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UK Employment Law Update – February 2024

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

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Recent publications

- The UK Corporate Governance Code 2024
- Anticipating changes: UK employment law for 2024
- Changes to when convictions become spent

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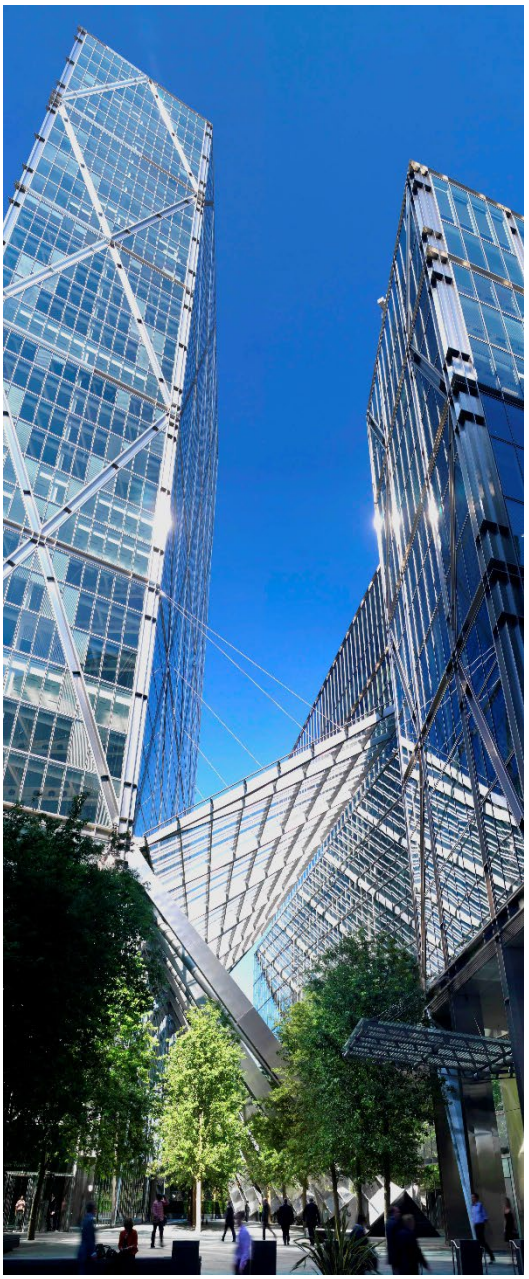
Case law updates

Costs award – serial claimant: An employment tribunal (ET) has ordered a claimant to pay £18,000 on the basis that he acted vexatiously and unreasonably in bringing his claim, it being part of a campaign of litigation. The ET found that the claimant (Dr Christian Mallon) was an experienced litigator who had brought numerous claims (the judgment suggests relating to some of over 4,600 job applications). He had previously been warned by a judge that strike outs and costs awards were a possible consequence if he was found to be routinely applying for jobs which he did not want, with the intention of commencing litigation. In this case, the ET found that the claimant's claim had not been made in good faith, that the claimant must have known his claim had no merit, and that it was part of a wider campaign and system of the claimant applying for multiple roles for which he had no relevant experience. (*Mallon v Electus Recruitment Solutions Ltd*)

Disability discrimination – reasonable adjustments: A recent Employment Appeal Tribunal (EAT) decision highlights the importance of knowledge of both a disability and its effects when determining whether discrimination has occurred. In this case, the claimant was being orally interviewed for an internal promotion and ahead of the interview said that because of his stammer (which his employer was already aware of) he may need longer to answer questions. He did well at interview and was just one point short of the next highest scorer, who was promoted. The claimant subsequently brought a claim for a failure to make reasonable adjustments, saying that during the interview he gave shorter answers than he might otherwise have done in order to avoid stammering, affecting his performance. However, as he had not previously mentioned this potential effect of his stammer, his employer had no actual knowledge of this particular disadvantage, and on the evidence his employer could not reasonably have been expected to know about it. It was relevant that the claimant performed highly at work (and did so at interview), and no concerns had arisen at a previous interview. As such, his claim failed. (*Glasson v Insolvency Service*)

Remedies – calculating compensation: A claimant has been awarded over £470,000 (excluding interest) after winning an unfair dismissal and disability discrimination claim. An interesting and headline-grabbing case from a factual perspective (the claimant having been dismissed for using racially inappropriate language during an equality training session), it acts as reminder to employers about not only appropriate sanctions, but also the financial consequences of getting it wrong. The remedies judgment provides useful commentary on the ET's approach to making recommendations and approach to certain elements of compensation, including: failures to reinstate, Acas uplifts, recovery of certain expenses, personal injury, and calculating long term loss of earnings. (*Borg-Neal v. Lloyds Banking Group*)



Settlement agreements: The Scottish Court of Session has been considering the scope and enforceability of a waiver purporting to exclude the claimant from pursuing a future claim, even when that claim is not in the knowledge or contemplation of the parties when the agreement is entered into. In this case the claimant signed a settlement agreement when his role was made redundant, the terms of which included an additional payment to be calculated in line with a collective agreement and to be paid a few months later. However, it later transpired that the claimant's age at the date of dismissal precluded him from qualifying for this additional payment and so he issued a claim of age discrimination. The extent to which the settlement agreement had waived this claim was in issue, and whilst the original ET concluded that he was prevented from claiming, this was overturned by the EAT. The Court of Session agreed with the original ET, concluding that a future claim may be covered by a waiver, even if the employee did not and could not have had knowledge of it, if the settlement agreement states plainly and unequivocally that this was intended. This decision will be of comfort to employers seeking to rely on similar waivers, although the drafting will need to be careful to maximise enforceability. It is also unclear as to whether this principle will apply where the employment relationship is ongoing, or only in a termination context. Commentators suggest the latter, but more case law may be required to clarify this. (*Bathgate v. Technip Singapore OTE Ltd*)

Transfer of undertakings (TUPE): A recent EAT decision has been considering what happens to liability for a constructive unfair dismissal and harassment claim where the alleged harasser had TUPE transferred to a new company, but the claimant had not (as his employment ended before the TUPE transfer date). The claim was brought against the former employer only, and not the alleged harasser. The claimant's former employer sought to argue that liability for the claim had transferred to the transferee by virtue of TUPE. The EAT disagreed and decided that as the claimant had not TUPE transferred, and had not resigned for TUPE connected reasons, liability for any employment claims had not transferred either. Responsibility for the alleged wrongdoing remained with the employer even though the alleged harasser had TUPE transferred. (*Moore v. Sean Pong Tyres*)

Whistleblowing: A recent EAT decision has concluded that an external job applicant was not protected from suffering detriment for making a protected disclosure. The applicant did not fall within the definition of 'worker' in the legislation, and the various tests were not met to extend protection under human rights principles. It should be noted that external applicants for NHS employers are expressly covered in the whistleblowing legislation. (*Sullivan v. Isle of White Council*)

Legislative developments

Paternity leave: New regulations have been published which amend the statutory paternity leave entitlements, applying to parents of babies whose expected week of birth begins after **6 April 2024** or who are expected to be placed for adoption on or after **6 April 2024**. The changes see eligible parents able to take their two weeks of paternity leave in non-consecutive periods of a week (rather than in one go), and within the first 52 weeks (rather than 56 days). The notice to be given for taking leave is also being shortened to four weeks, with flexibility introduced to allow dates to be changed. Employers should update their paternity leave policies accordingly.

Wages: Amendments to the national minimum wage legislation will take effect from **1 April 2024** and will see live-in domestic workers entitled to the appropriate national living or minimum wage, having previously been exempted.

Other news

Corporate governance: A 2024 edition of the UK Corporate Governance Code has been published by the Financial Reporting Council alongside accompanying guidance. Amongst other things, the new Code requires more disclosure around malus and clawback arrangements (including express provision to be included in director contracts and other remuneration documentation); board appointments and succession planning to promote diversity, equity, and inclusion; increased reporting on a company's material controls; updated provisions on the roles and responsibilities of the audit committee; and obligations on the board to maintain effective internal risk management. The 2024 Code will apply to financial years beginning on or after **1 January 2025**, with the exception of the changes to risk management and internal control monitoring and reporting, which will apply to financial years beginning on or after **1 January 2026**. Read more on Reed Smith Perspectives.

Immigration fees: The immigration health surcharge is increasing to £1,035 from **6 February 2024**.

Immigration – sponsor licences: Any sponsor licences due for renewal on or after **6 April 2024** will automatically renew for 10 years without the need for a new application of renewal fee. Where licences expire before 6 April 2024, a new application and fee will be required.

Right to work in the UK: The maximum fine for employing someone without the right to work in the UK increases to £45,000 per illegal worker from **13 February 2024**, a few weeks later than previously announced. There is an updated statutory code of practice for employers to follow to avoid penalties.

Spring Budget: This will take place on **6 March 2024**.

New guidance

Flexible working: Acas has published its draft Code of Practice on flexible working, providing updated guidance on making and handling flexible working requests following the changes to legislation in this area which are expected to come into effect in April 2024. The draft needs approving by Parliament and will be accompanied by yet-to-be-published non-statutory guidance."

Right to work in the UK: There is an updated statutory Code of Practice for employers which sets out the checks they should be carrying out to avoid penalties for illegal working.

Terminal illness: CIPD has issued guidance for employers on supporting employees with a terminal illness, or who are caring for or bereaved from someone who was given a terminal diagnosis.

Consultations

Allocation of tips: A consultation has been launched on the draft statutory code of practice, to sit alongside the new legislation. The code will require employers to pass on tips and gratuities to workers, and to distribute them fairly. This new legislation was enacted in July 2023, although regulations will be needed to bring it into force. The consultation is open until **22 February 2024**.

IR35: The government is inviting comments on its draft regulations and guidance relating to the set-off mechanism where there has been an overpayment of taxes following non-compliance with the IR35 rules. Comments are to be provided by **22 February 2024.**

Data protection – keeping employment records, and recruitment: The ICO is seeking views, by **5 March 2024**, on guidance which will help employers to comply with record-keeping requirements.

Employment tribunal fees: The government is consulting on reintroducing a fee for lodging an employment tribunal claim or appeal. The previous fee regime was introduced in 2013 but abolished in 2017 following a successful judicial review. Under new proposals, and different to what went before, a flat £55 fee will be payable on presenting a claim or lodging an appeal, with some limited exemptions. This is regardless of the type of claim, with nothing else payable throughout the journey of the claim or appeal. The consultation is open until **25 March 2024.**

Fit notes: As part of a series of welfare reforms, the government has announced an intention to consult on reforms to the fit note regime. There is currently no detail on what it has in mind, nor a date for launching the consultation.

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