ReedSmith
Driving progress
through partnership

UK Employment Law Update – September 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 – redundancy and furlough: There have been two non-binding tribunal decisions this month considering the tricky issue of whether the existence of the Coronavirus Job Retention Scheme (CJRS) renders a COVID-19-related redundancy unfair. In *Mhindurwa v. Lovingangels Care*, the judge found that the claimant had been unfairly dismissed when her employer had failed to consider furlough as an alternative to redundancy. In contrast, in *Handley v. Tatenhill Aviation*, the judge was of the view that the existence of the CJRS did not necessarily render any redundancy dismissal unfair. Whilst seemingly contradictory decisions, the facts of both cases were relevant; whereas the employer in the first claim had failed to give furlough any serious consideration, the employer in the second case had initially furloughed the claimant and could show wider business and financial reasons to justify proceeding with the redundancy. This issue is largely academic now given that the CJRS is due to close at the end of September, but it may be relevant for employers who are currently undergoing redundancy exercises, acting as a reminder that furlough should be actively considered as an alternative to redundancy and that in the absence of a reasonable explanation, the ongoing availability of furlough (albeit now limited) may render the dismissal unfair.

Disability discrimination – knowledge: A recent Employment Appeal Tribunal (EAT) decision provides a helpful reminder that as well as meeting the statutory definition of having a 'disability', an employer must know or ought reasonably to know of that disability. The claimant had not disclosed any medical impairment, and the medical report (which in any event is to provide evidence rather than a determination on the issue) did not support the definition being met. The case also highlights that it is the effect of the impairment, and not the impairment itself, which must be 'long term', and that this must be judged at the time of the alleged discrimination. *[J v. DLA Piper]*

Disability discrimination – reasonable adjustments: Reiterating established principles that it will rarely be a reasonable adjustment to pay an employee for a role they are not performing, a disabled claimant was unable to claim pay protection when she moved to an alternative lower-paid role due to her condition. While her previous higher pay had been protected on a temporary basis, it was not a reasonable adjustment for this to continue permanently. [*Aleem v. E-Act Academy*]

Disability discrimination: The EAT has held that an employer's absence management policy which included discretion to redeploy an employee as an alternative to dismissal where there were concerns about levels of attendance nevertheless placed a disabled employee at a significant disadvantage as they remained at greater risk of dismissal where discretion to redeploy was not exercised. Employers with similar policies should proceed with caution, but they can avoid liability where (as was the case in this matter) they take all reasonable steps and adjustments to avoid any disadvantage arising. [*Martin v. Swansea*]

Discrimination – genuine occupational requirements (GORs): The existence of a justifiable GOR for a particular role can be a defence to discrimination, although the tribunal held on the facts of the case that a requirement for an actress not to be visibly pregnant did not amount to a GOR – although accepted that the character should not be visibly pregnant, it was possible to film in such a way as to conceal her pregnancy. Interestingly, the GOR provisions of the Equality Act 2010 refer to a requirement for a person to **have** a particular protected characteristic, rather than **not to have** one – this case involved the latter, but the legal interpretation issue was not considered by the tribunal on this occasion. Although specific to the circumstances, it is a reminder that justifying a GOR can be difficult for employers. [*Kinlay v Bronte Film and Television*]

Insured benefits: The EAT determined that an employer was liable to pay permanent health insurance payments to an employee despite these not being covered fully by insurance by the time payments were due. Following a transfer under the Transfer of Undertakings (Protection of Employment) Regulations 1996 (TUPE), the new employer's insurance policy did not provide the same level of cover as the former employer and, when the claimant subsequently was on long term sickness absence, they limited payments based on the extent they could recover sums under their policy. The claimant succeeded with a claim for unlawful deduction from wages – the employee's contractual entitlement was clear and not limited with reference to what could be recovered. This is an important reminder for employers to carefully word contractual provisions around insured benefits, and that in cases of a TUPE transfer, for transferees to carefully check whether any transferring insured benefits are covered by their existing insurance. [*Amdoc Systems v. Langton*]

Post-termination restrictions: An employer was unsuccessful with an application for interim relief for alleged breach of restrictive covenants when it failed to establish sufficient evidence that the employee had improperly accessed a database to extract confidential information, and in circumstances where there was a challenge to the technical evidence about what had been taken. It was also relevant that the employee had been on furlough for approximately eight months prior to his resignation, significantly limiting his work activities and contacts, and thereby limiting the scope of his restrictions. Although not changing the law in this area, the case acts as a reminder that employers wishing to enforce restrictive covenants should carefully consider the strength of their evidence, and the overall circumstances, before proceeding. [*Celebrity Speakers v. Daniel*]

Privilege: An EAT decision has found that email communications between an HR consultant and the company were covered by litigation privilege, despite indicating a clear intention to dismiss the claimant ahead of the disciplinary process. In this case, the employer's position was assisted by not explicitly seeking or receiving advice on how to act unlawfully, and it was considered that the content of the communication fell within what was expected and usual to rightfully remain privileged. However, privilege can be a tricky area, and whilst this decision is reassuring for employers, there are some academic concerns that restrict confidence in relying on it. Communications with non-lawyers are not necessarily protected (and so may become disclosable), and communications or documentation that further unlawfulness can, depending on the circumstances, cause privilege to be lost. Employers should therefore be careful when seeking advice and should not necessarily assume that all communications and documentation are covered by privilege. [*Abbeyfield (Maidenhead) v. Hart*]

Unfair dismissal – appeals: The EAT has found that in circumstances where the claimant was dismissed for a breakdown of relationships in the small organisation where he had previously been CEO but had stepped down (albeit remaining a director and employee), it was not unfair for him to be denied a right of appeal. On the facts, the claimant was considered to be responsible for the breakdown in relations, and showed no remorse, with the EAT satisfied that any appeal process would have been futile. Although an appeal process would ordinarily be an important part of a fair dismissal process, this case is a rare example of circumstances where the refusal of an appeal did not render the process or dismissal unfair. [*Moore v. Phoenix Product Development*]

Unfair dismissal – prior warnings: A claimant who had been subject to ongoing performance management, and who was on a final written warning for failing to meet his targets, was not unfairly dismissed on capability grounds. It was not for the tribunal to 'look behind' the final written warning unless it was 'manifestly inappropriate', which it was not in this case, and so there was no need for the tribunal to consider the reasonableness or appropriateness of the warnings when assessing the fairness of the dismissal. The same principle applies in conduct cases. Nonetheless, employers should be particularly mindful in situations where the capability or conduct leading to the dismissal is different or unrelated to the circumstances that gave rise to the prior warning.

COVID-19 update

Coronavirus Job Retention Scheme (CJRS): Following a tapering down of the grant in August, there is no change to the CJRS grant in September, but the scheme remains scheduled to close completely on **30 September 2021**. Final claims must be submitted by **14 October 2021**.

International travel: The guidance for employers on testing where staff travel internationally for work has been updated. Organisations with more than 50 employees and where staff are required to travel across UK borders for work purposes need to ensure those staff understand what tests they need to take, and take reasonable steps to support them in taking those tests.

Mandatory vaccination: From **11 November 2021**, anyone working or volunteering in care homes in England will need to be fully vaccinated unless exempt. Operational guidance has now been issued.

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 again. The temporary adjustments will now remain in place until 5 April 2022 (moved from 31 August 2021). Standard checks resume from **6 April 2022.**

Test, trace and isolate:

- Since 16 August 2021, children and individuals who have had both doses of an approved vaccine do not have to self-isolate if they have had close contact with a person who has tested positive for COVID-19 and instead are encouraged to be tested. Anyone who tests positive will still need to self-isolate regardless of their vaccination status or the nature of their work. Guidance on isolation and exemptions has been updated, as has guidance on safe places of work. Employers will need to consider whether and how they intend to monitor and check whether staff are exempt from self-isolation, although the government guidance says that employers are not expected to check this.
- Daily contact testing, as an alternative to isolation, is being piloted in workplaces, although it currently only applies to employers who have been approved to take part in the testing scheme. The guidance on test and trace in the workplace has been updated.

Winter 2021: The Academy of Medical Sciences has produced a report on looking ahead to winter 2021, which has been considered by the government's Scientific Advisory Group for Emergencies (SAGE). The report warns of the resurgence and exacerbation of respiratory illnesses, including flu, asthma and COPD, in addition to COVID-19 remaining in circulation; ongoing health and wellbeing implications of the pandemic, such as long COVID, and mental and physical deconditioning; delays in diagnosis and disease management; and continued disruption in health and social care. Employers should be mindful of these implications and consider what steps they can take to mitigate the impact on staff, such as flu vaccination programmes and additional support and flexibility for those who are particularly vulnerable to respiratory illness.

Legislative developments

Flexible apprenticeships: Following consultation, the government has announced plans to proceed with the introduction of a 'flexi-job' apprenticeship scheme in the creative, agricultural and construction industries, being sectors that tend to have non-traditional working patterns and for which the standard apprenticeship is not suitable. The scheme will operate through flexi-job apprenticeship agencies who then hire out apprenticeships to host organisations. Applications for becoming an agency and access to the £7 million apprenticeship fund for registered agencies closes on **6 October 2021**. It is envisaged that there will subsequently be an annual window for new registrations.

Consultations

Data protection: The Information Commissioners Office (ICO) has launched two consultations:

- The first consultation is seeking views to help shape its employment practices guidance on compliance with data protection legislation, covering topics such as recruitment, record keeping, employee monitoring and heath data. The deadline for submitting views is **21 October 2021**.
- The second consultation is considering how businesses can protect personal data when it is transferred outside of the UK, and it closes on **7 October 2021**.

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 that is being experienced. The inquiry will also consider whether further legislation is needed, including amendments to the Equality Act 2010 to enhance protection for menopausal women, and a requirement for employers to have a menopause policy in place. Interested employers are invited to submit views before **17 September 2021**.

Other news

Employment status and IR35: Despite the use of HRMC's Check Employment Status for Tax (CEST) tool, the DWP and the Home Office are reported as facing multimillion-pound tax bills for the incorrect status determinations of its contractors after the IR35 rules changed in the public sector in 2017. The rules changed in the private sector in April 2021, shifting the responsibility of tax status to the users of contractor resources. To avoid hefty tax bills, thorough status determinations should be carried out on all contractors working through personal service companies, and caution should be applied where relying on CEST.

Gender pay gap reporting: Companies employing more than 250 people have until **5 October 2021** to publish their gender pay gap information (following a six-month extension due to the pandemic), although businesses can still voluntarily publish their gender pay gap information before this date, and they are encouraged to do so.

National minimum wage: 191 employers have been named and shamed for failing to pay the national minimum wage to workers. The breaches, which are not necessarily intentional, equated to £2.1 million being owed to over 34,000 workers in the period from 2011 to 2018. The report notes that the top three reasons for breach were wrongly making deductions from wages, failing to pay overtime and paying incorrect apprentice rates. The report also highlights how employers must stay on top of the national minimum wage rate and rules to ensure not only that workers receive the correct pay but also to avoid the reputational damage associated with being publically named for non-compliance.

Recruitment: A recent study suggests that language used in job advertisements can discourage female applicants. Adverts using words such as 'driven', 'challenging' and 'individual' attracted fewer female applicants than those where more feminine or neutral language (such as 'responsibility', 'together' and 'share') was used. Recruiters should carefully consider their choice of language when advertising roles, neutralising gendered language where possible to attract the widest pool of applicants.

Right to disconnect: A think tank report is calling for a statutory right to disconnect to be introduced in the UK. The call follows concerns arising from the pandemic over employees working hidden overtime, impacting their mental health and disproportionately impacting women. It is unclear whether the government intends to add this to their legislative agenda.

8 September 2021

Reed Smith is a dynamic international law firm, dedicated to helping clients move their businesses forward.

Our long-standing relationships, international outlook, and collaborative structure make us the go-to partner for speedy resolution of complex disputes, transactions, and regulatory matters.

ABU DHABI
ATHENS
AUSTIN
BEIJING
BRUSSELS
CENTURY CITY
CHICAGO
DALLAS
DUBAI
FRANKFURT
HONG KONG
HOUSTON
KAZAKHSTAN
LONDON
LOS ANGELES
MIAMI
MUNICH
NEW YORK
PARIS
PHILADELPHIA
PITTSBURGH
PRINCETON
RICHMOND
SAN FRANCISCO
SHANGHAI
SILICON VALLEY
SINGAPORE
TYSONS
WASHINGTON, D.C.
WILMINGTON

reedsmith.com