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Employment Law Update

February 2024

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EMPLOYMENT LAW

Retained EU Law (Revocation and Reform) Act 2023

- Royal Assent: 29 June 2023
- No longer repeals any relevant legislation
- But does remove the ‘interpretative effects’ of EU law
- That meant that any law based on ECJ decisions would be in doubt
- But Act gives Government power to ‘restate’ EU principles by Regulations
- So Government has issued draft Regulations to clarify position

The Equality Act 2010 (Amendment) Regulations 2023 – from 1 Jan 2024

- Pregnancy and maternity – tidied up a bit
- Indirect discrimination – new S.19A
 - where PCP indirectly discriminates against one group, members of another group can claim if they suffer the same disadvantage
- New unlawful act (enforceable only by EHRC) – making public statements indicating intention to discriminate in recruitment
- Equal Pay allows comparison where two employers have pay determined by a single body or collective agreement
- Disability – covers not just 'normal day to day activities' but also 'ability to participate fully and effectively in working life on an equal basis with other workers

The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023

- Draft Regulations set to come into force 1 January
- Minor amendment to TUPE – transfers involving fewer than 10 employees or businesses with under 50 employees can inform / consult individuals if representatives not in place
- Main provisions make amendments to annual leave and holiday pay

The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023

Details

This Statutory Instrument will:

- reduce time-consuming reporting requirements under the Working Time Regulations
- simplify annual leave and holiday pay calculations
- streamline the regulations that apply when a business transfers to a new owner.

These proposals do not seek to remove rights, but instead remove unnecessary bureaucracy preventing those rights from working, allowing business to benefit from the additional freedoms we now have.

It really does not do this!

Regulation 13 and 13A

- 4 weeks' annual leave (Reg 13) and 1.6 weeks' additional leave were to be merged
- But new regulations preserve difference – and entrench it
- Inclusion of allowances, overtime and commission confined to Reg 13 leave
- Differences in 'carry over of leave' depending on which leave is being taken

Carrying over leave

- Reg 13 Leave untaken because of sickness absence carried forward into next year, to be taken within 18 months
- Reg 13 and 13A Leave untaken because of statutory leave (maternity, adoption, shared parental leave) carried forward into next year
- Reg 13 Leave also carried over from any year if employer fails to:
 - Recognise a worker's right to paid annual leave
 - Give the worker a reasonable opportunity to take the leave or encourage them to do so or
 - Inform the worker that any untaken leave which cannot be carried forward will be lost
- Reg 13 Leave will keep carrying over until those conditions no longer met
- Regs still allow agreed carry over of Reg 13A leave – but not Reg 13

Included within holiday pay (Reg 13 but not Reg 13A)

- payments, including commission payments, which are intrinsically linked to the performance of tasks which a worker is obliged to carry out under the terms of their contract;
- payments for professional or personal status relating to length of service, seniority or professional qualifications;
- other payments, such as overtime payments, which have been regularly paid to a worker in the 52 weeks preceding the calculation date.

included by calculating the average weekly amount of those payments payable in the relevant period and adding it to the amount of a week's pay arrived at under those sections.

Irregular hours and part-year workers

Meaning of irregular hours workers and part-year workers

15F.—(1) For the purposes of these Regulations—

- (a) a worker is an irregular hours worker, in relation to a leave year, if the number of paid hours that they will work in each pay period during the term of their contract in that year is, under the terms of their contract, wholly or mostly variable;
- (b) a worker is a part-year worker, in relation to a leave year, if, under the terms of their contract, they are required to work only part of that year and there are periods within that year (during the term of the contract) of at least a week which they are not required to work and for which they are not paid.

Irregular and part-year workers (excluding agriculture)

- Applies where holiday year starts on or after 1 April 2024
- Annual leave accrues over the holiday year
- Accrual at rate of 12.07% of number of hours worked in a pay period (rounded to nearest hour)
- During sick leave or statutory leave (eg maternity):
12.07% of average hours per week (including weeks with no work, but excluding weeks of absence) over 52-week period before absence, multiplied by weeks of absence
- Cannot accrue more than 28 days of annual leave (unless contract says otherwise)

Rolled up holiday pay for irregular and part-year workers

- Holiday pay may be paid by way of a 12.07% uplift to remuneration for work done
- Payment of 12.07% must be maintained during sick leave or statutory leave based on 52-week average prior to absence
- Itemised pay statement must indicate amount of holiday pay paid for the period covered by the statement

Record Keeping

- Employer must keep records ‘adequate to show’ that working time limits are being complied with
- May be ‘created, maintained and kept in such manner and format as the employer reasonably thinks fit’
- An employer ‘need not record each worker’s daily working hours... if the employer is able to demonstrate compliance without doing so’

PSNI v Agnew & ors

(Supreme Court, 4 October 2023)

- Police in Northern Ireland work regular overtime, but that is not included in holiday pay
- Clear that this is wrong following Bear Scotland v Fulton & ors case
- They claim backpay as far as 1998 – a series of unlawful deductions
- EAT in Bear Scotland said a gap of three months breaks a series
- No it doesn't rules Supreme Court
- Note two year back pay limit applies in GB but not NI

Cook v Gentoo Group Ltd

(EAT, January 2023)

- Employer rushes redundancy process to get dismissal in before employee reaches 55th Birthday
- Tribunal finds dismissal unfair – but redundancy was inevitable
- Had a fair process been followed he would have been 55 at dismissal
- Tribunal (wrongly) finds no discrimination but holds any discrimination would have been justified anyway
- EAT sends back – Tribunal had not shown proper basis for justification

R v Secretary of State for Business and Trade

High Court (Kings Bench) 13 July 2023

- Government had repealed Reg 7 Conduct of Employment Agencies Regs 2003, which outlawed using agency workers to replace strikers
- But Regulations under the Employment Agencies Act 1973 can only be made after consultation
- Government consulted on proposal in 2015 but decided not to go ahead in face of opposition
- But Government revived proposal in 2022 in context of rail strikes and repealed Reg 7 with effect from 21 July
- High Court rules this repeal was unlawful – could not rely on the earlier consultation
- Even if in theory he could, duty was on Kwasi Kwartang to consider those responses and evidence was he had not done so

Jackson v University Hospitals of North Midlands NHS Trust (EAT July 2023)

- Nurse on Band 6 slotted into a Band 5 role following a restructuring
- She says that she would prefer redundancy and raises grievance. She resigns when the grievance is rejected
- Employer then allows appeal against the grievance and agrees she should be made redundant with 8 weeks' notice. She withdraws her resignation
- Disagreement about her termination date led her to reinstate her original resignation, which the employer then accepted
- Tribunal finds unfair dismissal based on a concession – issue is contractual redundancy pay.
- Tribunal finds she left before notice expired and so was not entitled to enhanced redundancy
- EAT say the Tribunal should not have ruled out the possibility that imposition of the Band 5 role was a dismissal from the Band 6 role and so she was entitled to full contractual redundancy

Mid and South Essex NHS Foundation Trust v Stevenson & ors (EAT, August 2023)

- Three employees were “Head of HR”. After a restructure they were offered ‘Senior HR Lead’ with no loss of pay
- They declined the new roles and were dismissed for redundancy but employer refused to pay redundancy payment
- Tribunal says the new roles were suitable alternative work, but it was not unreasonable for employees to decline them
- EAT agree – their personal perception was a loss of autonomy and status
- Objectively they were wrong about that, but given their perception, their refusal was not unreasonable

Alcedo Orange Ltd v Ferridge-Gunn (EAT, April 2023)

- New employee dismissed soon after disclosing that she was pregnant
- Manager was unsympathetic when she was off sick with morning sickness
- That manager then reported her for poor performance to a more senior manager who dismissed her on that basis
- Tribunal found that the particular issue that led to the report was caused by her morning sickness absence – found pregnancy discrimination
- EAT overturn – CA decision in **Reynolds v CLFIS (2015)** – it is the motive of the decision-maker that matters
- Case goes back to ET – possibly to be amended to bring claim regarding the manager

Riley v Direct Line Insurance Group plc (EAT July 2023)

- Employee is a member of employer's private health insurance scheme which offered support to retirement age in case of incapacity
- Absent from 2014-2017 with anxiety and depression – paid 80% of salary under the scheme
- Returned to work on phased return with adjustments related to his Asperger's
- After a month he went off sick again. Medical reports concluded he was unable to perform his 'insured role'
- Employer suggested he be moved to a scheme where he was paid directly by the insurance company rather than him. After discussions he agreed
- Employer then terminated his employment - and he claimed unfair dismissal
- EAT holds it was a termination by mutual agreement and not a dismissal

Omar v Epping Forest District Citizen's Advice 9 (EAT, November 2023)

- Employee resigns in heat of the moment (for the third time)
- Employer asks him to confirm in writing – but he seeks to retract resignation. Employer refuses, he claims unfair dismissal
- Tribunal finds he resigned – but EAT allows appeal
- Tribunal needed to make clearer findings about surrounding circumstances
- EAT then sets out guidance for future cases

Heat of the moment resignations

- Starting point: once given, notice of dismissal or resignation cannot usually be withdrawn without agreement
- Whether notice has been given does not depend on the subjective intention of the person giving it
- What matters is whether a reasonable bystander would understand that
 - clear words of resignation or dismissal were used
 - they were 'seriously meant' or 'really intended' at the time they were said
- Evidence of what happened later might cast light on whether the words were 'really intended'
- Evidence of what the other party understood the intention behind the words to be is also relevant – but not determinative

Greasley Adams v Royal Mail Group Ltd (EAT June 2023)

- Employee has Autistic Spectrum Disorder – employed as a driver
- He was accused of bullying by two colleagues he had been in conflict with – internal complaint upheld
- He challenged that unsuccessfully then brought his own harassment claim
- Part of his claim is that the two colleagues made comments about him behind his back – which came to light in the internal investigation
- Can conduct you are not aware of amount to harassment?
- EAT says no – perception is an important ‘element’ in harassment. Without perception there can be no harassment
- Tribunal entitled to find that it was not reasonable to regard matters coming to light in an investigation as amounting to harassment

Higgs v Farmor's School

(EAT, June 2023)

- Employee dismissed because of Facebook posts on trans rights and same sex relationships
- Tribunal finds beliefs were protected under Equality Act, but she was not dismissed for those beliefs, but the concern that parents would think she was transphobic / homophobic
- EAT say you can't draw that distinction
- Tribunal failed to consider whether the posts were a manifestation of her belief
- If they were, then a balancing exercise had to be struck. Was it necessary to limit her expression in order to protect others?
- Case now going to Court of Appeal

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