preparatory activities that an employee can legitimately carry out during their employment for the purposes of competing in the future is very narrow indeed and that employees, especially the more senior they are, have a duty to disclose to their employer any potentially competitive activities, including their own.*

Unfair Dismissal Rights for International Commuters

In *Ravat v Halliburton Manufacturing and Services Ltd* [2012] UKSC 1, the Supreme Court ruled that the test for determining whether an employee can claim the statutory right not to be unfairly dismissed is whether the employment relationship has a stronger connection with the United Kingdom than the country where the employee works. This is the latest in a series of cases on the territorial scope of the statutory British employment rights.

The legislation under which employees enjoy the right not to be unfairly dismissed does not contain any geographical limitations – for example, there is no provision that provides that someone has to be employed wholly or mainly in the United Kingdom to benefit from the right. Nonetheless, in a number of previous decisions, the courts have interpreted the relevant statutes so as to imply a territorial limit such that, subject to some limited exceptions, only employees who mainly work in the United Kingdom have the right to claim for unfair dismissal.

The House of Lords (now the Supreme Court) gave detailed guidance on the general rule and the exceptions to it in the case of *Lawson v Serco* in 2006. In that case, it was held that employees who work outside of the United Kingdom can, in certain limited cases, be regarded as working in Britain and benefit from the right not to be unfairly dismissed. The House of Lords divided employees into three broad categories: the standard employee (working in Britain), the peripatetic employee and the expatriate employee. While the statute clearly applied to the standard employee, it would only apply to the peripatetic employee whose base is the United Kingdom, or to the expatriate employee if there were otherwise equally strong connections to the United Kingdom.

In this case, Mr. Ravat was employed by Halliburton Manufacturing and Services Limited ("**Halliburton**"), under a contract of employment governed by English law. He worked in Libya on a 28 days on, 28 days off rotational basis. When he was not working, he lived at home in Preston, Lancashire. His salary was paid in Sterling and was subject to the deduction of UK income tax and National Insurance. He liaised with Halliburton's Aberdeen office in relation to HR matters. Mr. Ravat performed no work at all in the UK and all duties were performed for a German company within the Halliburton Group. His operations manager was based in Libya and his line manager was based in Cairo. When Mr. Ravat was made redundant he was paid a redundancy payment in accordance with the English statutory redundancy formula.

Mr. Ravat brought a claim of unfair dismissal. Halliburton argued that the Employment Tribunal did not have jurisdiction to hear the claim because Mr. Ravat did not work in the United Kingdom.

The Supreme Court ultimately held that Mr. Ravat's employment had sufficiently strong connections with the United Kingdom, thus allowing him to claim unfair dismissal in the Employment Tribunal.

Comment

This case illustrates that employees of companies based in the United Kingdom who work overseas can pursue unfair dismissal claims where there is considered to be a closer connection with the United Kingdom than elsewhere. Each case will be determined on its own facts, but the key issues to be taken into account when considering whether employees have the right to unfair dismissal protection in the United Kingdom will include:

- *where the employee was recruited;*
- *how the employee has been classified within the company;*
- *who pays the employee;*
- *the currency in which the employee is paid;*
- *where the tax and social security deductions are made;*
- *the governing law of the employment and/or secondment agreement;*
- *whether the employee has statutory protection in another country;*
- *the place where the employee habitually lives;*
- *which company receives the benefit of the employee's work product.*

While this case relates to the right not to be unfairly dismissed, it is generally expected that the approach of the courts and tribunals in relation to expatriate employees' ability to bring claims for unlawful discrimination will be similar, especially given that the Equality Act 2010 (the statute which contains the bulk of the United Kingdom's antidiscrimination laws), like the legislation relating to unfair dismissal, does not contain any express territorial jurisdiction provisions.

News Update

EMPLOYMENT TRIBUNAL REFORM

With effect from 6 April 2012, substantial changes to the employment tribunal procedures are expected to be introduced. These include:

- Employment judges will hear unfair dismissal cases alone in the Tribunal and there will no longer be lay members (traditionally one from a trade union or other employee-friendly body and one from an employer-friendly body) who form part of the decision-making panel, unless they direct otherwise;
- The maximum amount of a costs order which a Tribunal may award in favour of a legally represented party will increase to £20,000;
- Witness statements are to be taken "as read" and will not need to be read out by a witness unless the Tribunal directs otherwise; and
- The maximum amount of a deposit order which a Tribunal can order a party to pay as a condition to continuing with Tribunal proceedings will increase to £1,000.

The Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2012 will amend the existing employment tribunal rules of procedure and the amended rules will apply in respect of claims submitted to the Tribunal on or after 6 April 2012.

CHANGES TO THE PAYE TREATMENT OF POST-P45 TERMINATION PAYMENTS – A REMINDER

Prior to 6 April 2011, tax on termination payments was deducted at basic rate and the employee's tax code was not taken into account for the purposes of any payments made to an employee after their P45 had been issued. An employee was liable to tax at the higher (40%) or additional (50%) rate of tax and HMRC then collected the underpayment from that individual through their Self-Assessment tax return. This resulted in an immediate cash flow benefit for the individual with any additional income tax only becoming due by 31 January following the end of the tax year.

The position changed in April 2011. Employers are now required to deduct income tax at the basic, higher or additional rate according to the individual's level of earnings. The cash flow benefit has now turned in favour of HMRC since they will no longer have to wait until 31 January following the end of the tax year to recover tax underpayments from higher rate and additional rate taxpayers.

TAX TREATMENT OF LEGAL FEES ON TERMINATION

There is currently a tax concession which allows an employee's legal costs on termination of employment to be paid by the employer free of tax if they are either ordered to be paid by a court or tribunal, or paid direct to the employee's lawyer pursuant to a compromise or severance agreement.

This tax concession will be withdrawn with effect from 6 April and replaced by Regulation 10 of the Enactment of Extra-Statutory Concessions Order 2011. It had initially appeared that the 2011 Order would significantly restrict the tax concession as it would only apply to cases involving a court or tribunal costs order, or a formal compromise agreement complying with section 203 of the Employment Rights Act 1996. However, in December 2011, HMRC confirmed that it will be amending tax legislation to make it clear that the tax exemption available where an employer pays an employee's legal fees pursuant to a settlement agreement will apply to all settlement agreements. We are awaiting responses to the consultation.

ARE SMARTPHONES EXEMPT FROM INCOME TAX?

In a Revenue & Customs Brief (02/12), HMRC has revised its interpretation as to what constitutes a mobile phone to include smartphones and therefore exempt these devices from income tax. Up until very recently smartphones were only exempt from tax if they were provided by the employer solely for business purposes and any private use was not significant.

Since the emergence of smartphones into the consumer mobile phones market, HMRC has always considered the devices to be Personal Digital Assistants (PDAs) as they combined the functions of a mobile phone with many of the functions associated with a computer. That view was based on the understanding that smartphones were not devices that are designed or adapted for the primary purpose of transmitting and receiving spoken messages and used in connection with a public electronic communications service.

The Revenue now accepts that devices such as the iPhone, Blackberry and their counterparts satisfy the conditions to qualify as "mobile phones". HMRC warns that this will not apply to devices that are solely PDAs, such as the iPad.

Employers that have provided their employees with a smartphone from 6th April 2007 onwards and declared such as a benefit-in-kind on form P11D or included the benefit in a PAYE Settlement Agreement may now apply for retrospective repayments of Class 1A NIC. Likewise employees who have paid tax on such a benefit may apply for a refund of overpaid tax for years 2007/08 et seq. The time limits for claiming a tax repayment is four years from the last day of the relevant tax year, but HMRC has confirmed that it will consider any claims made for 2007/08 if they are made on or before 31st July 2012. Time limits for refunds of Class 1A NIC are later, so compliance with the dates for income tax will ensure that the time limits for claiming a Class 1A repayment is satisfied.

DECREASE IN LIFETIME PENSIONS ALLOWANCE

From April 2012, the lifetime pensions allowance (the total amount of pension savings that receives favourable tax treatment) will decrease from £1.8 million to £1.5 million.

PERSONAL ALLOWANCE FOR INCOME TAX TO INCREASE

With effect from 6 April 2012, the personal allowance for income tax is to increase to £8,105 and the threshold at which employees pay the higher rate of income tax of 40% is to reduce to £34,371.00.