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UK Employment Law update – June 2021

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

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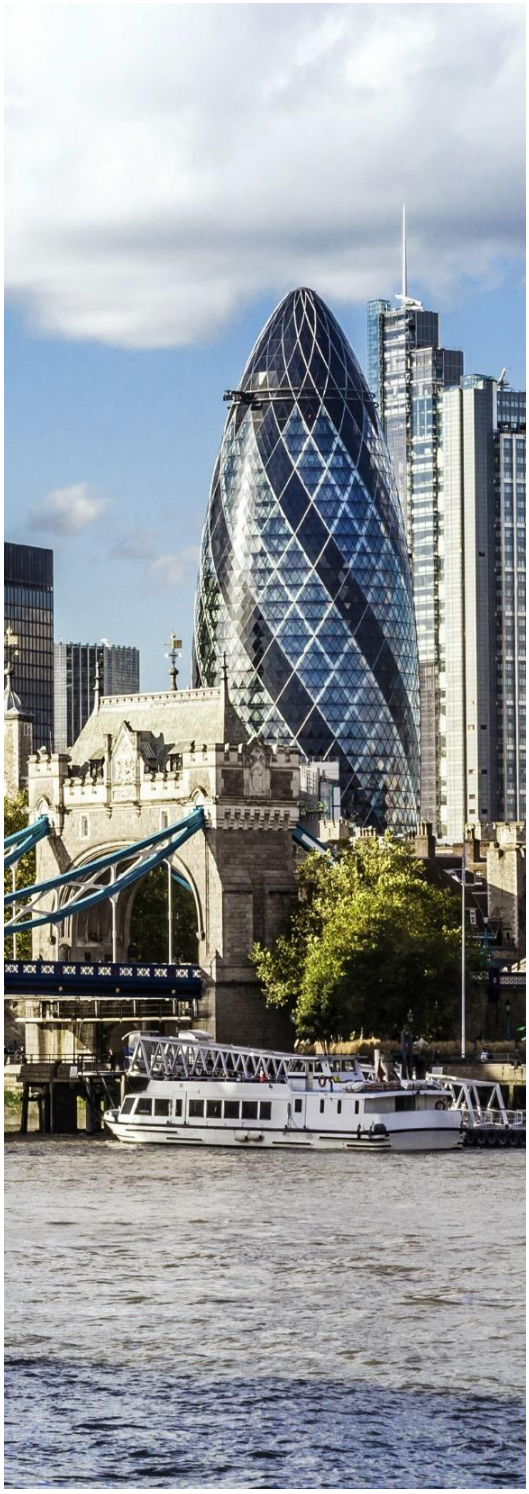
Case law updates



Changing terms and conditions: An employee was found to have been unfairly dismissed after she refused to agree to a variation of her terms and conditions of employment at the start of the pandemic when her employer was responding to the workforce challenges at the time. Interestingly, the tribunal was satisfied that the employer had a potentially fair for the dismissal (namely "some other substantial reason"); the finding of unfair dismissal arose from the employer's failure to engage in any meaningful consultation or explore alternatives to dismissal, and the decision to terminate her employment (without notice) within 48 hours of first raising the variation. This acts as a useful reminder that a fair process is crucial to dismissal, including a dismissal and re-engagement exercise to facilitate a change to terms. This practice is, however, under the spotlight at the moment, with the unions calling for a ban on 'fire and re-hire' tactics. The issue has been discussed in parliament, but it remains to be seen if the government intends to reform the law in this area. [*Khatun v. Winn Solicitors*]

Constructive unfair dismissal: When identifying whether there has been a fundamental breach of contract, the Employment Appeal Tribunal (EAT) held that the Employment Tribunal needs to examine whether the breach occurred in the period prior to resignation, and not simply to focus on the situation at the point of resignation. The EAT also reaffirmed that once a breach of contract becomes fundamental, it cannot be remedied by the employer. In the present case, the claimant worked with a disabled child who required daily lifting and she resigned on returning to work after a period of sick leave with back pain. Although at the time of her return she was promised manual handling training, and told she would not be required to lift, this was said against a background of her repeatedly requesting (but not being provided with) training over a period of months prior to her sickness absence. Although at the time of her resignation there was a genuine concern for her health and safety, her employer's earlier failings meant it had already fundamentally breached its implied duty to provide a safe place of work. As the breach became fundamental at some point before the claimant was signed off sick, it could not then subsequently be cured so as to avoid the constructive unfair dismissal claim. [*Flatman v. Essex County Council*]

Cross-border jurisdiction: When considering whether the employment tribunal has jurisdiction to hear a cross-border claimant's claims, it is important to identify not only whether the claimant can establish a sufficient connection with the UK, but also the point at which that connection arose. In this case, the claimant was an employee of a U.S. company who worked in New York, Switzerland and then London. On the facts, the tribunal did not consider that the claimant had sufficient connection with the UK at the time of moving to London, but then failed to consider at what time (if at all) this changed. The EAT was clear that the tribunal had erred, highlighting that the point in time at which the sufficient connection test was satisfied was relevant to which claims there was jurisdiction to hear. [*Partners Group (UK) Ltd and anor v. Mulumba*]

Employment status: The Court of Appeal has held that the lack of any obligation on an individual to accept or perform a minimum amount of work is not fatal to establishing them as a 'worker' and entitling them to the associated employment rights. In this case the claimant worked as a fee-paid panel member on a fitness to practise committee and had an overarching contract in relation to the provision of those services. Although there was no obligation to be offered a minimum number of hearings or sitting dates, nor any obligation to accept any dates offered, any work provided had to be done personally and it was found that there was an individual contract in place in respect of each hearing. Following an extensive review of the case law on mutuality of obligation, the Court of Appeal was satisfied that the lack of an irreducible minimum of obligation was not inconsistent with worker status. [*Nursing and Midwifery Council v. Somerville*]

Privilege: A respondent who voluntarily disclosed privileged legal advice on two specific issues relevant to its defence had not waived privilege in full. The EAT restated established principles that a waiver of privilege on a particular issue applies to all materials relevant to that issue, but while the selection of what is disclosed cannot be cherry-picked or misleading, or lead to unfairness, a waiver of privilege on a particular issue does not mean all privileged material must be disclosed. [*Watson v. Hilary Meredith Solicitors*]

COVID-19 update

Right to work checks: The date for the end of the temporary COVID related adjustments on right to work checks has been amended. They had been due to revert to pre-pandemic standard checks on 17 May 2021, but has now been pushed back to **21 June 2021**.

Coronavirus Job Retention Scheme (CJRS):

- A reminder that from 1 July 2021, the CJRS grant payment from the government reduces to a 70 per cent (up to £2,187.50). Employers will be required to contribute 10 per cent (up to £312.50).
- The government has now issued a template for submitting claims for 16 – 99 people.

Lockdown easing (England): The next stage of previously announced easing of restrictions went ahead as planned from 17 May 2021. The 'work from home where you can' mandate remains in place, and where workplace attendance does occur, social distancing and other COVID-secure measures should continue. Although nothing has been announced formally, there are suggestions that the 'work from home' mandate will be relaxed from 21 June 2021 with the next phase of lockdown easing (the date being subject to the evolving public health position). Changes to foreign travel also took effect from 17 May 2021, although these remain limited. Certain jobs qualify for travel exemptions.

Long COVID: Acas has issued guidance for employers and workers on long COVID. It emphasises that employers should be flexible and supportive, recognising that symptoms may come and go and that the condition is not yet fully understood. It suggests looking at what reasonable adjustments can be made (irrespective of whether the condition may or may not be a disability), and notes that normal sickness absence principles apply.

Remote working – loneliness: With ways of working having changed, and remote working to some extent being likely to remain post-pandemic, the government has issued guidance for employers on how they can help to address loneliness among their workforce.

Legislative developments

Health and safety detriment: The Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021 came into force on 31 May 2021. This legislation amends section 44 of the Employment Rights Act 1996 to extend the protection from health and safety detriments to workers rather than just employees.

Queen's speech: May's Queen's speech, which sets out the government's legislative agenda, was notably quiet on employment law reform, and was silent on the Employment Bill, which was first mentioned in the Queen's speech in December 2019 and intended to strengthen workers' rights. The government has previously committed to progressing the Employment Bill "when Parliamentary time allows".

Other news

Changing terms and conditions: The pandemic has thrown dismissal and re-engagement practices into the spotlight, with the trade unions calling upon the government to ban 'fire and re-hire' tactics. The issue was debated in parliament at the end of April 2021, but it remains to be seen whether there is any reform in this area. The notable lack of mention of employment law reform in the Queen's speech (see above) suggests that any change or development in this area is unlikely to be soon.

Conflict in the workplace: Acas has published a report which estimates the cost of workplace conflict in the UK at £28.5 billion per year – an average of £1,000 per employee. The cost takes into account the costs associated with handling internal and legal processes, sickness absence and resignations, with the report emphasising the benefit of handling issues early and properly to avoid irreparably damaging relationships, while saving money. With conflict expected to increase as staff return to workplaces post-pandemic, effective conflict management will be a critical.

National living and minimum wages: The Low Pay Commission has launched a consultation on the impact of the national living and minimum wages which will help inform its decision on proposed rate increases in 2022. For anyone wanting to contribute, the consultation closes on 18 June 2021.

Shared parental leave: Maternity Action has published a report on shared parental leave, arguing that it is not fit for purpose and recommending reform to simplify and strengthen the rights of both parents when taking leave after the birth of a child. The report follows campaigns by other groups to reform this area and although plans to strengthen maternity rights form part of the Employment Bill (as announced in December 2019), the latest Queen's speech does not appear to include this in the government's immediate legislative agenda.

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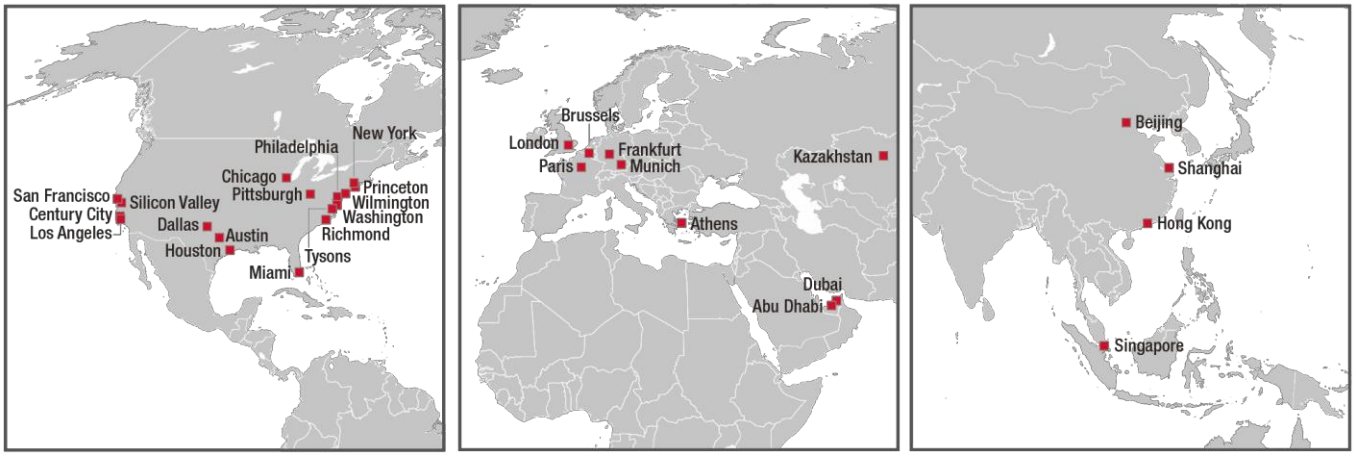

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