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UK Employment Law Update – August 2021

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

In this issue:

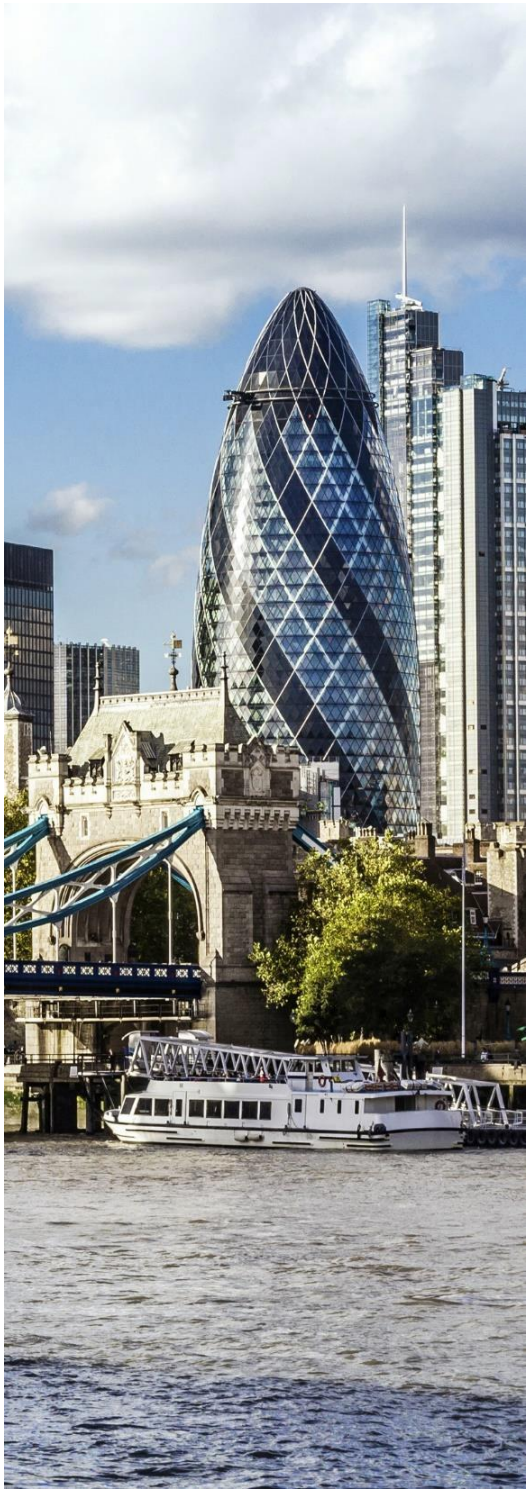
Robin Jeffcott
Partner, London
rjeffcott@reedsmith.com

Graham Green
Partner, London
ggreen@reedsmith.com

David Ashmore
Partner, London
dashmore@reedsmith.com

Alison Heaton
Knowledge Management Lawyer,
Global Solutions - Leeds
alison.heaton@reedsmith.com

Case law updates



COVID-19 – automatically unfair dismissal: There has been a further decision by an employment tribunal in favour of a claimant who was dismissed for taking steps to protect themselves or others from a serious and imminent threat to health and safety in the context of COVID-19. The tribunal considered the circumstances in March 2020 to create a reasonable belief of such a threat, and found it was not inappropriate for the claimant to remain in Italy (where he had been on holiday) rather than return to the UK, and from where he was able to work and communicate with his employer and clients. [*Montanaro v. Lansafe*]

COVID-19 – commission payments: An employee was able to successfully claim unpaid commission after the employment tribunal held that his employer had unlawfully exercised its discretion during the pandemic. Although the tribunal found that the employer had lawfully deferred commission payments for furloughed employees, it found that the decision to withhold commission thereafter was not a rational or good faith exercise of discretion. Although the tribunal's decision is not binding on other tribunals, the case acts as a useful reminder that the principles around the exercise of discretion remain in place notwithstanding the uncertainties of the pandemic. [*Sharma v. Lily Communications*]

Discrimination – diversity and inclusion: Two men have succeeded with claims of sex discrimination, with the employment tribunal concluding that their redundancy was motivated by the company seeing them as a significant impediment to improving the company's poor (45 per cent) gender pay gap, and following their complaints after the company had made statements about the need to "obliterate" the dominance of "white, privileged straight men". Their unfair dismissal claim also succeeded, although claims of age, race and sexual orientation discrimination, and whistleblowing failed. The decision does not change the law in this area, nor necessarily impact on diversity and inclusion initiatives that companies may want to adopt to improve representation of their workforce, but is a helpful reminder that D&I initiatives, and redundancy exercises, must be handled properly and in line with established legal principles.

For insights into D&I strategy, Reed Smith has prepared a thought leadership report on diversity, equality and inclusion in the corporate world, looking particularly at how strategies have developed and changed in the past year.

Discrimination – compensation: A decision to award life-long financial losses to a claimant who developed symptoms of PTSD, depression and paranoia following sexual orientation discrimination at work has been upheld by the EAT. Although career-long losses are rare, the medical evidence supported a life-long impact on the claimant's health and ability to work. However, the tribunal was criticised for failing to properly take into account the possibility of the claimant's career being cut short for other reasons and to apply an appropriate discount for this. The claimant was also awarded £41,000 for injury to feelings, £15,000 for aggravated damages, plus a 20 per cent uplift for the employer failing to apply the Acas Code, equalling an overall award in the region of £2 million. Although the employer's appeal over the extent of the discount and uplift were successful and these issues have been remitted to the tribunal, this case acts as a stark reminder that, as damages for discrimination are uncapped, lengthy campaigns of discrimination and harassment that are not handled effectively by employers can result in enormous compensatory awards being made in favour of the employee. [*Secretary of State for Justice v. Plaistow*]

Discrimination – religion and belief: The European Court has held that provided any rule or policy which seeks to ban workers wearing any visible signs of a political, religious or philosophical belief is not directly discriminatory if applied to all staff generally, and that any indirectly discriminatory effect is capable of justification by employers that have a genuine business need to maintain neutrality on political, religious and philosophical beliefs. This decision is not binding in the UK, although the domestic courts and tribunal may nevertheless have regard to it. [*IX v. WABE eV; MH Müller Handels GmbH v. MJ*]

Discrimination – burden of proof: The Supreme Court has held that despite a change in the language between historic discrimination legislation and the Equality Act 2010, there has been no substantial change in the law on the burden of proof in discrimination cases. It remains necessary for the complainant to establish, on the balance of probabilities, facts from which unlawful discrimination can be inferred. [*Royal Mail v. Efobi*]

Dismissal on medical grounds: A recent EAT decision acts as a helpful reminder that employers looking to dismiss employees on medical capability grounds should ensure that there is an up to date understanding of the individual's medical condition and the prognosis at the time of the decision to dismiss, particularly in cases where the employee is not absent on long sick leave. In the present case, the claimant's condition (which was a 'disability' for the purposes of the Equality Act 2010) necessitated periodic absence from work, and she was dismissed based on medical evidence and the lack of further adjustments to be made, and because her absence levels were considered unpredictable in nature and of an unacceptable level. Although the employment tribunal dismissed her claims of unfair dismissal and discrimination arising from disability, the EAT was critical of the approach taken by the tribunal in a number of respects: the occupational health and medical evidence relied upon were from six and 12 months prior to her dismissal respectively, and the tribunal had made an error in allowing post-dismissal medical reports as evidence; the claimant was in work at the time of the decision to dismiss and throughout the appeal process, and prior to dismissal had not been absent for a few months; and a change in her medical care meant her prognosis was improving. The claims have been remitted to a new tribunal. [*Brightman v. TIAA*]

Dismissal on reputational grounds: The Scottish Court of Session has upheld an employer's decision to dismiss an employee who was charged, but never prosecuted, for possessing indecent images of children on his home computer. While there was no evidence of misconduct, his position as a teacher meant that the employer's child protection concerns and responsibilities provided a rationale for dismissal for 'some other substantial reason' (SOSR) in order to safeguard their reputation. SOSR dismissals are not always straightforward, but in the right circumstances can be fairly achieved. This case also highlights the importance of carefully considering the reason for dismissal and being consistent, as the disciplinary process inferred that the reason for action and potential dismissal was misconduct, but the claimant was ultimately dismissed for SOSR. Although not detrimental to the employer's defence of this case, it may be in other circumstances. [*L v. K*]

Harassment: Correcting an anomaly in the legislation, and overturning previous case law, the EAT has held that constructive unfair dismissal is, in principle, capable of constituting an act of harassment. This means that where an employee resigns in response to conduct which includes unlawful harassment, the associated constructive unfair dismissal can itself be "unwanted conduct" for the purposes of a harassment claim under the Equality Act 2010. The decision brings clarity, and creates consistency with the other types of discrimination claim. [*Driscoll v. V&P Global*]

Whistleblowing: The EAT has held that it was not necessary to consider the motivations of anyone other than the decision-maker in circumstances where there had been a process designed to get rid of the claimant for making protected disclosures. Although several people were involved in a process that was described as "grossly unfair", the dismissing officer was not an innocent decision-maker who had been duped by others, and so it was not inappropriate to only consider his thought process. [*University Hospitals North Tees & Hartlepool NHS FT v. Fairhall*]

Legislative developments

Sexual harassment: The UK government has published its response to a consultation on sexual harassment in the workplace, and has proposed the introduction of enhanced obligations for employers, including a duty to take "all reasonable steps" to prevent sexual harassment at work, including specific protection for volunteers and interns, and third party harassment. The proposals also include extending the time limits for tribunal claims. Although the new duty, and a proposed statutory code of conduct, is not expected imminently, employers should nevertheless be mindful of their existing obligations, with the proposals acting as a useful opportunity to revisit policies, procedures, workplace training, and internal support networks. Visit the Employment Law Watch blog for more information on this topic.

Vaccinations: The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 has been passed to require care home workers to be vaccinated against COVID-19. It comes into force on 11 November 2021, in England only.

Workplace health: The government has also issued its response to a consultation looking at measures to reduce ill health related job losses, supporting staff with health conditions that affect their work, and improving the employment and retention of disabled people. Other than confirming plans to consult on making flexible working the default position, and progressing a strategy to improve access to occupational health services, the government has not committed to any other measures. This means it will not be moving forward with other proposals such as a right for non-disabled workers to request adjustments on returning from sick leave, or reforming SSP.

Whistleblowing: The Whistleblower Directive (Directive (EU) 2019/1937) requires every company or public body in the EU that has 250 or more employees to implement its own internal reporting policy for whistleblowing. It must be implemented by member states no later than 17 December 2021 and applies to all multinationals doing business in Europe. Read more in our client alert.

COVID-19 update

Coronavirus Job Retention Scheme (CJRS): On 1 August 2021, the CJRS grant payment from the government was reduced to 60 per cent of salary (up to £1,875). Employers are now required to contribute 20 per cent (up to £625) for the hours spent on furlough.

Lockdown easing (England): England entered stage 4 of its lockdown easing on 19 July 2021, and the guidance on what people can and cannot do has been updated to reflect the changes. Key points to note are:

- The 'work from home if you can' instruction was withdrawn, although it is encouraged that any return to the workplace takes place gradually. The guidance on working safely in different workplace settings has been updated with advice for employers on what precautions and steps can be taken to minimise risk. Visit the Employment Law Watch blog for more details on how employers can plan for returning staff to the workplace.
- Businesses and venues which were closed under stage 3 were allowed to reopen, and there will be no restrictions on the number of people permitted to meet indoors or outdoors (although meeting outdoors is encouraged).
- The 1m-plus distancing requirement has been relaxed and face coverings are no longer mandatory, although individuals are encouraged to take personal responsibility for their choices and the general expectation and recommendation is that face coverings should still be worn, particularly in busy areas.
- Guidance for the extremely clinically vulnerable advises following, as a minimum, the same guidance as everyone else although it encourages exercising caution and taking appropriate additional precautions.

Test, trace and isolate:

- The test, trace and isolate arrangements remain in place for the time being and the government has updated guidance reminding employers and employees of their duties in this regard, including the penalties for non-compliance. There is a limited exemption for certain critical workers who, rather than having to self-isolate if they have had close contact with someone who has tested positive, can do daily tests instead. Employers wanting to make use of the exemption must have authority from the government.
- Also, from 16 August 2021 children, and individuals who have had both doses of an approved vaccine, will not have to self-isolate if they have had close contact with a person who has tested positive for COVID-19. Anyone who tests positive will still need to self-isolate regardless of their vaccination status or the nature of their work. Employers will need to consider how they intend to monitor and check whether staff are exempt from self-isolation.

Working during pregnancy: The guidance for pregnant employees has been updated to reflect the lifting of work from home restrictions, reminding employers of their health and safety duties and obligations towards pregnant employees and that alternative working arrangements may still be needed even where other staff are returning to the workplace.

Vaccinations: The government has issued a guide for employers on steps that can be taken to promote the vaccination programme, and to support staff to take up the offer of a vaccine.

Other news

Age discrimination: In an interview with the *Daily Telegraph*, the new chairman of the Equality and Human Rights Commission (EHRC), Baroness Falkner of Margravine, indicated that the EHRC intends to have a strategic focus on age discrimination, particularly in respect of reducing potential discrimination against middle aged workers. She highlighted in particular the potential for discrimination against this group in respect of support during technological change.

Financial services: The FCA has issued a policy statement about the UK Investment Firm Prudential Regime (IFPR), including, among other things, feedback on and changes to the remuneration code. The new regime represents a major change for FCA investment firms and is expected to take effect in January 2022. Listen to our podcast on the IFPR for more information.

Hybrid working: Acas has issued guidance for employers looking to introduce hybrid working, with advice on issues to consider, including the practicalities of implementing a flexible policy, and how employers can support and manage staff working in this way.

Menopause and the workplace: The House of Commons Women and Equalities Committee has launched an inquiry into workplace issues surrounding the menopause. The inquiry will look into workplace practices, whether enough is being done to support menopausal women, and the extent and nature of any discrimination which is being experienced. It will also consider whether further legislation is needed, including a requirement for employers to have a menopause policy in place. Interested employers are invited to submit views before 17 September 2021.

Worker status and rights: As part of a plan to end insecure employment, the Labour party has announced plans that under its government, it would simplify employment status by creating a single status of 'worker' (i.e., removing the current distinction between an 'employee' and a 'worker'), and create day one rights for all workers in respect of the minimum wage, sick pay, holiday pay, paid parental leave and unfair dismissal protection.

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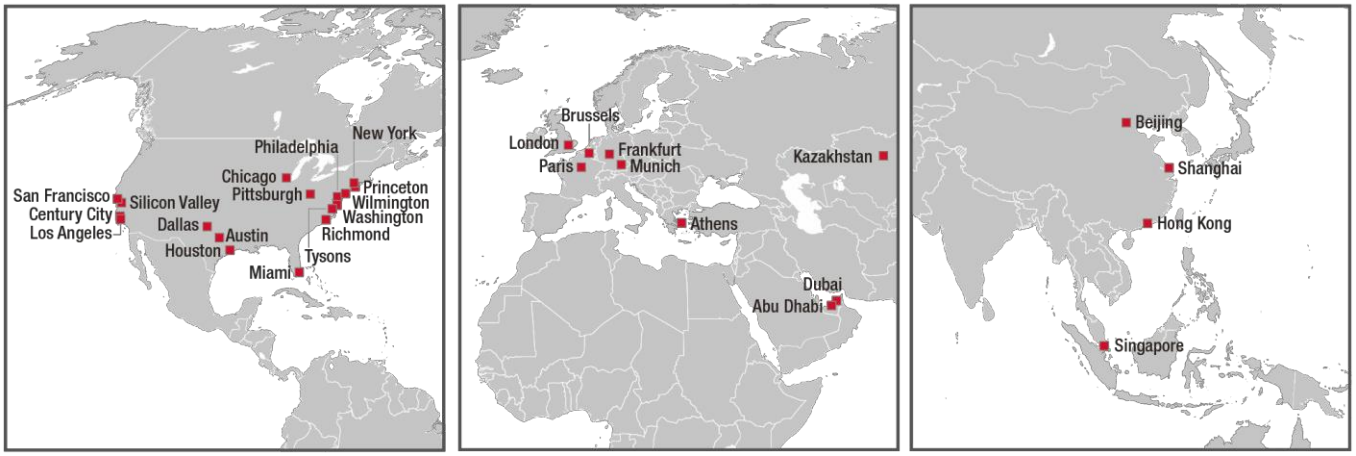

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