ReedSmith
Driving progress
through partnership

UK Employment Law Update – August 2022

Welcome to our monthly newsletter, with a summary of the latest news and developments in UK employment law.

In this issue:

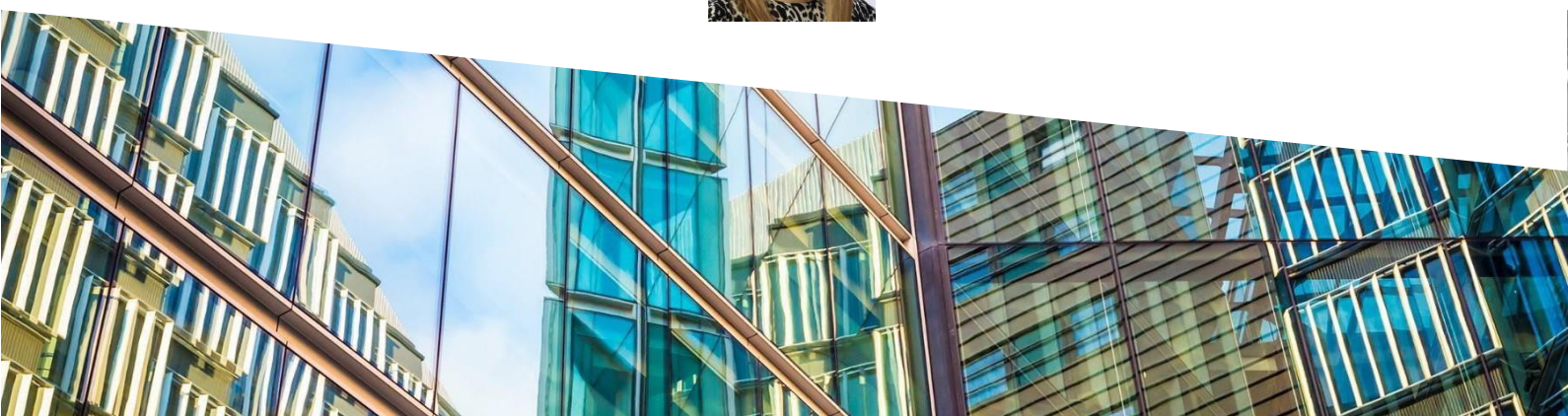
Robin Jeffcott
Partner, London
rjeffcott@reedsmith.com

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 – philosophical belief: Last year, in a well publicised case, the Employment Appeal Tribunal (EAT) determined (as a preliminary issue) that a claimant's view that biological sex is real, important, immutable and separate to gender identity was a protected belief under the Equality Act 2010. The EAT then sent the case back to the employment tribunal for it to determine if the Claimant had been discriminated against. Having now heard the substantive claim, the employment tribunal has concluded that the claimant was directly discriminated against, and victimised, because of her beliefs. Her employer argued it was the way she expressed her beliefs, rather than the beliefs themselves, which led to the non-renewal of her contract, but the tribunal was satisfied that she was not objectively offensive or unreasonable. While not all elements of her claim were successful, it is a reminder for employers to act carefully where employees have and choose to share strong beliefs which may be considered controversial. (*Forstater v. CGD Europe and others*)

Employment tribunals – bias: In another case involving beliefs around sex and gender, the EAT has ordered the recusal of a lay member due to personal social media posts demonstrating strong views on transgender issues. The lay member was part of a tribunal panel considering a case involving such issues and had not (as they ought to have) brought the possibility of bias to the attention of the parties in advance, and instead had been discovered by those acting for one of the parties. Parties litigating cases involving issues which are particularly controversial, with scope for strong and polarised views, should be particularly vigilant over the risk of bias at hearings. (*Higgs v. Farmor's School*)

Whistleblowing: Agreeing with the decisions of the employment tribunal and EAT, the Court of Appeal has rejected the argument that it is impossible to distinguish between conduct in making protected disclosures and the disclosure itself, and as such the claimant had not been unfairly dismissed. There was no dispute in this case that the claimant had made a protected disclosure, but on the facts, the principal reason for her dismissal was found to be her conduct in questioning the professional awareness of the person to whom she made the disclosure, rather than the protected disclosure itself. The Court of Appeal accepted that in some cases the two would not be distinguishable, but that it was not impossible for a 'separability principle' to apply – tribunals needed to explore each case on its own facts to ascertain the real reason for the dismissal in the mind of the decision maker, while taking into account considerations such as common sense and fairness in identifying whether the conduct could truly be separated from the disclosure. This decision highlights the fine line that employers may need to tread when dismissing employees who have made a protected disclosure, particularly where the reason for dismissal is purported to be conduct that is linked to the disclosure. (*Kong v. Gulf International Bank (UK)*)

Holiday pay: Agreeing with the Court of Appeal, the Supreme Court has held that the correct holiday pay calculation for a part time worker on a zero hours contract with no regular hours (in this case, a music teacher who worked term time only and with fluctuating hours depending on demand for her instrument lessons) was to look at the average hours worked or earnings paid over the relevant reference period prior to the annual leave (and ignoring any weeks where no work was carried out) and not on a proportionate basis pro-rated to a part timer, even if this results in receiving proportionately higher holiday pay than other colleagues. This claim was ultimately a technical decision than turned on statutory interpretation. This decision will be of particular significance to any employers who engage workers on a permanent contract but who work varying hours and only during certain parts of the year, working neither full time hours, nor part time hours with a consistent, weekly pattern. Read more on our *Employment Law Watch* blog. (*Harpur Trust v. Brazel*)

Fire and rehire: In our March 2022 update, we reported that the High Court had granted an injunction preventing an employer from using 'fire and rehire' (i.e., termination of employment on notice, with re-engagement on new terms) to remove a contractual entitlement to enhanced pay. The Court of Appeal has now overturned that decision, determining that an injunction was not justifiable in the circumstances. Although the High Court described it as an "unusual case", the Court of Appeal's judgment limits the scope for the widening of available remedies where an employer uses the fire and rehire approach to changing terms and conditions. The government remains committed to introducing a statutory code of practice on fire and rehire, although the detail and timings remain unknown. (*USDAW v. Tesco*)

Breach of contract: The Court of Appeal agreed with the lower courts that it was appropriate to strike out a claimant's High Court claims for employment benefits (other than notice pay) when he claimed wrongful dismissal. The claimant was dismissed without notice for alleged gross misconduct, and brought a claim for 12 months' notice pay plus loss of shares and bonus, arguing that he should have received notice. Applying the 'least burdensome mode of performance' rule, the respondent could have lawfully terminated the contract with a payment in lieu of notice (PILON) and if it had done so, no share or bonus payment would have been due. As such, the claimant could only proceed with his notice pay claim. (*Mackenzie v. AA Ltd*)

Misconduct: Upholding an earlier decision, the EAT agreed that it was fair to dismiss a financial consultant for failing to disclose his bankruptcy despite no contractual, policy or regulatory requirement for him to do so. The nature of his role and experience meant it was reasonable for his employer to have taken the view that bankruptcy was something which he ought to have known to disclose. The same rationale will not apply to all roles, and employers can avoid any uncertainty for employees by having a clear contractual provision and/or policy setting out what disclosures must be made and the consequences of not doing so. (*Pubbi v. Your-Move*)

Age discrimination – comparators: A direct age discrimination claim requires a claimant to show they have been treated less favourably than a comparator who is in materially the same circumstances, and who is in a different age group. Establishing whether someone is in a different age group can be tricky, particularly where there are marginal differences in age – in this case the claimant was 55, citing a 51 comparator. The employment tribunal found in his favour, but on appeal the EAT was critical that the tribunal had not properly assessed and examined the respondents' perception of the age difference. The EAT noted that a relatively small difference in age made discrimination less likely, but careful scrutiny was required and the particular circumstances were important; e.g., a small age difference may be relevant in a case where the employer operated an age cut-off, and the particular ages being considered may also affect the issue. This case is also of interest in respect of mitigation of loss, the claimant having started his own consultancy business after his dismissal. The EAT concluded that, in principle, holding a shareholding in a company post dismissal could be set off against losses, although it highlighted the importance of proper expert evidence on valuation. (*Citibank & others v. Kirk*)

Age discrimination – PHI payments: The EAT has upheld a decision that an employer did not discriminate against an employee after payments under a permanent health insurance (PHI) scheme stopped when he reached age 65. The Equality Act 2010 contains an exemption to age discrimination in respect of such insurance backed payments, allowing them to end at the older of age 65 or the state retirement age. The EAT confirmed that the employer's obligation to act in a non-discriminatory way was in respect of access to the scheme, and once the insurance had been accessed on incapacity, their responsibility crystalised and became a matter for the insurers. As the state retirement age was 65 at the time of crystalisation in this case, the employer had not discriminated, even though the claimant's state retirement age subsequently increased to 66. This does however remain a tricky area, and employers should regularly review the terms of their PHI offering to ensure the exemption in the Equality Act 2010 applies, or otherwise remember that they may need to objectively justify the termination of payments at a particular age. (*Pelter v. Buro Four Project Services*)

Insured benefits: In another case involving PHI, the Court of Appeal has found an employer liable to pay PHI payments to an employee despite these not being covered fully by insurance at the time payments were due. The claimant's employer changed in 2008, a year before he became absent on long term sick leave, and argued that an 'escalation payment' allowing for a 5 per cent annual increase in PHI benefit had been lawfully removed from the PHI benefit offered at the time of the employment transfer. However, the escalation payment had been incorporated into the claimant's contract of employment, there was nothing in his original documentation linking the benefit to an insurance policy or allowing for the terms to be amended from time to time, and the employer had failed to communicate any change to the policy terms. The claimant was therefore entitled to rely on his original summary of benefits, and claim the escalation payment as an unlawful deduction of wages. This case acts as an important reminder for employers to carefully word their contractual provisions around insured benefits, and for transferees on a TUPE transfer to carefully check the contractual position. (*Amdoc Systems Group v. Langton*)

Unfair dismissal – political affiliation: The normal two year qualifying period for unfair dismissal protection does not apply where the dismissal 'relates to' political opinions or affiliations. In this case (where the claimant alleged she was dismissed for asking permission to stand as a candidate in the general election when her contract of employment contained a political neutrality clause), the EAT held that the exception only applied to the content of the employee's political opinion or to the identity of the political party they wished to stand for, neither of which were established here. The EAT did however accept that her belief that "those with the relevant skills, ability and passion should participate in the democratic process" was a philosophical belief protected by the Equality Act 2010. (*Scottish Federation of Housing Associations v. Jones*)

Legislative developments

Neo-natal care: The government has confirmed it is backing a private member's bill to introduce paid leave for parents whose babies are admitted to hospital for at least seven continuous days in the first 28 days of their life. The right to paid time off will apply from day one of employment, and provide for 12 weeks of paid leave, in addition to existing family leave entitlements. The timing for introduction of the legislation is currently unknown.

Strike action: Since 21 July 2022, it has become easier for businesses to source temporary workers from an employment business to cover the duties usually carried out by someone who is striking (or to carry out the duties of a worker who has been reassigned to cover the striking worker). This practice was previously unlawful. (The Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022)

New guidance

Discrimination: Acas has issued guidance for employees and employers on raising and responding to questions around discrimination.

Domestic abuse: The Home Office has issued statutory guidance to support organisations in identifying and responding to domestic abuse, and to promote best practice.

Other news

Menopause: The government has provided its response to a recent independent report which set out a number of recommendations for improving menopause support. The government has committed to the appointment of a Women's Health Ambassador, who will be a permanent member of the UK menopause taskforce. The taskforce is intended to take a holistic approach to menopause support, seeing it as a cross-cutting policy issue rather than simply one about health. It will run public health campaigns and work with employer groups to break down taboos, promote best practice and provide support. However, the response is clear that there are no plans to amend the Equality Act 2010 to explicitly include menopause as a protected characteristic, considering sex, age and disability to provide sufficient protection, nor to introduce dual discrimination.

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**.

Upcoming events

(Register using the links below)

- Let's talk building and developing diverse teams – 8 September 2022
- Let's talk gender, sex, identity and equity – 8 December 2022

Publications

- UAE employers, are your HR affairs in order?
- Unfair Dismissal Compensatory Awards – The Cost of Compliance
- Employers in Germany must take action following changes to the Notification Act

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