Advisory Bulletin

Employment Law Update December 2021: No. 697

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Welcome

In December's Bulletin we close out another difficult and challenging year in which Local Authorities have made enormous efforts to support their communities, and again look forward hesitantly but optimistically to a better new year ahead.

At the time of writing various Local Government unions are balloting or consulting members on whether they wish to take industrial action in support of a higher pay award than has been offered. We await the results of those consultations and ballots and next steps towards agreeing a pay award, ready to give further advice in the new year should it be necessary. However, in this bulletin we are also reminded in timely fashion by the EAT in the case of Ryanair Dac v Mr B Morais and Others of the protection against detriment for those taking industrial action, provided by the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 and associated regulations.

We also cover a disability discrimination case which demonstrates the extent to which an employer's decisions and actions will be scrutinised in employment tribunals and higher courts. In Gray v University of Portsmouth the University had taken time and worked through its established processes before ultimately deciding to dismiss Mr Gray, which the employment tribunal accepted had been fair and justified, but the Employment Appeal Tribunal was not satisfied with the level of the tribunal's analysis and assessment of the University's evidence and actions.

Moving on from case law we provide information relating to the unanticipated decision by the Government to extend the self-certification process which applies to the requirement to be vaccinated against Covid-19, or clinically exempt from vaccination, in order to enter a care home. That has been quickly followed by temporary changes to the rather different self-certification provisions in respect of Statutory Sick Pay designed to relieve some pressure from GPs. We also include new guidance on hybrid working produced by the Flexible Working Taskforce, a Government consultation on Disability Workforce Reporting, proposals to increase various statutory rates of pay, and the Employment Law Timetable.

Finally, we provide details of the next LGA Employment Law Update event to take place on 10 March 2022. Following positive feedback in 2021, this will again be a virtual event in 2022 and will include the usual combination of case law and statutory developments combined with topical issues and updates on national pay negotiations.

Whatever the impact this year has had, we again send our very best wishes to you and your loved ones and fervent hopes for a Happier New Year.

DETRIMENT: TRADE UNION ACTIVITIES

In **Ryanair Dac v Mr B Morais and Others** (EA/2021/000275) the Employment Appeal Tribunal held that employees are protected from detriment or blacklisting by reason of taking industrial action organised by their trade union.

The facts

Mr Morais and his colleagues are airline pilots employed by Ryanair and based in Great Britain. They are members of the trade union BALPA and all participated in a strike called by BALPA. Ryanair reacted to this by withdrawing their concessionary travel benefits for a period of one year. The pilots complained that they had been subjected to detrimental treatment contrary to (a) section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A); and (b) regulation 9 of the Employment Relations Act 1999 (Blacklists) Regulations 2010 (the Blacklist Regulations).

The law

Part 3 of TULR(C)A deals with rights in relation to union membership and activities. Section 146 is headed "Detriment on grounds related to union membership or activities" and its material parts read as follows:

"(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of –

(a) …
(b) Preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so…

(2) In subsection (1) 'an appropriate time' means –

(a) A time outside the worker's working hours, or
(b) A time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union…, and for this purpose, 'working hours', in relation to a worker, means any time when, in accordance with his contract of employment…he is required to be at work."

If an employer breaches the provisions of s.146 an employment tribunal can award compensation. There are additional measures which protect against unfair dismissal on grounds of taking part in trade union

activities. There are rights to reasonable time off to undertake trade union duties and activities excluding industrial action. Additionally, there are more complex rights to prevent unfair dismissal where individuals have taken part in lawful industrial action.

Regulation 3 of the Blacklist Regulations provides, in part:

“General prohibition

3.—(1) Subject to regulation 4, no person shall compile, use, sell or supply a prohibited list.

(2) A “prohibited list” is a list which—

(a) contains details of persons who are or have been members of trade unions or persons who are taking part or have taken part in the activities of trade unions, and
(b) is compiled with a view to being used by employers or employment agencies for the purposes of discrimination in relation to recruitment or in relation to the treatment of workers.

(3) “Discrimination” means treating a person less favourably than another on grounds of trade union membership or trade union activities.”

Regulation 9 provides:

9.—(1) A person (P) has a right of complaint to an employment tribunal against P’s employer (D) if D, by any act or any deliberate failure to act, subjects P to a detriment for a reason which relates to a prohibited list, and either—

(a) D contravenes regulation 3 in relation to that list, or

(b) D—
(i) relies on information supplied by a person who contravenes that regulation in relation to that list, and
(ii) knows or ought reasonably to know that information relied on is supplied in contravention of that regulation.

(2) If there are facts from which the tribunal could conclude, in the absence of any other explanation, that D contravened regulation 3 or relied on information supplied in contravention of that regulation, the tribunal must find that such a contravention or reliance on

information occurred unless D shows that it did not.

(3) This regulation does not apply where the detriment in question amounts to the dismissal of an employee within the meaning in Part 10 of the Employment Rights Act 1996."

The Employment Tribunal

Some previous case law touching on the issues had in part dealt with slightly different statutory provisions and took place before the implementation of the Human Rights Act 1998. For example, in Drew v St Edmundsbury Borough Council [1980] ICR 513 the EAT held that the statutory protection at that time, in respect of unfair dismissal for taking part in the activities of a trade union, did not extend to participation in industrial action.

In this case the employment tribunal noted that the legislation did not define the activities of trade unions and so the expression should have its plain and natural meaning. It commented that collective bargaining and industrial action are all "intrinsic to the activities of a trade union." Also, it is "difficult to comprehend why, when collective bargaining has broken down, taking strike action would not amount to the activities of a trade union."

Additionally, the employment tribunal in this case concluded that section 3 of the Human Rights Act 1998 (the HRA") was now relevant and must be taken into consideration. Section 3(1) provides: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention right."

Having regard to Article 11 of the European Convention on Human Rights which covers freedom of assembly and association, this approach required the detriment provisions to be interpreted in such a way that they protected employees taking part in a strike where it was protected by a ballot.

Ryanair appealed. In addition the pilots appealed against the protection being limited to industrial action protected by a ballot.

The EAT

The EAT dismissed Ryanair's appeal and allowed the pilot's appeal.

This was partly influenced by the decision in the

Mercer case (see Advisory Bulletin 692) which covered similar issues and had been heard by the EAT after the employment tribunal had given its decision in this case and before the EAT had heard this case.

In Mercer, similar to the employment tribunal in the Ryanair case, the EAT had held that, having regard to Article 11, and the HRA interpretative obligation, the protection of section 146 should be construed as extending to participation in industrial action.

In any event the EAT stated that as a matter of ordinary language, the phrase “activities of an independent trade union” would be apt to include industrial action sanctioned by the union, and that it would be artificial to suggest that a strike organised and called by a trade union is not one of its own activities.”

Therefore activities of a union would include industrial action sanctioned by the union and that the protections provided by the legislation would extend to include all official action organised by the union and not just that protected by a ballot under s.219 TULR(C)A. Where there has not been a ballot care may be needed to determine that it was indeed union action and not a campaign by an individual union representative.

Comments

In this case the EAT was almost certainly going to make a similar decision to that which it had made in the Mercer case. The decision in relation to industrial action which is not supported by a ballot provides additional protection although it is very unusual for a trade union to authorise industrial action without a protective ballot. It is worth noting that the issue is due to be heard by the Court of Appeal early next year when it considers the employer’s appeal against the EAT decision in the Mercer case. We will report that case when a judgment is published.

It is worth stating that this ruling does not affect the ability to deduct pay when an employee takes strike action or in some cases action short of a strike. Firstly, when employees withhold their labour they are in breach of contract and so not entitled to be paid. Secondly, pay deductions do not infringe Article 11 Freedom of Association principles if they relate to the period of strike action. However, any punitive deductions above that amount would infringe that right.

DISABILITY DISCRIMINATION: JUSTIFICATION

In **Gray v University of Portsmouth** (UK/EAT/0242/20), the EAT found that an employment tribunal had failed to demonstrate it had carried out the necessary critical evaluation when determining if the employer's actions under its ill health policy and the dismissal of an employee with a disability were justified as a proportionate means of achieving a legitimate aim.

The facts

Mr Gray was employed from 2009 by the University of Portsmouth (the University) as a Service Delivery Analyst in its Information Service Department. In 2014 he went on sick leave for three months due to a health issue unrelated to work. At some time in 2014 Mr Gray was also diagnosed with autism, which it was accepted in this case was a disability within the meaning of the Equality Act 2010 (the EqA).

After Mr Gray's return to work, in late October he was involved in an incident that appeared to have resulted in a breakdown in his relationship with his manager. The University then arranged a facilitated meeting to enable a reconciliation between Mr Gray and his manager, but this was unsuccessful as Mr Gray was unwilling or unable to engage in the process. In late November 2014 he was then referred to an occupational health physician, the first of six referrals taking place over the next two years.

The issues between Mr Gray and his manager then progressed to the initial stages of a disciplinary investigation, but that was put on hold when Mr Gray went off sick from 13 January 2015 with a stress-related condition. He did not return to work after that.

Mr Gray's sick leave was managed under the University's Managing Sickness Absence Policy (the Policy). That was a four-stage procedure, with a formal meeting at the end of each stage to consider whether to proceed to the next stage.

Mr Gray progressed through that process and throughout meetings were frequently delayed or rescheduled to accommodate Mr Gray's or his chosen representative's availability. As well as seeking advice from Occupational Health at various points to see what steps could be taken to help Mr Gray return to work, a specialist assessment was provided by a consultant psychiatrist. In line with the professional advice there were then discussions about providing Mr Gray with a

support worker experienced in dealing with adults diagnosed with autism. However, Mr Gray was reluctant to discuss that further and was not willing to agree to the occupational health physician answering the questions in the referral form.

Under the Policy Mr Gray was entitled to full pay for the first six months of sickness absence, and then to half pay for the next six months. Therefore, his sick pay ended in October 2015, at which time he progressed to stage 2 under the Policy. At the end of that stage matters were still unresolved, and so he progressed to stage 3 and ultimately to stage 4. Throughout the process the possibility of providing a support worker was discussed, although the University expressed some reservations about the practical difficulties of retaining a support worker and about the likely "substantial and disproportionate" costs. That being said, at the first stage 4 meeting the University offered to pay for a support worker for the two weeks prior to Mr Gray's return to work and for the six weeks thereafter. No progress was made on identifying a suitable support worker and ultimately at a meeting on 1 November 2016 the decision was taken to terminate Mr Gray's employment on ill-heath/capability grounds. On appeal that decision was upheld.

Mr Gray then brought a claim of disability discrimination under section 15 of the EqA.

The law

Section 15 of the EqA provides:

"15 (1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

The Employment Tribunal

The employment tribunal dismissed Mr Gray's claim.

In its judgment the employment tribunal noted the key issue it had to determine was whether the action taken

against Mr Gray, including his dismissal, could be justified as a proportionate means of achieving a legitimate aim. The particular instances of treatment in issue were:

1. inviting Mr Gray to a stage 1 meeting
2. withdrawing his sick pay in October 2015
3. the decision to dismiss; and
4. the rejection of his appeal.

The tribunal found that all such treatment was justified, accepting that the efficient running of the University's Information Service Department, as part of the provision of services to students, was a legitimate aim, weighing that need against the discriminatory effect of the provision on Mr Gray.

Mr Gray appealed.

The EAT

The EAT upheld Mr Gray's appeal.

In summary, the appeal was on the grounds that the tribunal had failed to make sufficient findings on the question of justification, or to "weigh in the scales" the adverse impact of Mr Gray's continuing absence.

In coming to its decision, the EAT noted that having identified the University's legitimate aim, the tribunal's task was then to carry out a critical evaluation of the evidence to determine whether the treatment in question was a proportionate way of achieving that aim. In that respect the tribunal must carry out its own assessment and demonstrate in its reasons that it had carried out that assessment.

In this case, the tribunal had engaged in some detail with Mr Gray's various objections to the timescales set out in its Policy, and in doing so had permissibly concluded and demonstrated that the move from stage 1 under the policy was justified. Similarly, the EAT commented that bearing in mind the case law which the tribunal cited, it was not open to Mr Gray to challenge the decision on the stopping of sick pay. In this appeal though the EAT noted that the real issue was Mr Gray's dismissal and the decision to uphold that decision on appeal. In that respect the tribunal had said it was "obvious" that continuing to hold open Mr Gray's job for him was significantly disruptive for the University. However, the tribunal's decision did not record why it made that finding. No finding was made

as to whether there was any additional cost as a result of Mr Gray's absence, sick pay having ceased in October 2015, or whether there was any difficulty covering his work. Further, in its evidence the University had referred to the concern it had about Mr Gray's absence in relation to timescales and the need to take decisions. However, that concern appears to have changed over time to one about the disruption that might arise on Mr Gray's return. That later concern was not addressed by the tribunal. While both concerns might provide valid justification, the EAT had no way of knowing which concern the tribunal was accepting as justification for the dismissal and the upholding of that decision on appeal.

Overall then the EAT concluded that the tribunal had failed to demonstrate that it had engaged with and made findings on the needs of the University and had weighed those against the discriminatory impact of the relevant decisions. Without that being demonstrated the EAT could not be sure that the tribunal's conclusion was safe, so it referred the case back to the same tribunal for it to reconsider its findings.

Comments

Although the appeal in this case focussed on the employment tribunal's approach to the question of justification, it does demonstrate the level of scrutiny that an employer's actions should be put under when determining if they are justified. Therefore, it reminds us of the importance of an employer being clear throughout the management of a long-term sickness case of the reasons why it is taking the steps it takes at the relevant time, and of recording the evidence in relation to those reasons.

VACCINES IN CARE HOMES: EXTENSION TO SELF-CERTIFICATION PROCESS

On 8 December, the Department of Health and Social Care issued a letter informing local authorities and care providers that the cut-off date for the validity of self-certificates of medical exemption from COVID-19 vaccination would be extended to 31 March 2022.

This new date applies to those who have provided a self-certificate stating that they meet the medical exemption criteria before 24 December 2021.

The extension has been brought in due to the fact that some people who had applied for formal exemption had experienced delays in receiving notification of the outcome of their application. The extension is designed to allow people who are unsuccessful in the application

for formal exemption to have sufficient time to become fully vaccinated and secure formal proof of their vaccination status. From 1 April 2022, they will either need to show proof of formal medical exemption or be fully vaccinated in order to continue working in a CQC-regulated care home.

The background information that follows the letter provides a link to the self-certification form, which also sets out the issues which the Government considers satisfactory in demonstrating that a person is exempt from vaccination for clinical reasons.

STATUTORY SICK PAY: TEMPORARY CHANGE TO SELF-CERTIFICATION

The Government has made some temporary changes to the self-certification procedure for Statutory Sick Pay (SSP). Normally an employee can self-certify for the first seven days of sickness absence but the Statutory Sick Pay (Medical Evidence) Regulations 2021, which were made on 16 December 2021and came into force on 17 December 2021, have temporarily changed this so that an employee can self-certify for the first 28 days of sickness. The provisions will apply to sickness commencing in the period from 10 December 2021 up to 26 January 2022.

The temporary change is no doubt intended to relieve some of the pressure on GPs at a time when there may be increasing amounts of sickness and isolation due to the rapid growth of the Omicron Coronavirus variant, while at the same time more of their time and resources will be required assisting with delivering Covid vaccine boosters.

Whilst contractual sick pay in most cases is considerably more than SSP and therefore has its own contractual requirements in respect of providing certified medical evidence, it is clear that many employees could find it very difficult to produce such medical evidence during this period. Employers should therefore act reasonably in seeking medical evidence during this time.

HYBRID WORKING GUIDANCE

Earlier in the year, the Government asked the Flexible Working Taskforce to help take forward the best of what has been learned through the pandemic and to develop advice to support the change to the new ways of working. As a result of this, the Taskforce has now published guidance for employers on hybrid working. The guidance is designed to supplement guidance that has been developed by Acas, which is

also part of the Taskforce. Further information and resources can be found on the LGA's website under New ways of working in local Government.

COVID-19 EMPLOYMENT LAW AND WORKFORCE FAQS: UPDATE

The LGA's COVID-19 employment law and workforce FAQs have been updated following the reintroduction of working from home, and other changes in England from 13 December 2021 in response to the Omicron variant.

STATUTORY PAY RATES: PROPOSED INCREASES

The Government has published its proposals for increases to a range of benefits and pension rates to take effect in 2022. Those of most interest to employers are the range of family rights payments and statutory sick pay. The proposals for these are as follows:

Statutory Adoption Pay (SAP), Statutory Maternity Pay (SMP), Statutory Paternity Pay (SPP), Statutory Shared Parental Pay (SShPP), Statutory Parental Bereavement Pay (SPBP)		
	2021/22	2022/23
Earnings Threshold	£120	£123
Standard Rate	£151.97	£156.66
Statutory Sick Pay (SSP)		
	2021/22	2022/23
Earnings Threshold	£120	£123
Standard Rate	£96.35	£99.35

DISABILITY WORKFORCE REPORTING: CONSULTATION

The Government has issued a Consultation on Disability Workforce Reporting. The consultation was launched on 16 December 2021 and closes at 11.45pm on 25 March 2022.

Consulting on the issue of voluntary and/or mandated workforce reporting on disability for large employers was a key commitment of the Government's National Disability Strategy, published in July 2021.

There is currently a voluntary reporting framework, which provides support to employers to voluntarily report information on disability, mental health and wellbeing in the workplace. The consultation will be seeking evidence of the practice and potential of reporting to inform the Government's approach going forward as it seeks to ensure inclusive workplaces, increase opportunities for disabled people and tackle the disability employment gap.

LGA EMPLOYMENT LAW UPDATE: 10 MARCH 2022	The next LGA annual Employment Law Update event will be taking place from 9.45am - 12.30pm on 10 March 2022 and will again be a virtual event taking place over the Zoom platform. The session will include a case law and legislation update from Darren Newman plus the latest information on topical local government issues, such as national pay awards presented by our experts from the LGA. The cost to attend for LGA members and Employer Link subscribers is £99 +VAT. The cost for others is £149 + VAT. Further details about the event will be in upcoming Advisory Bulletins and on the events page of the LGA website.
EMPLOYMENT LAW TIMETABLE	We set out some of the key recent employment law developments, as well as those to look out for over the coming months.
Delayed from March 2018	Trade Union Act: check off provisions (see Advisory Bulletin 646). Due to lack of Parliamentary time, the Trade Union (Deduction of Union Subscriptions from Wages in the Public Sector) Regulations 2017 have not yet been brought into force. We await information on when they will.
6 April 2020	Changes to employer national insurance treatment of termination payments over £30,000 (see Advisory Bulletin 653 and Advisory Bulletin 679). This was originally due to come into force in April 2019 but was delayed (see the Budget 2018 feature in Advisory Bulletin 664). Good Work Plan developments: • removal of Swedish derogation in the Agency Workers Regulations 2010 • changes to written statement entitlement • reduction in employee numbers required to request employer to negotiate an agreement in respect of information and consultation from 10% to 2% • statutory holiday pay reference period increased from 12 to 52 weeks. For further details see Advisory Bulletin 665, Advisory Bulletin 670 and Advisory Bulletin 676 and Advisory Bulletin 679.

	Changes to National Minimum Wage relating to salaried hours workers (see Advisory Bulletin 677 and Advisory Bulletin 679). Introduction of parental bereavement leave and pay (see Advisory Bulletins 662, 665 and 676 and Advisory Bulletin 679).
4 November 2020	Introduction of a £95,000 cap on public sector exit payments (see our webpage on local government exit pay reforms). **Note:** On 12 February 2021 the Government announced that the cap was disapplied with immediate effect. On 25 February the Restriction of Public Sector Exit Payments (Revocation) Regulations 2021 (the Revocation Regulations), were then placed before Parliament which came into force and formally revoked the Exit Cap Regulations on 19 March 2021. More detail on this is in Advisory Bulletin 688.
1 April 2021	Increase in National Minimum Wage rates (see Advisory Bulletin 686).
6 April 2021	Changes to IR35 rules and extension of obligations to large and medium private sector organisations (see Advisory Bulletin 676). This was postponed from April 2020.
6 December 2021	Increase in maximum salary for political assistants in local authorities in England (see Advisory Bulletin 695).
1 April 2022	Increase in National Minimum Wage rates (see Advisory Bulletin 696).
To be confirmed – further exit pay and pension reforms	Implementation of further proposals to reform exit payments in the public sector: • DLUHC (previously MHCLG) reforms to exit pay for local government workers (see Advisory Bulletin 688) • Recovery of exit payments made to high earners who leave the public sector on or after the implementation date if they return to the public sector within 12 months of leaving. This was referred to in the 2019 Conservative Party Manifesto. • Following revocation of the £95,000 cap on

	public sector exit payments, the reintroduction of different legislation to cap or place additional limits on certain public sector exit payments.
No set date	Extending redundancy protection for women and new parents (see Advisory Bulletin 672)
	Introduction of carers' leave (see Advisory Bulletins 679 and 694)
	Measures to prevent misuse of confidentiality clauses (see Advisory Bulletin 668 and Advisory Bulletin 672)
	Extension of period required to break continuous employment from one week to four weeks.
	Duty to prevent sexual harassment (see Advisory Bulletin 694).

Key data

SMP, SPP, ShPP, SAP and Statutory Parental Bereavement Pay basic rates	£151.97 or 90 per cent of normal weekly earnings if lower from 4 April 2021
SSP	£96.35 from 6 April 2021
Lower Earnings Limit	Remains at £120 per week for 2021-22
'A week's pay'	£544 – statutory limit for calculating a week's pay from 6 April 2021
	£566 in Northern Ireland from 6 April 2021

FURTHER INFORMATION

Receiving the bulletin	The Advisory Bulletin is available to local authorities by registering on our website at www.local.gov.uk and selecting the 'Employment Law Update' from the list of email updates available at http://www.local.gov.uk/about/news/e-bulletins. For other organisations the Advisory Bulletin is available through subscription. If you have any queries about the bulletin please e-mail eru@local.gov.uk.

The employment law advisers	Philip Bundy, Samantha Lawrence and Kelvin Scorer will be pleased to answer questions arising from this bulletin. Please contact us on 020 7664 3000 or by e-mail on eru@local.gov.uk
Address	The Workforce Team, Local Government Association, 18 Smith Square, London SW1P 3HZ
Website	https://www.local.gov.uk/our-support/workforce-and-hr-support/employment-relations
Obtaining legislation and other official publications	Copies of legislation can be found at www.legislation.gov.uk