

# Employment Update

June 2010

## Case notes

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In *De Berlin v Eversheds Legal Services Ltd* the employer had placed the claimant in a redundancy selection pool together with a female colleague who was on maternity leave. One of the financial performance selection criteria was “lock-up”, the time lag between carrying out a piece of legal work and receiving fees for it measured over the course of the previous year. The claimant received a score of 0.5 and the female colleague was awarded a notional score of 2 since she was on maternity leave at the end of the period and no figure was available for her. [More...](#)

### 12-month post-termination non-solicitation clause too long to be enforceable

In *Associated Foreign Exchange Ltd v International Foreign Exchange (UK) Ltd and Another* the High Court held that there was insufficient evidence that a restriction of 12 months went no further than was reasonably necessary to protect an employer’s legitimate business interests. It therefore refused to grant an injunction to prevent an ex-employee soliciting customers. [More...](#)

### Inadequate investigation into misconduct with serious consequences for the employee

In *Salford Royal NHS Foundation Trust v Roldan* the claimant, a nurse from the Philippines, was alleged to have abused a patient in a number of ways. A senior manager interviewed Ms Roldan and a colleague (Ms Denton) who claimed to have witnessed the events. The manager made lengthy notes of the investigatory interview with Ms Roldan, but no notes of the interview with Ms Denton. The employer’s disciplinary panel found Ms Roldan’s evidence unconvincing and preferred that of Ms Denton. They dismissed Ms Roldan, who complained of unfair dismissal. The matter was reported to the police and Ms Roldan was prosecuted but acquitted. She also lost her right to remain in the UK. [More...](#)



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**Extension of flexible working: consultation due this year**

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## Any comments or queries?

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## Case notes

### Inflating redundancy score of employee on maternity leave constituted sex discrimination against male colleague

In *De Berlin v Eversheds Legal Services Ltd* the employer had placed the claimant in a redundancy selection pool together with a female colleague who was on maternity leave. One of the financial performance selection criteria was “lock-up”, the time lag between carrying out a piece of legal work and receiving fees for it measured over the course of the previous year. The claimant received a score of 0.5 and the female colleague was awarded a notional score of 2 since she was on maternity leave at the end of the period and no figure was available for her.

The claimant’s overall score in the exercise was 27 and the female employee’s was 27.5. Because his score was lower, it was the claimant who was made redundant.

The tribunal decided that the claimant had been discriminated against and unfairly dismissed due to less favourable treatment on the grounds of sex caused by the inflating of the female employee’s score. The tribunal held that the employer could have scored the exercise differently; for example, choosing a different period which included a time when the female employee was working.

The tribunal also found that the employer could not rely on the “special treatment” qualification in the sex discrimination legislation, which provides that “*no account shall be taken of special treatment afforded to women in connection with pregnancy or birth*”. This qualification could not be interpreted to provide women with blanket special treatment.

The decision is being appealed and we will report on future decisions in subsequent Updates.

### 12-month post-termination non-solicitation clause too long to be enforceable

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Associated Foreign Exchange Ltd (AFEX) and International Foreign Exchange (UK) Ltd (IFX) are competitors in the foreign currency exchange market. Mr Abbassi was an account executive at AFEX and, after three months on garden leave, moved to a similar position at IFX. AFEX sought to enforce a post-termination restrictive covenant in his employment contract which stated:

*“The employee undertakes that he will not, in any capacity (without the previous consent in writing of the employer) for a*

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*period of 12 months immediately after the termination date, in any capacity for a competitor, negotiate or, solicit business from, or endeavour to entice away from the employer a customer, or a potential customer.”*

The contract also contained a six-month post-termination “non-dealing” clause and provided that the duration of both clauses should be reduced by any period spent on garden leave.

AFEX sought injunctive relief against both Mr Abbassi and IFX to prevent solicitation of its customers and potential customers for nine months from Mr Abbassi’s last day of employment, taking into account the three months he had spent on garden leave.

When refusing the application, the High Court held that non-dealing clause gave adequate protection because Mr Abbassi was not particularly senior and he had not played a key part in securing new business for AFEX. Such protection would only be appropriate where a business could show that building up a relationship with its potential customers was a long and difficult process, involving significant investment in time and money.

## **Inadequate investigation into misconduct with serious consequences for the employee**

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The tribunal was concerned that, because the investigating manager and the disciplinary panel believed Ms Denton had no reason to lie, they had not sought to question the reliability of her evidence. The tribunal found the dismissal unfair and held that the employer should have made further enquiries into Ms Denton’s evidence and should have questioned other employees.

The EAT initially overturned this decision but the Court of Appeal agreed with the tribunal finding of unfair dismissal stating that tribunals should take into account the gravity of the consequences on the employee when assessing the fairness of an investigation. When the consequences are serious, the investigator must take even more care to be “even-handed” in looking for evidence in the accused’s favour as well as evidence against them.

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### **Fake “fit notes” being sold online**

A website has begun selling fake versions of the new “fit notes” introduced in April 2010. The notes are stamped and written on official doctors’ notepaper. Although the site claims the notes are for novelty use only, employers are being warned to be careful of them being used to claim sick pay, particularly while HR departments get to grips with the new “fit note” system.

### **Extension of flexible working: consultation due this year**

Edward Davey, the Parliamentary Under-Secretary of State for the Department of Business, Innovation and Skills, has confirmed that the Government will issue an extensive consultation on its commitment to extend the right to request flexible working to all employees. Mr Davey stated that the consultation would be issued with a view to bring its proposals into Parliament “*later in the year*”.

Future Updates will report on the consultation.

### **Survey finds flexible working to be the most valued benefit**

A survey by PricewaterhouseCoopers has found that flexible working is the most valued benefit for employees. Of the 1,167 respondents who took part in the survey, 47% named it as their most important benefit, with bonuses in second place, preferred by 19% of respondents. A higher number of employees see an improved work-life balance as more attainable in the long term than increased responsibility and salary.

Source: Employees rate work-life balance over bonus, PricewaterhouseCoopers  
31 May 2010.

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