ReedSmith
Driving progress
through partnership

UK Employment Law Update – November 2021

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

In this issue:

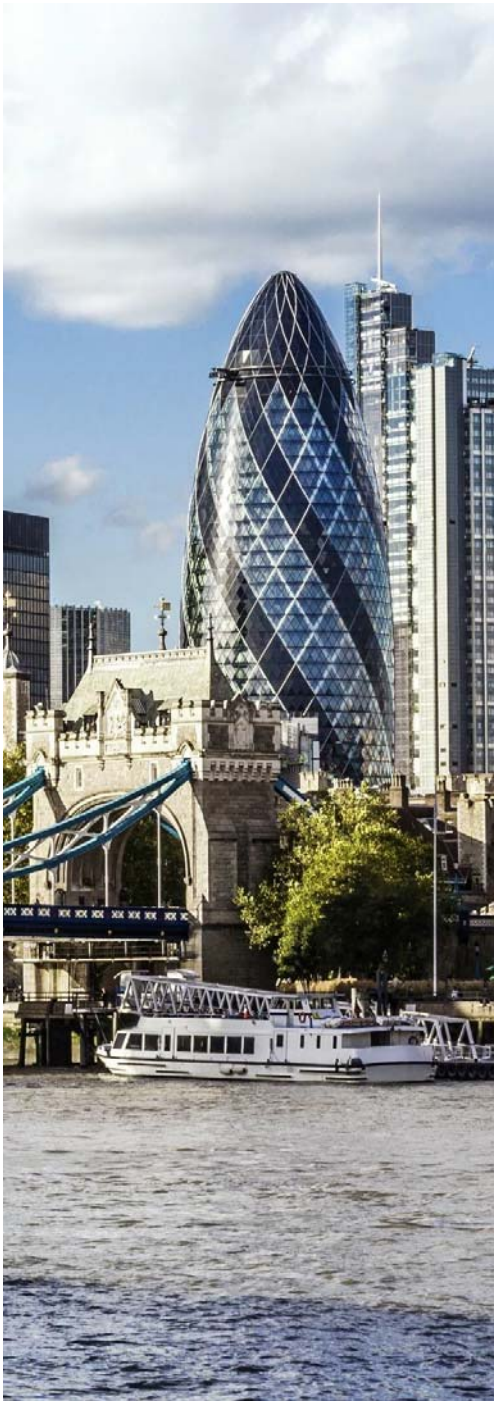
Robin Jeffcott
Partner, London
rjeffcott@reedsmith.com

Graham Green
Partner, London
ggreen@reedsmith.com

David Ashmore
Partner, London
dashmore@reedsmith.com

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

Case law updates



Collective Consultation: When proposing to dismiss 20 or more employees, employers have an obligation to collectively consult about the proposals unless there are 'special circumstances which render it not reasonably practicable' to comply. 'Special circumstances' are not defined and whether they exist will turn on the facts. However, this recent Employment Appeal Tribunal (EAT) decision highlights that the special circumstances exception will rarely be applicable – a large company unexpectedly going into compulsory liquidation was not sufficient to absolve them of their obligations to consult despite the circumstances being unforeseen. The EAT took the view that although the dismissals were inevitable (making any consultation on avoiding redundancies futile), information could nevertheless have been provided to the affected employees, and consultation could have taken place on mitigating the effects of the dismissals. As a consequence of the employer's failure to comply, each affected employee is entitled to a protective award of up to 90 days' pay, a reminder of the potentially high financial consequences attached to this legal requirement and that employers contemplating redundancies should take care to understand whether (and if so, how) the collective consultation obligations apply (*Carillion Services (in compulsory liquidation) v Benson & others*).

Disability discrimination – menopause: The EAT has overturned a tribunal's conclusion that a claimant's menopausal symptoms did not amount to a disability, finding that on the facts it was difficult to conclude anything other than her experiencing symptoms that were having a significant impact on her day-to-day activities. Claims linked to the menopause are increasing, with this case highlighting how the effects of the menopause can often be overlooked or downplayed, and that more work needs to be done to raise awareness. Employers should actively consider what support they can provide menopausal women at work, and recognise that menopausal symptoms may be sufficient to meet the definition of disability. An inquiry into potential law reform to better protect menopausal employees in the workplace closed in mid-September; we await its findings and details of whether legislation will be introduced in this area (*Rooney v Leicester City Council*). Read more on the legal issues surrounding menopause in the workplace and what employers can do in our Employment Law Watch blog.

Disability discrimination – knowledge: A recent EAT decision acts as a helpful reminder that an employer will only be responsible for most forms of disability discrimination where they know, or ought reasonably to know, that the employee has a disability. In this case, at the time of the alleged discriminatory dismissal, it was found on the specific facts that the employer did not have appropriate knowledge at the relevant time, and so the claim failed (*Stott v Ralli Ltd*).

Employment Status – substitution: Employers engaging individuals ostensibly on a self-employed basis should note a recent Court of Appeal decision, consistent with other recent decisions, that when the dominant feature of 'worker' status arises, there is an obligation to perform work personally, and that the mere existence of a right of substitution is unlikely to defeat this. In the present case, a courier could release a delivery slot to other couriers but if no one accepted, they remained liable for completing the work, an arrangement that the Court considered was too limited a right of substitution which, in reality, did not absolve the courier of personal service. By being categorised as a worker, individuals are entitled to enhanced employment rights as opposed to working on a self-employed basis, including paid holiday and the national minimum wage (*Stuart Delivery v Augustine*).

Trade Unions – collective bargaining: An employer is prohibited from making any offer to an employee to induce them to give up their rights to collective bargaining, and the Supreme Court has now ruled on the extent to which an employer making an offer directly to employees covered by collective bargaining of terms and conditions of employment amounts to an unlawful inducement. Overturning the Court of Appeal's decision, the Supreme Court found there to have been an unlawful inducement in this case; the correct test is whether relevant terms and conditions of employment would have been determined by a new collective agreement if the offer had not been made. In this case, while the negotiations had stalled, the collective bargaining process was still ongoing and so it was not appropriate for a direct offer to be made. On the

contrary, had the collective bargaining process been followed and exhausted, there would be no unlawful inducement. Where a claim of unlawful inducement is upheld, there is a mandatory award of compensation, which is currently £4,341 (*Kostal v Dunkley*).

Tribunal procedure – anonymity orders: The tribunal has the power to make an order to protect the identity of parties in proceedings where it is in the interests of justice or is necessary to respect an individual's human rights. However, as this case demonstrates, anonymity can be difficult to obtain in practice. The claimant had worked as a stripper and brought a claim against the strip club for unpaid holiday pay. She sought anonymity arguing that identifying her risked her being stigmatised, and having an adverse impact on her career prospects in a professional role. Although granted anonymity in respect of her application, it was denied more broadly – the EAT concluding that stigmatism was insufficient on its own as all litigation carried with it a risk of embarrassment and reputational damage (*A v Burke & Hare*).

Whistleblowing: Overturning the tribunal's decision, the EAT found that an individual had not been unfairly dismissed for making protected disclosures. In this case, the original tribunal had applied the wrong test – instead of considering whether the protected disclosures were the 'sole or principal reason for the dismissal', they had applied a lower threshold test of whether the disclosures had a 'material influence' on the decision to dismiss (*Secure Care UK v Mott*).

Legislative developments and law reform

"Fire and rehire": A private member's bill to prevent the practice of dismissal and re-engagement as a way to facilitate changes to terms and conditions of employment has been blocked by the government. However, although legislation on this issue will not be forthcoming, the government has asked Acas to develop more detailed guidance on when it is appropriate to use the practice.

Mandatory vaccination: The legislation on mandatory vaccination in care homes came into effect on **11 November 2021**, meaning anyone working or volunteering in care homes in England must be fully vaccinated unless exempt. The legislation is being challenged by way of a judicial review, but in the meantime, the government's consultation on making similar legislation in respect of frontline health and social care workers closed on 22 October 2021. We await details of whether the mandate will be extended.

COVID-19 Update

Coronavirus Job Retention Scheme (CJRS): Following the closure of the CJRS on 30 September 2021, the deadline for making any final claims was 14 October 2021 and any amendments had to be made by 28 October 2021. HMRC may accept late claims or amendments where an employer has taken reasonable care to try and claim on time, and has a reasonable excuse, claiming as soon as that excuse no longer applies.

Kickstart Scheme: The Kickstart scheme, which provides funding for employers to create jobs for 16-24-year-olds, is closing. The deadline for funding applications is **17 December 2021**, although jobs can start at any time up to 31 March 2022. Funding is for a six-month period.

Temporary rule changes: The government has issued a helpful summary of which rule relaxations remain in place and which ones are no longer in force. The measures still in place relevant to the workplace are:

- Annual leave: workers are permitted to carry forward statutory leave for up to two years if they have been prevented from it taking due to COVID-19.
- Statutory redundancy payments: furloughed employees are to receive redundancy pay, and other forms of statutory pay, based on their normal earnings and not their pay while on furlough.
- Right to work checks: remote checking of right to work documentation remains in place until **5 April 2022**.

Other News

Autumn Budget: The Budget took place on **27 October 2021**. Key employment-related announcements include:

- **National Minimum Wage:** The National Living Wage rate **(**for those aged 23 and over) will increase to £9.50 per hour from **1 April 2022**. This equates to a 6.6% increase and means minimum wages remain on track to be two-thirds of median earnings by 2024. The other National Minimum Wage rates will also increase (to £9.18 for 21-22-year-olds, £6.83 for 18-20-year-olds, and £4.81 for under 18s and apprentices).
- **Public sector pay:** The current pay freeze on public sector pay will end in 2022, allowing for a 'fair and affordable' pay rise.
- **Jobs, skills and training:** There will be an increase in funding for a variety of skills and learning initiatives, as well as an expansion of the 'Plan for Jobs' to improve employment prospects, particularly for those leaving furlough, the unemployed over 50, the lowest paid and young people.
- **Unemployment:** The unemployment rate is expected to peak at 5.2%, significantly lower than the 12% rate previously predicted.
- **Inflation:** It is predicted that inflation will peak at 4.4% during 2022.
- **Universal Credit:** Changes to Universal Credit will see low-paid workers keep more of their income.

Diversity and Inclusion: The Social Mobility Commission has launched a toolkit to help employers with improving socioeconomic diversity. Although aimed at creative industries, the publication contains guidance that will be equally helpful in other sectors.

Facial recognition software: It is understood that tribunal claims are being brought by two separate Uber drivers who claim that facial recognition software (which verifies identity to maintain an account) directly discriminates on the ground of race, arguing that the system generates more inaccurate results when used by black and minority ethnic workers. We will report more on this case as details emerge in this interesting and developing area.

Sexual harassment: The Fawcett Society has published a report, Tackling Sexual Harassment in the Workplace, highlighting the scale to which women experience harassment at work. The report suggests that at least 40 per cent of women experience sexual harassment during their career, with rates higher amongst disabled women and women from ethnic minorities. The report also suggests that sexual harassment has increased with working from home. Although the UK government has committed to legislation to better tackle the issue of sexual harassment in the workplace, employers should not wait for the legislation to be introduced. The report highlights how an organisation's culture, policies, training and reporting mechanisms are key, recommending that employers should take sexual harassment seriously; ensure women feel able to report harassment (including on an anonymous basis) and treat those who make reports with respect and empathy; increase gender equality generally within the business, particularly at the highest levels, and demonstrate a leadership commitment to addressing harassment; conduct surveys to measure organisational attitudes; provide support and guidance to managers; and have a clear and separate sexual harassment policy.

Consultations

Flexible working: The government's consultation on making flexible working the default position for all workers and making the right to request flexible working a day one right remains open until **1 December 2021**. The consultation will also consider the reasons for refusing requests, the administrative process, whether alternatives should be actively explored and temporary arrangements.

IR35: The Finance Bill sub-committee has launched an inquiry into how the implementation of IR35 rules in the private

sector is working in practice. Comments should be made by **15 November 2021.**

Upcoming events

Register using the links below

16 November 2021: Disability Inclusion Summit – the Microsoft journey – progressing DE&I through cultural change

2 December 2021: Disability Inclusion Summit – a resolute journey of evolution through continuous dialogue

Previous events

Global Disputes in 2021 – A Renewed Perspective: Webinars including 'The office reboot: How COVID-19 has changed the workplace'. Please use the above link to access the on-demand sessions.

Disability Inclusion Summit – the ABA and LDD perspective – the importance of disability diversity for organisations and businesses. Please use the above link to access the on-demand event.

2021 Diversity, Equity and Inclusion Summit: Please use the above link to view the summary of highlights from this event. For more Reed Smith DE&I content, check out our critically acclaimed podcast, **"**Inclusivity Included: Powerful Personal Stories**".**

Publications

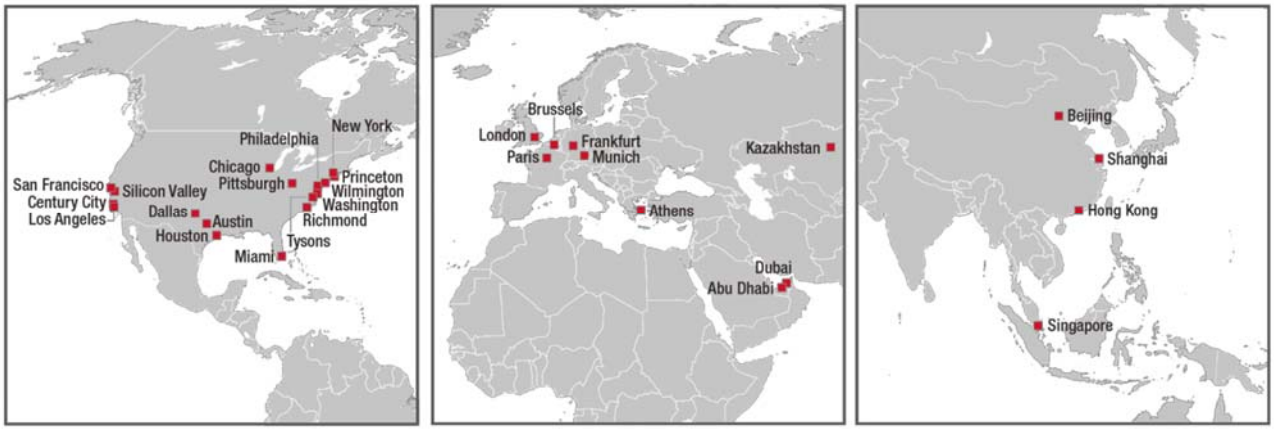
Global perspectives – International trends in commercial disputes: Articles including 'The new workplace: how vaccines and testing impact employers in England and the United States'.

French employment law update (October 2021): The latest quarterly update of news and developments in French employment law.

12 November 2021

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

reedsmith.com