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UK Employment Law update – May 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

Automatically unfair dismissal – health and safety (COVID-19): An employee who was dismissed after leaving the workplace at the start of the pandemic saying he would stay away until lockdown had eased due to concerns over infecting his medically vulnerable children, was not automatically unfairly dismissed for taking reasonable steps to remove himself from serious and imminent danger. The tribunal rejected the argument that COVID-19 created circumstances of serious and imminent workplace danger regardless of the employer's safety precautions; i.e., the pandemic in and of itself was not sufficient. Instead, the circumstances had to be judged on what was known when the relevant acts took place. In this case it was relevant that (i) the claimant had breached self-isolation guidance in his personal life the day after leaving work; (ii) he had not raised concerns with his manager about danger at work, nor taken steps to avert such alleged danger; and (iii) the employer was complying with the government's guidance in place at the time about COVID-19 measures to be implemented in the workplace. Of course, on alternative facts, the test of serious and imminent danger may be made out, and there is likely to be more litigation on this issue in the coming months. For more details, please see the Employment Law Watch blog. [*Rodgers v. Leeds Laser Cutting*]

Automatically unfair dismissal – health and safety: In another case involving protection from dismissal for health and safety reasons, this time not in a COVID-19 context, the Employment Appeals Tribunal (EAT) has held that an employee who was tasked with implementing a new safety procedure and then dismissed when there were complaints about how this was carried out, was automatically unfairly dismissed. In considering its decision, the EAT took the view that health and safety activities may often be resisted or unwelcomed by staff and that it would run contrary to the protections afforded in law if an employer could rely on any upset caused by pursuing legitimate health and safety activities, or the manner in which those activities were carried out, to then fairly dismiss the person tasked with the work, provided it was done reasonably. The case reminds us that employees carrying out health and safety activities for their employer are afforded a broad protection in law. [*Sinclair v. Trackwork*]

Damages: In addition to actual financial losses incurred by employees who were underpaid wages, overtime and holiday pay, the High Court also awarded the claimants an additional uplift of 20 per cent as aggravated damages to compensate them for exploitation, manipulation and abuse suffered as a result of a repeated denial of their statutory rights. The company's directors were held to be jointly and severally liable for the aggravated damages on the basis that they had induced the breach of contract. The background facts of this case are extreme, but the case acts as a reminder that there can be scope to recover (including from individual directors) more than financial loss in a pay claim, particularly where there is a known and systematic failure to pay what is properly due. [*Antuzis and others v. DJ Houghton Catching Services Ltd and others*]

Disability discrimination: There have been two cases this month which are helpful for assessing whether an individual is disabled for the purposes of the Equality Act 2010, looking at two different elements of the statutory definition:

- The first considered the question of when an impairment is 'substantial', with the EAT concluding that the statutory definition prevails over the associated guidance and EHRC Code of Practice. The Equality Act defines 'substantial' as "more than minor or trivial" (section 212), whereas the guidance and code go on to refer to the impairment having a greater effect than "the normal differences in ability which might exist among people". The EAT held that the guidance and code should only be considered if the statutory definition failed to provide a conclusive answer, that the focus of the test is to look at what the individual cannot do, and that the issue should be considered in the context of the whole statutory definition of 'disability'. [*Elliott v. Dorset County Council*]
- The second looked at the question of 'long term', and what should be taken into consideration when assessing whether the effects of an impairment had or were likely to last for at least 12 months. The Court of Appeal held that the issue must be considered and assessed by reference to the facts and circumstances existing at the time of the alleged discriminatory act(s), and anything occurring after that time should not be taken into account. [*All Answers v W & another*]

Employment status: Following last month's Supreme Court decision about Uber drivers, the Court of Appeal has refused permission to appeal the decision that Addison Lee drivers were 'workers' for the purposes of employment rights. As workers, the drivers are entitled to the national minimum wage and paid holiday. [*Addison Lee v. Lange*]

Sex discrimination – comparators: The claimant was unable to pursue a sex discrimination claim on the basis of comparing his pay while on shared parental leave with the pay of a female colleague on adoption leave; adoption leave was materially different to shared parental leave and so the claimant could not establish that there was 'no material difference' in circumstances between himself and his comparator. [*Price v. Powys County Council*]

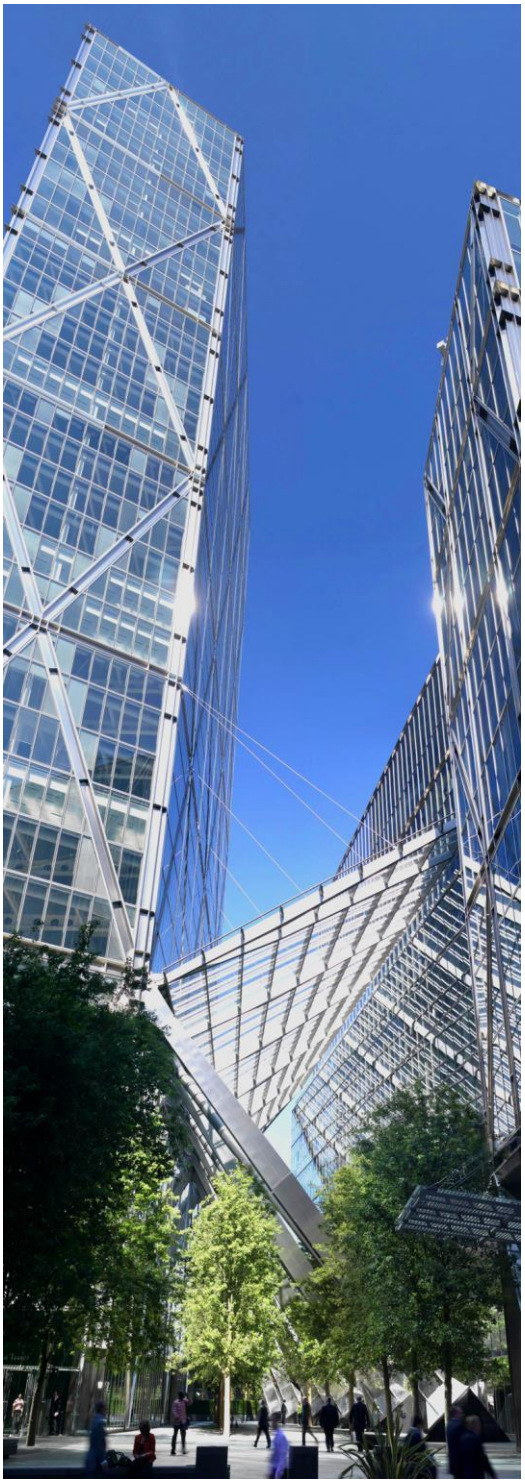
Sex discrimination: The Court of Appeal has held that a female police officer was not directly discriminated against when she did not receive a 'London allowance' during her maternity leave, partially overturning the decisions of both the Employment Tribunal (ET) and EAT. The Court of Appeal agreed with earlier findings that under the relevant Police regulations the allowance was payable in full during maternity leave. However, it concluded that the reason it was not paid was due to a mistaken belief that the allowance was 'pay' (entitlement to which is reduced in line with the maternity policy), and that the reason for non-payment was her absence from work, the reason for that absence being immaterial. Although this case looks specifically at particular Police regulations, it is a helpful reminder of issues that can potentially arise for organisations with complex pay and allowance structures. [*Commissioner of the City of London Police v. Geldart*]

Tribunal procedure – strike out: When considering an application for strike out, or a deposit order, the tribunal should take reasonable steps to identify the heads of claim and the issues, the EAT making the point that "you can't decide whether a claim has reasonable prospects of success if you don't know what it is". Where the claimant is a litigant in person, the tribunal should go further than simply asking the claimant to identify their claims; the onus is on the judge to read the pleadings and any core documents setting out the claimant's case. The EAT added that legally represented respondents should assist the tribunal and not take procedural advantage of litigants in person who have not properly pleaded their claim. [*Cox v. Adecco*]

Unfair dismissal – re-engagement: The Court of Appeal has confirmed that when considering an order for re-engagement after a finding of unfair dismissal, an employer's belief in the employee's ability to perform in the required role is relevant. Where the employer can demonstrate a genuine and rationally held belief that the employee would not be able to perform the role to the required standard, or that trust and confidence is broken, ordering re-engagement is not practicable. In addition, when contemplating re-engagement, only potentially suitable vacancies that exist at the date of the remedies hearing need to be considered (i.e., anything which had arisen, but been filled, prior to this date does not need to be). [*Kelly v. PGA European Tour*]

COVID-19 update

Coronavirus Job Retention Scheme (CJRS): The various guidance notes have been updated and now include: provision that on a TUPE transfer, the transferor should ensure that any information needed to calculate future claims under the CJRS are passed on to the transferee; and that contractors who are 'deemed employees' for IR35 purposes may be eligible to be furloughed and a claim made under the scheme. Another (the seventh) Treasury direction has also been issued dealing with the extension of the scheme to cover the period from 1 May – 30 September 2021.



Returning to work:

- A business psychology firm has reported findings from a survey that employees returning to work after furlough have significantly lower wellbeing, job satisfaction, personal confidence and loyalty to their employer than workers who had not been furloughed. This may have a knock-on effect on issues such as attendance, performance and turnover of staff, and adds an extra layer of complexity to managing the effective return of staff to the workplace.
- The government is carrying out a Social Distancing Review to consider how social distancing measures can be relaxed in various settings, including in the workplace. BEIS is consulting with businesses on how measures can be managed longer term as people return to offices.

Right to work checks: The temporary changes put in place at the start of the pandemic to allow employers more flexibility in carrying out their checks on whether someone has a right to work in the UK are coming to an end on 16 May 2021. The temporary changes allowed employers to carry out checks by video call, permitted scanned or photographed documents to be shared rather than originals, and allowed employers to use a checking service if a prospective or existing employee could not provide the accepted documentation. From 17 May 2021, employers will need to revert to their pre-COVID processes to ensure right to work checks are carried out in compliance with their legal obligations. This will include having to check the individual's original documents, or checking the right to work online (if appropriate codes have been shared).

Vaccinations:

- The Department of Health and Social Care has launched a consultation on making vaccination against COVID-19 a mandatory requirement for workers in care homes for older adults, except where they are medically exempt from vaccination. It also considers whether the mandatory vaccination requirement should be extended to include other professionals who visit care home residents, such as NHS workers providing close personal care. The consultation closes on 21 May 2021. There is currently no suggestion of mandating vaccines in a broader context.
- Following a period of research, the Joint Committee on Vaccination and Immunisation (JCVI) has updated its advice to say that pregnant women should be offered the COVID-19 vaccine at the same time as the rest of the population, based on their age and clinical risk group. Pregnant women are however advised to discuss the risks and benefits of vaccination with their doctor, including the latest evidence on safety and which vaccines they should receive.

A 'week's pay': The regulations which provide for how to calculate a week's pay for furloughed employees for the purposes of certain statutory payments are being extended and will continue until 30 September 2021.

Legislative developments

Health and safety detriment: The Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021 comes 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.

Consultations

Apprenticeships: The government has launched a consultation on a flexi-job apprenticeship scheme as a means to increase the use of apprenticeships in certain sectors and professions, particularly where short-term and project-based contracts are common. The consultation closes on 31 May 2021.

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

10 May 2021

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