That was the year that was! 2019

By Paul Quain - 23 December 2019

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Well, it's been quite a year. Thank goodness its almost over! We started it (much as we started every year since 2016) in a fog of uncertainty around Brexit. We have ended it at least knowing that the UK will be leaving the EU on 31 January 2020 (announced by Big Ben being brought back into action to chime and a new 50p coin), although our future relationship with the EU remains as foggy as ever!

What else has happened? Well, England won the cricket world cup (with a dramatic finish) but its rugby team was not quite able to repeat this success. Whilst it managed to defeat New Zealand in an exciting semi-final it could not quite repeat this formidable performance in the final against South Africa.

We said goodbye to Doris Day, Freddie Starr, Robert Mugabe, Jacques Chirac, Ross Perot, Toni Morrison and Niki Lauda.

On the employment law front there were a surprising number of developments despite the unsurprising political focus on all things Brexit. The number of claims in Employment Tribunals continues to rise (which appears to be an ongoing consequence of the abolition of employment tribunal fees), although they are not yet at the levels seen before the introduction of fees. The average value of an award has, however, fallen. There has been talk and angst (as well as a consultation) about what have become known as NDAs (non-disclosure agreements) but in fact, relate to the confidentiality clauses in settlement agreements. We have picked a few significant issues and have randomly selected some interesting cases from throughout the year.

January

In January the focus was on pay differentials and we saw legislation introducing, amongst other things, mandatory reporting of the ratios between CEO and average staff pay for listed companies. In addition, the consultation closed on ethnic pay gap reporting. We await to see what the new government will do with this.

June

In June the Court of Appeal looked at whether you can bypass a recognised trade union and make offers direct to the workforce. After their decision, at the moment making "one off" direct offers to the workforce which by-pass a trade union seem ok. The case is likely to go to the Supreme Court so watch this space!

July

To much fanfare and the great excitement of many employment lawyers, the UK Supreme Court delivered its first judgment on employment post-termination restrictions for a century in Tillman v Egon Zehnder. In this case, the Supreme Court accepted that the words "interested in" included in a non-compete restriction on a former employee were unenforceable (as they prevented her from simply holding a few shares in a competitor), but held that they could be struck out or "severed" from the rest of the non-compete clause so that the non-compete became enforceable.

There are a few takeaways from this decision for employers:

- This decision may open the doors to more employers trying to enforce restrictions which have a couple of words which may fall foul as being too broad, on the basis that they can be severed. So, we may see more willingness on employers to "have a go" at enforcement or threatening enforcement.
- Although the Supreme Court did sever the problematic words in the restriction in this case, it is still sensible to expressly carve out minority or passive shareholdings.
- Expect to see more arguments between employers and employees as to whether risky words can be deleted from covenants without generating a "major change" in the overall effect of the post-termination restrictions. What constitutes a "major change" is a point which we expect to see developed in future case law.
- But beware, as the Supreme Court has left open who should pick up the costs when an employer successfully persuades a court to sever certain words from a restriction in order to make it enforceable – it suggests that the employer may still have to pick up some or all of the legal costs for not getting the drafting of their restrictions right in the first place. So, it still pays to carefully draft your post-termination restrictions and to keep them under review so that you don't have to rely on a severance argument in the first place.

December

The Supreme Court said that it was automatically unfair to dismiss an employee if the person who took the decision to dismiss was not aware that the employee had made protected disclosures and had been misled by the employee's line manager. The line manager was aware of the disclosure and had engineered a dismissal for poor performance. This was bad news for the employer (the Post Office).

The employment tribunal also heard the case of Ms. Maya Forstater a public policy researcher and writer with the Centre for Global Development. She claimed that following the end of her contract in December 2018 the refusal of CGD to engage her further was because of comments she made on Twitter (and elsewhere) about trans issues. The case has divided opinion and caused passionate advocacy (on both sides) on the issue. One of the questions the tribunal had to determine was whether a belief that there is no spectrum in sex and there are no circumstances whatsoever that a person can change from one sex to another is a belief which is protected from discriminatory conduct under the equality act. The tribunal concluded that this was a belief held by the claimant but was not one worthy of respect in a democratic society because it is incompatible with the human rights of others which have been identified and defined by the European Court of Human Rights and put into effect by the Gender Recognition Act. Feelings are running very high about this case and it will certainly be appealed over the coming months.

The year ended with a bang with the election of a new Conservative government with a significant majority which means the new decade will start with the UK formally leaving the EU and a potential new landscape unfolding. We have had a go at some predictions but will need to wait and see what 2020 holds in store!