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UK Employment Law Update – July 2021

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

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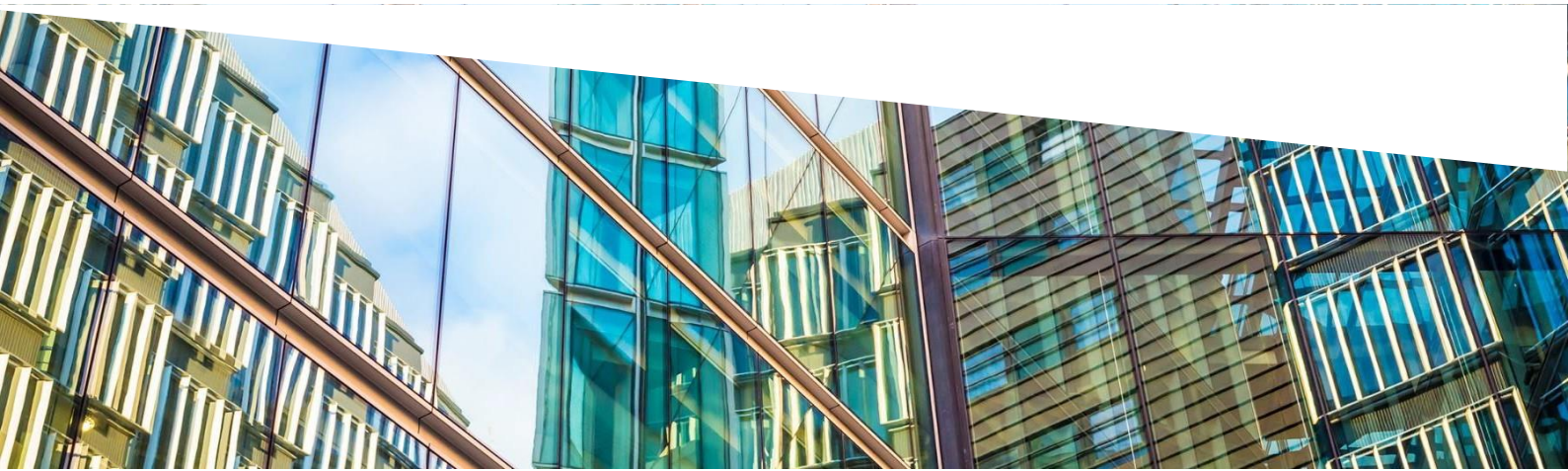

Case law updates

COVID-19 – automatically unfair dismissal: There have been two more reported employment tribunal cases looking at whether dismissals are automatically unfair under section 100 of the Employment Rights Act 1996 where individuals are dismissed for taking steps to protect themselves or others from a serious and imminent threat to health and safety. Although in both cases the tribunal was satisfied the claimants reasonably believed that COVID-19 posed a serious and imminent danger to their health and safety at the time, the cases turned on whether the employer acted reasonably in trying to accommodate concerns and reduce the risks. In *Accattatis v. Fortuna Group*, the employer acted reasonably in suggesting an employee, who did not want to commute to work, take holiday or unpaid leave in circumstances where working from home was not feasible and furlough inappropriate, and so did not unfairly dismiss him when he refused either option. In contrast, in *Gibson v. Lothian Leisure*, an employer who took a robust 'shut up and get on with it' attitude when an employee raised concerns about the lack of PPE or COVID-secure measures prior to returning from furlough, in circumstances where he had concerns for his medically vulnerable father. Although these two cases turn on their facts, and arise from very early in the pandemic when the government was referring to the virus in the most serious of terms, they serve as a useful reminder that the reasonableness of an employer is significant when they are faced with employees who are reluctant to attend the workplace, something which will become more relevant as employers gear up to getting people back into work in the coming weeks and months.

Discrimination – philosophical belief: Overturning the employment tribunal's decision, the EAT has held that the claimant's gender critical views, including that sex is unable to be changed and not to be conflated with gender or gender identity, is a belief capable of protection under the Equality Act 2010. Whereas the tribunal had denied this protection on the basis that the belief failed the test of needing to be "worthy of respect in a democratic society, not be incompatible with human dignity, nor conflict with the fundamental rights of others" (one of five tests to be overcome), the EAT disagreed saying that beliefs of this nature did not deny trans persons their rights, and (perhaps controversially) suggested that only beliefs tantamount to Nazism or totalitarianism should fail this limb of the test. It is currently unclear if the EAT's judgment will be appealed. The judgment makes clear that the EAT was not expressing any view on the transgender debate, nor that it denied trans persons protection from discrimination and harassment under the Equality Act 2010. Employers remain potentially liable for such acts against their trans workforce, but will also need to be mindful not to unlawfully discriminate against those employees who have gender critical views. This is an area where there is a clear potential for a conflict of opinion and belief, and employers should focus on creating a workplace which encourages staff to respect the views of others. [*Forstater v. CGD Europe & others*]

Discrimination – indirect sex discrimination: The EAT has held that it was appropriate to consider the concept of 'childcare disparity' (i.e., that the current societal norm is that women have greater childcare responsibilities than men) when assessing whether women were disadvantaged by a particular policy, in this case a policy to change working days from being fixed to flexible. The claimant was personally disadvantaged by the changes due to her childcare commitments, but the tribunal found there to be no group disadvantage because none of her team or colleagues were similarly disadvantaged. The EAT considered that the principle of childcare disparity should have been taken into account. However, the EAT also made it clear that although taking account of childcare disparity might be appropriate (as in this case), it will not always mean that group disadvantage is made out, and will instead depend on the policy, criteria or practice in question. [*Dobson v. North Cumbria Integrated Care*]

Equal pay: The ECJ has ruled that article 157 of the Treaty on the Functioning of the EU (TFEU), which deals with equal pay, has direct effect in 'equal value' claims as well as 'equal work' claims. In the UK, equal pay legislation is contained within the Equality Act 2010, but where domestic law cannot be interpreted consistently with article 157, EU law must take

precedence. A significant difference is that where under UK law a claimant must work in the same 'establishment' as their comparator, under EU legislation claims can include working in the 'same service' where terms and conditions are attributable to the 'same source'. By confirming that article 157 applies to equal value claims, it makes it easier for claimants to bring equal pay claims by being able to compare themselves to a broader range of comparators in other areas of a business. Although this decision post-dates Brexit and so is not part of retained EU law, the UK courts must nevertheless give regard to it, and it is expected to be followed. [*K v. Tesco Stores*]

Illegality in employment: Where an employment contract is affected by illegality, the parties may be prevented from bringing claims in respect of it. However, in a case which helpfully explores the case law on illegality, the Court of Appeal has held that the claimant was able to access the tribunal system to enforce her contract after she was dismissed, because the illegality in question (the non-payment of income tax by the claimant) had been rectified, thereafter restoring her rights. The employer is seeking permission to appeal to the Supreme Court. [*Robinson v. HRH Al-Qasimi*]

Industrial action: The law protects individuals from suffering a detriment for taking part in the activities of a recognised trade union. Overturning case law from the 1970s, the EAT has held that 'trade union activities' for this purpose extends to taking steps to prepare for, and take part in, industrial action and that any alternative interpretation would be in contravention of article 11 (right to freedom of association and assembly) of the European Convention on Human Rights. As such, the claimant in this case, who was suspended for planning and organising strike action, was able to continue with her claim. [*Mercer v. Alternative Future Group Ltd*]

Collective agreements: The High Court has approved the principle that rectification (an equitable remedy allowing the correction of a mistake when documenting agreed terms) can apply to collective agreements, even though these are not legally binding documents. [*Tyne and Wear Passenger Transport Executive t/a Nexus v. National Union of Rail, Maritime and Transport Workers & others*]

Interim relief: The Court of Appeal has held that it is not a breach of the European Convention on Human Rights for interim relief (a remedy to allow ongoing employment pending the outcome of certain claims where there is a high prospect of success) to be restricted to whistleblowing and trade union claims and not claims of discrimination under the Equality Act 2010. Although interim relief hearings are rare, employers will be comforted that their scope has not widened. [*Steer v. Stormshore*]

Unfair dismissal – misconduct during sickness absence: Two cases from June act as a useful reminder that employers should not be hasty to act or dismiss for misconduct when employees on sick leave take part in activities which may be perceived as inappropriate. In the first, a man was unfairly dismissed for being in his local social club while off sick, and the second case involved an employee who travelled to Pakistan during his sickness absence. Employers should remember that social activities outside of work may not necessarily be inconsistent with the medical condition which is preventing the employee from working, and in some cases may have been recommended to aid recovery.

Unreasonable and vexatious parties in litigation: The EAT has upheld a decision to strike out a claimant's claim in circumstances where she had engaged in repeated intimidating and "scandalous, unreasonable and vexatious" correspondence with the respondent's representatives and witnesses. The tribunal had originally tried to address her conduct with more robust case management, but ordered strike out when she continued to send unreasonable correspondence in breach of an order that had attempted to moderate her conduct, considering that her behaviour rendered a fair trial impossible. Although strike out in these circumstances is rare, the decision acts as a stark reminder for parties to act reasonably and that recourse is available against vexatious or abusive litigants. [*A v. B*]

Legislative developments

Brexit: Paul Scully MP, the under-secretary of state for BEIS, has reiterated a commitment to protect workers' rights post Brexit.

Employment Bill: Despite being first raised in December 2019, the Employment Bill has fallen off the government's agenda and its mention was notably lacking from the 2021 Queen's speech. In response to calls to bring forward the Bill, the government has said it will be introduced "when the time is right" and "not while the pandemic is ongoing". The commitment is seemingly still there, and some limited progress is being made around flexible working and the single enforcement body (see below); a response to the consultations on paternity and carer's leave is expected later in the year; and separate bills on the following have had their first reading in the House of Commons: enhanced redundancy protection that would apply during pregnancy and maternity leave, and for six months after childbirth; paid leave for people who have experienced a miscarriage; improved flexibility and eligibility for paternity leave and pay; and paid leave for unpaid carers.

Flexible working: The government has indicated that it plans to consult on making flexible working the default during 2021.

'Fire and re-hire': The practice of dismissal and re-engagement to enable a change to terms and conditions is not a new one, but has been particularly relevant during the pandemic as employers have sought to adjust to the circumstances. At the request of the government, ACAS has been collating evidence on the prevalence of the practice and the extent to which it is perceived as an unreasonable and underhand tactic. ACAS's report has been published, making no clear findings and noting that there are a range of views on the reasonableness of the practice and whether measures are needed to control its use. While ACAS has suggested a range of legislative and non-legislative steps that could be taken to discourage, limit or control 'fire and re-hire', it remains to be seen whether, and if so how, the government takes this forward.

Single enforcement body for workers: The government has announced plans to create a workers' watchdog to take responsibility for protecting workers' rights, particularly to tackle modern slavery, enforce the minimum wage, protect agency workers, address holiday and statutory sick pay, improve enforcement and provide a 'one stop shop' for employees and businesses to obtain help and support. The watchdog will be established through legislation, although no timescale has been provided.

COVID-19 update

Coronavirus Job Retention Scheme (CJRS):

- From 1 July 2021, the CJRS grant payment from the government dropped to 70 per cent (up to £2,187.50). Employers will be required to contribute 10 per cent (up to £312.50).
- A template is now available for employers claiming for 16 or more employees.

Right to work checks: The date for the end of the temporary adjustments of right to work checks due to the pandemic has been put back for a second time. The temporary adjustments will now remain in place until 31 August 2021 (moved from 20 June). **Standard checks resume from 1 September 2021**, meaning employers will need to check original documents or eligibility online from this date. The Home Office has updated its guidance on right to work checks.

Kickstart scheme: The terms and conditions for the government's Kickstart scheme (which provides grants for getting 16-24-year-olds into work) have been updated. These terms apply from 21 June 2021.

Lockdown easing: Stage 4 of the lockdown easing in England was postponed from its provisional date of 21 June 2021. The current stage 3 restrictions continue to apply (see what you can do and cannot do), although subject to confirmation on 12 July, it has been announced that stage 4 is expected to apply from 19 July 2021. The 'work from home if you can' message will be removed at that time.

Mandatory vaccines: The government has announced plans to introduce regulations requiring all CQC-regulated providers of nursing and personal care services in care homes in England to allow entry to the premises only to individuals who have completed their course of an authorised COVID-19 vaccine (or provide evidence that they are exempt from vaccination). The requirement will only apply indoors and exclude residents; friends or relatives of residents who are visiting; persons providing emergency assistance or urgent maintenance work in the care home; and those under the age of 18. There is currently no suggestion of mandating vaccines in other settings.

Travel exemptions: The list of exemptions on quarantining after international travel has been updated, with new exemptions for business directors and in-flight security officers, and updated exemptions for aerospace engineers, overseas elite sportspersons, non-UK border security officials and regular work abroad. Further, eligible senior executives can also temporarily leave quarantine in England if they are undertaking business activities which are likely to be of significant economic benefit to the UK, subject to having first had written permission from the government.

Vaccination statistics: The government has published statistics of the vaccination take-up rates of those aged 40 and over by various socio-demographic groups. While the rates are generally high, there are notably lower rates in certain categories, particularly by ethnicity and religion, but also take up for those aged 40-49 appears to be around 15 per cent lower than for older age groups (although the data only goes up to mid-May, which may explain this age group discrepancy, and is also why under 40s are not yet included). This data may be particularly helpful for employers exploring potential discrimination risks associated with vaccine related policies, and also when considering how best to support staff to obtain the vaccine.

Other news

Senior Managers and Certification Regime (SM&CR) – absence: The PRA has published a policy statement, and the FCA has updated its handbook, regarding temporary long term absences by those covered by the SM&CR.

Immigration: In order to remain lawfully resident in the UK from 1 July 2021, any EEA nationals (and their families) who were in the UK before 31 December 2020 must have submitted their applications under the EU Settlement Scheme by 30 June 2021. A failure to do so may result in their losing their UK immigration status, including the right to live and work in the UK.

Shared parental leave: The government has launched an online tool to help check eligibility, and payments due, for shared parental leave. It is hoped that this will help make the scheme easier to access and understand.

Podcasts

9 July 2021

Here are some recent podcast episodes from the Reed Smith London team.

- **Disputes in Perspective**: Remote work during COVID-19 and legal implications of working overseas
- **FinReg Focus**: Remuneration policies and employment contracts – what changes under UK's Investment Firm Prudential Regime?

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