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UK Employment Law Update – June 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: The Employment Appeals Tribunal (EAT) has provided a helpful summary for calculating compensation in circumstances where an employer has failed to comply with an order for reinstatement, but where the statutory cap on compensation is relevant. While recognised that an employer should not be better off by failing to reinstate, with legislation providing for the statutory cap to be disapplied in certain circumstances to prevent this, the EAT held that the Employment Tribunal (ET) had been wrong to disapply the cap in this case. The ET had awarded a compensatory award of the amount the claimant would have received if they had been reinstated, which was in excess of the statutory cap of a year's pay. However, they should have had regard to the overall sum the employer was required to pay, factoring in all elements of the compensation payable. As the aggregated amount of the compensatory award and the award for failure to reinstate was significantly in excess of the statutory cap, it was not necessary to disapply the cap on the compensatory award element. (*University of Huddersfield v. Duxbury*)

Discrimination – genuine occupational requirements (GOR): There are exceptions to direct discrimination where there is a GOR for a particular protected characteristic, although it is not a straightforward argument and as a recent case demonstrates, the usual principles around acting proportionately in response to a legitimate aim apply. In this case, a male claimant was employed to provide care (including of an intimate nature) to a physically disabled female client. During his probationary period, the client decided she was uncomfortable with him providing care of an intimate nature and, without providing reasons, extended his probation. He later resigned when he discovered the reason and brought a number of claims for discrimination. The ET was unsympathetic to the GOR argument – while the provision of personal and intimate care can be a reason to justify a GOR for an employee of a particular sex, and protection of privacy and dignity is a legitimate aim, the response here was not deemed proportionate. Had the client been more open about her need to build up a relationship of trust before the provision of intimate care, the claimant could have taken steps to address that concern and shifts could have been managed to ensure female carers were available at key times. Although only an ET decision, it is a helpful reminder of the principles. (*Donnelley v. PQ*)

Disability discrimination: The definition of 'disability' under the Equality Act 2010 (EqA) is well known, but application of the test can often prove tricky for ETs. In this case, the claimant suffered from anxiety, which arose out of issues at work. The various strands of the test were met, except for whether the condition was likely to be long term (i.e., likely to last for at least 12 months). The ET concluded that it was not likely to be long term on the basis that as the claimant's anxiety had arisen from work, it would not persist long after her employment had terminated. The EAT criticised the weight that the ET had placed on the impact of termination and remitted the question of 'long term' to the ET for reconsideration. The case is a helpful reminder that the threshold for establishing the length of an impairment is relatively low and must be assessed at the time of the discriminatory act(s) – in this case, the termination of the claimant's employment post-dated the acts being complained of. (*Morris v. Lauren Richards Ltd*)

Indirect discrimination: In overturning an ET decision, a recent EAT decision highlights the importance of identifying the correct pool for comparison in indirect discrimination claims. In this case, the claimants were employed by a third-party contractor engaged by the respondent for cleaning services. Unlike those engaged directly by the respondent, the outsourced workers received less than the London living wage. They brought a claim against the respondent for indirect race discrimination, alleging they were less favourably treated and that contract workers were more likely to be from racial minority groups. Satisfied that the respondent had sufficient control over pay levels to be claimed against, the ET found in the claimant's favour. However, the EAT allowed the appeal on the basis that the ET had erred in its comparison – instead of comparing the direct workers to the outsourced workers on the cleaning contract, they should have looked at all outsourced workers. (*The Royal Parks Ltd v. Boohene and others*)

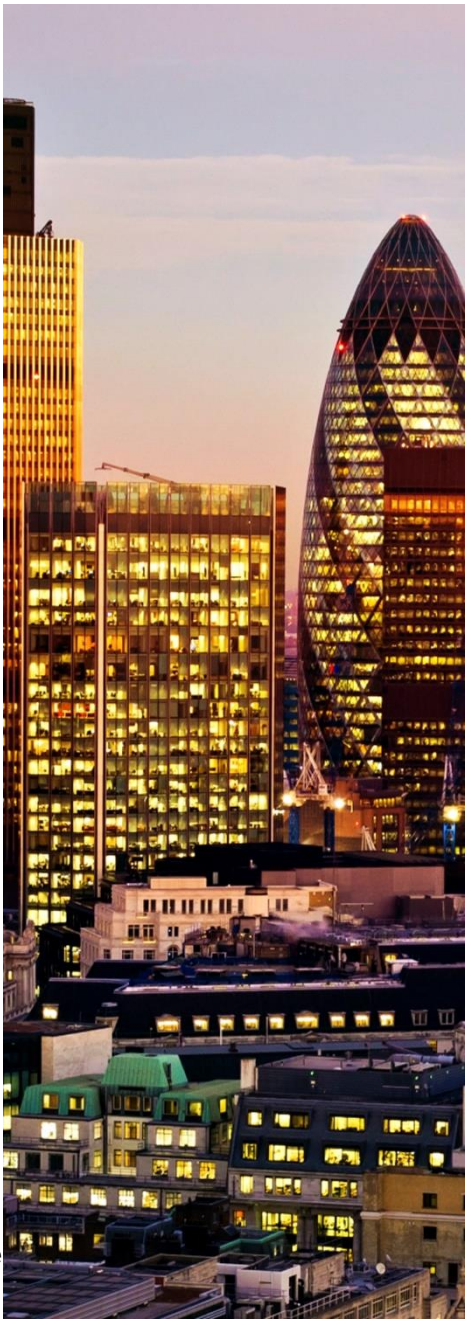
Pregnancy discrimination: A claimant who was purportedly dismissed for poor performance shortly after notifying her line manager of her pregnancy has had her case remitted after the EAT rendered the ET's finding of discrimination unsafe. The

case highlights that simply because one act follows another, it does not necessarily mean that there was a causal link; scrutiny of the particular circumstances is needed, including an analysis of the motivations of the decision-maker(s). In this case, the ultimate decision-maker was the company's managing director, although the claimant alleged that her line manager influenced that decision. In contrast to recent whistleblowing cases where the motivations of others can be attributed to a decision-maker, liability for discrimination under the EqA only attaches to an employer if the individual who did the act complained of (e.g., a decision to dismiss) was motivated by the protected characteristic (e.g., pregnancy). As such, the ET erred in not properly assessing the decision-maker's motivations and whether the decision was made jointly, alone or under influence. (*Alcedo Orange Ltd v. Ferridge-Gunn*)

Redundancy: An employee was unfairly dismissed when her employer failed to consider furlough as an alternative to redundancy during the pandemic. Regardless of whether furlough was necessarily appropriate, the failure to properly consider it as an option was sufficient to render the dismissal unfair. Although the facts of this case relate to furlough, it is nevertheless a useful reminder that employers, acting reasonably, should explore ways to avoid a redundancy dismissal. (*Lovingangels Care v. Mhindurwa*)

Holiday pay: The EAT has held that a payment in lieu of accrued but untaken holiday on the termination of employment should not equate to less than the worker would have received if that same period had been taken as holiday during employment. In this case, the contact provided for a calculation of holiday in lieu, which was less than the employee would have received if the holiday had been taken. Employers who have a formula for calculating pay in lieu of holiday on termination should be particularly mindful of this case. (*Connor v. South Yorkshire Police*)

Data protection – EU GDPR: The European Court of Justice (ECJ) has provided its provisional ruling on the meaning of 'copy' and the concept of 'information' in the context of obligations under the GDPR. The ECJ ruled that the right to obtain a 'copy' means providing a faithful and intelligible reproduction of personal data and that 'information' relates only to personal data that the data controller is required to provide a copy of. Although not a binding decision in the UK, the decision may still be relevant in the UK. (*Österreichische Datenschutzbehörde, Case C-487/21*)



Legislative Developments

Allocation of tips: The Employment (Allocation of Tips) Act 2023 has now received Royal Assent, although it is not expected to come into force until May 2024. The Act places new obligations on employers with the allocation of tips, requiring fair allocation and prompt payment. A statutory code of practice is expected, with an associated consultation on its content later this year.

Brexit: The sunset provisions set out in the Retained EU Law (Revocation and Reform) Bill (which provided that EU law would automatically be repealed on 31 December 2023 unless retained) have been scrapped. Now, EU law will remain binding unless and until it is revoked. This is what we know so far:

- The only EU employment legislation that has been announced as being repealed is the Posted Workers (Enforcement of Employment Rights) Regulations 2016; the Posted Workers (Agency Workers) Regulations 2020; and the Community Drivers Hours and Working Time (Road Tankers) (Temporary Exemption) (Amendment) Regulations 2006.
- A consultation on proposed changes to the Working Time Regulations (WTR) and Transfer of Undertakings (Protection of Employment) Regulations (TUPE) has been launched (see below).
- The government has indicated that it intends to preserve current laws on maternity and parental leave, paternity and adoption leave, less favourable treatment of part-time and fixed-term workers, agency workers, and information and consultation. It has also said it has no intention to abandon its record on workers' rights.

Employment law reforms: The UK government has made announcements proposing reforms to employment law in the following areas:

- **WTR:** reducing the record-keeping requirements for employers and reducing the administrative burden and complexity of calculating holiday pay. There are no proposals to reduce minimum leave or rest requirements, nor to make any change to the 48-hour week.

- **TUPE:** changing the information and consultation requirements.
- **Non-competes:** limiting these to a maximum of three months.

Read more on our Employment Law Watch blog, and see the consultation section below in respect of the proposals around TUPE and WTR.

Family-friendly laws: A number of private members' bills have finally received Royal Assent, and we can now expect the following laws to come into effect in due course:

- **Neo-natal care:** The Neonatal Care (Leave and Pay) Act 20023 will provide for paid time off for eligible parents in the event that their baby needs neonatal care. This is in addition to existing statutory rights. This is not expected to come into effect as law until April 2025.
- **Carer's leave:** The Career's Leave Act 2023 provides a statutory right to unpaid leave for the purposes of caring for a dependant. This is not expected to come into effect as law until at least April 2024.
- **Redundancy protection:** The Protection from Redundancy (Pregnancy and Family Leave) Act 2023 extends the period of enhanced rights in a redundancy scenario to include a period of time after the return to work.

Other News

Apprentices: The House of Commons Education Committee has published a report noting the long-term decline in apprenticeships for young people and has urged the UK government to take steps to address this, particularly for under 19's, who are often overlooked in favour of older candidates. The report recommends an independent review and potential reform of the apprenticeship levy.

Artificial intelligence (AI): A private member's bill has been brought seeking to protect workers' rights in the wake of the growth in AI. Although not expected to be taken forward to become new law, it has been brought with the intention to prompt discussions and conversations about the issues.

Employment law modernisation: A new All-Party Parliamentary Group has been set up to explore how the UK can become a more attractive labour market. In the first instance, it will concentrate on four key areas: improving inclusivity; making hiring quicker; using technology to overcome barriers to recruitment; and how to balance the need for growth with the fair treatment of workers. It is unclear what this might mean for the future of employment laws.

Financial services – skills: The Financial Services Skills Commission (FSSC) has published a report identifying 13 key skills needed for the future and for sustainable growth in financial services. These include AI; cyber security; digital literacy; data analytics; coaching and relationship management; and agility, adaptability and creative thinking. The FSSC recommends that firms see skills development as an important strategic priority, reviewing and forecasting regularly and investing time and money in upskilling and reskilling programmes. Although focused on financial services, the principles apply equally to other sectors.

Financial services – whistleblowing: The FCA has published a report following a 2022 survey of whistleblower experiences when making reports to the regulator. The survey revealed particular dissatisfaction among whistleblowers regarding the level of information provided on next steps, which the FCA has resolved to address. Its findings generally will also be fed back to the Department of Business and Trade as part of its current review of whistleblowing.

Redundancy: Acas has recently conducted a survey on redundancies, suggesting that about a third of employers (and particularly those with 250 or more employees) are planning redundancies in the next 12 months.

Right to disconnect: In a recent interview, Angela Raynor (deputy leader of the Labour Party and shadow secretary of state for work) indicated that the right to disconnect will likely be a feature of the Labour Party's election manifesto. For more details, see our Employment Law Watch blog.

Sexual harassment: A recent survey conducted by the TUC suggests that 58% of women (and 62% of 25-34-year-old women) have experienced sexual harassment, bullying or verbal abuse at work but that less than a third reported it to their employer. This highlights the prevalence of issues in this area and that many employers could do more to foster a culture of support. Employers should also be mindful of the Worker Protection (Amendment of Equality Act 2010) Bill 2022-23, which will introduce legislation placing a duty on employers to address harassment at work. For more details of this bill, see our Employment Law Watch blog.

New guidance

Data Subject Access Requests (DSAR): The Information Commissioner's Office has issued new guidance for employers, in the form of FAQs, on handling DSARs.

Stress at work: Acas has launched new guidance for employers on managing stress at work. It provides guidance on spotting signs of stress (which may be work-related or personal) and creating a positive and supportive environment.

Consultations

Artificial intelligence: Alongside its white paper, 'A pro-innovation approach to AI', the Department for Science, Innovation and Technology has launched a consultation seeking feedback on its policy proposals. It closes on **21 June 2023**.

IR35: HMRC has launched a consultation on the calculation of PAYE liability where there has been non-compliance with the off-payroll working rules (IR35). It closes on **22 June 2023**.

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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