SLAUGHTER AND MAY

Employment Bulletin

May 2019

Employer could start disciplinary proceedings while police investigation ongoing

Summary: The Court of Appeal held that an NHS Trust employer had not been entitled to withhold salary while a doctor was suspended. However, the Trust had been entitled to start disciplinary proceedings against the doctor while a police investigation into patient deaths was ongoing, as there was no evidence that the disciplinary process would give rise to a danger of a miscarriage of justice (*North West Anglia NHS Foundation Trust v Gregg*).

Contents

Key practice point: This case confirms that employers can progress their internal investigation pending the outcome of any regulatory or criminal investigation.

Facts: The Trust became concerned that the claimant doctor had hastened patient deaths and they started disciplinary proceedings. The Trust notified the police and suspended the doctor on full pay. When the General Medical Council suspended the doctor's registration to practice, the Trust stopped his salary. The doctor's lawyer advised him not to participate in a disciplinary hearing, as he would risk prejudicing himself in the ongoing criminal investigation. The Trust refused to adjourn the hearing. In addition, it considered convening a separate hearing under a provision in the employment contract which allowed the Trust to dismiss for lack of registration.

The doctor obtained an interim injunction preventing the Trust from continuing with disciplinary proceedings until the police investigation was complete. The Trust appealed against the grant of the interim injunction.

Decision: The Court of Appeal overturned the injunction, deciding three issues:

1. **Was the Trust entitled to withhold pay during the interim suspension? No.** The doctor was ready, able and willing to work but the decision of a third-party tribunal had removed his registration to do so. The terms of the doctor's contract did not allow the deduction of pay during an interim suspension. Where a contract did not address whether pay could be deducted during suspension, the default position was that it should not be. Exceptional circumstances, such as an admission of guilt, might justify a deduction, but none arose in this case.

2. **Could the Trust hold a hearing on the alternative basis of failure to maintain registration? Yes.** Just because the Trust had pursued its investigations based on misconduct, that did not mean it was too late to base a termination on a failure to maintain registration.

3. **Had the Trust breached the implied term of trust and confidence by progressing the internal disciplinary proceedings without waiting for the police investigation to be completed? No.** An employer did not usually need to wait for the conclusion of any criminal proceedings before starting internal disciplinary proceedings. The court would only intervene if the employee could show that the continuation of the disciplinary proceedings gave rise to a real danger of a miscarriage of justice in the criminal proceedings. There was no evidence that the internal disciplinary process would have any effect on the criminal investigation, let alone give rise to a real danger of a miscarriage of justice.

The High Court judge had not applied the correct test on breach of trust and confidence (which the Court of Appeal noted was a "severe" test). It had equated the implied term with a more general obligation to act fairly, and had not asked whether the conduct was calculated to destroy or seriously damage the relationship and whether there was reasonable and proper cause for that conduct.

Analysis/commentary: Employers will not usually wish to wait for the outcome of criminal proceedings before conducting a disciplinary hearing, particularly when the employee has been suspended on full pay, as this will usually take several months. The Acas Code on disciplinary and grievance procedures requires the employer to hold any disciplinary hearing without unreasonable delay, which also indicates that the employer should not wait for the conclusion of court proceedings.

An employee should remain on full pay for the period of any suspension, unless the employment contract expressly provides for deduction.

Post-termination restrictions too wide and unclear to be enforceable

Summary: The High Court held that post-termination restrictions (PTRs) entered into by a former employee were unenforceable. It was not clear whether the employee was "senior" (and therefore what length of covenant applied) and the scope of the covenants was too wide (*Freshasia Foods Ltd v Lu*).

Key practice point: PTRs must go no further than reasonably required to protect the employer's legitimate business interests, and this will be judged as at the time they are entered into. It is not always easy to identify at the outset of employment what the employer will need to protect on termination, so covenants should be reviewed on a regular basis to ensure they remain relevant and appropriate.

Facts: The employer supplied food products to Chinese shops and restaurants. The defendant, L, started work in a junior role but progressed to marketing advertising manager. When he left to work for a competitor, the employer applied for an injunction to enforce non-solicitation and non-compete clauses in the employee handbook (which formed part of L's contract).

Under the non-solicitation clause, L agreed that he would not, during the six months after termination (12 months for "senior" employees), deal with anyone who was, at the date of termination, a customer or potential customer with whom he had dealt, or had business dealings or knowledge, in the six months (12 months for senior employees) before departure.

The non-compete clause prevented L from competing with his employer's business, directly or indirectly, in the UK and Europe, for six months (again, 12 months for senior employees).

At the first, interim, stage, the High Court granted a very limited injunction in relation to the non-solicitation clause, with the parts the Court thought would be unenforceable severed. The case then went to a full trial.

Decision: The High Court decided not to award any injunctions. There were problems with the validity and enforceability of both covenants.

A key issue was whether L was a "senior" employee. The covenants applied to "senior employees" for a period of 12 months, and to "non-senior employees" for a period of six months. There was no definition of "senior" or "non-senior" in the employee handbook and L had not been told that he was a senior employee. As a result, the Court found that the clauses were too uncertain to be valid.

The Court went on to consider enforceability, on the assumption that the covenants were valid and that L was a senior employee. To be enforceable, PTRs must be reasonably necessary to protect the employer's legitimate business interests and no wider than necessary.

The Court decided that both covenants were unenforceable because the employer had no legitimate business interests requiring protection. L's contact with customers was minimal. Confidential information was protected by separate covenants and by the general duty of confidence.

Even if there had been legitimate business interests requiring protection, the covenants were wider than reasonably necessary to protect those interests:

- The non-compete clause extended to the whole of Europe, whereas the employer had customers in nine European countries only. It would also have stopped L from being employed by a competitor in a non-marketing role.

- The 12-month period was too long. Although the employer had argued that it took 12 months to build a relationship with a customer, it did not follow that the employer needed protection for 12 months after L's departure – that would only be required for someone who had only just become a customer at the end of L's employment, and in that situation L would, by definition, have had little customer contact.

- The non-solicitation clause would have prevented L from accepting any work from customers (for example, working for a supermarket customer). It was also too wide because it prevented him from soliciting "potential customers" as at his departure date, as well as customers he had known but with whom he had not had any dealings.

Finally, the Court commented that, even if the non-compete clause had been valid and enforceable, an injunction might well have been refused because of its potential effect on L's immigration status. The evidence showed that it would have been difficult for him to find a job with a sponsoring employer outside the Asian food industry that paid at least the £30,000 required to maintain his immigration status.

Analysis/commentary: This case underlines that PTRs must be tailored to the individual employee's role and no wider in scope than necessary. Enforceability is judged at the time at which the covenant was entered into, so where an employee is promoted to a senior position, employers should consider whether the employee should enter into a new service contract, with more extensive covenants, designed for their new role.

An injunction to enforce PTRs is a discretionary remedy and a balancing act for the courts between the protection of the employer's legitimate interests and the impact on the former employee. Here, because the PTRs were invalid, the Court did not have to weigh up the competing interests, but it did indicate that it would have taken into account the potential impact of an injunction on the employee's immigration status.

In relation to the possibility of severing the unenforceable parts of the covenants, there was a brief discussion of the Court of Appeal's decision in *Tillman v Egon Zehnder*. In *Tillman*, a non-compete covenant which provided that an employee should not "*directly or indirectly engage or be concerned or interested in*" any competing business was found to be impermissibly wide, because it had the effect of preventing an employee from becoming a shareholder in a competitor. The Court of Appeal decided it was unable to sever the words "*or interested*", so struck it down in its entirety.

The Court's view at the interim stage in *Freshasia* was that the decision in *Tillman* did not prevent severance of parts of a single covenant. At trial, the High Court declined to enter the debate, given that the appeal in *Tillman* was heard in the Supreme Court in January and the judgment is awaited.

Employer not vicariously liable for injury at Christmas party

Summary: The High Court upheld a County Court decision that an employer was not liable in negligence for injury sustained by an employee at a Christmas party, nor was it vicariously liable for the actions of the visitor who caused the injury (*Shelbourne v Cancer Research UK*).

Key practice point: This decision confirms the established position that an employer will not be vicariously liable for the behaviour of an employee at a work social event, if the employee was not acting within his "field of activities" at the time.

Facts: The employer, CRUK, held a Christmas party at its research institute. It undertook a risk assessment, focussing on ensuring that partygoers did not return to the laboratories after the party had started, as well as on the dangers from the games provided at the party.

The claimant, S, was on the dance floor when another partygoer, B, attempted to pick her up but lost his balance and dropped her. S sustained a serious back injury. B was a visiting scientist but was not employed by CRUK. S sued CRUK for negligence. The County Court rejected her claims and she appealed.

Decision: The High Court dismissed the appeal.

CRUK was not in breach of its duty of care. It was not required to have staff trained to look out for any sign of trouble and to alert security staff, as S had asserted. CRUK's risk assessment had been sufficient.

On vicarious liability, there was no doubt that the nature of B and CRUK's relationship was capable of giving rise to vicarious liability. B was a sufficiently integral part of the business to render CRUK potentially vicariously liable for his actions. However, under the test established in *Mohamud* (see our Bulletin dated 11 March 2016), for vicarious liability to apply there had to be a sufficient connection between the "field of activities" entrusted by CRUK to B, and his conduct. B was not acting within his field of activities at the party. CRUK's motivation in organising the party was not primarily, or even significantly, to derive a benefit for its operations. It was merely "*responding to the expectation of its members of staff that this is what their employer does for them at Christmas*". The field of B's activities was simply his research work and it had been plainly correct for the County Court to take the view that this field was not sufficiently connected with what happened at the party to give rise to vicarious liability.

Analysis/commentary: The decision confirms that, generally, employers will not be vicariously liable for the behaviour of employees (or quasi employees) at work-organised social events. *Bellman v Northampton Recruitment Limited*, where the Court of Appeal found that a company was vicariously liable for injury

caused at an impromptu drinks session after an office party (see our Bulletin dated November 2018), was an exceptional case. At the time of the assault in that case, the person who caused the injury was purporting to act as MD and this created the connection necessary to establish vicarious liability.

Meanwhile, Morrison's have been granted leave to appeal against the decision of the Court of Appeal last year that they were vicariously liable for a rogue employee's deliberate data breach (see our Bulletin dated November 2018), so the Supreme Court will be considering this issue.

Resignation in response to issue of improvement notice was constructive dismissal

Summary: The EAT upheld a decision of the Employment Tribunal that an employee had been constructively unfairly dismissed when she resigned in response to her employer issuing an informal "Improvement Notice", in a manner which was inconsistent with its disciplinary policy (*Epsom & St Helier University Hospitals NHS Trust v Starling*).

Key practice point: The failure by an employer to follow its disciplinary policy can amount to a breach of the implied trust and confidence term, enabling the employee to resign and claim constructive dismissal.

Facts: The claimant, S, a fertility nurse specialist, had become unwell at work on 9 June 2015. On the advice of one of the consultants on the unit, S went to A&E in the afternoon. She was discharged at 7pm and went home. As a result, she forgot to turn on the unit's incubators to charge that night, ready for a procedure the next day. The following morning S realised her mistake and immediately called C, the consultant in charge, to inform her. By then, the incubators could not be charged in time for the procedure. This had potentially significant consequences for the patient, as well as causing her actual inconvenience, and the Trust incurred costs in making alternative arrangements for the patient. C decided that S should be issued with an Improvement Notice under the Trust's disciplinary policy.

The Notice, written by C, was given to S by the matron for the unit on 8 July, without any meeting with S. S resigned on 24 July.

The Employment Tribunal found that S had been constructively unfairly dismissed. In the circumstances, there was a breach of the implied term of trust and confidence resulting from the issuing of the Improvement Notice.

Decision: The EAT dismissed the Trust's appeal. The Employment Tribunal had not erred by holding, in effect, that there needed to be an investigatory meeting before the employer issued the Improvement Notice.

Paragraph 3 of the employer's policy stated: "*…the Trust encourages informal discussions between staff and their managers/supervisors. The discussion is intended as a basis for advising staff. These informal discussions should be followed up with an Improvement Notice letter to the member of staff outlining the expectations that have been set, and that if these expectations are not met the formal disciplinary procedure will be followed. The formal disciplinary procedure will begin when the informal discussion and subsequent Improvement Notice has failed to achieve the desired effect or when an offence is serious enough to warrant formal action.*"

The EAT found that the policy set out a procedure for dealing with issues of potential conduct which did not immediately merit formal action. The informal procedure was not followed in this case. C did not find out

about key information prior to deciding to issue the Improvement Notice. The significance of meeting and talking about potential problems with staff was clear from the wording of the policy and from the draft example of an Improvement Notice contained in it. C was not required to hold anything like an investigatory meeting with S but she did have to meet and to talk with her, or (at the very least) to ensure that someone else had done so, to understand her account of the potential conduct issue, before issuing an Improvement Notice.

Analysis/commentary: There have been cases of constructive dismissal in relation to the handling of disciplinary matters – notably on suspensions. This decision illustrates that missing even one step in what is meant to be an informal procedure may constitute a repudiatory breach.

Horizon scanning

What key developments in employment should be on your radar?

31 October 2019	European Union (Withdrawal) Act 2018 expected to take full effect
9 December 2019	Extension of the SMCR to FCA solo-regulated firms
April 2020	Annual updates to employment rates and limits
6 April 2020	All termination payments above £30,000 threshold will be subject to employer class 1A NICs
6 April 2020	Written statement of terms to be provided to employees and workers from day one of employment and to contain extra details
6 April 2020	Threshold for valid employee request for information and consultation will be lowered from 10% to 2% of employees
6 April 2020	Abolition of the opt-out of the equal pay protections of the Agency Workers Regulations (the "Swedish derogation")
6 April 2020	Change in reference period for calculating holiday pay for workers with variable remuneration, from 12 to 52 weeks

We are also expecting important case law developments in the following key areas during the coming months:

- **Employment status**: *Uber v Aslam* (Supreme Court: whether drivers are workers for employment protection, minimum wage and working time purposes)

- **Data protection**: *Wm Morrison Supermarkets Plc v Various Claimants* (Supreme Court: whether employer was vicariously liable for deliberate disclosure of co-workers' personal data by rogue employee)

- **Discrimination / equal pay**: *Hextall v Chief Constable of Leicestershire Police* (Court of Appeal: indirect discrimination and shared parental pay); *Chief Constable of Norfolk v Coffey* (Court of Appeal: perceived disability discrimination); *McNeil v HMRC* (Court of Appeal: establishing particular disadvantage to women in equal pay claims); *Owen v Amec Foster Wheeler Energy* (Court of Appeal: justification of denial of overseas assignment based on risk assessment)

- **Whistleblowing**: *Royal Mail v Jhuti* (Supreme Court: awareness of protected disclosure); *Bamieh v FCO* (Court of Appeal: territorial jurisdiction)

- **Trade unions**: *Kostal v Dunckley* (Court of Appeal: inducements/by-passing of collective bargaining); *Jet2.com v Denby* (Court of Appeal: refusal of employment)

- **Restrictive covenants**: *Tillman v Egon Zehnder* (Supreme Court: non-competes and minority shareholdings)

- **Agency workers**: *Kocur v Angard Staffing Solutions* (Court of Appeal: parity of terms)

- **Employer's liability**: *Lungowe v Vedanta Resources Plc* (Supreme Court: parent company duty of care for subsidiary operations)

- **Working time**: *Flowers v East of England Ambulance Trust* (Court of Appeal: overtime and holiday pay).

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Dated May 2019