ReedSmith
Driving progress
through partnership

UK Employment Law Update – July 2024

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

The new TUPE rules applying to transfers from 1 July 2024 are now live, but it is otherwise a quiet month on the legislative front due to the UK General Election on 4 July 2024. Our July edition focuses on some interesting case law, including the scope of a settlement agreement waiver, and pooling and alternative roles in a redundancy situation.

In this issue

Recent publications

- Striker! Does UK law adequately protect an employee's right to strike?
- AI in the workplace – is regulation on its way in the UK?
- Labour Party's proposed employment reforms: What UK employers need to know

Follow us on LinkedIn to stay up to date with our latest news and publications.

Case law updates

Contractual benefits: An employer was not entitled to remove life-long travel benefits provided by a third party in circumstances where there was a right to retain the benefit post-termination if the employees were made redundant with more than five years' service. The claimants met these criteria, and it was established that the terms had been incorporated into the employees' contracts of employment and that the contractual position had not been changed by the third-party provider having given notice to the employer that benefits would stop on termination for anyone employed after 1996 (which included all the claimants). (*Adekoya and others v. Heathrow Express Operating Company Ltd*)

Employment tribunals – disclosure: In a claim for unfair dismissal, sex and age discrimination arising from a redundancy exercise, the Employment Appeal Tribunal (EAT) has upheld an employment tribunal (ET) case management decision to require specific disclosure of the employer's internal documentation containing financial information. The respondent had provided a redacted copy, having first deleted details about cost savings and employee costs, but the redacted information was deemed relevant to the issues for determination (specifically regarding the reason for dismissal and the choice and application of selection criteria) and disclosure of that information was both necessary and proportionate in the circumstances. (*Virgin Atlantic Airways v. Loverseed and others*)

Fixed-term contracts: The EAT has upheld an ET's decision that it was objectively justifiable to retain an employee – a locum doctor – on a fixed-term contract. The claimant had been engaged on a series of successive fixed-term contracts, which would ordinarily mean she would be deemed a permanent employee, but the objective justification for retaining her on a fixed-term basis was made out in the circumstances. Employers using successive fixed-term contracts should remember that permanency becomes the default after four years and they should consider very carefully their rationale for continuing with another fixed-term arrangement. (*Lobo v. University College London Hospitals NHS Foundation Trust*)

Minimum wage: Considering the tricky issue of when travel time is work time, the EAT has overturned an ET decision

and found that time spent travelling is not work time and so does not attract entitlement to a minimum wage. This case involved zero-hours workers who were collected from their home by their employer and transported by minibus to their place of work, but the fact that travel time was arranged by their employer did not mean it could be considered work. There will, of course, be occasions where time spent travelling is "work" for pay purposes, but it was not on the facts of this case. (*Taylors Services Ltd v. HMRC*)

Redundancy: A recent EAT decision acts as a reminder to employers that they should genuinely apply their mind to the issue of pooling, and consult on pooling (and other relevant issues) at a time when it can make a difference – namely, before any decisions are made. In this case, the claimant was one of four employees carrying out a similar role, each in four different geographical locations. The claimant was dismissed as redundant, having been placed in a pool of one. The ET concluded his role was unique, a decision that the EAT criticized. The ET should not have simply accepted the employer's position and should have questioned its approach and the reasonableness of its decision to exclude the other three employees from the pool. The case has been referred back to a new ET for the issues to be considered again. (*Valimula v. Al-Khair Foundation)*

Redundancy: A claimant who was dismissed as redundant while on maternity leave has had her claim remitted to the ET after a successful appeal that the relevant issues had not been considered properly. In this case, the claimant alleged that the redundancy was a sham and her dismissal was maternity discrimination but, also, if it was a redundancy situation, a newly created role was "suitable alternative employment," for which she had priority. The EAT concluded that the ET had failed to engage with the question of whether there was a genuine redundancy situation before considering only whether the new role was a suitable alternative. (*Ballerino v. The Racecourse Association*)

Settlement agreements: A disabled employee who entered into a settlement agreement in 2013, but who remained in employment under his employer's "disability plan," has been precluded from bringing a disability discrimination claim in relation to payments received under that plan. The settlement agreement included a waiver of (among other things) disability discrimination claims, whether or not the claims were or could be in the contemplation of the parties at the date of the agreement. Although there was an exception in respect of the ability to bring future claims, this did not apply in respect of matters related to the grievance that led to the settlement agreement and his transfer onto the disability plan. The EAT was satisfied that the claimant's new complaints fell within the scope of the waiver and that the waiver was valid, thereby preventing the claimant from further complaint. (*Clifford v. IBM UK Ltd*)

TUPE: The merger of NHS clinical commissioning groups (CCGs) did not give rise to a TUPE transfer after analysis that the purchasing and commissioning activities carried out by the CCG were not an "economic activity" and, as such, there was no transfer of economic entity carrying out economic activities under the business transfer provisions. (*Bicknell & the BMA v. NHS Nottingham and Nottinghamshire Integrated Commissioning Board*)

Unfair dismissal – redeployment: The EAT has been considering the extent to which the ET should, on its own volition, look at the potential for redeployment as an alternative to an ill health dismissal when considering the fairness of the dismissal, and as a potential failure to make reasonable adjustments. In circumstances where redeployment was never suggested as a reasonable adjustment for the claimant's disabilities, there was no need for the ET to have considered this for the reasonable adjustment claim. However, the EAT concluded that the ET should have taken the possibility of redeployment into account when assessing the unfair dismissal claim, despite this not having been raised as an issue. This is a helpful reminder for employers that they ought to be considering redeployment as an alternative to dismissal and that failing to do so may affect the fairness of the dismissal. (*Bugden v. Royal Mail*)

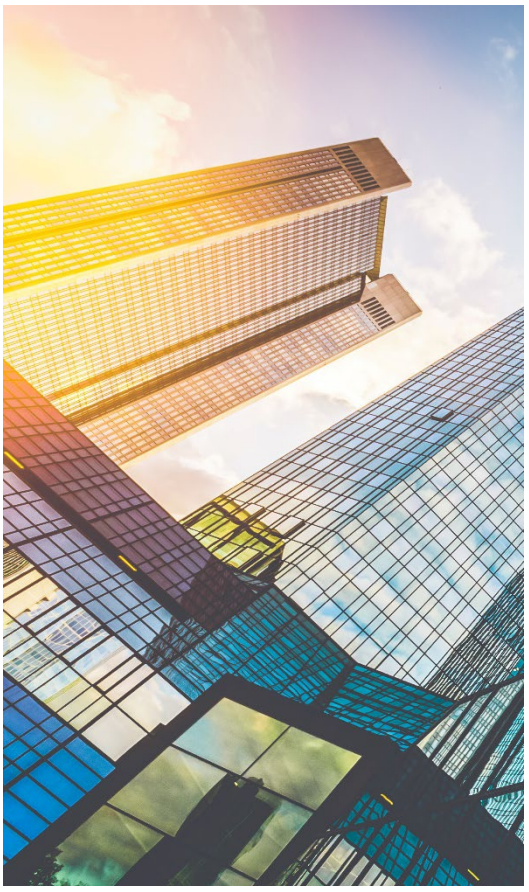
Legislative developments

New TUPE rules: From 1 July 2024 employers no longer have to consult with affected employees via representatives where the TUPE transfer involves fewer than 10 employees (regardless of the size of the employer).

Fire and rehire: The statutory code of practice on dismissal and re-engagement is due to come into force on **18 July 2024**. The regulations which extend the uplift for failing to comply with the code to protective awards remain in draft as they were not finalised before parliament was dissolved ahead of the election.

Paternity leave – bereavement: The Paternity Leave (Bereavement) Act 2024, dealing with paternity leave whether the mother, or person with whom a child is or is due to be placed for adoption, dies, has received Royal Assent, although requires regulations to bring it into force.

Tips: The statutory code of practice on fair and transparent allocation of tips has been approved. It, together with the remaining provisions of the Employment (Allocation of Tips) Act 2023, is expected to come into force on **1 October 2024** but require commencement regulations.



Other news

Menstruation: A recent study suggests that menstruation remains a taboo in the workplace and that workers who menstruate face challenges not only from the mental and physical implications but often also in terms of access to adequate facilities and choice of appropriate uniform. The study calls for increased education and backing by employers to improve facilities and increase support.

Neurodiversity: A survey by trade union Prospect suggests that many employers in the UK tech sector have insufficient support in place for neurodiverse workers, with many "masking" their conditions and failing to request reasonable adjustments. The union calls for more to be done to improve support.

New guidance

Right to work: The Home Office has updated its guidance for employers on right to work checks, providing clarity around (among other things) right to work checks for those with pre-settled status under the EU Settlement Scheme, and situations where workers have short-dated biometric residence permits.

Consultations

Fit notes: The Department for Work and Pensions is looking at reforming the fit note system and is inviting views on the current regime and what could be done to provide better support. Views should be submitted online by **8 July 2024**.

TUPE: The government has launched a consultation on proposals to clarify that TUPE only applies to employees, and to prevent contact splitting where a business or service is transferred to multiple transferees. The consultation runs until **11 July 2024**.

European Works Councils (EWC): The government has launched a consultation on abolishing the legal framework for EWCs, again running until **11 July 2024**.

Seafarers: The government is reviewing the Equality Act 2010 (work on ships and hovercraft) regulations 2011 and is seeking views, by **19 July 2024**, on their effectiveness and whether they meet required objectives, with a view to determining whether they should be kept, amended, repealed or replaced.

Directors: The Institute of Directors has launched a consultation on a Code of Conduct for Directors, intended as a voluntary commitment to a behavioural framework. Comments are invited from the business community and public by **16 August 2024.**

Sexual harassment: Ahead of the new mandatory duty on employers to prevent sexual harassment in the workplace, which will apply from **October 2024**, the EHRC is expected to launch a six-week consultation on the associated

technical guidance in early summer.

Key contacts

Robin Jeffcott
Partner, London
rjeffcott@reedsmith.com

David Ashmore
Partner, London
dashmore@reedsmith.com

Carl De Cicco
Partner, London
cdecicco@reedsmith.com

Joanna Powis
Counsel, London
jpowis@reedsmith.com

Alison Heaton
Knowledge Management Lawyer,
Global Solutions - Leeds
alison.heaton@reedsmith.com

Follow us on LinkedIn

Reed Smith is a dynamic international law firm, dedicated to helping clients move their businesses forward.

Our long-standing relationships, international outlook, and collaborative structure make us the go-to partner for speedy resolution of complex disputes, transactions, and regulatory matters.

ABU DHABI
ASTANA
ATHENS
AUSTIN
BEIJING
BRUSSELS
CENTURY CITY
CHICAGO
DALLAS
DUBAI
FRANKFURT
HONG KONG
HOUSTON
LONDON
LOS ANGELES
MIAMI
MUNICH
NEW YORK
ORANGE COUNTY
PARIS
PHILADELPHIA
PITTSBURGH
PRINCETON
RICHMOND
SAN FRANCISCO
SHANGHAI
SILICON VALLEY
SINGAPORE
TYSONS
WASHINGTON, D.C.
WILMINGTON

reedsmith.com