Employment Update
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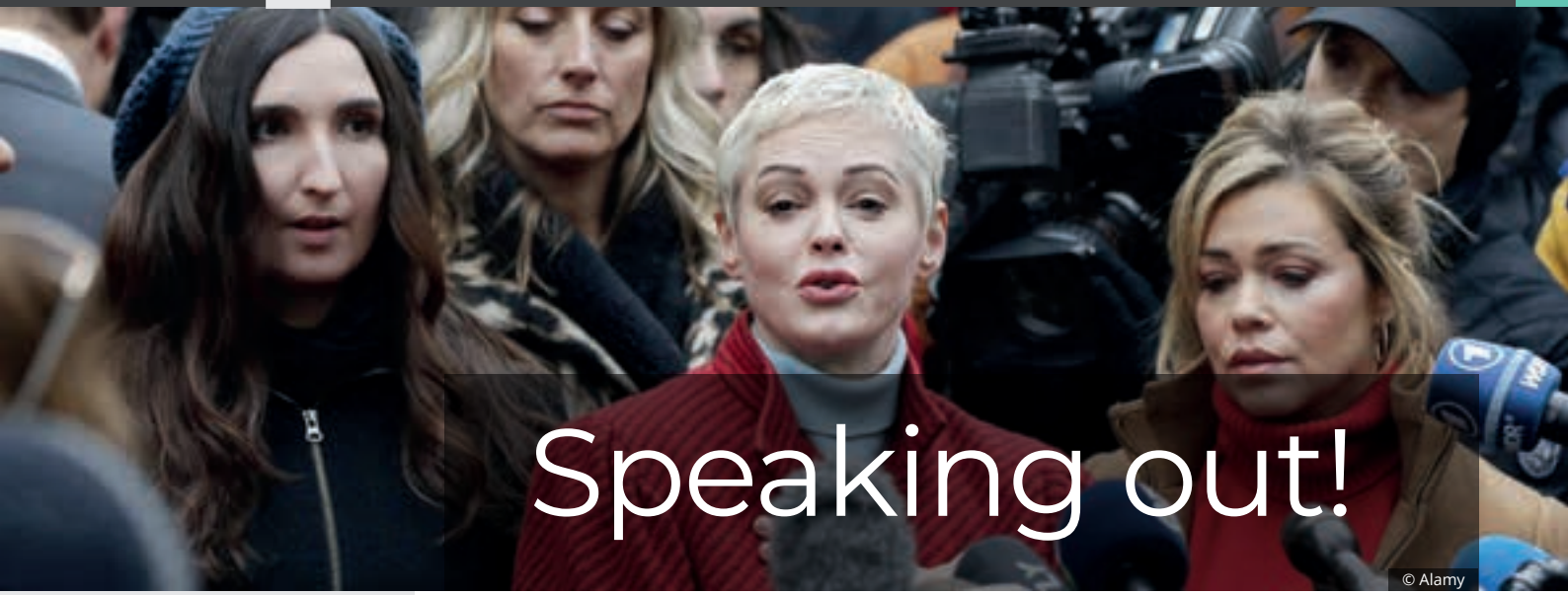
ELY PLACE CHAMBERS



Speaking out!

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Featured in this edition

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Max Cole

Harvey Weinstein, the disgraced film producer, is currently on trial in New York. Allegations against Weinstein had been made for a number years but gained traction in October 2017 following investigative stories in the New York Times and the New Yorker. Since then, more than 80 women have made allegations of sexual assault, harassment and rape against him.

For employment lawyers, one notable theme in the story is the use (or misuse) of non-disclosure provisions in the settlement agreements by which Weinstein compromised claims against himself and his companies.

In July 2018, the House of Commons' Women and Equalities Select Committee issued a report on Sexual Harassment in the Workplace. During the course of its inquiry, the Committee heard evidence from an employee who had settled a claim against Weinstein. The terms of settlement – which were part of the evidence to the Select Committee – are densely drafted and barred her from discussing any aspect of her employment with family, friends, medical practitioners, the Inland Revenue, accountants, financial advisers or legal representatives unless they first signed an NDA acceptable to the employer.

Evidence of this sort led to the Committee launching a further inquiry into the use of non-disclosure agreements ("NDAs") in discrimination cases. The inquiry was prompted by concern that "some allegations of sexual harassment are being 'dealt with' using settlement payments and agreements that prevent the employee from speaking about the alleged behaviour - even unlawful behaviour - without those allegations ever being investigated and without any sanctions for perpetrators." It reported in June this year.

The Committee expressed concerns about the imbalance of power between employer and employee which leads employees to feel coerced into signing settlement agreements which include stringent non-disclosure provisions. It noted that although non-disclosure provisions can assist in settling claims, they can cause significant future difficulties to employees by, for instance, restricting access to professional advice, limiting (or at least causing significant uncertainty about) what can be said to future employees, restricting assistance in criminal and other proceedings and generally being used to cover up discriminatory conduct which – of course – is illegal.

The Committee's report includes extensive recommendations which focus on "ensuring that NDAs cannot prevent legitimate discussion of allegations of unlawful discrimination or harassment, and stopping their use to cover up allegations of unlawful discrimination, while still protecting the rights of victims to be able to make the choice to move on with their lives."

* Continued on page 4

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Making a dash for workers' rights

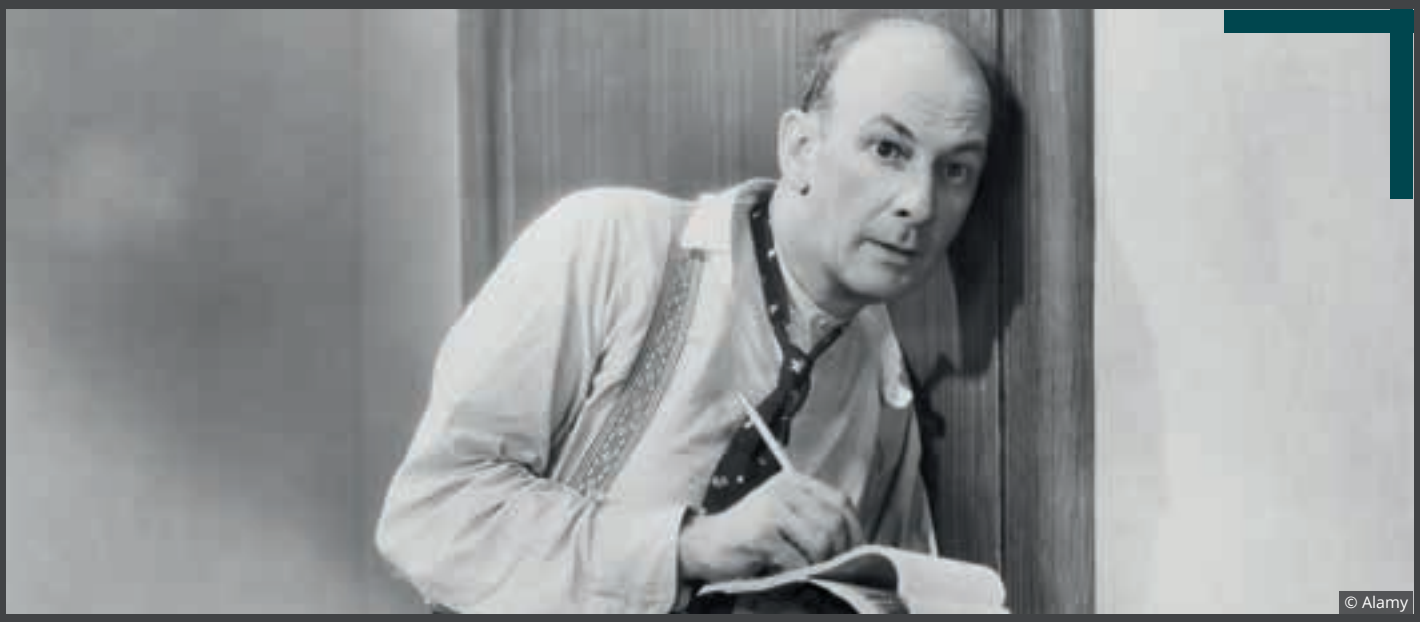
Gill Crew

Cycle couriers bringing a claim under the TUPE regulations have scored a victory in the employment tribunal which may have implications for a wide category of workers. Following a preliminary hearing at London Central employment tribunal in the case of *Dewhurst v Revisecatch Ltd (t/a Ecourier)*, Employment Judge Joffe held that those considered to be workers under section 230(3)(b) of the Employment Rights Act 1996 and reg 2(1) of the Working Time Regulations 1998 also fell within the definition of "employee" under reg 2(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006. For that reason, they are entitled to protection under the TUPE regulations.

The Claimants were bringing, amongst other claims, holiday pay claims under the Working Time Regulations and claims for failure to inform and consult under TUPE. They had provided their services as couriers in relation to the HCA Healthcare contract. From 1 February 2018 this contract transferred to the First Respondent, Revisecatch, from City Sprint (UK) Ltd. A preliminary hearing was heard to consider whether a worker under s230(3)(b) ERA 1996 and/or reg 2(1) WTR 1998 fell within the definition of employee in reg 2(1) of TUPE 2006. No evidence was heard and the tribunal dealt with the matter by way of skeleton arguments and submissions, and so made no decisions on the individual claimants' employment status.

EJ Joffe found that UK Law recognised "employee" in two different ways. Firstly, in the traditional sense of an employee having a contract of employment, and also individuals who fell into the intermediate class between an employee and a self-employed person running their own business. These workers/employees benefit from rights derived from EU law, such as the right to equal pay, working hours, annual leave and the right not to be subjected to discrimination. EJ Joffe went on to find that the Acquired Rights Directive from which TUPE is derived could also be construed as embracing this class of working person. It was difficult to see how workers could be protected from discrimination but not entitled to have liabilities for infringement of their EU-derived employment rights transferred and preserved. He concluded that reg 2(1) of TUPE 2006 was intended to confer rights and obligations on a broader class of employees than those employed under a contract of employment or apprenticeship, as reflected in the words "or otherwise" contained in reg 2(1).

Although this is a first instance decision and therefore not binding, this case is one to watch as it makes its way up the appellate process – as it undoubtedly will. However, it is not a surprising decision in the context of recent 'gig economy' cases where employment status is more often than not resolved in the worker's favour. In those circumstances, it seems logical that workers who would be integrated into the business in question and not running their own business would have such protection extended to rights under TUPE when the undertaking in which they are working is transferred. ■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Pardon? I'm trying to trap you with a secret recording!

Michael Salter

There's no need to listen at the door now that most of us carry a smartphone, so it is, perhaps, no surprise that tribunals are dealing with increasing numbers of claims where covert recordings exist, be they recordings of conversations between members of staff at the watercooler, or of formal meetings.

The use of such recordings is a balancing act for tribunals between maintaining privacy and the public interest in meetings being confidential, against that of the admissibility of relevant material. A clear example of where that balance fell was the tribunal case of *Eyre and Ors v Heerema Hartlepool Ltd* (2506949/2012) in which it was determined that parts of a transcript of a covert recording in which there were numerous references to legal advice were held to be inadmissible.

In *Vaughan v London Borough of Lewisham* [2013] IRLR 720 it was noted that covert recordings were distasteful, yet they were admitted as evidence, although not the full 39 hours the Claimant had recorded, but a more focussed five hours.

Generally such recordings are admissible: *Chairman and Governors of Amwell View School v Dogherty* [2007] ICR 135, although in this case a distinction was drawn between a meeting's "open" and "private" sessions. In the latter it was, perhaps unsurprisingly, considered that the panel would have an expectation of privacy in deliberations. Indeed, in that matter the panel had asked the parties to leave when they conducted their deliberations. It is also worth noting that the panel had agreed to give full reasons for its decision.

The EAT noted that a different result may have arisen if there was evidence in the discussion of discrimination. This point arose in *Punjab National Bank Int'l Ltd and Ors v Gosain* UKEAT/0003/14 in which the Claimant had made covert recordings of conversations in both the private and public parts of grievance and disciplinary hearings. She then resigned and claimed constructive dismissal, race and sex discrimination. The recordings were ruled admissible, and the matter referred to the EAT. Here the recordings revealed that the officer said the Claimant's manager had instructed them to dismiss her; they had skipped over key parts of her grievance on purpose; and they made sexually offensive comments about her. The EAT refused to overturn the ET's decision that there was no public interest in protecting those comments from disclosure.

More recently the EAT has revisited this matter in *Phoenix House v Stockman (No 2)* UKEAT/0284/17, which considered the effect of covert recordings on compensation. The Respondent argued that, had it known of the covert recordings, it would have inevitably dismissed the Claimant, as her conduct was culpable and it would fall within that category of contributory conduct and with an inevitably fair dismissal the Polkey principle would reduce the compensatory award.

The ET found that the Claimant's actions were not gross misconduct, as covert recording of meetings was not specifically identified as an act of gross misconduct, and, they found, the Claimant was flustered at the time she made the recording. The covert recording per se was not therefore automatically a breach of the implied duty of trust and confidence.

What should employers do then if they find an employee has been covertly recording meetings or colleagues? If tribunal proceedings are in train the issue may arise as one of compensation. If the employee is still employed, there could be disciplinary proceedings.

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Shhh! I'm recording!

Michael Salter

* Continued from page 3

Whether this constitutes misconduct or gross misconduct will however turn on factors such as the reason the employee has for making the recording: is it entrapment, or is it to prevent being misrepresented, and if so, why did the employee consider that this was a risk? What is the attitude of the employer to covert recordings? Is it signposted in a policy? Did the recorded meeting start with "ground rules" being spelt out? The culpability attached to an employee may vary from an employee who has specifically been told that a recording must not be made, or has lied about making a recording, to the inexperienced or distressed employee who bears little culpability.

What damage has been done to the respondent by the information being recorded? Would it have been provided to the employee anyway, or is it material that legitimately could be withheld, e.g. other people's personal data or sensitive commercial information?

What practical lessons can we glean from these cases? A claimant that has such recordings should disclose them and a transcript of the recording.

Employers should try to pre-empt these difficulties by setting out the consequences of making covert recordings. Policies and contractual terms outlawing recording will set the "ground rules" for meetings.

If possible, have a separate room so a panel can withdraw to deliberate in private. That way, an employee cannot "accidentally" record them after "carelessly" leaving their phone in a bag or jacket when the employee leaves the room. ■

NDAs: a user's guide

Max Cole

*Continued from page 1

Quite how, and whether, this balance can be struck effectively, remains to be seen. Very shortly after publication of the select committee's report, the government published a response to its own consultation on preventing the misuse of non-disclosure provisions in relation to workplace harassment and discrimination. Then, at the end of October, it gave a formal response to the Select Committee's recommendations. In those documents the government committed to legislation in the following areas:

- making it illegal to prevent disclosures to the police, health and legal professionals;
- requiring limitations in NDAs to be clearly set out in employment contracts and settlement agreements;
- enhancing the independent legal advice given to those signing NDAs;
- introducing enforcement measures for NDAs that do not comply with legal requirements.

However, there is no commitment as to when the measures will be introduced.

The EHCR, Law Society and SRA have all published guidance on non-disclosure provisions in settlement agreements. How is the busy practitioner to proceed?

First, non-disclosure provisions remain a perfectly legitimate aspect of settling employment-related disputes, including allegations of sexual harassment and discrimination. The key is to ensure that the agreement includes appropriate carve-outs which permit appropriate disclosures, for instance:

- by making a protected disclosure under the whistleblowing legislation;
- when reporting misconduct to a regulator;
- when reporting criminal offences or participating in a criminal investigation or prosecution;
- when dealing with the tax authorities;
- to a spouse, civil partner or close family members (provided that such individuals agree to keep that matter confidential);
- for the purpose of seeking tax, medical or other professional advice;
- In order to comply with a court order or when giving evidence in court or to a tribunal.

All of the carve-outs should be in plain English. ■

Briefs, beliefs, bereavement

- It's no surprise that Maya Forstater has announced she is to appeal the decision of EJ Tayler following the first hearing of her claim against Center for Global Development Europe and others at London Central Employment Tribunal in December. He ruled that her belief that biological sex is immutable, and that it is not possible for a human to change sex, was not worthy of protection as a philosophical belief. The heated debate on Twitter and elsewhere from trans activists and free speech advocates is unlikely to die down soon. ■

- In January, Mr Casamitjana Costa had an easier time persuading EJ Postle in Norwich ET that his belief in ethical veganism was worthy of protection - as the parties agreed that it was. However, the zoologist will face further hurdles in his ongoing claim against the League Against Cruel Sports, which claims he was dismissed for gross misconduct and not because of his beliefs. ■

- Employees who, as parents, suffer the loss of a child under 18 will from April 2020 be entitled to two weeks' paid bereavement leave under the Parental Bereavement Leave Regulations 2020. Credit for the law change goes to Lucy Herd, who campaigned for the paid leave following the death of her 23-month-old son, Jack. ■

- The National Living Wage will rise by 51p per hour to £8.72 from 1st April 2020. The National Minimum Wage rates also rise. ■

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Contact us

Call 020 7400 9600
or email our clerks at
admin@elyplace.com

Ely Place Chambers
13 Ely Place, London EC1N 6RY
DX: 291 London Chancery Lane

www.elyplace.com