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UK Employment Law update – April 2021

Welcome to our monthly newsletter, with a summary of the latest news and developments in UK employment law.

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Case law updates

Damages: A claimant, a gynaecologist employed by a private hospital, was awarded over £880,000 (being 10 years of loss) after succeeding with his whistleblowing detriment claim. However, the employer appealed, and the Employment Appeal Tribunal granted the employer's appeal against the amount, accepting that the tribunal should have taken into account the following factors when making an award for a substantial, career-long loss: the extent to which the claimant's losses were caused by the detriments; the possibility that claimant's workplace would close in the future; the possibility that the claimant's career would not have progressed as claimed; and whether it would be reasonable to expect the claimant to relocate to mitigate his loss. These points may act as useful guidance for employers challenging significant loss of earnings claims. [*BMI Healthcare v Shoukrey*]

Discrimination – religious beliefs: A former magistrate and non-executive director of an National Health Service (NHS) and social care trust was found not to have been discriminated against, nor his human rights breached, when he was removed from his lay magistrate post and disciplined in his non-executive director role for publicly expressing his Christian views objecting to same-sex couples adopting children. The Court of Appeal held that the action taken against him was not because he was a Christian but because his views prevented him from acting impartially in adoption cases involving same-sex couples and because his comments impacted the trust's ability to engage with gay service users. [*Page v Lord Chancellor*; *Page v NHS Trust Development Authority*]

Equal pay (1): The Supreme Court has ruled that for the purposes of an equal pay claim, the work of mainly male depot distribution workers could be relied upon by the claimants, a group of female retail store workers, for comparison even though they did not work at the same establishment. The Supreme Court ruled that the tribunal was required to apply the 'North hypothetical', that is, it should have considered whether the male depot workers would have been employed on broadly similar terms to their current ones if they had worked at the same site as the claimants. The Supreme Court did not interfere with earlier decisions which concluded that they would have. This is the first stage for the claimants in a notoriously complex area of discrimination law; to succeed with their claim, they will need to establish that their work was of 'equal value' to the male comparators, and any differential in pay will need to be found to be due to gender and not a material, non-discriminatory reason. [*Asda Stores Ltd v Brierley*] For more information, please visit the Employment Law Watch blog.

Equal pay (2): The requirement for an employer to disclose documents and information relating to alleged comparators' contracts, jobs, and pay in a group equal-pay claim was not 'a fishing expedition', but a necessary exercise to help the claimants formulate their choice of comparators and address the "informational asymmetry" which arises in these cases (that is, because the employer tends to hold the information necessary for claimants to prove their case). [*Tesco Stores Ltd v Element and others*]

Holiday pay: An individual who took leave but was not paid for it (because he was treated as self-employed by the company, although later held by the Supreme Court to be a worker) was out of time for bringing a holiday pay claim on the termination of his employment, rather than within three months of when payment would have been due. Although the CJEU in *King v. Sash Window Workshop* established that a holiday which was not taken because an employer refused to pay for it could be carried forward, the Employment Appeal Tribunal (EAT) held that the CJEU decision did not apply in cases like this one where the leave had in fact been taken, albeit unpaid. We understand the decision is being appealed. [*Smith v. Pimlico Plumbers*]

National minimum wage: The Supreme Court has found that care workers who are required to sleep at or close to their workplace to provide assistance if needed are only entitled to the national minimum wage during the times that they are "awake for the purposes of working", a composite term which requires both elements to be met. Time spent asleep, or awake but not for the purposes of working, do not qualify. [*Royal Mencap v. Tomlinson-Blake*]

Settlement negotiations: An employee who accepted the offer of the transfer of ownership of his company car on termination, but did not reach agreement on overall severance terms, was not then able to claim a breach of contract when the car was not transferred to him. Although the tribunal found that a binding agreement had been reached, the EAT concluded this was an error. The EAT concluded that the offer of the car was not freestanding, but was part of wider settlement discussions and that negotiation of severance agreements would become too complex if a party could unilaterally sever the terms by accepting some but seeking to improve others. Although fact-specific, the case acts as a reminder of the importance of clarity in negotiations and the benefit of settlement agreements to record the agreed terms. [*Evergreen Timber Frames v. Harrington*]

Tribunal procedure – adjournment and strike out: In circumstances where a claimant was unable to attend a hearing through no fault of her own (in this case, the need for emergency dental treatment) and also did not notify the tribunal until the morning of the hearing, it was a denial of justice for the tribunal to have refused the application for an adjournment and to have struck out her claim. [*Mukoro v. Independent Workers' Union Of Great Britain*]

Tribunal procedure – case management: In the absence of a material change in circumstances, an original order being based on material omission, or there being some other substantial reason, it was not for a tribunal of equivalent jurisdiction to interfere with a case management order already made. In the present case, this meant that it was not appropriate for a tribunal to overturn an existing order that a jurisdictional point be heard at a preliminary hearing. [*E v. X, L & Z*]

Tribunal procedure – out of time: The EAT has overturned the tribunal's finding that it was not reasonably practicable for a claimant to submit his claim on time in circumstances where he had not received the Acas early conciliation certificate. Although the claimant needed the certificate to bring his claim, and the tribunal had not considered it unreasonable for him to have waited until the limitation period had expired before contacting Acas, the correct test was whether it was reasonably practicable for the claimant to have obtained the certificate sooner, a test which requires more than just behaving reasonably. [*Stratford on Avon District Council v. Hughes*]

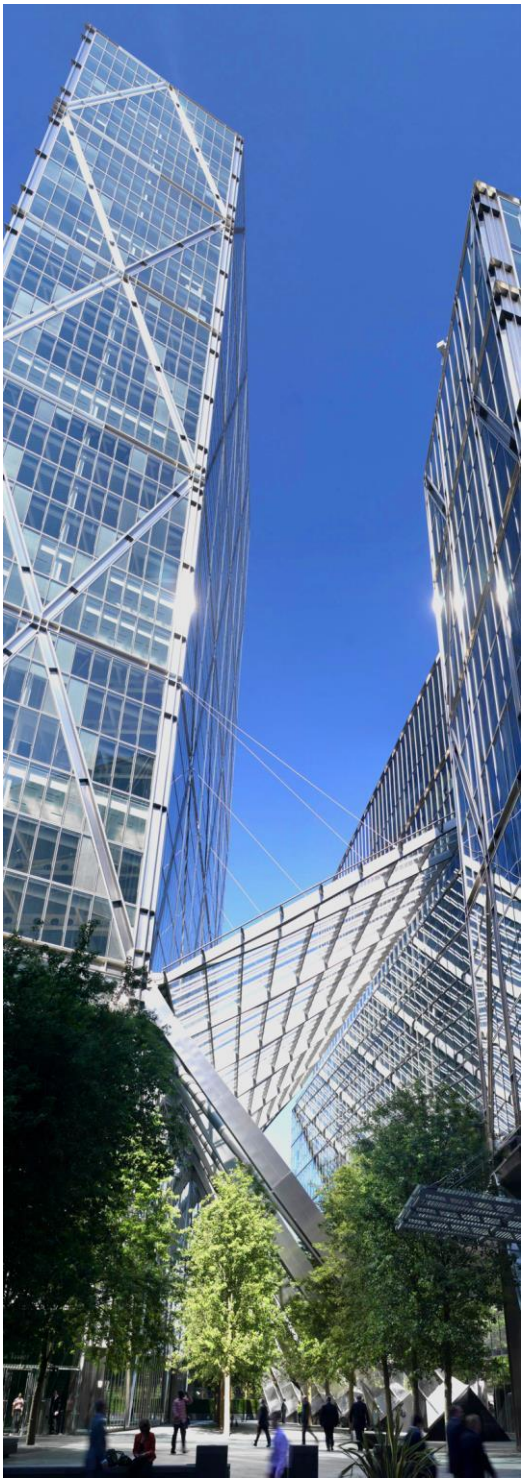
Tribunal procedure – judgments: The High Court has provided guidance on when it is appropriate to still hand down a reserved judgment in circumstances where, having seen a draft, the parties have agreed to settle conditional upon judgment not being handed down, considering that the parties' interests and agreement had to nevertheless be weighed up with the public interest. Public interest considerations may outweigh private ones where, for example, the dispute related to regulated entities, the judgment vindicated a witness, or points of public interest were raised. The decision will turn on the facts, but the case acts as a reminder that last-minute settlements will not necessarily prevent the judgment being handed down. [*Beriwala v. Woodstone Properties*]

TUPE: Last year, the Court of Justice of the European Union (CJEU) found that, subject to a contract being easily divisible and an employee's working conditions not being severely impacted overall, the Acquired Rights Directive could be interpreted to make it possible for individuals to transfer to multiple transferees in proportion to the tasks they carry out under their contract on a business transfer. The EAT has now ruled that this decision does and should apply to service provision changes under the Transfer of Undertakings (Protection of Employment) (TUPE) where there are multiple transferees. The EAT concluded that there was no reason in principle why an employee could not hold two or more contracts of employment with different employers where their work under each contract was easily separable and identifiable as such, although the judgment does not address the issue around the impact on working conditions, which was a feature of the European case. This decision marks a change from previous domestic principles that an employee could only transfer to one transferee. [*McTear Contracts Ltd v. Bennett and others*]

A 'week's pay': The Employment Tribunal has held that Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 – which came into force on 31 July 2020 and which set out how a 'week's pay' is calculated for statutory pay purposes when the employee has been furloughed – does not apply retrospectively. As such, the claimant, whose notice period spanned this date, was only entitled to receive notice pay based on his full pre-furlough pay for the period of notice on and after 31 July 2020. [*Bayliff v. Fileturn Ltd*]

Working time (1): The ECJ has handed down two judgments on when being on standby counts as working time under the Working Time Directive, finding that where a worker is constrained by a requirement to be contactable and to potentially return to the workplace, this will only be 'working time' if there is an objective and significant impact on the worker's ability to devote time to their leisure interests while in this standby mode. Only constraints imposed by the employer, the law, or a collective agreement are relevant factors linked to the worker's choice (such as where they choose to live), and the availability of leisure activities in the vicinity are irrelevant. As a post-Brexit case law decision, UK courts and tribunals are not bound by it, although they may nevertheless 'give regard to' it, and so the decision remains relevant in that context. [*DJ v. Radiotelevizija Slovenija* and *RJ v. Stadt Offenbach am Main*]

Working time (2): The ECJ has found that where an employee works under several employment contracts with the same employer, whether there has been compliance with minimum rest periods should be considered by looking at all the contracts as a whole, and not each one individually, given that the purpose of the legislation to protect workers' health and safety. The same issue – but where an individual has more than one contract of employment with different employers – was not considered, but employers with workers in this position should be mindful of the principles in this decision. As a post-Brexit decision, UK courts may 'give regard' to it. [*Academia de Studii Economice din Bucureops ti v. Organismul Intermediar pentru Programul Operational Capital Uman – Ministerul Educatiei Nationale*]



Legislative developments

April changes to statutory rates and limits: The annual increases to the living and national minimum wages, rates for statutory leave, and limits for tribunal claims have taken effect. Please visit the Employment Law Watch blog for more details.

IR35: After being postponed from last year, the IR35 reforms in the private sector have now come into effect. Please visit the Employment Law Watch blog for more details.

Post-employment notice pay: Individuals whose employment is terminated, and who have received the termination payment on or after 6 April 2021 will be subject to an amended formula for calculating post-employment notice pay (PENP) where their pay period is defined in months, but the contractual notice period is expressed in weeks. Instead of basing the calculation on the number of days in the pay period, 30.42 (being the mean average number of days in a month) should be used.

Employment tribunals (1): Practice directions have been issued so as to authorise members of a tribunal staff appointed as legal officers in England, Wales, and Scotland to carry out certain functions of a judicial nature.

Employment tribunals (2): An updated 'road map' for employment tribunal proceedings in 2021/22 has been published, setting out the expected default position for hearing new cases. Although it is recognised that in-person hearings are preferential, remote hearings are expected to remain a feature for the next few years. A new 'virtual region' will be set up in April 2021 allowing cases generated in any of the regions to be heard remotely, and the majority of new cases listed will default to being conducted by video or telephone. Discrimination and whistleblowing claims will increasingly default to being in-person, as will claims for, as an example, unfair dismissal. However, experience may vary across the country depending on the physical estate and the extent of existing backlogs, and there is likely to be a greater reliance on video and hybrid hearings in London and the South East. As is the case now, an employment judge will have the discretion to decide that the default position should not apply, and it remains open for parties to apply for an alternative format.

Health and safety detriment: The Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021 has been laid before Parliament to amend s.44 of the Employment Rights Act 1996 and extend the protection from health and safety detriments to workers rather than just employees. This legislative change, which is due to come into force on 31 May 2021, follows a High Court decision last year which held that the UK's failure to extend protection to workers was a breach of the EU Health and Safety Framework.

Immigration: The UK government has published a Statement of Changes to the Immigration Rules. Changes include: a new graduate route which will open for applications on 1 July 2021; a global talent category for certain prize winners; an expanded shortage occupations list; and a new minimum hourly rate in the Skilled Worker category.

Other news

Discrimination claims – awards for injury to feelings: The guidelines on the compensation to be awarded for injury to feelings awards in England and Wales have been updated in line with the RPI. The new bands, which apply to claims presented on or after 6 April 2021, are as follows: lower band (for less serious cases) £900 – £9,100; middle band (for cases which do not merit the upper band) £9,100 – £27,400; and upper band (for the most serious cases) £27,400 – £45,600. Awards should only exceed £45,600 in exceptional cases.

Flexible working: The Behavioural Insights Team and Indeed.com have reported that job adverts which offer flexible working have increased applications by up to 30 per cent. Their report, 'Encouraging employers to advertise jobs as flexible', has been published by the Government Equalities Office and has led to calls for flexible working to be a standard option. The Department for Business, Energy and Industrial Strategy has announced that it will launch a consultation later in 2021 on extending flexible working and strengthening employees' rights. It is currently unclear whether this will also include consulting on making flexible working the default position, which is something the government had previously committed to doing.

Inclusive workplaces: The Muslim Council of Britain has published a report, 'Defining Islamophobia', which makes a number of recommendations to foster good working environments for Muslim staff. It also highlights some working practices which may alienate Muslim employees.

Immigration: To drive innovation and support UK jobs, the chancellor has announced a number of measures aimed at attracting highly skilled talent. Proposals include a global business mobility visa (allowing overseas businesses to establish or transfer staff in the UK) and an elite points-based visa from spring 2022, reform of the global talent visa category, and a review of the innovator visa category.

Right to work checks: The Home Office has published updated guidance for employers on right to work checks for EU citizens starting work in the UK between 1 January and 30 June 2021. Until 30 June 2021, employers can rely on checking an individual's passport or national identity card to evidence their right to work in the UK, and there is no mandate to require retrospective checks on anyone employed before this date. From 1 July 2021, all EU citizens (except Irish nationals) will need to evidence their right to work in the UK by virtue of their immigration status and via an online service. More guidance on this topic is expected in the coming months.

Training and work placements: In the spring budget, the chancellor committed to ongoing funding for employers who support training, apprenticeships, and work placements.

COVID-19 update

Certification: The government has sought evidence as part of a review about whether COVID-19 status certification (that is, the use of testing and vaccination data and information) could play a role in reopening the economy, reducing restrictions on social contact, and improving safety.

Clinically extremely vulnerable people: New guidance has been published to clinically extremely vulnerable people to say that, from 1 April 2021, they are no longer advised to shield. This means that if they cannot work from home, they should attend the workplace and will no longer be entitled to SSP by virtue of being required to shield.

Coronavirus Job Retention Scheme (CJRS): The CJRS has been extended to 30 September 2021, with a gradual tapering of the government grant from July. Employers will be required to contribute 10 per cent (up to £312.50) towards the hours their staff do not work in July, increasing to 20 per cent (up to £625) in August and September. Details of the changes, along with a table of what contributions are paid by who when, can be found at www.gov.uk. With the scheme now extended to the end of September 2021, the various guidance notes have been updated to include the claim deadline dates through to then. It is also now no longer possible to claim grants for claim periods on or before 31 October 2020.

SEISS: To mirror the CJRS extension, a further grant will be payable to eligible self-employed people to cover the period May – September 2021.

International travel (1): Since 8 March 2021, anyone travelling from England to outside the UK must complete a travel declaration form explaining the reason(s) for their journey. The form, and links to the different rules which apply for Scotland, Northern Ireland, and Wales is at www.gov.uk. The restrictions on international travel (except for limited reasons) remain in place despite the 'stay at home' mandate being lifted in England from Monday, 29 March. Anyone travelling without reasonable excuse could be fined up to £5,000. Some jobs are exempt from the requirements.

International travel (2): Employers are under a duty to take reasonable steps to arrange for COVID-19 testing for their employees who frequently travel across UK borders. Reasonable steps include establishing workplace testing or providing employees with home testing (see workplace testing below), and supporting access and signposting to testing outside of the workplace.

Restart grants: Eligible businesses in non-essential retail, hospitality, leisure, personal care, and gym sectors in England may be entitled to a one-off cash grant, via their local council, to support their safe reopening. The grants have been available since 1 April 2021, although applications can be made before then. More information, including the eligibility criteria and details of the grant amount, can be found at www.gov.uk.

Statutory Sick Pay (SSP): The rebate scheme which allows employers to reclaim up to two weeks' SSP for COVID-19-related sickness absence will continue for the time being.

Vaccinations: A survey carried out by the TUC suggests that 45 per cent of employers are paying their employees for time off to be vaccinated against COVID-19, a step they say may be hindering take-up.

Whistleblowing: There are reports that the government is planning a review of whistleblowing rules in light of a significant increase in complaints by individuals that they were dismissed or suffered a detriment for raising COVID-19-related concerns. The scope of the review is currently unknown.

Workplace testing: The UK government has extended its scheme to make free rapid lateral flow testing available to employers. The scheme was available to all businesses with over 10 employees where employees cannot work from home and on-site testing is not possible, providing they registered their interest before 12 April 2021. The scheme is free until the end of June 2021. More information is available through an online portal. The message to work from home if you can remains in place.

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