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UK Employment Law Update – May 2024

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

In this issue

Recent publications

- Reed Smith's DEI annual report 2023

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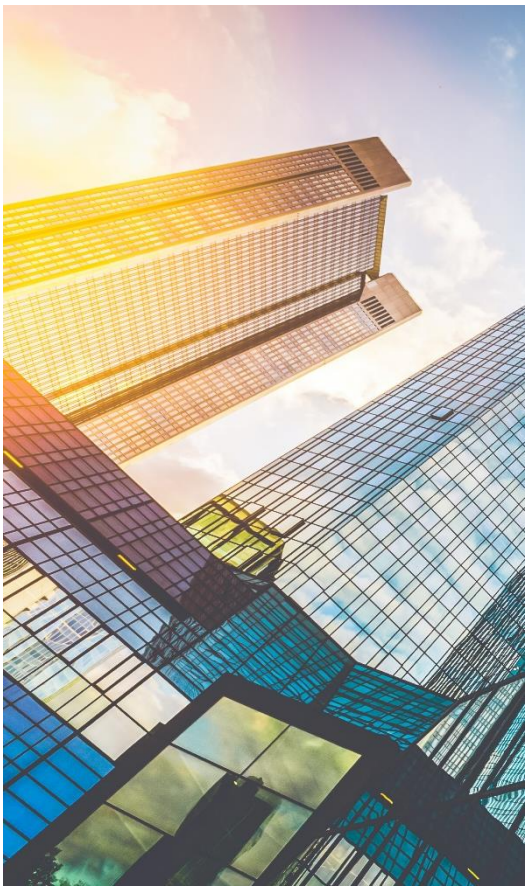
In this month's edition, we provide an update on developments relating to 'fire and rehire' and the use of non-disclosure agreements, potential reforms around fit notes and sick pay, and the UK Labour party's proposal to make company directors personally liable for non-payment of Employment Tribunal awards.

Case law updates

Unfair dismissal: In a rare case, the Employment Appeal Tribunal (EAT) has ruled that dismissal was fair despite the employer not following any dismissal process. The claimant had been at risk of redundancy, but the process was halted following his successful grievance claim about being placed at risk. The grievance also contained allegations that his line manager had undermined and scapegoated him, but these allegations were not upheld. Although the employer subsequently made efforts to rebuild relationships with the claimant and to retain him, the claimant (who was off sick at the time) refused to engage. The employment tribunal (ET) found that he placed unreasonable conditions on his employer with respect to his return to work, became confrontational, and threatened further grievances, tribunal claims and referrals to the employer's ethics team. A more senior line manager considered that the relationship had broken down so much that it was incapable of repair, and the claimant was dismissed without a warning and with no right of appeal. The EAT found that in all the circumstances, this was not an unfair dismissal, although the EAT acknowledged it was an unusual and rare case. As such prudent employers should continue to follow a dismissal process as this remains an essential part of a fair dismissal, other than in truly exceptional circumstances. (*Matthews v. CGI IT UK Ltd*)



Unfair dismissal: An ET claim hit the headlines this month, illustrating how the perception of fairness can result in litigation and media attention even when the employer has acted properly. In this case, a long-serving supermarket worker was dismissed for gross misconduct for not paying for 'bags for life' with his shopping. Following a full investigation, the employer formed a reasonable belief of the employee's misconduct, with dismissal deemed an appropriate response, so there was no unfair dismissal. Contrary to the portrayal in the media coverage, the value of the bags was irrelevant – the employee's dishonesty and theft were at issue. (*Doffou v. Sainsbury's Supermarkets Ltd*)

Holiday pay: The EAT has been looking at the approach to be taken in determining whether or not an allowance paid to staff should be included in holiday pay calculations. The EAT concluded that a payment which was intrinsically linked to the performance of the role should be included, but one made genuinely and exclusively to cover costs should not. The EAT made it clear that an allowance was either one or the other, and could not be split so that only a proportion of it be taken into account. The EAT also concluded that there was sufficient similarity between each non-payment of holiday pay that it could be treated as a series of deductions. (*De Mello v. British Airways Plc*)

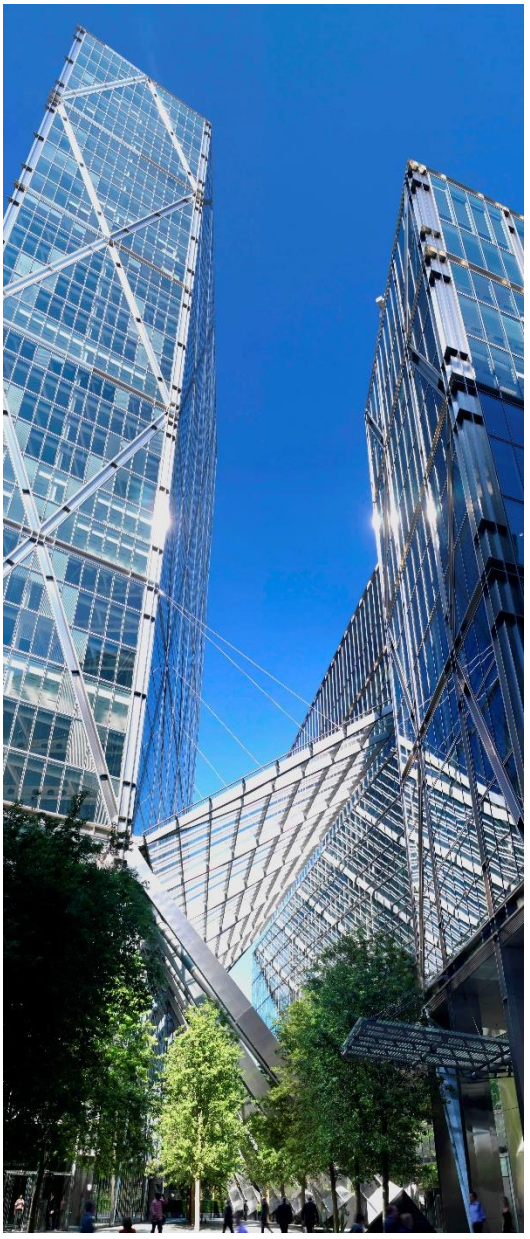
Race discrimination – burden of proof: In ET proceedings, if a claimant can demonstrate an inference of discrimination, the burden of proof then flips such that it then falls on the employer to prove that discrimination was not the reason for the treatment. In this case, the claimant – an Algerian Arab-speaking employee working in the concession of an Italian designer brand – alleged both unfair dismissal and race discrimination following her dismissal under her employer's sickness absence policy. The ET found that there was no inference of discrimination, meaning the burden of proof did not shift to her employer to prove otherwise. She appealed, but while the EAT concluded that there was an inference of race discrimination (for example, the management team were all Italian, Italian employees were arguably treated differently, and there was a suggestion that the investigation into the claimant was started after she'd raised a grievance about her Italian manager), it was satisfied that the ET had fully considered all of the evidence and was entitled to reach the decision it had. Although this decision centres on the legal technicalities, it is a helpful reminder that taking the wrong route to a conclusion does not necessarily mean that conclusion is wrong or perverse. (*Atif v. Dolce & Gabbana UK Ltd*)

Industrial action: The Supreme Court has ruled that due to a gap in the UK domestic law does not protect workers from suffering detriment which falls short of dismissal where they have organised or taken part in lawful strike action during working hours. This decision demonstrates that domestic law is incompatible with the right to freedom of association under human rights laws, and so it is possible that we will see legislative changes in the UK to ensure compatibility with the European Convention on Human Rights, which will provide more protection to those lawfully striking. (*Secretary of State for Business and Trade v. Mercer*)

Multi-claimant litigation: The EAT has been considering the extent to which claimants in multi-party employment tribunal proceedings should be placed in the same position in the litigation – for example, in relation to access to documents – even when they are not represented by the same law firm. The issue arose from a multi-claimant equal pay claim where three sets of claimants were represented by three different law firms, with the litigation in respect of two groups stayed pending the resolution of the third. Lawyers acting in the stayed claims wanted access to documentation in the ongoing claim, and to attend the privately held preliminary hearings, but this was refused by the ET. The EAT agreed: while it noted that there was some inequity, this arose from the claimants' choice of legal representation and there was no right for everyone to be on an equal footing. Under general case management powers, a tribunal could have allowed for more information sharing, but it was not unreasonable for it not to do so.

Whistleblowing: The EAT has concluded that, in a claim for detriment arising from whistleblowing, the knowledge and motives of the decision maker are the only consideration for the ET; i.e., it is right to disregard any involvement or manipulation by others which may have occurred. This was a surprising outcome because the Supreme Court has previously concluded in whistleblowing dismissal cases that the ET can look behind the knowledge and motives of the person who decided to dismiss when determining whether whistleblowing was the real reason for the action. (*Williams v. Lewisham & Greenwich NHS Trust*)

Legislative developments



Fire and rehire: The statutory code of practice on dismissal and re-engagement will be brought into force in **July 2024**. Legislation has also been laid before parliament to provide that the 25 per cent uplift for failing to follow the code will apply to protective awards where there has been a failure to collectively consult. Read our Employment Law Watch blog for more information.

Non-disclosure agreements (NDAs): The government has announced its intention to legislate to prevent NDAs being used to stop victims from reporting a crime or discussing information relating to criminal conduct with the police (or other investigators or prosecutors), lawyers, or support service providers who are bound by confidentiality (such as counsellors and medical professionals). Read more here.

Tips: A code of practice on the fair and transparent allocation of tips has been published and laid before parliament. It is expected to come into force on **1 October 2024**.

Artificial intelligence (AI): The TUC has published a draft Artificial Intelligence (Regulation and Employment Rights) Bill. Legislation in this area is not expected any time soon – the government has said it will legislate in due course when the risks are better understood – but this draft may provide a useful basis for debate and policy direction.

Paternity bereavement: Legislation to introduce a right to leave for a father or male partner following the death of the mother or primary adopter of their child continues its passage through the legislative process. In its latest draft, the proposed legislation clarifies that the intention is to provide for 52 weeks' leave during the first year of the child's life.

Other news

Artificial intelligence (AI): The Institute for Public Policy Research has published a paper on how generative AI could affect work in the UK, urging the government to implement strategies to encourage job transitions and to recognise the benefits of AI.

Employment tribunals – submitting a response: A new practice direction, expected to apply from **1 October 2024**, will remove email as a method for submitting a response (form ET3) to the ET, except in exceptional circumstances. Respondents should use the online submission service.

Employment Tribunals – liability for unpaid ET awards: It was widely reported in recent days that the UK Labour party is proposing to introduce new laws that would make a company director personally liable for an ET award which is unpaid by the Company. Further details are expected to be published this month.

Sexual harassment: A recent survey suggests that one in 10 employees have experienced or witnessed sexual harassment at work, yet only half report it.

Statutory sick pay (SSP): A new report on SSP suggests that the current regime does not provide adequate support when employees are absent from work due to sickness. The report recommends increasing the rates of SSP, amending legislation to pay SSP during phased returns and establishing sick pay for self-employed workers. It also recommends a review into SSP for agency workers, and consulting with small and medium sized businesses on an SSP rebate scheme. The government has two months to respond to the report.

Wages – national living wage (NLW) and national minimum wage (NMW): The Low Pay Commission has published its latest report, with recommendations for 2024 and beyond. The latest rates took effect from 1 April 2024, with the NLW rate applying to those aged 21 and over (down from 23). The report recommends that the gap between the NMW and NLW is reduced in the future, and that the government works towards the NLW being payable from age 18.

New guidance

Disability: The Department for Work and Pensions has issued new guidance for employers on recruiting, managing and developing disabled people.

Family rights: The Equality and Human Rights Commission has updated its guidance on pregnancy and maternity protections, and Acas has published guidance on redundancy protections, carer's leave and flexible working following legislative changes which took effect in early April.

Holiday pay: The government's guidance on holiday pay and entitlement reforms from 1 January 2024 has been updated.

Consultations

Procedure – Supreme Court: The Supreme Court has published a consultation on revising its rules and is inviting comments on its draft Supreme Court Rules 2024, which will replace the current 2009 rules. Reponses are requested by **17 May 2024**.

Wages: The Low Pay Commission is seeking views and evidence relating to the economic and labour market conditions faced by businesses and workers, and the impact of the NLW and NMW rates. The consultation closes on **7 June 2024**. Feedback is likely to feed into recommendations made for changes applying from April 2025.

Procedure – employment tribunals: Responsibility for making procedural rules in the ET is moving to the Tribunal Procedural Committee (TPC) later in 2024. In anticipation, the TPC has launched a consultation on proposals relating to this transfer of rulemaking responsibility. The consultation also sets out a number of proposed changes to the ET rules of procedure, which the TPC intends to implement in two stages during 2025 following further consultation. Comments are invited by **26 June 2024**.

Fit notes: The Department for Work and Pensions is looking at reforming the fit note system and is inviting views on the current regime and what could be done to provide better support. Views should be submitted online by **8 July 2024**.

Seafarers: The government is reviewing the Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2011 and is seeking views, by **19 July 2024**, on their effectiveness and whether they meet required objectives, with a view to determining whether they should be kept, amended, repealed or replaced.

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