ReedSmith
Driving progress
through partnership

UK Employment Law Update – October 2023

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

In this issue

Recent publications

- Am I being unreasonable? The 'all reasonable steps' defence in discrimination claims

Follow us on Employment Law Watch to stay up to date with our latest blog posts and publications.

Case law updates

Disability discrimination – menopause: An employment tribunal (ET) has found an employer liable for discrimination arising from disability, and a failure to make reasonable adjustments after giving a menopausal employee a low appraisal rating and a written warning about her performance, and withdrawing sick pay when she was subsequently off work. Despite the employer providing a variety of support (including additional training, daily management advice and support, occupational health (OH) referrals, a change in role and counselling through the employee assistance programme), the ET considered that more should have been done (e.g., OH referral was left too late, the performance management process was inappropriate, and targets could have been adjusted) and that the actions taken were not a proportionate way to achieve their legitimate aims of ensuring staff were performing to deliver a quality and efficient service; less discriminatory alternatives could and should have been explored. Although the decision is not binding and may yet be appealed, this case demonstrates the difficulties with managing disabled employees who are falling behind expected performance standards, particularly in the context of menopause where there may be a lack of awareness and understanding amongst managers about menopausal symptoms and their impact on both work and the day-to-day. With open discussions around menopause being more commonplace, employers can perhaps expect more claims along these lines. A menopause policy, training for HR and managers, and raising awareness generally will all help manage any issues and help support, and retain, menopausal staff and mitigate the risks of discrimination. Interestingly, as part of her c. £65,000 compensation, the claimant received an award for aggravated damages arising from the employer's unreasonable refusal to concede disability at an earlier stage. (*Lynskey v. Direct Line Insurance Services*)

Disability discrimination – failure to make reasonable adjustments: The Employment Appeal Tribunal (EAT) has been considering the issue of time limits in cases where the cause of action arises from an omission or failure to act (e.g., a failure to make reasonable adjustments for a disabled employee), providing some helpful guidance that consideration should be given to when a reasonable employer would have made the adjustments, but also when a reasonable employee would objectively have realised that the duty was not going to be complied with. The EAT is also exploring circumstances where a duty to make reasonable adjustments might be extinguished by a change in circumstances. These issues are all highly fact and circumstance specific; nevertheless, the EAT's decision will be useful when considering limitation periods in similar cases. (*Fernandes v. DWP*)

Redundancy – suitable alternative employment: Redundant employees can be denied a statutory redundancy payment if they have unreasonably refused suitable alternative employment – the EAT has been considering an appeal on the issue of reasonableness in this context. Three claimants had each been employed as 'Head of Human Resources', but when their roles were made redundant in a restructure, they were offered the alternative role of 'Senior HR Lead', which they refused. They were subsequently denied a redundancy payment and challenged this decision through an ET. The EAT was satisfied that there had been no error in law when the ET determined that while the new roles were "suitable", it was not unreasonable for the claimants to have refused the positions – the claimants had perceived the new roles as having a lower status with less autonomy and while this was objectively incorrect, their subjective perception was relevant to the issue. They were therefore entitled to their redundancy payment. (*Mid & South Essex NHS Foundation Trust v. Stevenson & others*)

Sex discrimination – childcare disparity: In this case, the EAT had previously decided that the employer's requirement to work flexibly, including at weekends, placed women (including the Claimant) at a disadvantage because of the disparate childcare responsibilities between men and women, the case was referred back to the ET to consider whether the requirement was discriminatory. The ET dismissed the Claimant's claim on the basis the employer could demonstrate that the flexible working requirement was a proportionate way to achieve the legitimate aim of providing 24/7 care in the community. On the facts, requiring occasional weekend work was the only option and the claimant did have some childcare support available. (*Dobson v. Cumbria Partnership NHS Foundation Trust*)

Termination of employment: An employee who received a 'dismissal' letter to terminate his contract of employment on medical grounds (and who was in receipt of long-term payments under a permanent health insurance scheme) has been prevented from bringing an unfair dismissal claim on the basis that his employment was terminated by mutual agreement rather than being a dismissal. As there was clear evidence of prolonged discussions leading to a consensual termination without duress, undue pressure or coercion, the EAT decided that a reference to 'dismissal' in the letter did not undermine that mutual agreement. The case nevertheless highlights the importance of language in correspondence and the need, in similar circumstances, for employers to ensure that their actions are consistent with there being a genuine mutual termination. (*Riley v. Direct Line Insurance*)

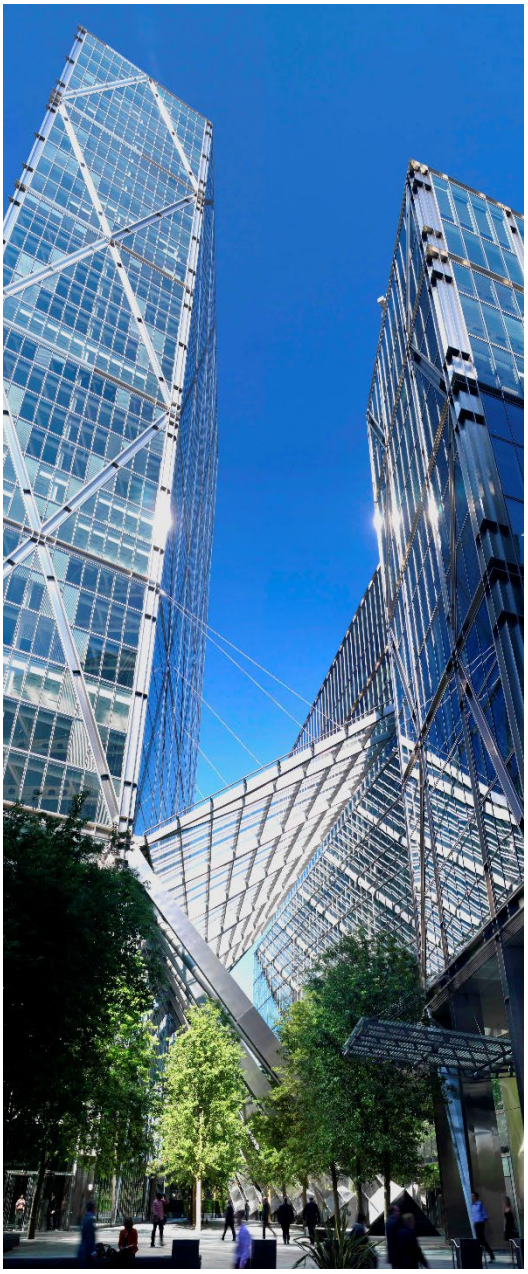
Unfair dismissal: An ET decision that an employee was unfairly dismissed after using an offensive racial term during equality training is a reminder to employers that ordinary unfair dismissal principles apply when addressing apparent equality issues. In this case, described as having "very particular circumstances", the claimant had asked the external trainer how to handle a situation where they heard an offensive word, giving an example of the use of the 'n' word (using the word in full). Following a complaint by the trainer, and given the employer's zero tolerance approach to discrimination, he was subject to disciplinary action and subsequently dismissed. The ET deemed this unfair – while right of the employer to invoke disciplinary proceedings and to be appalled at the use of the word in a professional context, the decision to dismiss was outside the range of reasonable responses in the circumstances. The context of the comment, the claimant's immediate apology, the disparity in offence caused at the time and the claimant's significant remorse, meant that on the particular facts the ET concluded that the decision to dismiss was not reasonable. (*Borg-Neal v. Lloyds Banking Group*)

Legislative developments

Equal pay: The UK government has announced its intention to introduce domestic legislation to replicate the effect of EU principles allowing comparisons for equal pay purposes to be made between workers in the same establishment or services where terms and conditions are attributable to a "single source". This will ensure equal pay protections are safeguarded notwithstanding Brexit.

National minimum wage (NMW): Regulations have been laid before parliament to remove the 'live-in domestic worker' exemption to the NMW. If passed, the new regulations will come into force on 1 April 2024, entitling workers who reside in their employer's home as part of the family to the applicable NMW.

Workers – predictable contracts: The Workers (Predictable Terms and Conditions) Act 2023 has now been passed, although it is unlikely to come into effect for another year. The new legislation will allow workers and agency workers the right to request (up to two times in a 12-month period) a predictable working pattern in certain circumstances. It is anticipated that there will be a minimum service requirement of 26 weeks, and applications can be rejected on statutory grounds. As with other statutory rights, workers will be protected from suffering detriment because they have made an application and will have recourse where employers have failed to follow the appropriate procedure. A new Acas code of practice, a draft of which will be available for comment and consultation later this year, is expected to help guide employers on the new rules..



Other news

Artificial intelligence: The House of Commons Science, Innovation and Technology Committee has published an interim report detailing several challenges which need to be addressed as part of the ongoing inquiry and discussions on AI governance and regulation. The identified challenges include bias, privacy, misrepresentation and transparency. It also specifically notes the challenges arising from how AI disrupts employment opportunities.

Autumn budget: The 2023 autumn statement will be presented on **22 November 2023**.

Immigration: Immigration fees increased (by around 20%) on **4 October 2023**.

Whistleblowing and gagging clauses: The House of Commons Library has published a briefing note on whistleblowing and the use of gagging clauses at work. It provides a useful overview of the law on whistleblowing and the law and best practice around attempts to silence workers.

New Guidance

Data protection – health data: The Information Commissioner's Office has published new, detailed guidance for employers on processing workers' health data under data protection legislation. As well as providing an overview of the law, the guidance offers practical advice on compliance.

DEI: CIPD has published new guidance on workplace transgender and non-binary diversity, equity and inclusion. It covers specific challenges faced by transgender and non-binary workers, ways in which employers can provide day-to-day support, and advice on drafting effective policies and training.

Fertility: The Fawcett Society has issued guidance for employers who are looking to create a more 'fertile friendly' workplace.

Status: Acas has refreshed its guidance on employment status, including details on distinguishing between employed, worker and self-employed status and what employment rights and responsibilities come with each.

Consultations

Flexible working: Although the consultation on an accompanying Statutory Code of Practice on handling statutory flexible working requests has now closed, there is also a separate call for evidence on organisations' approaches to flexible working outside of the statutory regime. This is open for comment until **7 November 2023**.

Disability: The government has launched a consultation on its Disability Action Plan, a facet of its disability strategy aimed to improve the lives of disabled people. Anyone can comment on all or parts of the consultation until **6 October 2023**, with the views and experiences of disabled people and other interested parties particularly sought.

Occupational health (OH): The Department for Work and Pensions has launched a consultation exploring the ways in which OH coverage and quality can be improved. The consultation is open until **12 October 2023**.

Financial services – diversity, equity and inclusion (DEI): The PRA and FCA have issued separate, but linked, consultation papers on proposed regulation, rules and expectations to improve DEI in regulated firms. Both consultations are open for comment until **18 December 2023**.

David Ashmore
Partner, London
dashmore@reedsmith.com

Carl De Cicco
Partner, London
cdecicco@reedsmith.com

Robin Jeffcott
Partner, London
rjeffcott@reedsmith.com

Joanna Powis
Counsel, London
jpowis@reedsmith.com

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

Follow us on LinkedIn

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
ASTANA
ATHENS
AUSTIN
BEIJING
BRUSSELS
CENTURY CITY
CHICAGO
DALLAS
DUBAI
FRANKFURT
HONG KONG
HOUSTON
LONDON
LOS ANGELES
MIAMI
MUNICH
NEW YORK
ORANGE COUNTY
PARIS
PHILADELPHIA
PITTSBURGH
PRINCETON
RICHMOND
SAN FRANCISCO
SHANGHAI
SILICON VALLEY
SINGAPORE
TYSONS
WASHINGTON, D.C.
WILMINGTON

reedsmith.com