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UK Employment Law Update – February 2023

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

Dismissal: An interesting Employment Appeal Tribunal (EAT) decision concluded that it was not unfair to dismiss a claimant despite the issues having already been addressed under concluded disciplinary proceedings resulting in a final written warning. While rare to reopen concluded matters, there is no general rule against 'double jeopardy' and this unusual case is an example of where it was not unfair to revisit the issues. The claimant held a senior position in an NHS hospital trust and had responsibility for improving racial equality, as well as being the chair of her employer's BME network. She faced disciplinary proceedings after numerous allegations of (amongst other things) bullying, harassment and discrimination, and ultimately received a final written warning. However, in the meantime, a report by the Care Quality Commission concluded that bullying, harassment and discrimination were "rife" in the organisation, and the trust was placed into special measures with the management taken over by another trust's executive team. The new chief executive questioned the previous disciplinary findings and instigated the process which led to the claimant's dismissal on ground that she was not objectively credible or accountable to lead on race issues. Interestingly, as well as finding the dismissal fair, the EAT also concluded that it was irrelevant whether the dismissal was framed as a 'conduct' or 'some other substantial reason' dismissal – the key was whether the dismissal was fair and within the range of reasonable responses. Although uncommon, this will be of interest to employers faced with significant intervening events, such as the involvement of a regulator (as here), which provide a reason to revisit previous disciplinary proceedings. (*Lyfar-Cissé v. Western Sussex University Hospitals NHS Foundation Trust and others*)

Disability discrimination (i): In a decision that will be reassuring for employers, the EAT has found that the dismissal of an employee who had been on long term sickness absence (and was disabled for the purposes of the Equality Act (EqA)) was not discriminated against when he was dismissed, nor was he disadvantaged when a decision was made to reduce the compensation payable to him under the Civil Service Compensation Scheme (CSCS) following his capability dismissal. In a period spanning a couple of years, the claimant had been absent from work for 245 days over 23 occurrences and at the point of dismissal he had been off for seven months and there was no prospect of his return. Further, his absence was negatively impacting on productivity and team morale, and his employer concluded that all reasonable adjustments had been exhausted. The EAT was satisfied that dismissal was a proportionate means of achieving a legitimate aim (of maintaining a fair, effective and transparent sickness management regime, and efficient use of resources) in the circumstances. In respect of the CSCS, the amount paid was reduced due to the claimant's conduct and although partly related to his disability, his entitlements under the scheme were not unfavourable treatment. (*McAllister v. Revenue and Customs Commissioners*)

Disability discrimination (ii): Another EAT decision this month is a helpful reminder that a respondent must know, or should reasonably have known, that the claimant was disabled for potential discrimination to occur. In this case, the EAT was satisfied that there was no evidence on which the employer could or ought to have known that the claimant was disabled at the point at which alleged discrimination took place, and as such disability discrimination could not have arisen. (*Preston v. Eon Energy*)

Discrimination – marital status: Claims alleging discriminatory treatment because of marital status are rare and a recent EAT decision highlights the narrow scope of marital status protection. In this case, the claimant was married to the majority shareholder of the company where she worked, but they separated and an acrimonious divorce followed. The claimant was subjected to numerous unfounded allegations, reported to the police, and was dismissed. She succeeded with a discrimination claim based on marital status in the Employment Tribunal (ET), but the EAT allowed an appeal. Although expressing sympathy with the claimant, acknowledging that she had been treated badly, the EAT ruled that the Tribunal had failed to address their minds to the real issue. The ET had wrongly focussed only on whether the Claimant was treated unfavourably because she was married to the majority shareholder. The correct approach involved a comparative analysis. The ET should have been asking itself whether the Claimant would have been treated in the same unfavourable way if she had been in a close personal relationship with the shareholder, but not married to him. As the ET had focussed on the wrong issue, the appeal was allowed, albeit the EAT noted it did so with a "very heavy heart". (*Ellis v. Bacon and another*)

Data protection – EU GDPR (i): The attorney general has provided an opinion on the scope of the duty to provide a copy of personal data undergoing processing under the EU General Data Protection Regulation (GDPR). His opinion includes views that "copy" should be interpreted as a faithful reproduction of the personal data requested, in an intelligible form, with the form of that copy being dependent on the specific circumstances; and that "information" is limited to the copy of personal data undergoing processing. Although not binding in the European Court of Justice (ECJ) or in the UK, the opinion will nevertheless be of interest for organisations in the UK where the EU GDPR has reach.

Data protection – EU GDPR (ii): The ECJ has handed down a decision that the right of access to personal data under the EU GDPR extends to also identifying the specific recipients (or categories of recipient if individuals cannot be identified) to whom the personal data has been disclosed, if this information is requested. Although not directly binding in the UK, the relevant provisions of the EU GDPR are materially the same as the UK GDPR. (*RW v. Österreichische Post AG*)

Legislative developments

Industrial action: There will be a judicial review of the Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022, which came into force in July 2022, allowing agency workers to be used to fill in for striking workers.

Industrial action: The Strikes (Minimum Service Levels) Bill has been launched. If enacted, the legislation will allow minimum service levels to be set in sectors such as health, transport and education during periods of strike action, with employers in these areas required to identify which individuals are working during a strike to meet those minimum levels.

Other news

Menopause: The government has rejected many of the recommendations put forward in a report by the Women and Equalities Commission to improve support for menopausal employees at work. Although it has said it will appoint a 'Menopause Employment Champion' to work with businesses, unions and advisory groups and report on progress, and will back employer-led communications on menopause in the workplace, it will not go as far as piloting a trial on menopause leave, or look to amend the EqA.

Statutory rates: From **April 2023**, statutory sick pay will increase to £109.40 per week (up from £99.35) and statutory maternity, paternity, adoption, shared parental and parental bereavement pay will increase to £172.48 per week (up from £156.66).

Spring budget: The chancellor will present his spring budget on **15 March 2023**.

Pensions: A new report has recommended that the government introduce a legal duty to inform employers about how their pensions will be impacted by a change to working hours or other key contractual terms. The report, which focuses on the gender pension gap, notes that over a third of women reduce their contracted hours for a prolonged period and about a fifth opt out of a workplace pension, and that women are more likely than men to fall under the auto-enrolment threshold. Even in the absence of any legal duty, employers should consider what additional information they can provide to employees when making contractual changes which may impact their pension and retirement planning. In the meantime, the pensions minister has announced a series of measures to help address the pension inequality gap.

Consultations

Fire and rehire: The government has now published its draft code of practice on fire and rehire, and has launched a consultation on its content. The consultation closes on **18 April 2023**. The code sets out guidance and accepted standards in regard to how employers should approach changing terms and conditions, with an emphasis on meaningful consultation, transparency and openness, fire and rehire being a last resort, and dismissal not being used as a threat or negotiating tactic. Further, the tribunal will have the power to uplift or reduce compensation by 25% where the code is not followed, unreasonably. Read more on our *Employment Law Watch* blog.

Financial services – Senior Managers and Certification Regime: The chancellor has announced plans to launch a consultation on the legislative framework around the Senior Managers and Certification Regime (SM&CR), with the Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) tasked at looking at the regulatory framework. The intention is to review and explore the effectiveness, scope and proportionality of the SM&CR regime, and look into ways in which it could be improved or reformed. The call for evidence is expected in **Q1 of 2023**.

Financial services – bankers' bonuses: Following the announcement in the autumn budget that the cap on bankers' bonuses would be removed, the PRA and FCA have published a joint consultation on how this will be done. The consultation closes on **31 March 2023**.

Holiday pay: Following the Supreme Court's decision in *Harpur Trust v. Brazel* last year, the government has launched a consultation on calculating holiday pay for part-year workers, seeking to understand the implications of the judgment and what steps should be taken to ensure fair and proportionate holiday pay. The consultation closes on **9 March 2023**.

Non-disclosure agreements: There are reports in the legal press about the Legal Services Board looking to launch a call for evidence later this year on the use of non-disclosure agreements (NDAs). As well as looking at standards of conduct on their use and a potential ban in matters involving sexual harassment, discrimination and whistleblowing (as well as other possible instances of 'serious misconduct') unless the member of staff involved has asked for one and that member has access to legal advice, the board also proposes looking at the construction of NDAs, reporting obligations and mandatory training. We will report further when more information is known.

Employment tribunals: A consultation has been launched to look into the composition of ETs and the EAT, particularly the circumstances in which lay panel members are required to sit in addition to a judge. The consultation closes on **27 March 2023**.

Publications

Teacher strikes: How UK employers can mitigate workplace disruption

Tomorrow's Hospitality A-Z Navigating the future - download the full report by clicking the link or explore our UK employment law articles by clicking the links below:

- **U**K returns to in-person 'right-to-work' checks
- E**X**clusivity clauses, resilience, retention and reform are the key themes in UK hospitality employment
- **Y**oung workers and the workforce of the future: Considerations and limitations
- **Z**ero-hour contracts (and exclusivity clauses) in the UK

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