



EMPLOYMENT GROUP BULLETIN



The new year heralds another year of change, uncertainty and opportunity for employment practitioners. The year 2011 brings with it mounting speculation in the press that companies are to be given greater freedom to sack under-performing workers as part of a plan to overhaul employment laws. Reforms mooted as part of the so-called “employers’ charter” might include the requirement for claimants to pay a fee when lodging a complaint and a possibility that small companies will be excluded from the full panoply of employment legislation. Given the embryonic nature of these proposals the best that can be said at present is watch this space.

This edition focuses on a number of ways in which tribunals can provide protection to litigants where needed, whether claimants or respondents. Martina Murphy and Louise Mankau focus on anonymity orders while Paul Staddon discusses springboard injunctions.

PAUL STEVENSON

SPRINGBOARD INJUNCTIONS: AN UPDATE

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The potential spread and misuse of confidential information in this increasingly digital age means that it has never been more important for employers to protect themselves and quickly. Springboard injunctions may provide employers with the remedy which they need. Paul Staddon highlights the key authorities and clarifies the approach which courts will take.

The classic description of a springboard injunction is Roxburgh’s J in **Terrapin v Builders’ Supply (Hayes)**¹.

“[T]he essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication, and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public.”

Accordingly, the Court will seek to unravel an unfair competitive advantage that has been obtained by misuse of confidential information. In **Roger Bullivant Ltd v Ellis**², for example, the MD of the Claimant had, before leaving his employment, removed a copy of its customer card index, which was arguably confidential under the second limb of **Faccenda Chicken v Fowler**³. The Court of Appeal upheld the granting of a springboard injunction restraining the Defendant from approaching all the persons named on the card index, even though he could remember some of the addresses or easily find them by looking up some suitable reference book: “Having made a deliberate and unlawful use of the plaintiff’s property, (the Defendant) cannot complain if he finds that the eye of the law is unable to distinguish between those whom he could, had he chose, have contacted lawfully and those whom he could not.” However, it allowed the appeal in part, holding that an interim injunction should be of fixed duration limited to such period as would deprive the Defendant of the illegitimate advantage he had gained.

In **Balston v Headline Filters**⁴ Scott J took the view that springboard injunctions were limited to misuse of confidential information cases. But in **UBS Wealth Management (UK) v Vestra Wealth**⁵,

SPRINGBOARD INJUNCTIONS: AN UPDATE

ANONYMITY ORDERS IN EMPLOYMENT TRIBUNALS

CONTINUED OVERLEAF

PAUL STADDON



Paul is an experienced advocate, who is frequently called upon to handle difficult cases where a particularly tough approach is called for and where fast, realistic advice is called for at an early stage. He has often been called upon to represent in litigation his own instructing solicitors, when they have serious legal problems of their own. Instructing solicitors comment on his incisive advice and tenacious cross-examination.

Paul has a particular interest in post-employment injunctions, particularly so-called “springboard” injunctions where used for the protection of confidential information. He has recently hosted seminars on this subject and in this newsletter provides an update on their use and a comprehensive overview of the relevant case law.

Openshaw J disagreed holding that such injunctions are available to prevent any future or further serious economic loss to the previous employer caused by a former employee taking advantage of any serious breaches of his contract of employment – in this case breach of the implied covenant of fidelity. For an injunction to be granted, the unfair advantage had to exist at the time when the injunction was sought, and it must be shown that it would continue unless restrained.

Recently, Arnold J reviewed the leading authorities in **Vestergaard A/S v Bestnet Europe Ltd**⁶. His conclusions were:

- (i) In general, the remedy for past misuse of confidential information is a financial one. Where appropriate, the claimant can claim a restitutionary remedy, namely an account of profits, which deprives the defendant of the benefit of his wrongdoing;
- (ii) As the law stands, it is not clear whether springboard relief can be granted to prevent a defendant from benefiting from a past misuse of confidential information;
- (iii) When an interim injunction is sought, the court's task is to hold the ring pending trial. Since it cannot at that stage determine the parties' legal rights nor award either compensatory or restitutionary remedies, a limited injunction to prevent the defendant from benefiting from any past misuse of confidential information may be the best way to preserve the status quo. If it turns out to have been wrongly granted, the court can require the claimant to compensate the defendant under the cross-undertaking in damages; and
- (iv) Considerable caution is required as to whether to grant such an injunction at all and, if so, as to its form and duration. Any injunction should not put the claimant in a better position than if there had been no misuse. Nor should it extend beyond the period for which the defendant's illegitimate advantage may be expected to continue.

CONCLUSIONS

1. Absent a ruling from an appellate court, the new consensus is that the springboard jurisdiction is not restricted to misuse of confidential information cases.
2. There remain doubts, in misuse of confidential information cases, whether it is available where the information has ceased to be confidential or where it is “semi-confidential”, ie information obtainable by legitimate means such as reverse-engineering or research of information in the public domain.
3. Courts are reluctant to grant springboard injunctions, preferring to leave claimants to their monetary remedies, including that of an account.
4. Springboard injunctions are more likely to be granted at an interlocutory stage, to keep the ring pending trial.
5. Springboard injunctions should be of limited duration, and not extend beyond the period for which the defendant's illegitimate advantage may be expected to continue.

PAUL STADDON

¹[1960] RPC 130 ²[1987] FSR 172 ³[1985] FSR 105 (CA) ⁴[1987] FSR 330

⁵[2008] EWCH 1974 (QB) ⁶[2009] EWHC 1456 (Ch); [2010] FSR 29 ⁷See

OUR AUTHORS



ANONYMITY ORDERS IN EMPLOYMENT LAW

Protection of their personal and sensitive information can, for some litigants, be a high priority. Among the options on offer are anonymity orders. Potential pitfalls which apply. In this article Martina Murphy and Louise Mankau chart a path through the law.

SUMMARY

There has been an upsurge in applications for anonymity orders in the courts generally. In **HM Treasury v Ahmed & Others [2010] 2 WLR 325** (Supreme Court) Lord Rodger commented (see paras 1 and 2) on the “widespread phenomenon” of anonymisation.

In employment law, there is statutory provision for protecting the identity of persons in certain circumstances, ie by means of restricted reporting orders and register deletion orders. However, because the protection afforded by these orders is limited, the Employment Appeal Tribunal (EAT) has developed the law in this area further.

REPORTING RESTRICTION ORDERS (RROs)

RROs are restricted to specific cases: those involving allegations of sexual misconduct and cases of disability discrimination involving “evidence of a personal nature” (r 50 Employment Tribunal Rules 2004 (ETR)). The effect of an RRO is to prevent the publication or broadcast in Great Britain, of, in a sexual misconduct case, any matter identifying either a person affected by or the person making the allegation, and in a disability discrimination case, the complainant or any other persons named in the order (see ss 11 and 12 Employment Tribunals Act 1996 (ETA)).

RROs may be temporary or full, and may be made by a tribunal or judge acting on their own initiative, or on application by a party. A temporary order automatically lapses unless a party applies before the 15th day for a full order. In order to obtain a full order, the parties must first have the opportunity to make oral representations. Importantly, a third party, for example the press, may apply, not only to make representations before a full order is made, but to have the order varied or revoked (see **Tradition Securities & Futures SA v Times Newspapers Ltd [2009] IRLR 354**).

The effect of an RRO:-

- There are restrictions on what may be reported in the press up to the date when the case finishes. RROs are designed to offer temporary protection, the rationale being that the press are generally more interested in reporting contemporaneous events; and
- **If the case settles prior to determination of remedy, an unrevoked FRRO remains in place in perpetuity (see Davidson v Dallas McMillan [2010] IRLR 439).**

It is important for advisers to appreciate the limitations of RROs which include:-

- **They are not perpetual.** RROs automatically terminate at the end of



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Martina specialises in representing claimants and respondents in all aspects of employment and discrimination law. She appears in tribunals and the appellate courts, most recently appearing before the Court of Appeal in NHS Trust in **Arhin v Enfield Primary Care Trust [2010] EWCA Civ 1481**. Also experienced in High Court matters, recently

seeking injunctive relief acting for a FTSE 250 company in a restrictive covenant/confidential information case.

Martina sits on the Employment Committee of the Federation of Small Businesses, recently speaking on their behalf at the European Parliament, on Women in the Workplace in Europe/female entrepreneurship.



LOUISE MANKAU

Louise has become an important junior within Tanfield's employment team and is noted by solicitors for being down-to-earth and client-friendly. For four months, Louise was retained by the London Borough of Southwark to provide assistance to their employment team and

has particular experience of local authority procedures and policies. She is instructed on a regular basis by several London Boroughs and County Councils. A very experienced employment tribunal advocate, she has also appeared in the EAT several times for both parties, and has successfully represented employees of international institutions not subject to the jurisdiction of English Law in internal unfair dismissal and discrimination hearings. Louise remains a keen Hull City fan, despite their exit from the Premier League, and is currently addicted to playing MarioKart on the Nintendo Wii!

EMPLOYMENT TRIBUNALS

litigants, be a major hurdle to bringing or fighting a complaint in a pitfalls lie in the way, however, amongst the rules and authorities clear way through.

the proceedings unless revoked earlier (r 50(8)(b)). They are designed as temporary protection to prevent witnesses being inhibited in terms of the evidence they give. If the press remains interested after the case has been determined, they are free to publish the identities of the persons hitherto protected by the order;

and

- They are only binding in the UK, as opposed to similar orders in the High Court which are worldwide.

Sexual Misconduct

RROs are available in any case where there are allegations of sexual misconduct (s 11(6) ETA). The allegations of sexual misconduct / offences do not have to be a central issue in the case or even pleaded, they may simply be part of the factual background.

"Identifying matter" is defined as, in relation to a person, "any matter likely to lead members of the public to identify him as a person affected by or making the allegation" (r 11(6)).

"...the tribunal will have to be convinced that the administration of justice will be affected, most commonly where a witness will be deterred from pursuing a case or giving full and frank evidence regarding the allegations in issue."

In relation to the effect of the claimant's wish, or otherwise, to have the protection of an RRO, see **Tradition Securities** (above). There, the EAT concluded, somewhat controversially, that as a matter of principle, it was open to respondents to insist that claimants should be covered even if against a claimant's wishes. This could occur, for example, where identification of a claimant would be likely to lead to the identification of a respondent protected by an RRO.

In order to convince the tribunal that a person is "affected by" the allegation, the tribunal will have to be convinced that the administration of justice will be affected, most commonly where a witness will be deterred from pursuing a case or giving full and frank evidence regarding the allegations in issue.

In terms of evidence, an applicant for an RRO would be well advised to give a statement explaining why they say they would be deterred from pursuing their case or from giving full and frank evidence if the RRO is not granted.



Disability Discrimination Cases

RROs are available under tribunals' powers (r 50(1)(b)) in disability discrimination cases which involve "evidence of a personal nature", defined as "any evidence of a medical, or other intimate, nature which might reasonably be assumed to be likely to cause significant embarrassment to the complainant if reported" (s 12(7) ETA).

The RRO in this context is designed to protect, primarily, the complainant, but there is potential to cover other persons (see definition of "identifying matter" in s 12(7)).

REGISTER DELETION ORDERS (RDOs)

Where a case involves an allegation of the commission of a sexual offence (ie not simply sexual misconduct), the tribunal *has* to make an RDO irrespective of the parties' views. The effect of an RDO is that any "identifying matter", which is likely to lead to the public identifying any person "affected by or making" such an allegation, is omitted or deleted from the Register, any judgment, document or record of the proceedings which is available to the public (r 49 ETR 2004). An RDO has been described as a "permanent anonymity order" (in **A v B [2010] IRLR 844**, supplementary judgment, at para (3), per Underhill J) to identify "the essential distinction between an order under r 49 and one under r 50". There is, however, no power under the rules to make an RDO in cases other than those involving an allegation of the commission of a sexual offence.

CONTINUED OVERLEAF

THE EAT'S POWERS

The EAT's power to make an RRO is limited to two situations, ie where the appeal is:-

- (1) Against an ET decision to refuse or make a RRO; or
- (2) Against an interlocutory (or interim) decision of a tribunal in a case where an RRO is still effective (SI 1993/2854 r 23 (1); ETA 1996 s 31(2)).

There is no power to make such an order in an appeal against a tribunal's *final* order. Moreover, the EAT's power to make an RDO is limited to appeals in the above two situations and does not extend to anonymising the identity of persons affected by or making an allegation of a sexual offence in an appeal on the substantive merits of a case.

THE DEVELOPMENT OF ANALOGOUS ORDERS

The limitations highlighted in both the employment tribunal and EAT rules have resulted in the EAT making a series of decisions giving protection to persons who are not strictly covered by the statutory provisions.

So far as the tribunals are concerned, in **Chief Constable of West Yorkshire Police v A [2000] IRLR 465** and **X v Metropolitan Police Commissioner [2003] IRLR 411** the claimants, who were both transsexuals, sought orders protecting their identities in sex discrimination cases on the ground that, in the absence of such orders, they would be deterred from pursuing their claims as they did not wish to disclose the fact of their transsexuality in public. In both cases the EAT considered that a tribunal has power to make protective orders, analogous to RROs and RDOs, based on art 6 of the Equal Treatment Directive requiring member states to give an effective remedy for breach of the rights conferred by the Directive, and on the EU principle of effectiveness which provides that claimants with EU-based rights should not be subject to procedural rules which render virtually impossible or excessively difficult the exercise of those rights. In **X v Metropolitan Police Commissioner**, Burton J went further and held that the power to make such orders could also be based on tribunals' own general regulatory powers in r 60(1) of the ET Rules.

"If there is a good reason to make an analogous order in situations not covered by the rules, the tribunals are likely to find a way of achieving the desired objective."

The EAT's own limited powers were considered in **A v B [2010] IRLR 844**, where Underhill J described the inability of the EAT to make RROs and RDOs on appeals against the substantive decisions of tribunals as producing "a remarkable anomaly and a wholly unfair situation". The case concerned a claim of unfair dismissal following a report to the employer by the police of allegations that he had been involved in paedophile activities overseas. The employment tribunal had made an RRO and an RDO under the rules, but on appeal the EAT could not make similar orders under its own rules. As it was an unfair dismissal case, unlike the position in **A** and **X** above, the claim was not based upon any right deriving from EU legislation and so the principle of effectiveness was not in play. The EAT, however, got around this by relying on s 6 of the Human Rights Act 1998 which requires the EAT to act in a manner that protects Convention rights (here art 8, the right to respect for private and family life). By this route, it held that there was no difficulty in principle in construing s 30(3) of the 1996 Act so as to permit the making of an order equivalent to a permanent anonymity order. Having considered that the Claimant's art 8 rights were in play, it carried out the necessary balancing exercise between those rights and the rights protected by art 10 (rights of the press), and concluded that the balance came down clearly in favour of preserving the claimant's anonymity. The EAT, having kept the claimant's identity secret during the hearing, accordingly anonymised the judgment and deleted from the public record any matter which was likely to lead members of the public to identify the claimant.

CONCLUSION

The decisions discussed above show that the circumstances in which tribunals and the EAT may make anonymity orders need not be limited by the precise parameters of the statutory provisions concerning RROs and RDOs. If there is a good reason to make an analogous order in situations not covered by the rules, the tribunals are likely to find a way of achieving the desired objective. But an applicant for anonymity in such a case must show a real need for protection. In **X v Metropolitan Police Commissioner**, for example, that need was the fact, as found by the tribunal, that the claimant would have been deterred from proceeding with her claim if no order was made. It does, however, need to be stressed that before making any sort of anonymity order (other than an RDO) the tribunals will always have to carry out a balancing exercise weighing the particular rights of the applicant for such an order to have his or her identity protected against the wider rights of the public (including the press) for open justice and the right to receive information.

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