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UK Employment Law Update – June 2022

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:** The EAT has upheld the tribunal's decision that the dismissal of an employee who refused to attend the workplace during the first lockdown was not automatically unfair under the legislation that protects workers from dismissal or detriment for taking steps to protect themselves from danger where they have a reasonable belief of a serious and imminent danger to health and safety. In this case, the employee refused to attend work in circumstances where he had medically vulnerable children, but it was found that his concerns were not particularly attributable to the workplace, and his employer was complying with the 'working safely' guidance in place at the time. Although the EAT concluded that, in principle, circumstances outside of the workplace could give rise to a reasonable belief of serious and imminent danger, it was relevant on the facts of this case that the claimant did not wear a face covering, had breached self-isolation rules and could have taken precautionary steps at work, such as maintaining self-distancing and regular sanitisation of his hands. While relating to events in April 2020, when the COVID-19 landscape was different to now, this case will reassure employers with workers who are reluctant to return to work at the present time. However, employers must nevertheless remain cautious, comply with their health and safety obligations and be mindful of individuals' specific circumstances as on alternative facts there may still be the potential to satisfy the 'reasonable belief of serious and imminent danger' test. Read more on our Employment Law Watch blog. *(Rogers v. Leeds Laser Cutting*)

Employment status – IR35: The Court of Appeal has provided guidance on assessing employment status for the purposes of an IR35 status determination that, following the 2021 reforms, falls to the end user of services to carry out. In both cases, individuals' personal service companies were engaged to provide services under a series of contracts and the Court of Appeal considered there to have been a correct finding in earlier decisions that, on the facts, there was both mutuality of obligation and control by the end user. However, although the Court of Appeal reminded us that both these elements are necessary pre-requisites for employment status, they also concluded that their existence did not lead to a presumption of employment. Instead, it is important to consider all of the relevant factors and to consider the issue of status holistically, namely, that mutuality of obligation and control are part of that multi-factorial approach, but that other factors may also be relevant and given weight in the deliberation. While helpful guidance, these cases highlight the difficulties of assessing status for tax purposes. (*HMRC v. Atholl House Productions; Kickabout Productions v. HMRC*)

Harassment – baldness: In a claim hitting the media headlines this month, the tribunal has held that a claimant who was called an expletive in relation to his baldness at work was subjected to harassment related to his sex, contrary to the Equality Act 2010. On the facts, the comment was unwanted conduct with the purpose or effect of violating the claimant's dignity, and the tribunal concluded this was inherently linked to the protected characteristic of sex on the basis that baldness is more common in men. Although a non-binding decision, this claim demonstrates the potential scope of harassment protection and a reminder of employers' duties to prevent harassment in the workplace. It is unclear whether the decision will be appealed, and a remedies hearing has not yet been held to know the financial consequences of the finding. (*Finn v. The British Bung Manufacturing Company*)

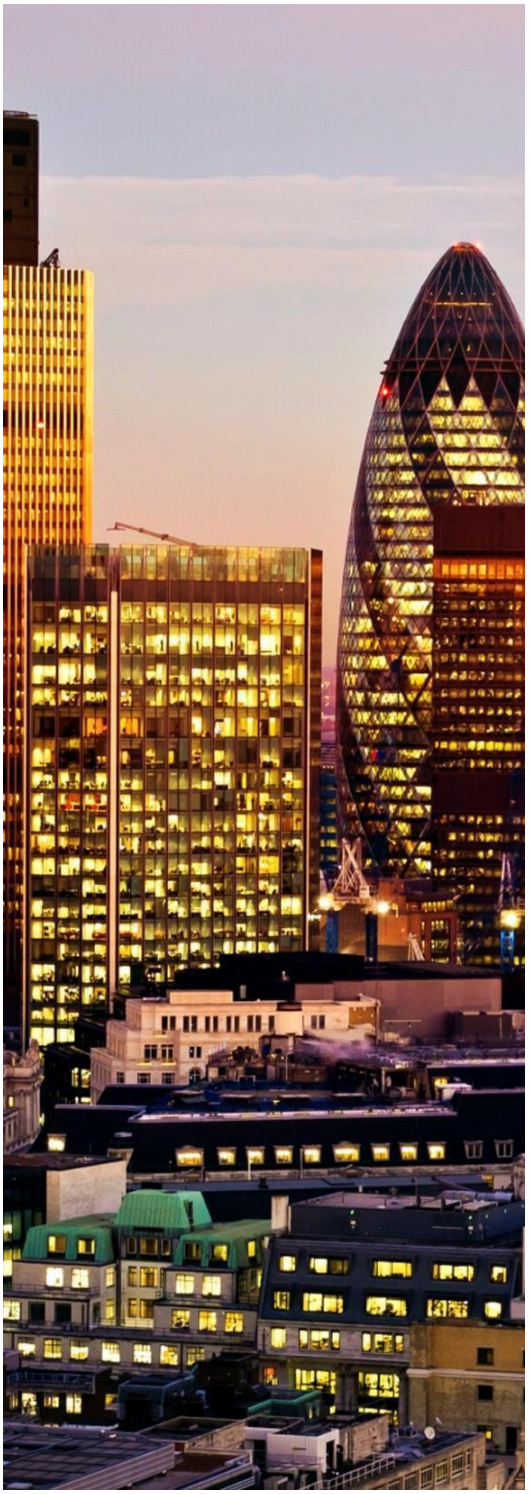
Victimisation: In another claim reported in the media this month, a tribunal has awarded £75,000 to a casino worker who was constructively unfairly dismissed and victimised for bringing complaints of race and age discrimination against her employer. The media reports pick up on her having been excluded from an invitation for drinks by her colleagues, although other elements of her claim were also successful (and many elements, including claims for direct discrimination, were not). The relatively large compensation claim (vis-à-vis her salary) was also newsworthy, although it is relevant that the award includes significant interest and 'grossing up' – without these adjustments, she received £18,000 of injury to feelings (the middle of the second 'Vento' band) and £4,000 of aggregated damages (i.e., additional compensation for distress caused by the employer's manner, motive or conduct), with named respondents being jointly and severally liable for elements of the award. Although an unbinding decision, the claim is a reminder that the bringing of a discrimination claim is a 'protected act' and that unfavourable treatment following from that may amount to victimisation. It is also a reminder that individual employees can get included in proceedings and be potentially personally liable. (*Leher v. Aspers (Stratford City)*)

Harassment – breastfeeding/expressing milk: A woman has succeeded with a claim of harassment when her employer failed to provide somewhere private for her to express breastmilk at work, requiring her to use her car or the toilets instead. Although there is no statutory right to be provided with facilities for breastfeeding or expressing milk, HSE guidance recommends that employers provide a clean and private environment and a fridge for storing milk. Failure to do so will not always give rise to a humiliating or degrading environment for harassment purposes, but employers are advised to act sensitively. (*Mellor v. MFG Academies Trust)*

Settlement negotiations – without prejudice: Overturning the tribunal's decision, the EAT has held that an employer who exaggerated allegations against an employee when seeking to negotiate a settlement could still rely on the without prejudice rule to avoid admissibility of the relevant documentation. As the allegations were not completely unfounded, the employer's conduct was not sufficient to amount to 'unambiguous impropriety' to defeat the without prejudice principle. However, the EAT acknowledged there had been some impropriety in the exaggerated allegations, the employer having 'sailed close to the wind'. Although without prejudice principles are an important and usual aspect of negotiations, this decision demonstrates circumstances in which without prejudice privilege could be lost, and so employers are reminded to tread carefully when making allegations against employees, and not to create improper pressure from exaggeration or dishonesty. (*Swiss Re Corporate Solutions v. Sommer*)

Employment Tribunal procedure – early conciliation: An EAT decision confirms that providing details of an Acas early conciliation (EC) certificate after submission of the ET1 claim form does not amount to a re-presentation of the claim. A claimant who sent her ET1 without going through the EC process and obtaining a certificate should have had her claim rejected on submission, and the adding of an EC number by way of subsequent email after contacting Acas did not rectify her error. This is a helpful reminder for employers to check the details of any claims received for the technicalities of the ET1 and EC requirements, as these can occasionally be overlooked by the tribunal. (*Pryce v. Baxterstorey Ltd*)

Employment tribunal procedure – hearing transcript: The EAT has confirmed that, subject to paying the applicable fee and following the required protocols, a party may apply for a transcript of a tribunal hearing where an audio recording has been made. (*Kumar v. MES Environmental*)



Legislative developments

Queen's Speech: The Queen's Speech on 10 May 2022, which set out the government's legislative agenda for the year ahead, was silent in respect of employment law. The Employment Bill, which was a feature of the Queen's Speech in December 2019, has been hampered by the pandemic and is seemingly no longer a priority. While a number of employment-related developments have been announced (e.g., statutory codes on sexual harassment at work and fire and rehire practices, carers leave and neonatal leave) the commitment has been limited to 'when Parliamentary time allows'. However, there is also speculation that certain plans (such as allowing workers to keep tips) have been dropped altogether. The Queen's Speech did include plans for an EU Law Bill, intended to clarify the status and remove the supremacy of retained EU law, and introduce new powers enabling the government to amend, repeal or replace retained EU law. The Bill will need to be passed through Parliament in the ordinary way, and as a lot of our employment laws derive from the EU, will be followed with interest. Read more about what's next for employment law on our Employment Law Watch blog.

Exclusivity clauses: The government has announced that it intends to extend the legislation that makes exclusivity clauses unenforceable in certain contracts to also include workers earning below the lower earnings limit (currently £123 per week). This extends the current restrictions for those on zero-hours contracts to those working less than around 13 hours a week (at minimum wage rates). There is no timescale for the introduction of the extended legislation.

Professional qualifications: The Professional Qualifications Act 2022 is now in force, allowing UK regulators the ability to make mutual recognition agreements with other countries to recognise professional qualifications from around the world.

COVID-19 update

Long COVID: The Equality and Human Rights Commission has issued a statement that, in its opinion, long COVID is capable of amounting to a 'disability' for the purposes of the Equality Act 2010, subject to the relevant test being made out. With an estimated 1.2 million people experiencing long COVID symptoms in the UK, employers should be mindful of their obligations towards sufferers, offering flexibility and considering reasonable adjustments where possible.

Other news

Ukraine: The government has issued guidance for employers offering work to people from Ukraine.

Women's health: Following reports that Spain is to introduce legislation for menstruation leave, charities are calling on the UK government to follow suit and for employers to improve communication, awareness, culture and general policy about periods in the workplace. This builds on existing pressure on the government to improve support and protection for working women during menopause. To date, the government has announced increased funding to certain charities specialising in women's wellbeing and reproductive health, intended to support those experiencing the menopause, pregnancy loss and other reproductive and menstrual health conditions to remain in the workforce, but has not committed to any specific new guidance or legislation.

Consultations

Mental health: The Department of Health and Social Care has published a discussion paper and call for evidence on what can be done to improve mental health and wellbeing. The call for evidence is open to all, although it is recognised that employers play a significant role. Anyone wishing to participate can do so online until 5 July 2022.

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