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UK Employment Law Update – January 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

Compensation – uplifts: The Employment Appeal Tribunal (EAT) has upheld a tribunal's decision to award the maximum 25 per cent uplift on compensation, including on the awards for injury to feelings and aggravated damages, following an employer's failure to follow the Acas Code on Discipline and Grievance (Acas Code), dismissing an appeal that the uplift was erroneous, included double-counting, and was disproportionate. Of course, not all breaches of the Acas Code will warrant the maximum, or any, uplift, and disproportionate amounts can be scaled down, but this case (which involved the dismissal of two pregnant employees in circumstances where there was found to have been a spurious TUPE transfer and a vindictive and sham disciplinary process) acts as a reminder of the tribunal's wide discretionary powers to increase compensation where it is just and equitable to do so. The EAT also provided guidance on how tribunals approach the issue of an uplift for breach of the Acas Code: (1) Is the case such as to make it just and equitable to award any Acas uplift? (2) If so, what does the tribunal consider a just and equitable percentage, not exceeding although possibly equalling, 25 per cent? (3) Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings and, if so, what is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting? and (4) Applying a 'final sense-check', is the sum of money represented by the application of the percentage uplift arrived at disproportionate in absolute terms and, if so, what further adjustment needs to be made? (*Slade Baronet & anor v. Biggs & others*)

Disciplinary procedure: In a recent Court of Appeal judgment, it was suggested that it is implied into every employment contract that a disciplinary process be carried out fairly, and that this is a separate implied term to mutual trust and confidence between employer and employee. Although the comment was made *obiter* (meaning it was the judge's general comment or observation rather than an issue for determination) and so not binding, it is a point which may now be argued substantively, and employers should ensure that disciplinary procedures are carried out fairly and reasonably to avoid arguments of breach of contract. (*Burn v. Alder Hey Children's NHS Foundation Trust*)

Employment status: The EAT has upheld a decision that, on the facts, a director and 40 per cent shareholder was neither an employee nor a worker of the business despite being in receipt of a salary. While the EAT was clear that working director-shareholders could be classed as employees or workers, the usual tests on status apply. (*Rainford v. Dorset Acquatics*)

Equal pay: At a preliminary hearing, the tribunal has concluded that retail workers at two supermarkets, Morrisons and Safeway, could compare themselves to logistics staff in regional distribution centres for equal pay purposes. It is yet to be determined whether the respective roles are considered to be 'work of equal value'.

Flexible working: Under the statutory flexible working procedure, all requests must be dealt with (including any appeals) within three months unless it is mutually agreed that the decision period be extended. Overturning a tribunal judgment, the EAT has held that merely agreeing to attend an appeal hearing after the three-month deadline does not necessarily imply that the decision period has been extended; there must be clear agreement to the extension. A failure to follow the prescribed timescales can lead to an award of compensation of up to eight weeks' pay (a week's pay being capped at the statutory amount in place at the time), meaning that employers should get explicit consent to an extension of time if it is needed, although it is good practice for requests to be dealt with promptly. (*Walsh v. Network Rail Infrastructure*)

Misconduct dismissals – hearsay evidence: When assessing potential misconduct as part of a disciplinary process, hearsay evidence in the form of written statements from eyewitnesses should still be given due consideration, even where the credibility of those eyewitnesses has not been tested through the witnesses giving oral evidence at the disciplinary hearing. In this case, an employee was summarily dismissed for smoking in his work lorry, contrary to company policy and criminal laws. He denied smoking, and an investigation found no evidence of him smoking in the vehicle, but two eyewitnesses gave written statements alleging they had observed him smoking while driving, and it was these statements (known as hearsay evidence because the individuals had not given their evidence orally at the disciplinary hearing) that was used as the basis for the summary dismissal. In the subsequent unfair dismissal claim, the tribunal concluded that there was insufficient evidence that the claimant had been smoking as it was not possible to evaluate the eyewitnesses credibility against that of the claimant. However, the EAT disagreed; the eyewitness statements had been admitted as hearsay, and oral

testimony does not necessarily 'trump' that. This acts as a useful reminder for employers that the strict rules of evidence that apply in other legal contexts such as criminal law (which generally prohibits reliance on hearsay evidence) do not apply to employers when making a decision in as part of a disciplinary process. The employer was entitled to rely on hearsay evidence that the employee had committed misconduct. The EAT held that all evidence should be weighed up when forming a reasonable belief of misconduct. (*Hovis v. Louton*)

Race discrimination: A claimant succeeded with her direct race discrimination claim when her casino employer accommodated a customer's request not to be served by Black staff. The casino had a policy on unacceptable client behaviour, but as it had failed to implement the policy on this occasion, it was unable to make out a defence that it had taken all reasonable steps to avoid discriminatory behaviour. This acts as a cautionary tale that simply having policies seeking to prevent discrimination and harassment are not sufficient – employers must follow them. (*Tesfagiorgis v. Aspinals Club*)

Unfair dismissal: Upholding the tribunal's decision, the EAT has found that an employer acted reasonably and that it was not unfair to dismiss an employee for gross misconduct for raising multiple grievances which he neither progressed nor withdrew. Employers should act cautiously when balancing potential dismissal actions where live grievances exist, although they will be reassured by this decision that vexatious and frivolous behaviour can lead to a fair dismissal. Employers may not always be able to rely on misconduct as the potentially fair reason for dismissal, and should consider using the "some other substantial reason" justification instead or in the alternative. (*Hope v. British Medical Association*)

Legislative developments

Financial services – Investment Firms Prudential Regime (IFPR): New mandatory rules affecting how firms regulated by the FCA pay and reward their employees came into force on **1 January 2022**. Learn more about the IFPR and how affected firms can prepare for the changes on our Podcast.

Statutory sick pay: Legislation has been introduced to temporarily extend the period of self-certification for sick pay purposes from seven to 28 days to help ease the burden on GPs while the vaccine roll-out continues. This means that employers should not ask for proof of sickness until there has been 28 days of absence. However, it only applies to the incapacity to work beginning in the period **17 December 2021 to 26 January 2022** (although it also includes incapacity starting less than seven days as at 17 December), and applies across the UK. Government guidance has been updated to reflect this change.

COVID-19 update

Working from home: A move to 'Plan B' was announced, and since 13 December 2021, the guidance to work from home where possible has been reinstated in England.

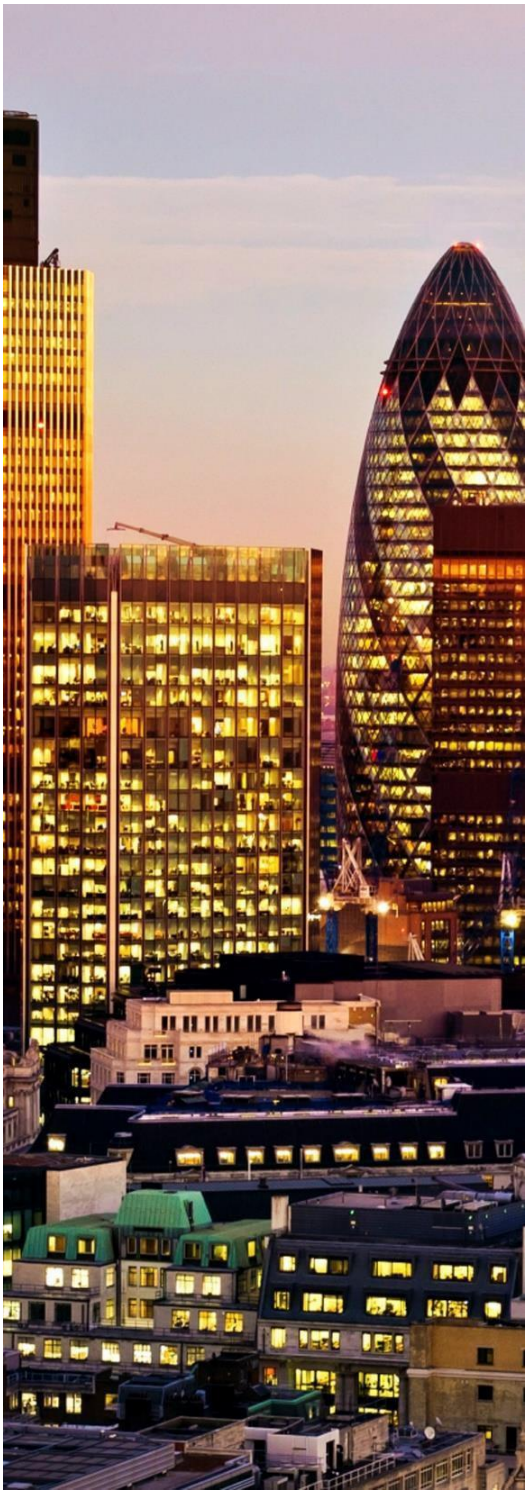
Coronavirus Job Retention Scheme (CJRS): Although the CJRS closed on 30 September 2021, guidance continues to be updated in respect of employers who have claimed a grant but have not paid their employees enough, requiring them to either pay the relevant employees within a 'reasonable period' or repay the grant. Guidance has also been updated in respect of the penalties which can be applied where businesses claimed a grant they were not eligible for, or were overpaid the grant and have failed to liaise with HMRC.

Kick-start scheme: Applications for funding closed on 17 December 2021.

Pregnancy: The charity Maternity Action has published a report, "Unsafe and Unsupported: workplace health and safety for pregnant women in the pandemic", with a number of recommendations to improve workplace safety for pregnant women. While these largely focus on improved guidance and legislative change which may take some time to be forthcoming (if at all), the report highlights the challenges facing pregnant women during the pandemic and is a useful reminder to employers of the need to carry out individual workplace health and safety risk assessments for pregnant employees and to take reasonable steps (for example, changing their working conditions or hours to avoid significant risk, finding alternative work for them, or, if appropriate, suspending the employee on full pay).

Self-isolation: Employees who are identified as a close contact of someone who has tested positive for COVID-19 are now advised to take daily rapid lateral flow tests, regardless of their vaccination status. This is not a legal obligation to self-isolate (which may still apply to some individuals), but may impact on the ability of some employees attending their place of work. However, the self-isolation period has been reduced to seven days (from 10), subject to a negative test result on days six and seven.

Statutory sick pay (SSP): The SSP rebate scheme which closed in September 2021 is being reintroduced. The new regulations come into force on 14 January 2022 and apply to COVID absences from 21 December 2021. As per the 2021 version of the scheme, employers with under 250 employees can reclaim up to 14 days of SSP for COVID-related sickness absence. Claims cannot be made after 24 March 2022.



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 also 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. It is exploring proposals aimed at restoring a balance between the rights of individuals and personal responsibilities with the public interest. The consultation closes on **8 March 2022**, and responses can be submitted online.

What to expect in 2022

Legislative developments and law reform

In another year dominated by the COVID-19 pandemic, legislative developments in UK employment law were not a priority during 2021, and as employment law issues did not feature in the 2021 Queen's Speech, they may also be limited during 2022. In addition to the legislation listed in the 'legislative developments' section above, here are a few things to watch out for:

- The annual statutory rate rises will happen again in April, with increases to the minimum wage and statutory family pay rates already announced:
    - Minimum Wage: the National Living Wage (for those ages 23 and over) will increase to £9.50 per hour from 1 April 2022. The other national minimum wages will also increase (to £9.18 for 21- to 22-year-olds, £6.83 for 18- to 20-year-olds, and £4.81 for those under 18 years old and apprentices).
    - Statutory pay: statutory maternity, paternity, adoption, and shared parental leave will increase to £156.66 per week from 11 April 2022.
- April 2022 will also see changes to national insurance contributions, with a 1.25 per cent increase to classes 1 (employee and employer) and 4 (self-employed). This increase is temporary pending the instruction of a Health and Social Care Levy.
- During 2021, the government confirmed plans to introduce the following: a new duty to prevent sexual harassment in the workplace; enhancement of the senior managers and certification regime; a statutory right to a week's unpaid carer's leave; a statutory right to leave and pay for neonatal care; the right for workers to retain tips in full; and the creation of a single enforcement body. Whether these will happen during 2022 is unclear – the timescale commitment has been limited to when "parliamentary time allows".
- The legislative commitments around carer's leave, neonatal leave and pay, worker's tips, and a single enforcement body are all expected to feature in the Employment Bill. However, it is unclear whether we will see any progress in the coming year. Alongside the areas already mentioned, the Bill may also cover rights to request a more flexible contract, enhanced protection during pregnancy and maternity, and any changes to flexible working which arise from the recent consultation.
- The government launched a number of consultations during 2021, seeking views on a variety of topics which may, in time, lead to legal reform. Although there is no guarantee that responses will be forthcoming during 2022 (we are still waiting on responses to several consultations from 2020 and before), here is a reminder of some of the topics explored during 2021: (1) exclusivity clauses (whether to ban them from certain contracts); (2) post-termination restrictions (whether they should be unenforceable altogether, or parameters set around their use); (3) menopause in the workplace (whether enough is being done to support menopausal women at

work and the extent of any discrimination experienced); (4) diversity and inclusion on boards of listed companies (and whether to require disclosure of diversity targets); (5) data protection (how businesses can better protect personal data when it transferred outside the UK and how the Information Commissioners Office guidance on compliance with data protection in the context of employment practices can be improved); (6) IR35 (how the extension of the off-payroll rules into the private sector are working in practice); and (7) flexible working (whether flexible working should be the default position and a "Day 1" right, the reasons for rejecting a request, and the process to follow).

- Following a consultation from 2019, we are expecting a report from the Law Commission in early 2022 with recommendations for reforms to support families through surrogacy.
- The government has recently committed to responding to another 2019 consultation – this one on ethnicity pay gap reporting – although it has not indicated its timescale.

COVID-19

We start 2022 with ongoing uncertainty, and it is hard to predict what is yet to come. Guidance to work from home where possible remains in place for the time being, although self-isolation periods have been shortened to help ease the effect of workplace absences.

While a number of the temporary measures put in place during 2021 to deal with the pandemic are no longer in force, modified right-to-work checks still apply (until April 2022), and temporary changes to SSP have been introduced (see above).

Workplace vaccinations and testing policies are likely to remain a hot topic during 2022. With the exception of care home and frontline health and social care settings, there is no legislation in place mandating that staff be vaccinated. However, with the virus still very much a part of our lives, analysis suggests that more and more UK employers have or are looking to introduce policies requiring staff to be vaccinated. A developing area, this is a topic that employers who have previously rejected such policies may look to reconsider. It also raises the question over what 'fully vaccinated' means, and whether both doses of an approved vaccine is sufficient or if boosters are required too.

Publications

Global Disputes in 2021 – A Renewed Perspective: A synopsis of the sessions included in our 2021 virtual conference

Anti-bribery:

- What do the FCPA, UK Bribery Act, or French, German, or Greek criminal codes mean for my dealings abroad?
- What other offenses do I need to watch out for if I suspect there has been bribery in my organization?

Disability inclusion:

- Watch the recording of our Disability Inclusion Summit panel discussion where we hear from our clients about how we can continue to move the needle and bring success to business through disability inclusion.
- Reed Smith marks International Day of Persons with Disabilities with three disability inclusion initiatives, including releasing a Disability Etiquette Guide, launching a disability inclusion group in Asia, and introducing Project Ability.

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