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UK Employment Law Update – September 2024

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

With the legislative agenda quiet due to the summer recess, our September update examines some interesting discrimination claims, including a landmark equal pay decision impacting the private sector, a case on the scope of positive action, and a case examining whether indirect discrimination can be claimed by someone who does not share the protected characteristic of a disadvantaged group but who is nonetheless disadvantaged in the same way.

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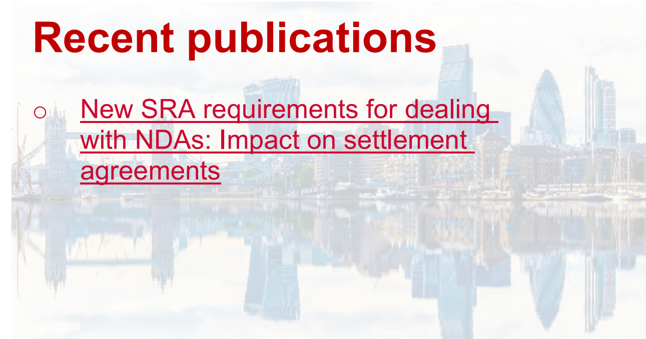

Recent publications

- New SRA requirements for dealing with NDAs: Impact on settlement agreements

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Case law updates

Positive discrimination: The Employment Tribunal (ET) has found that the decision to promote a minority ethnic employee without any competitive exercise was unlawful positive discrimination, finding in favour of three white claimants who had expressed an interest in the vacancy and alleged direct race discrimination for failing to be considered. Although the employer, a police force, had a 'Positive Action Progression Program', the ET concluded that their actions were not positive discrimination, going beyond encouragement to the disadvantage of others, and that their approach was not a proportionate means of achieving a legitimate aim of improving diversity at more senior levels. (*Turner-Robson and others v. Chief Constable of Thames Valley Police*)

Constructive unfair dismissal: The Employment Appeal Tribunal (EAT) has been considering whether the fact an employee did not exhaust a grievance process is relevant to the issue of whether an employee is entitled to resign and claim constructive unfair dismissal. In this case, the claimant resigned in response to aggressive and intimidating behaviour by a colleague, and dissatisfaction with how her employer was handling a grievance she had raised about that behaviour. She alleged this amounted to a repudiatory breach of contract by employer entitling her to resign and claim constructive dismissal. At the time of her resignation, the claimant had not exhausted the grievance process, with two more stages to go. The original ET rejected her claim, finding that the potential of the employee's complaint to be resolved by the remaining stages of the grievance process was enough to mean that the relationship of trust and confidence had not been damaged sufficiently seriously to found a claim for constructive dismissal. On appeal, the EAT was critical of this approach – the fact that the grievance process had not been concluded, or that had she completed it, a favourable outcome may have been made in the employee's favour, is irrelevant in determining whether there had been a repudiatory breach of contract entitling the employee to claim constructive dismissal; it is the employer's conduct which is relevant. The case will be reconsidered by the ET. (*Nelson v. Renfrewshire Council*)

Disability discrimination: An EAT decision is a helpful reminder that employers should consider impending future changes to their business when assessing reasonable adjustments or the reasonableness of a potential dismissal. In this case, the employee was a postal worker whose ill health meant that he was no longer able to perform outdoor delivery duties. The postal worker was given indoor duties instead, but this was a supernumerary job that did not need to be done. Ultimately the employee was dismissed by way of ill-health retirement. At the time of his ill-health retirement, no indoor duties existed, but a merger of two sites was imminent and this would have created indoor vacancies. The claimant argued that it would have been a reasonable adjustment to have kept him in employment until the merger, so that following the merger he could have been assigned to outdoor duties for which there was a business need. The ET rejected claims of unfair dismissal and disability discrimination on the basis that the employer should not have been expected to continue employing him "forever" in the supernumerary role and having done this for nine months, there was a time it had to come to an end. The EAT disagreed, finding that the ET was wrong not to take into account the imminent merger, which was expected to happen approximately four weeks after the decision to dismiss. The case has been returned to a new ET to be reconsidered. (*Cairns v. Royal Mail Group*)

Disability discrimination – arising from discrimination and reasonable adjustments: The EAT has upheld an ET decision that there was no discrimination arising from a sickness absence process, which resulted in an employee being dismissed even though the employer had failed to comply with its duty to make reasonable adjustments under disability laws. The claimant (who was disabled with anxiety and depression) had made a complaint of bullying and harassment by his line manager, but when his employer concluded this had been brought in bad faith, he was disciplined and given a two-year warning. The claimant then commenced long-term sick leave and raised a grievance about his disciplinary and warning, which was rejected. A sickness absence process established that the fact of the warning was a barrier to his return to work. The claimant was dismissed based on there being an irretrievable breakdown in the employment relationship. The claimant brought 31 claims in the ET, which were broken down into two timeframes and dealt with by two separate ET's. The first ET, which dealt with events up until the two-year warning, found that there had been a failure to make reasonable adjustments when the employer had failed to review its finding of bad faith and to remove the warning from his record. However, the second ET, which was considering the claims arising from the sickness absence process and the claimant's dismissal, rejected the claims of discrimination. The claimant appealed, arguing that the second ET's findings were inconsistent with those of the first. The EAT disagreed, concluding that the second ET had appropriate regard to the previous decision but was entitled to reach its own decision based on the evidence at that hearing. It was relevant that, by the time of the issues the second ET was considering, the two-year warning had expired and there were no reasonable adjustments at that time which could have enabled the claimant to return to work. (*Parnell v. Royal Mail Group*)

Indirect discrimination: In this case which serves as useful reminder of who is protected by UK indirect discrimination laws, an indirect discrimination claim arose out of a flight scheduling change at an airline during the pandemic. The change in schedule was alleged to (1) put those (predominantly non-British nationals) who lived abroad, and commuted to Heathrow from abroad, at a particular disadvantage compared to those who commuted from within the UK; and/or (2) put those (predominantly women) with caring responsibilities at a particular disadvantage compared with those who did not have caring responsibilities. The issue arose as to whether the ET had jurisdiction to hear an indirect discrimination claim from (a) a man with childcare responsibilities, and (b) a British national who lived in and commuted from France, both of whom were disadvantaged by the changes. In particular, the issue was whether it matter that although, both employees were disadvantaged by the flight scheduling change, they did not share the relevant protected characteristics. Following established European case law, the EAT upheld the ET's decision that indirect discrimination claims can be brought by claimants who share the same disadvantage as a disadvantaged group, even if they do not share the same protected characteristic. This principle is now reflected in an amendment to the Equality Act 2010 effective 1 January 2024. (*Rollett v. British Airways*)

Employment tribunals – witness evidence: The EAT concluded that an ET was wrong not to adjourn a hearing when legitimate concerns were raised about a witness's medical capacity to give evidence. The witness, a company director, was a respondent alongside a company in a sexual harassment complaint. He had suffered a stroke about two years prior to the hearing. Whilst he denied any long-term impact on his condition, when coming to give evidence he denied his witness statement was written by him and claimed not to remember conversations with his representatives sufficient to raise concerns about his memory. The ET refused an adjournment, taking the witness's comments about his health and memory at face value and was critical that the matter of an adjournment had not raised concerns previously. Considering the Equal Treatment Bench Book, which states that where there is good cause for concern and legitimate doubt as to capacity, there should not be a presumption of capacity and the courts should investigate, the EAT allowed the appeal, critical that the ET had relied on the director's answers to direct questions about his cognition without independent medical evidence. (*Lesley Easton & Co Ltd and others v. Donlon*)

Equal pay: Sales staff at a major retailer have won a claim for equal pay after successfully arguing that they, as a predominantly female group, earned lower wages than the retailer's warehouse staff, who were predominantly male. The retailer, who unsuccessfully argued that the differential in pay could be justified based on market rates and the need to recruit and retain warehouse staff on a 24/7 basis, is expected to appeal the decision. (*Thandi v. Next Retail Ltd* (unreported))

Legislative developments

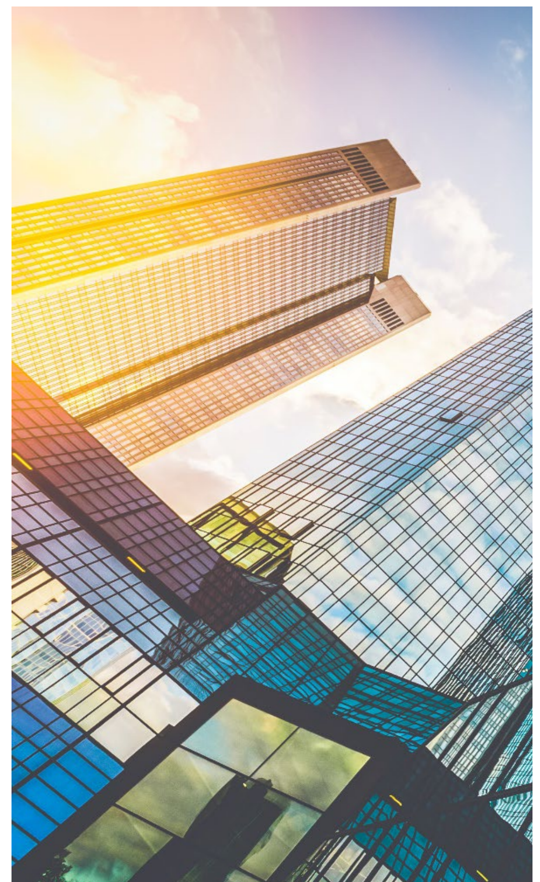
Sexual harassment: The duty on employers to take steps to prevent sexual harassment in the workplace comes into force on **26 October 2024**.

Tips: Legislation and a statutory code of practice which deal with the fair allocation of tips, including obligations to ensure there is a fair and transparent distribution and that workers receive tips in full, comes into force on **1 October 2024**.

Predictable contracts: The Workers (Predictable Terms and Conditions) Act 2023, giving certain workers the right to a more predictable working pattern, was passed last year and was expected to come into force this autumn but appears to have been dropped by the new government. Instead the government has committed to ending one-sided flexibility and giving workers a right to a contract reflecting the number of hours actually worked. Its proposals are expected to be revealed under the awaited Employment Bill.

Seafarers: Eight amendments to the Maritime Labour Convention aimed at improving living and working conditions at sea will come into force on **23 December 2024**. The amendments cover issues such as recruitment and placement, repatriation, accommodation, access to recreational and welfare facilities, food and catering, medical care, health and safety, and financial security.

Industrial action: There are several media reports that the government intends to repeal the Trade Union Act 2016, legislation which restricts the ability to organise lawful industrial action.



Other news

Flexible working: There have been media reports of the government introducing a right to a four-day week, although rather than a specific right this appears to be part of their previously announced plans to make flexible working the default position (i.e., it must be offered or granted unless unfeasible), a shorter week/compressed hours being just one of several flexible options employees could ask for. It is currently unclear how much of a shift from current flexible working laws there could be; detail of the government's plans should be included in the eagerly awaited Employment Bill.

Right to switch off: Although not mentioned in the King's Speech last month, there have been several media reports in recent weeks about the government's plan to introduce a right to switch off, which would limit contact outside working hours to promote a better work/life balance. There is no clear or settled direction on how this will work in practice, but there is a suggestion that, rather than legislation creating a legal right to disconnect, employers and employees should reach agreement on acceptable contact outside working hours. There is also talk of a code of practice, with financial penalties where this is breached in conjunction with a successful ET claim (rather than as a freestanding claim). The detail will need working through, but it appears that this issue is still very much on the agenda.

Race discrimination: The EHRC has published a report on racial discrimination in Great Britain and has made recommendations to the government to improve employment prospects, pay, recruitment, retention and progression for ethnic minority workers.

New guidance

Safety and discrimination: CIPD has published guidance for employers during times of unrest.

Consultations

ET procedure: The Tribunal Procedure Committee is consulting on proposals to change the rules around the provision of written reasons for decisions, including removing the requirement for them to be signed and to allow for both 'short' and 'long' form reasoned judgments. The consultation closes on **22 October 2024**.

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