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Springboard injunctions

Two recent cases have considered the use of so-called "springboard injunctions" to prevent parties from obtaining an unfair (or springboard) advantage in the market through breach of duties to their former employer.

In *QBE Management Services (UK) Ltd v Dymoke and others* [2012] EWHC 80, QBE was granted 12 months springboard relief from the date of the employees' resignations, preventing them from benefitting from an unfair advantage during this time period. The three employees in this case were headhunted by a competitor of QBE to set up a new venture and were later followed by a further eight employees. It became apparent from the disclosure exercise that the employees had unlawfully solicited other employees and clients as well as using QBE's confidential information to set up the venture and obtain financial support.

Unusually in a case of this sort, the court also awarded QBE damages of over £300,000 to cover QBE's costs in relation to pay rises and retention bonuses for current staff; recruitment expenses to fill vacant positions and to cover temporary employment costs.

In *Clear Edge UK Ltd and another v Elliot and others* [2011] EWHC 3376 three employees who had worked for Clear Edge for 20 years resigned and announced that they would be joining a competitor. Clear Edge applied for a springboard injunction to prevent the employees joining their new employer for six months, on the basis that they suspected misuse of confidential information, because they had "cleaned" their laptops and mobile phones.

Having heard oral evidence, the court ordered the springboard injunction as the employees had given themselves an unfair advantage by virtue of their long history with the company; breaches of their duties to the company; their misuse of confidential information and their co-ordinated departure.

A redundancy pool of one

The recent EAT case of *Capita Hartshead v Byard* highlights the importance of adopting a fair process when determining the employee pool from which to select individuals for redundancy. The claimant was an actuary who was placed in a redundancy pool of one because, her employer claimed, of the personal nature of scheme actuaries and the fact that this employee's client list had reduced considerably. The EAT upheld the tribunal's finding that this aspect of the process was unfair. The EAT found that the claimant should have been considered in a pool with other actuaries who performed the same or a similar role.

However, another EAT decision this month, *Halpin v Sandpiper Books* offers a contrasting approach in finding for the employer on a similar set of facts. This case reminds us that the test in *Taymech v Ryan [1994] EAT/663/94* is still good law and the employer will, in the majority of cases, only need to have "genuinely applied their mind to the problem" to overcome this procedural hurdle. Only in exceptional circumstances should a tribunal interfere with this business decision.

TUPE: what constitutes an "organised group of employees" for the purposes of a service provision change?

The 2006 TUPE Regulations codified the inclusion of service provision changes, such as outsourcing arrangements, within the TUPE regime. In order for a service provision change to qualify under the TUPE Regulations certain conditions must be met. These include the need for an "organised grouping" of employees to exist who are "assigned to the undertaking" which transfers.

In *Eddie Stobart Ltd v Moreman* the EAT helped to clarify what is meant by an "organised grouping" of employees in this context. The employees in this case worked at a depot which provided logistics services to five clients. Following a reduction in the client base to two clients, a separate company FJG Logistics picked up the work of one client Vion. The question for the EAT was whether all those employees who spent 50% or more of their time on Vion work moved with the client.

In clarifying the legal test in this area the EAT explained that simply because the organisation of shift patterns caused certain employees to devote 50% or more of their time to Vion work, this did not mean that they transferred with the Vion undertaking. The employees needed to comprise an "organised grouping" of employees, as well as being assigned to that undertaking. An example of this would be employees who are intentionally organised into a particular client team.

When considering which employees are likely to transfer in the context of a TUPE transaction, it is important for companies not to focus simply on the percentage levels of staff working in particular business areas. As demonstrated by this case, a more in depth assessment of intentionally organised work patterns will be adopted by Tribunals when deciding which groups of employees transfer with an undertaking under the TUPE Regulations.

In brief

- Roles will be reversed for Lord Alan Sugar as he may be forced to defend a constructive dismissal claim from Stellar English, winner of the 2010 series of the TV show *The Apprentice*.
- An ex-Ann Summers employee has been ordered not to publish confidential and private information about the company's chief executive, Jacqueline Gold, despite the fact that she had not signed a written confidentiality agreement. Mr Justice Tugendhat held that an "obligation of confidentiality may exist independently of any express or implied agreement".
- The EAT recently held in *Sulhayir v JJ Food Services Ltd* that an employee on long-term sick leave cannot effectively 'self-dismiss' by failing to notify his employer of a change in address. Furthermore, a letter stating that the claimant should 'respond or be taken to have resigned' would not terminate his contract until it he had read it.

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