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UK Employment Law Update – September 2022

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

Carl De Cicco
Partner, London
cdecicco@reedsmith.com

Alison Heaton
Knowledge Management Lawyer,
Global Solutions - Leeds
alison.heaton@reedsmith.com

Case law updates

Discrimination – gender reassignment: A transgender woman has succeeded with parts of her claim for gender reassignment discrimination after being subjected to transphobic abuse and having been asked questions which the ET considered a cisgender woman would not have been asked. The case raises an interesting question about the correct comparator in direct discrimination cases of this nature (and we could perhaps expect an appeal over whether a cisgender woman was the correct comparator in this case). (*V v. Sheffield Teaching Hospitals*)

Discrimination: The Employment Appeal Tribunal (EAT) has dismissed claims for disability discrimination and indirect sex discrimination arising from an employer's policy during the COVID-19 pandemic, on the basis that there was neither any 'unfavourable treatment' nor any 'disadvantage'. The policy in question allowed employees to receive paid leave on an indefinite basis if they were unable to work because they were shielding or for childcare reasons, subject to them having first exhausted any accrued annual leave or time off in lieu (TOIL). The claimants argued that the inability to choose when to take annual leave or TOIL time was discriminatory, but the EAT concluded that the conditions for entitlement to the special leave did not detract from the favourable nature of the policy. (*Cowie and others v. Scottish Fire and Rescue Service*)

Recruitment: An individual who successfully worked as a CEO for over 10 years after lying about his qualifications and experience has had a confiscation order for some of his earnings from that role reinstated by the Supreme Court. He had pleaded guilty to obtaining a pecuniary advantage by deception and fraud over five years ago (resulting in a two-year prison sentence), but recovery of some or all of his earnings has worked its way through the court system, with an original confiscation order revoked by the Court of Appeal before being reinstated by the Supreme Court. The confiscation order is for approximately £100,000, a fraction of his net earnings over his time in post but considered to be the proportionate amount after factoring in what he might have earned if the fraud had not occurred. This is an extreme example of the consequences of an applicant being dishonest during a recruitment exercise and highlights the importance of employers having robust vetting processes in place to validate the accuracy of a candidate's purported qualifications and experience. (*R v. Andrewes*)

Tribunal procedure – anonymity: The EAT has ordered indefinite anonymity of a claimant's former female colleague who was neither a party to nor a witness in the proceedings, but against whom the claimant had made allegations of sexual misconduct that had been found to be untrue. The claimant was neither credible nor reliable as a witness, and he had demonstrated a malicious intention to destroy his colleague's reputation. In all the circumstances, her right to a private life was engaged and outweighed principles of open justice and the claimant's rights to freedom of expression. The order not only anonymises her in the judgment but also controls public access to documentation and prevents any disclosure of her identity by the claimant or by anyone else. (*Piepenbrock v. LSE*)

Tribunals – unconscious bias: In an unusual appeal case considering the conduct of the employment tribunal panel, the EAT concluded that there had been a real risk that the ET panel had been unconsciously influenced by their negative view of the claimant when dismissing his claim for victimisation. The panel was heavily critical of the way the claimant (a litigant in person) conducted his claim, referring to difficult and challenging behaviour in strong and personal terms. While ETs have to make findings of fact – of which credibility of a witness forms a part – in this case, the EAT expressed concern at the unkindness shown to the claimant at the ET hearing, and, recognising too that litigants in person can lack objectivity and emotional distance from their case, felt that the early poor impression the ET panel had formed of the claimant had influenced their judgment. The case has been remitted for a rehearing by a different tribunal panel. (*Laing v Bury and Bolton Citizen's Advice*)

New guidance

Employment status: The government has responded to a consultation launched in 2018 into employment status. Although there will be no legislative reform in this area, the Department for Business, Energy & Industrial Strategy has issued three new pieces of guidance on employment status and rights: (1) detailed status guidance for HR and legal professionals and other groups; (2) guidance for individuals; (3) and guidance for employers. The vast array of case law on status determination also remains highly relevant.

Other news

Right-to-work checks: The COVID-adjusted right-to-work checking measures are due to end on 30 September 2022. From **1 October 2022**, employers will need to either (i) revert to their pre-COVID checking processes, carrying out in-person manual checks; (ii) carry out right-to-work checks online, so long as the individual is a foreign national with a biometric work permit or a residence permit and has provided their date of birth and share code; or (iii) use a certified identity service provider for complete digital right-to-work checks.

Consultations

Financial services: The Prudential Regulation Authority has launched a consultation on its supervisory expectations concerning unvested pay, material risk takers, and public appointments. Responses are requested by **19 September 2022**.

Public sector exit payments: Following the repeal in 2021 of a cap on public sector exit payments, HM Treasury is now consulting on proposals to introduce administrative controls where public sector exit payments exceed £95,000 and to amend the process for special payments over and above contractual and statutory entitlements. The consultation closes on **17 October 2022**.

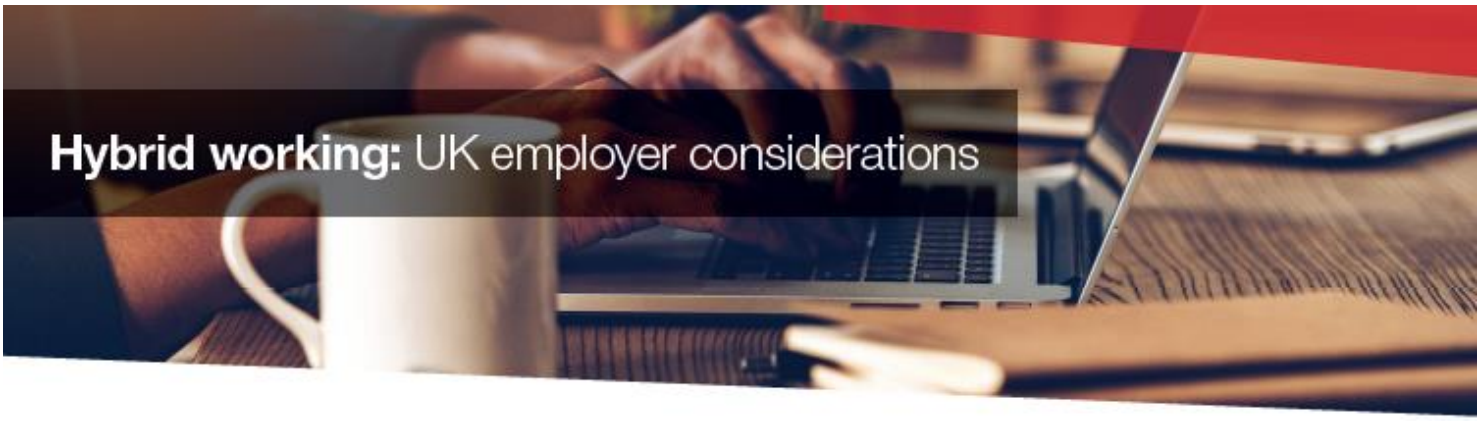
Events

(Register using the links below)

- Let's talk building and developing diverse teams – (on demand session)
- Reed Smith's 2022 Diversity, Equity and Inclusion Summit: All Rise – 11 October 2022
- Let's talk gender, sex, identity, and equity – 8 December 2022

Publications

With many employees heading back to work after their summer breaks, there may be an increase in emphasis from employers for them to return to the office. This document outlines some key points that UK employers should consider when implementing or reviewing their hybrid working policy. For more details, please access the document.



The COVID-19 pandemic has led to a sea change in the ways people work and the ways that people want to work.

We have summarised the key areas UK employers need to consider as hybrid working becomes the norm.

Contractual provisions: Employers should consider whether they want or need to formally change employment contracts to reflect new hybrid working arrangements and put them on a clear contractual footing (which will avoid allegations of breach of contract by employees who want to work where their contracts state but are prevented from doing so), or rely on implied consent or a mobility clause.

Flexible working requests: Where employers require a minimum level of attendance at a particular location but employees want flexible working arrangements, flexible working requests should be considered. Employers must remain mindful that removing flexibility that has been in place during the pandemic will be harder than granting it in the first place, and employers should not overlook the risk of discrimination where requests are not accommodated.

Health and safety at home: An employer's obligation to provide a safe working environment also extends to an employee's home working environment. Although employers should have been conducting risk assessments for home setups during the pandemic, this may have been overlooked while home working was considered 'temporary'. With home and hybrid working here to stay, employers should implement proper systems for routine workstation assessments.

Health and safety at work: With COVID-19 still in circulation, some employees may remain concerned about travelling to and attending a workplace, particularly if they are medically vulnerable, pregnant, or live with someone who is. Although no longer a legal requirement to consider COVID-19 risks explicitly, employers should continue to carry out risk assessments and consider individual circumstances.

There is legal protection afforded to employees who reasonably believe that attendance to the office would put them at risk of serious or imminent danger. However, this test is unlikely to be made out in the context of COVID-19, where employers can show:

- they have carried out and followed a risk assessment,
- complied with guidance in place at the time, and
- they have generally acted reasonably to mitigate the risk of infection.

Reducing office space and hot desking: As well as considering any impact of any office closure on the contractual workplace (see above), employers will need to carefully manage any move to hot-desking where this has not been in place before, as it could become a very sensitive issue for some employees. Where offices are to close altogether, employers will need to consider whether it triggers a redundancy situation (and its associated obligations).

Clarity and consistency: Employers should make their expectations clear and act consistently when faced with employees who do not comply with the required or minimum expected level of office attendance (subject to exercising flexibility for individual circumstances). Grievances and allegations of discrimination may arise when inconsistent treatment creates a perception of different treatment towards employees with similar circumstances.

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