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UK Employment Law Update – February 2022

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

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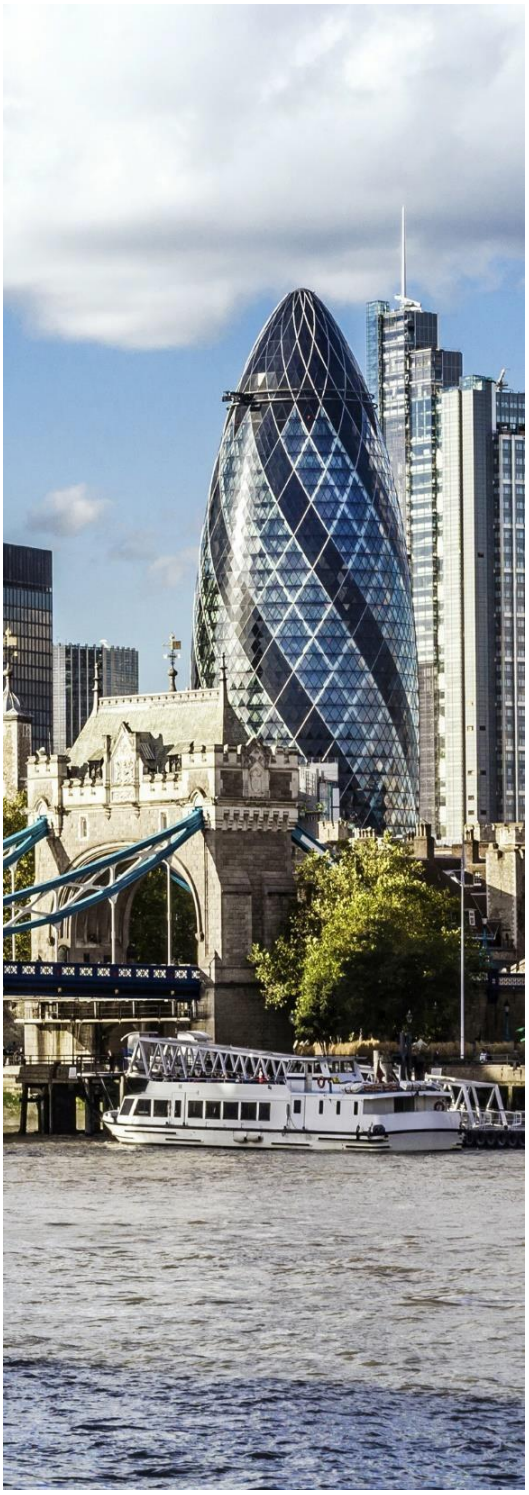
Case law updates



Unfair dismissal – vaccines: In a case where the employer made vaccination a condition of ongoing employment, a tribunal found that it was fair to dismiss an employee who refused to be vaccinated. Although it was accepted that the employee's fears and scepticism around the vaccination were genuine, the tribunal did not consider there to be any reasonable basis for her to refuse the vaccine and found that it was a reasonable management instruction to require vaccination to protect the health and safety of residents and visitors in a care home setting. Although not a binding decision, this case will be of interest to organisations considering a vaccine policy in the workplace, albeit the reasonableness of the policy in a specific context and the employee's reasons for refusal will always be relevant. (*Allette v. Scarsdale Grange Nursing Home*)

Employer's duties: The High Court has considered the extent to which an employer has a duty of care to protect employees against criminal conviction during the performance of work duties and whether there is an implied duty requiring an employer to indemnify employees. The claimant was arrested in connection with a transaction he had worked on while working in Romania, and he was subsequently convicted of criminal charges there. After being made redundant, he claimed career loss of earnings against his employer at the time, alleging that the conviction prevented him from working again and claiming that his employer owed him a duty of care to protect him from exposure to criminal convictions at work and to protect him from any resulting losses. While the court accepted that employers have a duty to take reasonable care for the safety of employees and to protect them from consequential financial loss, the overall circumstances in this case were relevant and the duty of case will not arise in every case. It was relevant that, at the time, Romania was not a high-risk country; the transaction was not high risk, nor were there any red flags; and there were no particular circumstances that increased the risk to the claimant. Therefore, while this claim failed, the court left open the possibility for a duty of care to be found, and an indemnity to apply, in different circumstances. (*Benyatov v. Credit Suisse Securities (Europe) Ltd*)

Employment status: Another gig economy case, this time with the Employment Appeals Tribunal (EAT) upholding a decision that a taxi driver working through the Mytaxi app was not a worker. Although the claimant driver was required to perform personally and there was no right of substitution, how often and at what times he worked were entirely his choice, he was not under any control of the operator, and also worked elsewhere. Overall, the EAT was satisfied that the operator was a client or customer of the driver and that the driver was in business on his own account. After a number of cases finding worker status, this case is a helpful reminder that genuine self-employment can be found in the gig economy. (*Johnson v. Transopco UK Ltd*)

Tribunal procedure – extensions of time: The EAT has given guidance on when it will be just and equitable to extend the usual time limits for bringing a discrimination claim under the Equality Act 2010, particularly where a grievance has been raised. In this case, the claimants (a husband and wife) brought their claims significantly out of the usual time limits despite being aware of when their claims had arisen and having received legal advice about the time limits (for which there was no suggestion of negligent advice). The claimants had, however, also raised a grievance about their allegations and demonstrated a genuine intention to resolve the issues without resorting to litigation. The tribunal granted an extension of time, prompting the respondents to appeal. The EAT accepted that this was a marginal case but did not consider the tribunal to have unreasonably exercised its discretion to extend time. The EAT held that the raising of a grievance was not, in itself, automatic justification for an extension of time, but in certain circumstances, the mere fact of a grievance having been raised in itself may justify an extension of time. It was relevant in this case that there was no suggestion of any prejudice to the respondent for allowing the claim to proceed - evidence was largely in written form similarly there was no concern over evidence being lost. Although not changing the law in this area, this case acts as a reminder for employers of the wide discretion afforded to tribunals to depart from the usual limitation periods. (*Wells Cathedral School v. Souter*)

Vicarious liability: Upholding the High Court's decision, the Court of Appeal has concluded that an employer was not vicariously liable when an employee's practical joke unintentionally led to a contractor being injured at work. The Court of Appeal considered there to be an insufficient connection between the employee's actions and his work to impose liability on the employer – the employee's actions were unauthorised and were not part of an authorised work activity, the equipment ultimately causing the injury was not the employer's property, and there was no reasonably foreseeable risk of injury. Employers will be reassured by this decision that the courts are willing to place limits on the circumstances in which an employer, find themselves liable for the unauthorised actions of their employees. (*Chell v. Tarmac*)

Wages: Overturning a tribunal's judgment, the EAT has been considering the extent to which a claimant could recover underpaid salary in respect of a pay rise for a new and different role with greater responsibility that was agreed in principle (subject to HR approval) but never implemented before employment ended. The claimant had agreed to take on a new role and was told that he could receive a £10,000 pay rise (to £52,000) as a result, subject to approval by HR. The claimant's predecessor had earned £52,000, and this figure had been assessed as the appropriate salary for the role by an external company, and it was generally accepted as the salary to be paid if recruitment had been external. However, HR did not agree a salary increase to this level and subsequent pay negotiations did not result in any agreement being reached. When the Claimant's employment ended he brought a claim for underpaid wages, seeking payment of an increased salary for the new role in which he had been performing. The tribunal held that as the offer of a pay rise was not guaranteed (it was always subject to approval), there was no contractual entitlement to the salary increase. However, in an unusual twist, the tribunal found in favour of the employee based on the legal doctrine of 'unjust enrichment' and that the employee could bring a "quantum meruit" ('the amount he deserves') claim to recover unlawful deductions. The appeal turned on the technicalities of whether such a claim could in fact be brought in this way, with the EAT concluding that it was a matter for the civil courts and not the employment tribunal. (*Abellio East Midlands Ltd v. Thomas*)

Legislative developments

Data Protection: Following the Court of Appeal's judgement last year that the immigration exception of the Data Protection Act 2018 was incompatible with the General Data Protection Regulation, amending regulations have been made and came into force on 31 January 2022. (*Data Protection Act 2018 (Amendment of Schedule 2 Exemptions) Regulations 2022*)

Personal Protective Equipment (PPE): The Personal Protective Equipment at Work (Amendment) Regulations 2022 have been passed, although they do not come into effect until 6 April 2022. These regulations extend an employer's duty to provide suitable PPE where there is a health and safety risk to workers. Previous legislation only applied the duty in respect of employees.

COVID-19 update

Working from home: With effect from 19 January 2022, the mandate to work from home wherever possible has been removed in England. The legal requirement to work from home where possible has also been removed in Wales from 28 January 2022 and in Scotland from 31 January 2022.

Mandatory vaccination: On 31 January 2022, it was announced that, subject to consultation and parliamentary approval, the legal requirement for health and social care staff to be vaccinated as a condition of deployment will be removed. Mandatory vaccination in a care home setting is already in force and is set to extend to health and social care settings in April.

Self-isolation: With effect from 17 January 2022, the self-isolation period has been reduced further to five full days, subject to a negative test on days five and six.

Statutory Sick Pay (SSP) (i): The SSP rebate scheme, which closed in September 2021, has been reintroduced. Employers with under 250 employees (on 30 November 2021) can reclaim up to 14 days of SSP for COVID-19-related sickness absence since 21 December 2021.

Statutory Sick Pay (ii): There have been several reports this month of large organisations offering SSP only to unvaccinated employees without a medical exemption, mitigating circumstances or a confirmed vaccination appointment, who are required to self-isolate. Listen to our views on this and other workplace vaccine policies on our real-time video chat.

Testing (England): With effect from 11 January 2022, there is no longer a requirement to take a confirmatory PCR test after a positive lateral flow test. Instead, the positive lateral flow test should be treated as the confirmation of a COVID-19 infection and trigger the requirement to self-isolate

Travel: With effect from 11 February 2022, fully vaccinated travellers to England will no longer need to take COVID-19 tests before or on arrival. Unvaccinated travellers will continue to have to show proof of a negative test to travel, take a test on day 2 after arrival, and complete a passenger locator form.

Other news

Flexible working: Around 30 organisations are taking part in a six-month pilot programme trialling a four-day working week with no loss of pay for employees. The pilot was launched in the UK this month and is based on the principle of employees receiving 100 per cent of their pay for 80 per cent of their time in exchange for a commitment to maintain 100 per cent productivity. Similar pilots have been or are due to be conducted in other countries too, and if successful, such pilots could help businesses shift away from the conventional model based on time spent at work, focusing instead on productivity.

Human rights: The previously well-publicised case of the 'gay cake' has developed this month, with the European Court of Human Rights rendering the customer's application to challenge the Supreme Court's decision inadmissible. The case revolved around a customer being denied a cake order which asked for an LGBT community logo and a caption saying 'Support Gay Marriage' on the grounds that the order ran contrary to the bakery owner's Christian beliefs. Claiming discrimination on grounds of sexual orientation, the case reached the Supreme Court, which, in 2018, found the bakery's refusal to accept the order to not be on the grounds of the customer's actual or perceived sexual orientation, so there was no less favourable treatment to the gay and lesbian community. The European Court of Human Rights rendered the application inadmissible on a technical basis because the customer had failed to exhaust domestic remedies first – he could have brought a claim under the Human Rights Act 1998. (Lee v. UK)

Consultations

Disability: A consultation has been launched to explore how disability workforce reporting for employers with 250 or more employees can be improved, looking at voluntary measures and whether to impose mandatory reporting. The consultation closes on **25 March 2022** and responses can be submitted online.

Human rights: The government has launched a consultation on updating the Human Rights Act 1998 and replacing it with a Bill of Rights. The government is exploring proposals aimed at restoring a balance between the rights of individuals, personal responsibilities and the public interest. The consultation closes on **8 March 2022** and responses can be submitted online.

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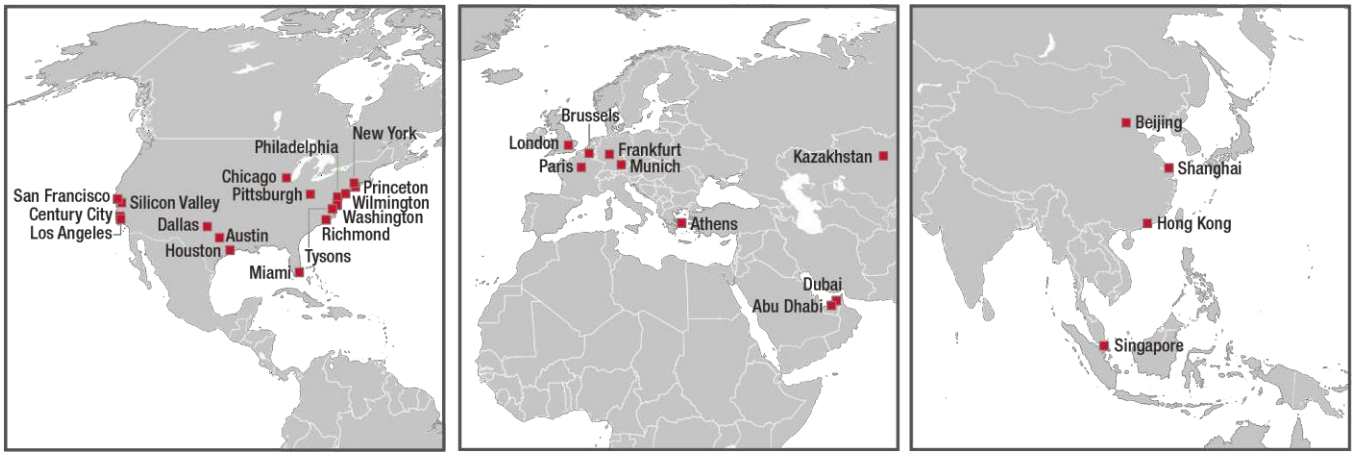

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