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UK Employment Law Update – July 2022

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

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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

Disability discrimination – **long Covid**: An Employment Tribunal (ET) has found an employee suffering with long Covid to be disabled for the purposes of the Equality Act 2010. Although not all long-Covid sufferers will be disabled, it is a reminder that the associated symptoms are potentially capable of meeting the definition. In this case, it is also noteworthy that the tribunal was satisfied that the test of disability was made out, notwithstanding that two occupational health reports obtained by the employer suggested otherwise. (*Burke v. Turning Point Scotland*)

Discrimination arising from disability: The Employment Appeal Tribunal (EAT) has concluded that the decision to dismiss a disabled employee after a period of prolonged sickness absence was discrimination arising out of disability, with the dismissal being a disproportionate response to the circumstances. The claimant suffered from chronic migraines, anxiety and depression which she claimed were exacerbated by bullying and harassment by a colleague. Although she trialled working at a different location, the EAT was critical that her employer failed to implement the trial properly or evaluate its success before moving to dismiss, and could not objectively justify its decision to dismiss. This case acts as a reminder that before moving to dismiss employees protected by UK disability law, alternatives to dismissal should be considered, and employers must be in a position to justify how their decisions meet any legitimate aims relied upon. (*DWP v. Boyers*)

Discrimination – philosophical belief: What amounts to a protected 'philosophical belief' under the Equality Act 2010 can often be difficult to ascertain. Supporting previous decisions, a recent London Central ET case has confirmed that a belief in ethical veganism can amount to a protected belief. However, it ruled that the claimant was not discriminated against when she was dismissed from her work as a veterinary nurse after a rescued sick turkey was found at her flat. The ET decided that a belief that there was a moral obligation to take positive action to reduce animal suffering, including trespass on property and removal of animals, as not a protected 'philosophical belief'. (*Miles v. Royal Veterinary College*)

Discrimination – philosophical belief and transgenderism: In an important philosophical belief claim this month, the EAT has held that a Christian doctor's belief that a person cannot change their biological sex, and who did not believe in transgenderism, was protected under the Equality Act 2010. However, his employer's actions in response to his refusal to use the preferred pronouns of service users were found not to be acts of direct or indirect discrimination, nor harassment. His employers had considered ways to accommodate the doctor's beliefs, and could objectively justify their actions on the basis that they provided a service promoting equal opportunities, and wanted to ensure transgender service users were treated with respect. (*Mackereth v. DWP*)

Constructive unfair dismissal: It is well established law that in an unfair dismissal claim, the employee's resignation can be in response to the employer demonstrating an intention not to comply with a term of the contract of employment which is so serious that it goes to the root of that contract. The EAT has provided a useful reminder that once a fundamental breach of contract is established, whether the employer intended to commit a fundamental breach and why the employer breached the contract is irrelevant. In this case, the claimant was denied company sick pay in circumstances where the employer was suspicious that absence was to avoid disciplinary proceedings, but where there was no investigation into the employer's suspicions. The non-payment was deemed a fundamental breach of contract, and it was not relevant that the employer's reason for withholding pay was to encourage the claimant to take part in the internal process, rather than ending the contract of employment. (*Singh v. Metroline West*)

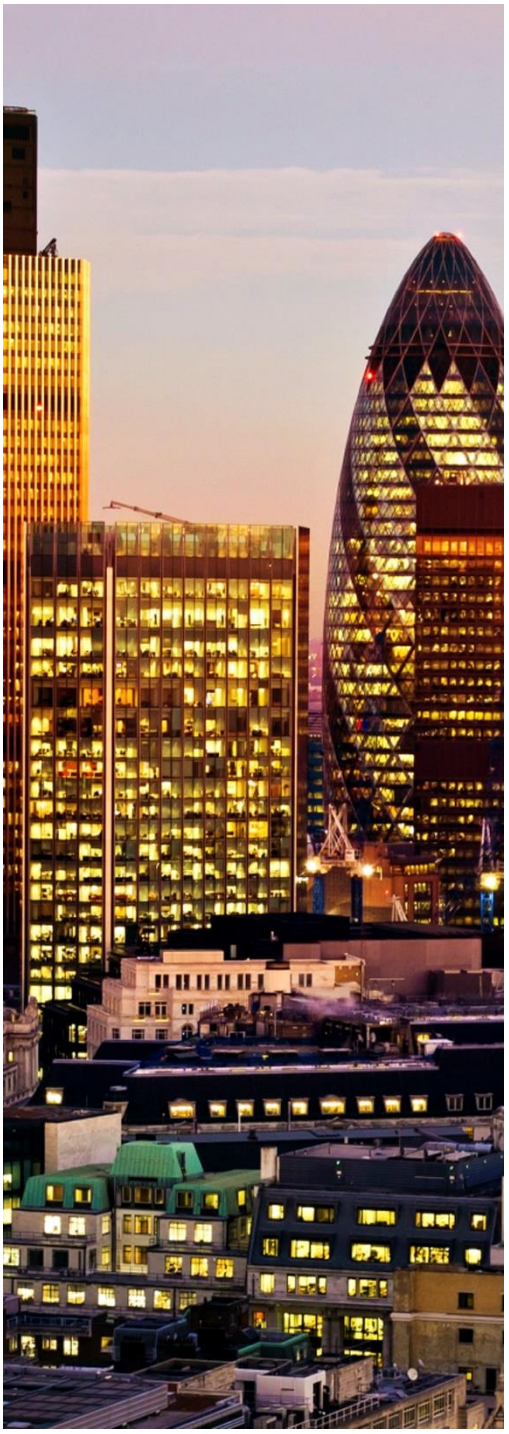
Compensation uplifts: The EAT has upheld a decision to award an employee a 25 per cent uplift on their compensation under the Acas Code of Practice on disciplinary and grievance procedures in a sham redundancy situation and where the tribunal had found the dismissal to have been an act of sex discrimination. The EAT set out some helpful guidance on when the Code will apply, including that it can still be relevant to cases which are not clearly related to a disciplinary or grievance issue. Certainly, pretending a dismissal is a redundancy (when the Code explicitly excludes redundancy dismissals) will not bypass its application. *(Rentplus UK v. Coulson*)

Compensation – statutory cap: The compensatory award for unfair dismissal is capped at 52 weeks' gross pay, or the annual statutory amount (currently £93,878), but complexities can arise where there are various adjustments to be made, particularly with regard to the stage at which the cap is applied. In this case the claimant won their claim and was awarded approximately £46,000, which was duly paid, although the claimant also appealed their award. On appeal they were awarded approximately £129,000 and so this question arose: should (a) the £46,000 be deducted from the £129,000, and then the cap (which at the time was £74,200) be applied, meaning £74,200 remained due; or (b) the cap be applied and then the £46,000 already paid be deducted, leaving approximately £28,000 left to pay? While sympathising with the respondent, the EAT interpreted the legislation as requiring that the statutory cap be exceeded. This is an astonishing decision which may well be appealed, but for the time being acts as a cautionary tale for employers abiding by tribunal orders for compensation where an appeal over the award is pending or likely and where the statutory cap applies. For further details, please read the Employment Law Watch Blog. (*Dafiaghor-Olomu v. Community Integrated Care*)

Non-compete clauses: The Court of Appeal has refused to grant an interim injunction preventing a former employee from working for a competitor while subject to a 12 month non-compete. Delay was an important factor in the decision, the former employer having not made their application promptly. It was also noted that it should not be assumed that damages will always be an appropriate remedy for an employee who is essentially prevented from working where a non-compete is successfully enforced; being unable to work may do damage which cannot be remedied with money alone. (*Planon Ltd v. Gilligan*)

Redundancy: An EAT decision reminds us that some issues in employment litigation are "so obvious" that they should be considered by the tribunal whether or not they are raised by the parties, unless it is made clear that they are not an issue. In this claim about the fairness of a redundancy, the 'obvious' issues for consideration, despite not being raised by the claimant, were whether an employer had carried out reasonable consultation, adopted a fair redundancy selection process and taken reasonable steps to seek alternative employment. (*Osinuga v. BPP University*)

Trade unions – collective bargaining: Legislation prevents employers from offering an inducement to employees to bypass collective bargaining commitments with trade unions. In this case, the employer had a collective bargaining agreement in respect of pay, and commenced negotiations with the recognised trade union. Negotiations were described as acrimonious, and while the parties were not far apart, negotiations stalled and the employer considered an impasse had been reached, so unilaterally made a pay award. The EAT concluded that this was an unlawful inducement, reminding employers to take care when making offers to employees before being certain that any collective bargaining process has reached a conclusion. (*Ineos Infrastructure Grangemouth v. Jones*)



Legislative developments

Fit notes: Since 1 July 2022, doctors have been joined by registered nurses, occupational therapists, pharmacists and physiotherapists in permitted to sign fit notes, in an attempt to ease the burden on GPs. Employers will need to be mindful of the expanded range of authorised fit note providers when managing absence staff. (The Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) (Amendment) (No. 2) Regulations 2022)

Strikes: Under current legislation, employers are prevented from obtaining temporary staff from an employment business to carry out the duties usually carried out by a worker who is striking or taking part in industrial action (or to carry out the duties of a worker who has been reassigned to cover the striking worker). However, the government has announced its intention to repeal this provision, which will make it easier for businesses to source temporary workers. Draft legislation is awaited, though it is thought to be being treated as a priority, with the changes expected to be in force within weeks.

Employment law reforms: Although a long way off being introduced as new legislation, there has been some development on a number of topics, with bills on the following having started the legislative process with their first reading during June: carer's leave; neonatal leave and pay; enhanced redundancy protection during pregnancy and maternity; flexible working; predictable terms and conditions; time off for fertility treatment; improved flexibility for paternity leave; and dismissal and re-engagement. Further readings are scheduled for later in the year. The government has also indicated an intention to publish (for consultation) a draft of its Statutory Code of Practice on dismissal and re-engagement in summer 2022.

Human rights: A Bill of Rights Bill has been introduced to Parliament which, if passed, will repeal the Human Rights Act 1998 and create a new human rights framework for the UK. The UK will however remain a signatory to the European Court of Human Rights.

Other news

Four-day working week: The pilot to trial a four-day working week was launched on 6 June 2022, with over 3,000 workers across 70 companies taking part. Employers have agreed that participating workers will receive 100 per cent of their pay for working 80 per cent of their hours, subject to maintaining 100 per cent productivity.

Immigration: Graduates from certain global universities are now able to apply for a short term (two-three year) visa to work in the UK under the High Potential Individual route, even if they do not have a job offer or company sponsor. Applicants will however need to have graduated from a qualifying university in the five years before they apply, meet English language requirements and, depending how long they have been in the UK, hold sufficient funds.

Wages (EU): EU member states and the European Parliament have reached a political agreement on a new directive on adequate minimum wage protection. Although respecting the ability for member states to determine wages, the directive intends to ensure wages are sufficient to maintain a decent standard of living. The directive will also provide a right of redress for workers, their representatives and trade union members if rules are violated, and strengthen collective bargaining in countries where it covers fewer than 80 per cent of workers. Although this will not apply to the UK, domestic national minimum wage legislation continues to apply, and UK businesses with operations in the EU should keep watch for developments.

Discrimination: The government has indicated that it has no intention to implement the combined discrimination provisions in the Equality Act 2010, nor to specifically make 'menopause' a protected characteristic.

Upcoming events

(Register using the link below)

"Let's Talk" CLE Series Session 2: Let's talk privilege and allyship – 20 July

Publications

- Sailing close to the wind: 'without prejudice' and the thresholds of 'unambiguous impropriety'
- Strikes and cancellations: The impact of travel chaos on employers
- Unfair Dismissal Compensatory Awards – The Cost of Compliance

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