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UK Employment Law update – February 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

Confidential information: The Court of Appeal has dismissed an appeal against a High Court decision that a company breached confidentiality obligations by using client information that it had obtained from ex-employees of its competitor. The company argued, amongst other things, that the obligation of confidence only arises if it knew, or had notice, that the information was confidential, with notice objectively assessed with reference to a reasonable person in the same position. The Court of Appeal disagreed, holding that an equitable duty of confidence arises in relation to information if a reasonable person would make enquiries as to whether it is confidential, regardless of whether the recipient of the information abstains from doing so. Employers will therefore need to take care when receiving potentially confidential information and make enquiries where a reasonable person would do so. [*Travel Counsellors v Trailfinders*]

Constructive unfair dismissal: Overturning an employment tribunal's decision, the EAT has held that an employee who resigned and claimed constructive unfair dismissal did not affirm the contract by invoking the grievance procedure. This is a helpful reminder that an employee's reliance on one contractual right (such as a grievance or disciplinary appeal) does not prevent them from accepting a repudiatory breach. [*Gordon v J & D Pierce (Contracts)*]

Discrimination – indirect sex discrimination: The EAT has held that the key question of whether women are placed at a particular disadvantage by a provision, criterion or practice is to be considered vis-à-vis men in the same material circumstances. Where it was alleged that a parental leave policy (under which staff lost a day's paid leave when they took three days of unpaid parental leave in a month) was indirectly discriminatory against women, the relevant pools for comparison were between male and female staff with children of sufficiently young age for the staff to be considered to have childcare responsibilities, not between staff members in general. The case has been remitted to the employment tribunal to consider the issue of disadvantage on this revised basis. [*Cummings v British Airways*]

Discrimination – victimisation: The EAT has held that a claimant's grievance referring to actions that "may be discriminatory" was not sufficient to be a 'protected act' for the purposes of a subsequent victimisation claim. The word 'may' signified doubt and uncertainty, there was no reference to any protected characteristic, and other allegations had been clearly expressed – all useful reminders of the importance of clear and unambiguous language. [*Chalmers v Airpoint*]

Employment tribunals – applications for interim relief: Hearings for applications for interim relief must be held in public, unless an order restricting publicity has been granted. [*Queensgate Investments v Millet*]

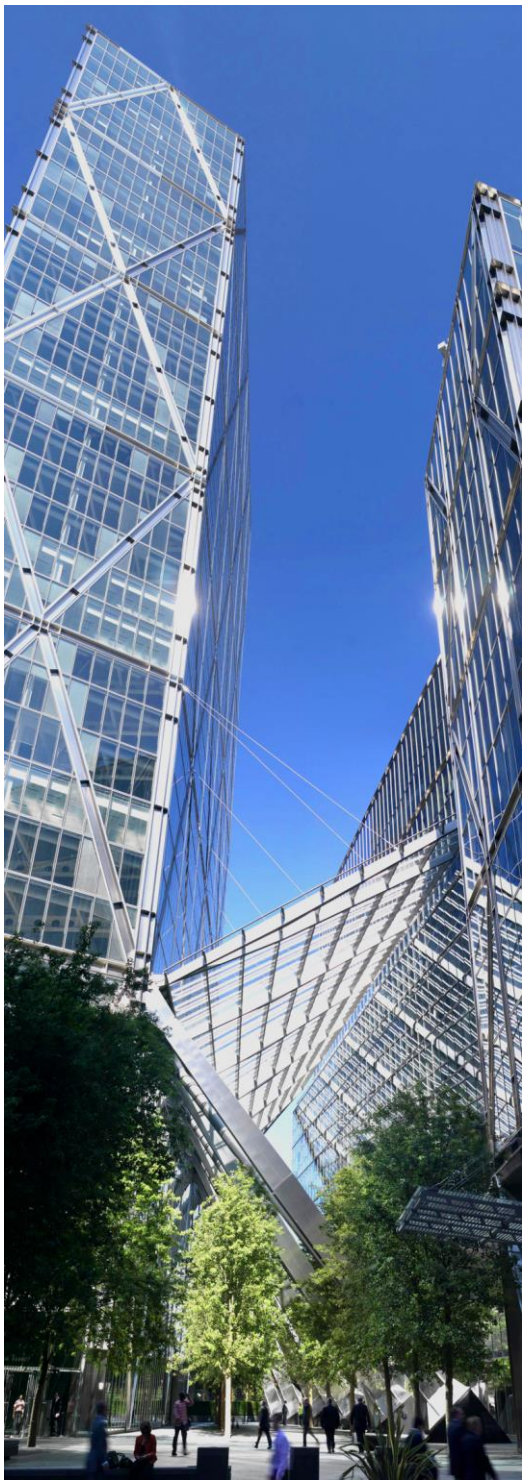
Employment tribunals – disclosure: The Court of Appeal has upheld a previous decision that employment tribunals' powers in ordering disclosure of documents extend to parties who are not present in Great Britain. The claim involved allegations of sexual harassment where the respondent, against whom disclosure of documents was ordered, resides in the United States. The respondent unsuccessfully argued that under rule 31 of the employment tribunal rules of procedure, the tribunal "may order any person in Great Britain to disclose documents", and so this did not extend to him. The Court of Appeal held that this rule only applied to non-parties and that, in any event, rule 29 (general case management powers) extended to disclosure and had no jurisdictional scope. [*Sarnoff v YZ*]

Employment tribunals – compensation: The EAT has held that where there has been a failure to mitigate, compensation should only be reduced by way of a crude percentage reduction provided that such approach can be justified, for example, where there is a lack of any evidence to make a more informed and logical calculation. In this case, the tribunal had sufficient evidence to determine when the claimant could reasonably have regained employment, and so should not have simply applied a blanket 30 per cent reduction. Employers are reminded of the importance of presenting evidence at a remedy hearing to support arguments of a failure to mitigate. [*Hakim v The Scottish Trade Union Congress*]

Employment tribunals – time limits: In a case where a claim was submitted three days late, the Court of Appeal considered the issues around extending time in discrimination claims, concluding that the factors set out in the Limitation Act 1980, and in particular the 'Keeble factors' (being a checklist of factors considered in extending time in personal injury cases), were not determinative. The court said: "*the best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) [Equality Act] is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular, 'the length of, and the reasons for, the delay. If it checks those factors against the list in Keeble, well and good; but [we] would not recommend taking it as the framework for its thinking*." The case reminds us of the tribunal's wide discretion on granting extensions of time, based on the particular facts and circumstances of the case. Here, the claimant had received legal advice on the time limits, which he had chosen to ignore having incorrectly believed he would benefit from an extension due to the early conciliation rules. However, the tribunal did not exercise its powers to allow the claim to proceed. [*Adedeji v University Hospitals Birmingham NHS Foundation Trust*]

Insolvent employers: For the purposes of the Third Parties (Rights against Insurers) Act 2010, the Court of Appeal has held that an employment tribunal is a 'court', meaning that the tribunal has jurisdiction to hear an employee's claim against their insolvent employer's insurers where there is an insurance policy in place covering employment tribunal claims. [*Irwell Insurance Co Ltd v Watson and ors*]

Interim injunctions – costs: Although the general rule is that costs of an interim injunction hearing are reserved, the High Court deviated from this position in what it described as "one of those rare cases." In this case, the defendant had repeatedly and brazenly refused to comply with duties of disclosure and delivery, failed to meaningfully engage with the claimant until proceedings were issued (at which point, the defendant quickly consented to the undertakings requested, which the court considered to be an inevitable outcome) and had repeatedly failed to comply with court orders. This history of non-cooperation and deliberately trying to stop or delay the claimant was sufficient for the court to determine costs at the time. [*Sportcal Global Communications v Laflin*]



Territorial jurisdiction: A U.S. resident, living in the United States and working on a ship registered in the Cayman Islands but owned by a Guernsey company and essentially owned by a UK resident, was entitled to bring a claim for unfair dismissal before the EAT. Since the ship mainly sailed to and from the UK and spent 50 percent of its time in UK waters, and all instructions were given by the UK resident 'owner' of the ship, even though he was not the technical employer, the EAT held that the claimant had sufficient link with the UK for the UK to have jurisdiction over his claims. It was also a relevant factor that there were no strong links to any other jurisdictions. [*Crew Employment v Gould*]

Trade union officials: Arising from a claim alleging negligent advice, the High Court has considered the extent of a trade union official's duty of care towards union members when supporting them in employment disputes. The court held that the duty is "to provide reasonable skill and care in the provision of practical industrial relations and employment advice. It includes having the reasonable knowledge and experience expected of a trade union in both individual and collective negotiations in representing their members' interests. Where, as here, the trade union is recognised by a particular employer, the union's experience in dealing with that employer will be particularly valuable and provide a level of insight that would not be available to a solicitor. The duty would include a general understanding of employment, HR, and industrial relations issues, to be reasonably well informed about employment law in general terms, to have a reasonable level of skill and expertise in persuasion and negotiation, to be able to provide strategic and tactical advice on how to seek to resolve a situation in the best interests of its member." [*Langley v GMB & others*]

Disability discrimination: In our June 2020 update we reported the (non-binding) preliminary ruling of an advocate-general of the CJEU that it could be indirect (but not direct) discrimination to treat one group of disabled employees differently from another group of disabled employees (in a case referred to the CJEU by the Polish courts). The CJEU has now delivered its judgment, finding that it may also constitute direct discrimination. The case involved an employer seeking to increase the number of employees who were certified disabled as this would reduce their financial contribution into a disability fund. The employer offered those disabled employees who did not have a certificate a financial payment (of approximately £60 a month) to get one, but no such incentive was offered to those who already had certification. Whereas the advocate-general ruled it not to be direct discrimination (as there was no direct link between disability and not getting the allowance – non-disabled employees also did not get it), the CJEU found that it could amount to direct discrimination if the date criterion was intrinsically linked to disability – a question for national courts to decide. [*VL v Szpital Kliniczny*]

COVID-19 update

Coronavirus Job Retention Scheme (CJRS)

- **Treasury direction:** Another Treasury direction has been issued, to cover the extension through to 30 April 2021 and to cover the rules of the scheme from 1 February – 30 April 2021 (as the previous direction only covered the period to 31 January). The CJRS is not fundamentally changing – the latest Treasury direction serves only to amend the dates to reflect the extension and to modify the methodology in respect of reference periods for reference salaries and hours to reflect the fact that the CJRS has been in place for more than 12 months; i.e., for March and April 2021 claims, where applicable, the relevant corresponding calendar months for reference purposes are March and April 2019 (and not 2020). The various guidance notes have been updated to reflect this.

- **Publication of employer details:** In an effort to combat fraud and improve transparency, the government has started publishing information about employers who have claimed under the scheme since 1 December 2020. The first report of employers claiming under the CJRS, covering claims made in December 2020, has now been published on the gov.uk website. In January, the data was limited to the employer name, but from February it will also include an indicative value of the claim. Details will not be published in respect of employers who can show that publication would result in a serious risk of violence or intimidation to certain individuals or anyone living with them, and has issued guidance on asking HMRC to withhold information.

- **Who can be furloughed:** The guidance has been updated to clarify that employees who have caring responsibilities resulting from COVID-19 (e.g., caring for children who are at home as a result of school and childcare facilities closing, or caring for a vulnerable individual in their household) can be furloughed.

- **Employment allowance:** Guidance has been updated to include details on how employers can claim employment allowance to reduce NICs. The rules around employment allowance remain unchanged.

Cross-border tax: The OECD has issued guidance which simplifies the tax obligations for cross-border remote workers, especially the rules around 'permanent establishments', in view of the public health measures (such as working from home) during the pandemic.

Financial support: The government has published a helpful document summarising the various economic support packages available to businesses and individuals due to the pandemic.

Kickstart scheme: 120,000 placements are reported as having been created for 16-24 year olds under the scheme, with more employers encouraged to get involved. From 3 February 2021, employers can apply directly to the Kickstart scheme for any number of job placements (i.e., the threshold of 30 job placements is being removed). Employers can also apply through a Kickstart gateway although applications for new Kickstart gateways will close on 28 January 2021. Kickstart gateways already working with the scheme can continue to add more employers and job placements to their grant agreement.

Lockdown review: The results of a review into the current measures, and a plan for taking the country out of lockdown, will be announced w/c 22 February 2021.

Mass testing: The government has extended its roll out of asymptomatic testing, making it available to all local authorities in England. Individuals who are unable to work from home are particularly encouraged to have regular testing, even if they do not display symptoms, where they live in an area that has signed up to community testing.

Travel to UK: Since 4am on Monday, 18 January 2021, all visitors to the UK (including UK nationals) need evidence of a negative COVID test, carried out in the 72 hours before departure, before boarding a plane, train or boat bound for the UK. There are fines of £500 for non-compliance. The guidance, including details of the exemptions (which include travel from certain limited places and people in certain limited jobs), can be found here; several previously exempt roles have been removed from the list, and the exemption for senior executives who bring significant economic benefit to the UK has also been suspended. In addition, from 15 February 2021, anyone travelling to the UK from a country on the UK's travel ban list will be subject to a mandatory 10 day quarantine in a government-approved facility.

Working during the national lockdown: The UK went into a third lockdown in January, with a strong 'stay at home' message. During the national lockdown anyone who can work from home must do so, and the clinically extremely vulnerable are advised not to attend work at all if they cannot work from home. The guidance says that "employers and employees should discuss their working arrangements, and employers should take every possible step to facilitate their employees working from home, including providing suitable IT and equipment to enable remote working. Where people cannot work from home, employers should take steps to help employees avoid busy times and routes on public transport." This requires proactivity on the part of the employer. The various context-specific guidance notes on working safely have been updated.

Other news

Discrimination: Widely reported in the media, a woman who was not invited to the work Christmas party while on maternity leave (as well having financial information and information about an impending redundancy withheld from her) has successfully claimed that her employer acted in a discriminatory way. This acts as a useful reminder that employees absent from work (including employees on maternity leave) should not be excluded from work events and communications.

Domestic abuse: BEIS has issued a report, "Workplace Support for victims of domestic abuse", which makes a number of observations about the nature of abuse and the importance of work and the workplace for victims. It also looks at the impact of the pandemic on domestic abuse, given that for many workers their home has become their workplace. In light of the report, the government has called upon all employers to be adept at spotting the signs of domestic abuse and helping staff find the right support. Acas has updated its guidance on working from home during the pandemic to include a section on managing and supporting employees experiencing domestic abuse, reminding employers of their duty of care. The Acas guidance also contains links to government guidance on spotting signs of domestic abuse, a CIPD handbook on managing and supporting employees experiencing domestic abuse, and to BITC's domestic abuse toolkit.

Employment rights post-Brexit: There had been speculation in the media that the government was planning an overhaul of employment rights in the UK, particularly in respect of working time. Business secretary Kwasi Kwarteng has rejected any suggestion of lowering employment protections, saying that the UK government intends to "protect and enhance workers' rights going forward". Although at the time he indicated that a review into employment rights was taking place, the business secretary has subsequently said that this review has been withdrawn. Please visit Reed Smith's Employment Law Watch blog to see a recent article on the implications of Brexit for UK employment law.

EU – free movement of services: The European parliament has passed a resolution on furthering the free movement of services in the single market, with a view, in particular, to EU Member States removing barriers on the cross-border movement of services and the people providing those services.

Self-Employed Income Support Scheme (SEISS): The terms of the SEISS have been subject to a judicial review with allegations that the scheme is indirectly discriminatory against women who have taken maternity leave. Judgment has been reserved.

Unemployment rates: The latest figures report unemployment having increased further, now standing at 5 per cent.

Government consultations

Exclusivity clauses: The UK government has launched a consultation on whether exclusivity clauses should be prohibited for those earning less than the lower earnings limit (currently £120pw). The consultation closes on 26 February 2021 and responses can be submitted online.

Human rights: The UK government has launched a consultation into the Human Rights Act (HRA) in order to review its operation, while nevertheless remaining committed to being a signatory to the European Convention on Human Rights. The review will look at (i) the relationship between domestic courts and the European Court of Human Rights and (ii) the impact of the HRA on the relationship between the judiciary, the executive and the legislature. More information about the consultation can be found here, with responses due by 3 March 2021.

Restrictive covenants: The UK government has launched a consultation seeking views on potential reform of post-termination restrictions in contracts of employment. In particular, views are sought on: (i) whether non-compete clauses should only be enforceable where the employer has provided compensation during the term of the clause, and whether this could be complemented by additional transparency measures and statutory limits on their length; and (ii) whether post-termination restrictions, including non-compete clauses, are unenforceable altogether. The consultation closes on 26 February 2021 and responses can be submitted online.

Upcoming dates

- w/c 22 February 2021: UK government review of current COVID-19 restrictions
- 3 March 2021: Spring Budget

9 February 2021

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