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UK Employment Law Update – July 2023

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

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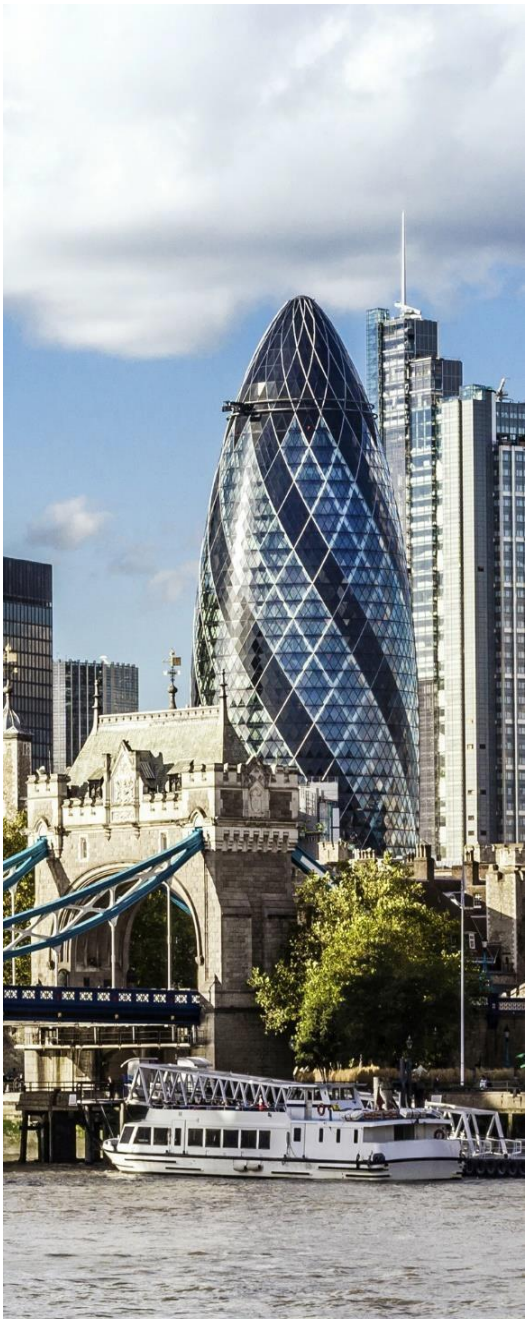
Case law updates



Compensation: Discrimination – philosophical belief: The Employment Appeal Tribunal (EAT) has allowed an appeal against a tribunal's finding that a claimant was not discriminated against when she was dismissed after a series of personal Facebook posts criticising the teaching of gender fluidity in schools. The respondent, a school, successfully argued in the employment tribunal (ET) that the claimant was not dismissed because of her gender-critical views (accepted to be a protected belief), but rather because of concerns arising from the perceptions created by the posts. However, the EAT has remitted the case for re-determination as the ET had failed to properly consider, in a context where there was a close connection between the posts and the beliefs, and when applying a proportional approach, whether objection could justifiably be taken to the way in which the claimant manifested her beliefs. The EAT was reluctant to lay down explicit guidelines for cases like these, although it did set out some basic principles underpinning the approach to proportionality where rights of freedom of expression, religion and belief collide (see paragraph 94). (*Higgs v. Farmor's School*)

Discrimination – philosophical belief: Another philosophical belief case this month is a useful reminder that simply because an individual asserts a protected belief does not necessarily give rise to protection – there are several considerations, including an assessment of whether the belief is genuinely held. In this case, a vegan care worker who was dismissed when she refused to have a Covid-19 vaccine failed with her claim. Whilst ethical veganism is a protected belief, on the facts, the claimant's beliefs and practices were insufficient to meet the threshold of holding a genuine belief in ethical veganism. (*Owen v. Willow Tower Opco 1 Limited)*

Harassment: In an appeal against an ET's finding that a claimant had not been subjected to harassment, the EAT has considered the extent to which awareness of the unwanted conduct is required and the test of reasonableness. In this case, the claimant, who has Asperger's Syndrome, was the subject of a bullying and harassment investigation, following complaints made against him by two colleagues, out of which he became aware of comments made by them about him that formed the basis of his harassment complaint. On the issue of awareness, the EAT was clear that derogatory comments could only have the potential of amounting to harassment once the claimant became aware of them, as the perception of the person claiming harassment is key and that perception cannot arise without awareness. Further, in the factual context of this claim, it was not deemed reasonable for the comments to have had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment to meet the test of harassment. It was inevitable that in the course of an investigation into him, issues and comments may come up that he did not like. (*Greasley-Adams v. Royal Mail Group*)

Investigation reports – legal advice privilege: The Scottish Court of Session has upheld an EAT decision (see our September 2022 newsletter) that an investigation report will not retrospectively attract legal advice privilege simply by virtue of having legal advice on its content. By way of reminder, in this case, a grievance investigation report was prepared by an independent member of staff but subsequently amended and reissued following external legal advice. Only the final version was disclosed as part of legal proceedings, although the claimant sought an application for disclosure of the original, unamended report, which promoted the argument about privilege. Neither the EAT nor the Court of Session accepted that the initial report was subject to privilege on the facts. This appeal decision consolidates the earlier judgment and further highlights the importance of working alongside legal advisors on an investigation plan, establishing in advance what legal advice is needed and preparing documentation with that plan in mind, as without careful consideration, draft reports may become disclosable. (*University of Dundee v. Chakraborty*)

Post-termination restrictions: The High Court has refused to grant an interim injunction to enforce a 12-month non-compete clause, despite there being a serious issue to be tried, because of the employer's delay in issuing proceedings. The employee resigned in March 2022 and was placed on garden leave. His employer knew of his intention to join a competitor in July 2022, and negotiations had not resolved matters by November. Notwithstanding this, the claim form was not issued until April 2023. The High Court was critical of the unreasonable delay on the employer's part, indicating that proceedings issued in November 2022 could have seen the dispute resolved. (*Jump Trading International v. Couture*)

Subconscious discrimination: The EAT has been considering whether the tribunal should always expressly and/or separately consider the possibility of subconscious discrimination, concluding that this is only necessary where there is evidence on which an inference of subconscious discrimination could be based (i.e., there is no universal obligation for them to do so). In this case, on the

facts, there was no suggestion that subconscious discrimination or stereotypical assumptions about the claimant's race played any part in the reason for her treatment, so there had been no error by the tribunal in failing to consider it as a possibility. (*Kohli v. Department for International Trade*)

For more information about non-compete clauses, and particularly the intention for reform in this area, see our Employment Law Watch blog.

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Tribunal procedure: A word of caution for respondents acting against litigants in person not to rely solely on agreed lists of issues. In this case, the EAT has found an ET to have erred in not making a determination on a discriminatory dismissal claim despite this not being included in the list of issues. The claimant had, in the EAT's view, included sufficient information on this point that it was, or should have been, evident to both the respondent and ET that it was part of her claim. (*Moustache v. Chelsea and Westminster NHS Foundation Trust*)

Other News

Four-day working week: The 4 Day Week Campaign, Autonomy, New Economics Foundation and Common Wealth have published a mini-manifesto seeking support from political parties to back a 32-hour working week (with no loss of pay) ahead of the general election. Read more about the four-day week on our Employment Law Watch blog.

Paternity leave: A report published jointly by the Centre for Progressive Policy, Pregnant Then Screwed and Women in Data, titled Leave in the lurch: Paternity leave, gender equality and the UK economy, explores the impact of paternity leave on both society and the economy and calls for the government to increase statutory paternity leave and pay to six weeks at 90% of income. While calls for changes to paternity leave are not new, the current government has not indicated an intention to review this area. However, with a general election looming, it may be an area that the political parties address in their manifestoes.

UK Bill of Rights: A controversial Bill intended to replace the Human Rights Act 1998 and empower UK courts to apply human rights in a domestic context, independent of the European Court on Human Rights, has been dropped. The Bill has been off and then on again a few times since first introduced to parliament, but the Justice Secretary has now confirmed that it will not be progressed

Workplace adjustments – dyslexia: Research by Made by Dyslexia and Randstad Enterprise, titled Dyslexic Thinkers: Recruiting the unique talent your company needs, suggests that many employers need to do more to meet the needs of dyslexic employees and candidates to establish truly dyslexic-friendly workplaces. The research interestingly suggests a significant disparity between organisations' perceptions of their work in this area and the lived experience of dyslexic staff.

New Guidance

Diversity, equity and inclusion (DEI): The British Standards Institute (BSI) has published a code of practice with guidance for employers on improving DEI in the workplace.

Fertility: CIPD has published guidance for employers on offering support to staff who are experiencing fertility difficulties.

Menstruation and menopause: The BSI has published a new standard for employers on managing menstrual and menopausal health in the workplace.

Consultations

EU law reforms to TUPE and working time: As noted above, the government announced its intention to change some parts of TUPE and the WTR and has launched a consultation to seek views on their proposals.

- **TUPE:** The government is only looking at the information and consultation requirements under TUPE and, particularly, the expansion of where employers are permitted to consult with employees directly. It is seeking views on allowing direct consultation on any transfers for businesses with fewer than 50 employees and for employers of any size where the transfer involved fewer than 10 employees.
- **WTR:** The consultation centres on record-keeping requirements, simplifying annual leave entitlements and allowing rolled-up holiday pay. It proposes retaining a minimum entitlement of 5.6 weeks per year but applying the same rules for all holiday and using the consultation to explore how holiday pay be calculated.

The consultation closes on **7 July 2023**. Responses can be provided online.

Financial services: There are currently several consultations affecting financial services:

- **Diversity:** The European Banking Authority is consulting on the content of draft guidelines on the benchmarking of diversity practices, including diversity policies and gender pay gaps. This will be of relevance to financial services institutions operating in EU member states. Comments can be submitted online by **24 July 2023.**
- **UK Corporate Governance Code:** The Financial Reporting Council has launched a consultation on the content of the UK Corporate Governance Code, an amended version of which is expected to apply from January 2025. The consultation explores a number of issues including board leadership and division of responsibilities; succession planning and performance reviews; remuneration principles; risk and audit; and reporting, including on ESG metrics. The deadline for responding is **13 September 2023**.

Open justice: HMCTS has published a consultation exploring principles of open justice, including access to court documents and information, the publication of case lists and judgments, remote observations, broadcasting and data use. It covers the whole court and tribunal system, not just employment tribunals. The consultation closes on **7 September 2023**.

Publications

- UK audit and corporate governance reform – UK Corporate Governance Code consultation

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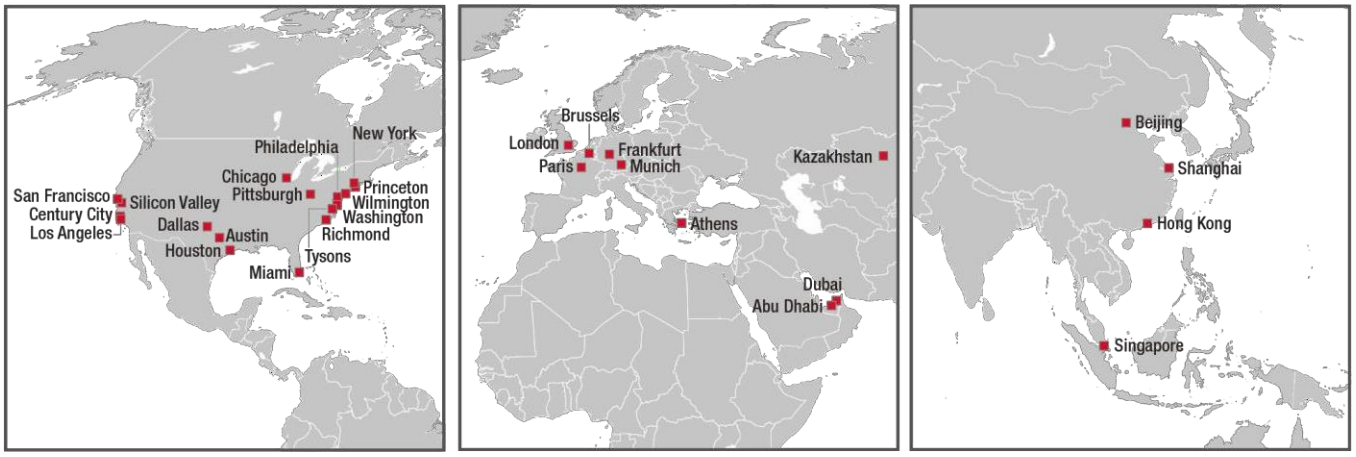

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