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UK Employment Law Update – January 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

Health and safety dismissal: In the first Covid-19-related case to reach the Court of Appeal, the earlier decisions that a claimant was not automatically unfairly dismissed when he refused to attend work at the outset of the pandemic have been upheld. The case considers the 'reasonable belief of serious and imminent danger' test and makes clear that the risk of/belief in danger may arise outside the workplace as well as inside it. In this case, the claimant was unable to make out the test, his employer was following the appropriate guidance and the employee could have taken steps to mitigate any existing risks. Read our commentary on the earlier Employment Appeal Tribunal (EAT) decision on our *Employment Law Watch* blog. (*Rodgers v. Leeds Laser Cutting*)

Redundancy: The EAT has criticised an Employment Tribunal's (ET's) approach to an award of nil compensation in an unfair redundancy situation, reminding employers that even where redundancy is inevitable, there may be financial implications for failing to follow due process. In this case, a chef was dismissed for redundancy without notice or consultation, which was found to be unfair. However, the chef's compensation was reduced to nil under Polkey principles (i.e., he would still have been dismissed on the same date even if a fair process had been followed, as he would have been in a pool of one). The EAT disagreed – the ET had failed to consider the appropriateness or reasonableness of a pool of one being applied and had overlooked the fact that the redundancy process would have taken time, during which the claimant would have been paid. Instead, determining his unfair dismissal compensation should have taken into consideration the likely outcome had there been proper warning and consultation about the pooling and selection for redundancy and the length of time the process was likely to have taken. *(Teixeira v. Zaika Restaurant)*

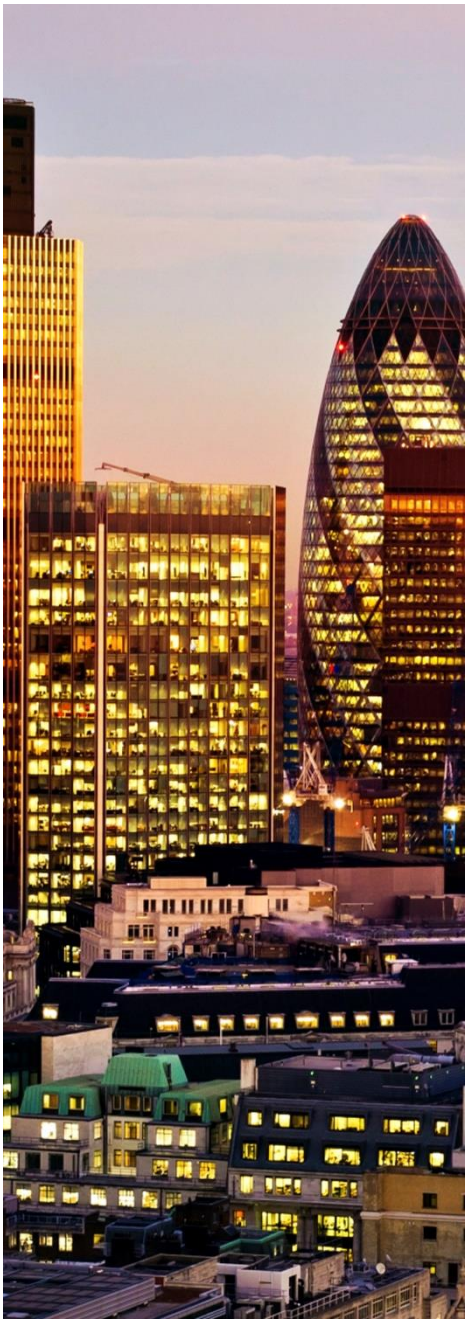
Remedy: A claimant sought five years' loss of earnings after succeeding with a disability discrimination claim when he was turned down for a role. The respondent, who had employed the claimant previously, sought to rely on documentation from the Claimant's previous role to argue that there was a significant chance he would not have stayed in post for five years even if he had been successful in securing it. Whereas the tribunal rendered those documents inadmissible, the EAT disagreed and allowed both parties to rely on the evidence for the purposes of remedy. The case highlights the importance of evidence in remedies hearings and reminds respondents to gather their own evidence to challenge loss of earnings claims. (*HSE v. Jowett*)

Settlement: The Court of Appeal has concluded that a claimant was prevented from proceeding with a claim for victimisation against his former employer because it fell within the scope of a COT3 settlement agreement he had previously entered into. The COT3 settlement arose out of a claim for race discrimination, but the claimant later argued that his former employer was responsible for him being rejected for a role with a subsidiary company. The COT3 included a waiver of all claims that the employee may have arising directly or indirectly in connection with his employment. While the claim did not arise 'out of' his employment, it was indirectly 'connected' with it, and as the cause of action had arisen when the COT3 was entered into, the drafting of the waiver of claims meant that the victimisation claim had been validly waived. (*Arvunescu v. Quick Release (Automotive) Ltd)*

Settlement discussions – without prejudice: The without prejudice rule (allowing certain evidence to be excluded from the court/tribunal) only applies where there is an 'existing dispute'. This can be tricky for employers wanting to engage in settlement discussions with employees who have raised a grievance as the fact of a grievance does not, in itself, mean there is a dispute. Whether or not there is a dispute turns on its facts. In this case, the EAT concluded that there was an existing dispute and the without prejudice rule had been engaged. The employee had wanted to refer to settlement discussions held when she issued proceedings for bullying, harassment and discrimination, which had been the basis of a previous grievance. The EAT was satisfied that litigation was reasonably contemplated when her employer proposed a without prejudice meeting and therefore that the meeting was properly without prejudice. As the alleged wrongdoing did not ostensibly arise out of the without prejudice meeting itself, and the discussions were held professionally, with no 'unambiguous impropriety' having occurred, there was no basis for the without prejudice rule to be disapplied. This will be reassuring for employers, although it is important to always consider the scope of the without prejudice rule in grievance scenarios. Where the without prejudice rule is not engaged, employers can hold 'protected conversations' if there is no existing dispute, although this will only exclude evidence in respect of unfair dismissal claims. (*Garrod v. Riverside Management*)

Employment tribunal procedure – appeals: There is a prescribed process for issuing an appeal against an ET judgment, which includes attaching the original pleadings and a copy of the ET's signed judgment and reasons to the notice of appeal. The strict nature of these rules is illustrated by two cases this month. In *Richardson v. Extreme Roofing Ltd*, the claimant had copied and pasted the content of the judgment into a separate document. The EAT ruled this was insufficient to properly institute their appeal. In *Anghel v. Middlesex University*, failing to attach the detailed grounds of claim in time meant the timescale for lodging an appeal had passed.

Equality Act 2010 – sex and gender – Scotland: The Outer House Court of Session has determined that the definition of 'woman' in the Equality Act 2010 includes trans women with a gender recognition certificate (GRC). While only binding in Scotland, the decision has persuasive value in the EAT, and given the recent developments in case law around sex and gender, this is an area of law we can expect to continue to progress across the UK. (*For Women Scotland Ltd v. Scottish Ministers*)



Legislative developments

Flexible working: The government has published a response to its 2021 consultation on flexible working. While stopping short of making it a default, the statutory flexible working regime will be reformed by legislation, with the following key points to note:

- The right to request flexible working will become a day one right, employees will not need to wait until they have 26 weeks' service.
- Up to two requests will be allowed in any 12-month period, doubling the current requirement of one request per year.
- Employers will have just two months to respond, reduced from the current three-month deadline.
- There will be greater emphasis on communication and employers working with individuals to explore flexibility. The requirement for employees to explain how their request might be dealt with will be removed, and employers will be required to discuss a request with employees where they are considering refusing it.
- There will be no change to the eight business reasons for turning down a request.

The changes will be implemented through primary legislation, although the timescale is currently unknown. Read more about these changes on our *Employment Law Watch* blog.

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 and allow agency workers to be used to fill in for striking workers.

Gender – Scotland: The Scottish Parliament has approved the Gender Recognition Reform (Scotland) Bill to simplify the process for gender recognition. The requirement for a diagnosis of gender dysphoria is being removed as a pre-requisite for a GRC, and an individual with a Scottish birth certificate, ordinarily living in Scotland, can certify their gender after living as that gender for three months, down from two years. Applications for a GRC are also being extended to 16- and 17-year-olds. However, the UK government has since said it plans to block progression of this legislation, so it remains to be seen whether the reforms ever take effect.

What is on the horizon? Read our *Employment Law Watch* blog for legislative developments we might expect to see in 2023.

Other news

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

Fire and rehire: The Supreme Court has granted permission to Usdaw (Union of Shop, Distributive and Allied Workers) to appeal the Court of Appeal's decision that overturned the injunction granted by the High Court to prevent Tesco from firing and rehiring warehouse staff. In the meantime, we still await statutory guidance on fire and rehire practices.

Pay: The Department for Work and Pensions has published its response to a 2020 consultation on supporting progression out of low pay. It looks at the barriers to progression for those in low-paid jobs (including a lack of skills and logistical challenges, as well as confidence and motivational barriers).

Spring Budget: The Chancellor will deliver his spring budget on **15 March 2023**.

Employment rights – enforcement: Previously announced plans to introduce a single enforcement body for workers to enforce their rights have been stalled. The government says it will instead concentrate on improving efficiencies in the current system.

Tax: The Office for Tax Simplification has published its report following a review of hybrid and distance working, considering trends in these areas, identifying new and changing issues in relation to tax and noting where there are opportunities for changes to tax policy.

New guidance

Violence and harassment at work: The International Labour Organisation has issued a new publication providing practical advice and guidance to employers in respect of their policies and systems for dealing with issues of violence and harassment in the workplace.

Consultations

Financial services – Senior Managers and Certification Regime (SM&CR): The Chancellor has announced plans to launch a consultation on the legislative framework around the SM&CR, with the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA) tasked with 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 banker's 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**.

Workers' health: The ICO has also produced draft guidance on information pertaining to workers' health and is inviting views on the content by **26 January 2023.**

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