



Employment law update

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Brexit and Employment Law

- Withdrawal Act 2018 provides a 'standstill transition'
- All employment law carries on just the same until amended by Parliament
- Some ambiguity about authority of ECJ cases post transition
- Big issue is extent of 'non-regression' clause in new trade deal

Employment Bill 2020?

- Creating a new, single enforcement body,
- Requiring employers to distribute tips to employees
- Introducing a new right for all workers to request a more predictable contract.
- ‘Extending redundancy protections to prevent pregnancy and maternity discrimination’
- Allowing parents to take extended leave for neonatal care
- Introducing an entitlement to one week’s leave for unpaid carers.
- ‘Subject to consultation, the Bill will make flexible working the default unless employers have good reason not to’

Taylor review measures

- Written statement of terms for all workers from day one of assignment (April 2020)
- Abolition of Swedish Derogation (April 2020)
- Holiday reference period moves to 52 weeks (April 2020)
- Reduced threshold (from 10% to 2%) for employee request for Information and Consultation arrangements (April 2020)
- Continuity of employment preserved by breaks of up to one month (TBC)

Parental Bereavement Leave

- From April 2020
- Two weeks' leave on death of child (under 18)
- Paid at lower rate of SMP

Exit Pay Cap

- New consultation on 95K cap – closed in July 2019
- Being dealt with this afternoon!

WM Morrisons Supermarkets plc v Various claimants

- Waiting for decision from Supreme Court
- Was Morrisons vicariously liable for criminal breach of Data Protection Act by one of its IT managers
- Employee had downloaded employee data onto personal memory stick and then published it to the press and online
- Employee was personally motivated by hostility to employer and was sentenced to 8 years imprisonment
- What link is needed between unlawful act and employee's duties?
- Should employers just insure against loss caused by such acts?
- Does Data Protection Act exclude vicarious liability for breaches of the Act?

Sleeping and the Minimum Wage

- Are sleepover workers working while asleep or are they just 'available for work'?
- **Royal Mencap Society v Tomlinson-Blake**: Care workers (time work) working overnight shifts where they are given sleeping facilities but may be woken if needed
- **Shannon v Rampersad and another**: Worker given rent free studio above a care home plus £90pw. Must spend every night (10pm-7am) at home. Only rarely called upon to help overnight worker in care home. Claims each night as salaried hours work
- To be heard by Supreme Court 12/13 February

Uber v Aslam

- Are Uber drivers workers?
- Do they provide work for Uber or do they work for each customer and use Uber to facilitate the transaction? (Quashie v Stringfellow, Cheng Yuen v Royal Hong Kong Golf Club)
- To what extent can Tribunal put aside the contractual documentation and look to the 'reality' of the agreement (Autoclenz v Belcher)
- If they are workers, when are they working? ('They also serve who only stand and wait' – Milton)
- Supreme Court hearing in July 2020

Dewhurst v Revisecatch Ltd

- TUPE Says: “*employee*” means any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services
- So what does ‘or otherwise’ mean?
- Tribunal holds that it encompasses EU concept of ‘employment relationship’ – wide enough to cover ‘workers’
- Exclusion of ‘contract for services’ refers to those genuinely in business on their own account
- No appeal being brought – implications?

Holiday Pay

- **Flowers v East of England Ambulance Trust** – If overtime is regular and predictable rather than exceptional and unforeseeable then it should be included (Court of Appeal)
- **Chief Constable of the Police Service of Northern Ireland v Agnew** - Claims for a series of unlawful deductions do not depend on gaps between deductions of less than three months

Brazel v The Harpur Trust

- Term time only casual music teacher
- Had his holiday pay capped at 12.07% of his annual hours
- But normal WTR calculation leads to higher proportion than that
- EAT say no justification for capping his holiday – part-time workers can be treated more favourably
- Court of Appeal agrees – even though Regulations go beyond what directive requires

Kostal UK Ltd v Dunkley

- EAT had held that it was an unlawful inducement to make pay offer direct to staff when union negotiations broke down
- Court of Appeal overturns – law aimed at derecognition, not temporary break
- Leave to appeal to Supreme Court being applied for

London Borough of Lambeth v Agoreyo

- Primary school teacher suspended for alleged 'inappropriate force' with two disruptive children
- Resigns same day – claims breach of contract
- High Court upholds claim – employer's reason for suspension was unclear, and no exploration of alternatives
- Court of Appeal overrules – High Court should not have interfered with county court findings
- County court entitled to find there was 'reasonable and proper cause' for suspension
- High Court wrong to apply a test of whether suspension was 'necessary'

Upton-Hanson Architects v Gyftaki

- Employee suspended when she takes unauthorised absence for personal reasons
- Resigns and claims constructive dismissal
- Tribunal upholds: no good reason for suspension and no grounds for fair dismissal
- EAT – employer should have pleaded fair reason for dismissal but didn't – appeal dismissed

Q v Secretary of State for Justice

- Probation officer dismissed after her daughter was put on 'at risk' register
- Tribunal holds her failure to disclose full details to her employer was gross misconduct
- EAT upholds. Article 8 ECHR was 'engaged' but employer's action was proportionate in the circumstances

Royal Mail v Jhuti

- Employee makes whistleblowing complaint to manager
- Manager then undermines her and gives misleading impression of her performance
- That leads to another manager ruling that she has failed her probation and dismisses her
- Supreme Court says the dismissal was for whistleblowing
- The motives of the first manager could be imputed to the employer, despite innocence of the second manager

Okwu v Rise Community Action

- Whistleblowing allegation must ‘in the reasonable belief’ of the employee be made in the public interest
- Employee’s three month probation extended by three months over concerns about her performance
- She responds with a number of complaints including potential Data Protection breaches resulting from her having to use her own phone
- Employer then dismisses
- Tribunal says not whistleblowing – private disputes, not in the public interest
- EAT send back – she only has to believe it is in the public interest and ET should have been more clear about the reason for the dismissal

East London NHS Foundation Trust v O'Connor

- Employee's role deleted as part of restructure exercise
- Offered alternative – accepts on a trial basis
- Trial extended, then he is off sick, but eventually he refuses to sign new contract
- Employer says no entitlement to redundancy as he is beyond 4 week trial
- EAT says trial period didn't apply – he was not under notice of dismissal when alternative work was offered

Raj v Capita Business Services Ltd

- Employee claims unwanted shoulder massage was sexual harassment
- ET says no: purpose was 'misguided encouragement' and contact was with 'gender-neutral area of the body'
- EAT say no error of law – burden of proof did not shift to employer to show behaviour was not related to sex
- Can that be right?

Forbes v LHR Airport Ltd

- Employee shares offensive image on Facebook
- That is seen by a colleague, who shows it to claimant while at work
- Claim for harassment dismissed – image was not shared by colleague in the course of employment
- Colleague was not subject of harassment claim – though perhaps should have been

Bessong v Pennine Care NHS

- Mental health nurse assaulted and racially abused by patient
- Argues that employer is liable for racial harassment that it failed to take steps to prevent
- EAT says no – employer’s conduct must be ‘related to’ protected characteristic
- But employee won indirect discrimination claim based on employer’s failure to apply its own reporting regime

Religion and Belief

- Ethical Veganism: *Casamitjana v League Against Cruel Sports*
- Gender critical feminism: *Forstater v CGD Europe*
- Religious objection to transgender identity: *Mackereth v Department for Work and Pensions*

Oxford Bus Company v Harvey

- Bus driver is a Seventh Day Adventist – needs to avoid Friday evening / Saturday working
- Required to work 5 day out of 7 rota – including Fridays and Saturdays – claims indirect discrimination
- Tribunal finds no justification – employer could have accommodated his need
- EAT allow appeal – issue was not the treatment of the individual, but the justification for the rule
- Employer was concerned that any exceptions would lead to further requests and undermine rota
- Sent back to Tribunal to consider justification afresh.

Heskett v Secretary of State for Justice

- Age discrimination challenge to probation service pay scales
- Rate of progression had slowed, exacerbating gap between those over 50 and those who were younger
- EAT upholds finding that this was 'proportionate means of achieving a legitimate aim'
- Not a desire to cut costs, but a legitimate aim of operating within financial constraints set by Government – employer entitled to break even
- Desire to reform was also relevant

South West Yorkshire Partnership NHS Foundation Trust v Jackson

- Number of claims arising from redundancy and restructuring
- One employee had important letter about redeployment sent to work address while she was on maternity leave
- ET finds maternity discrimination
- EAT sends back – failure to look at the ‘reason why’ the unfavourable treatment occurred

Ali v Capita Customer Management Hextall v Leicestershire Police

- Paying enhanced maternity pay, but only statutory Shared Parental Leave Pay is not discriminatory
- Those taking shared parental leave not comparable to those taking maternity leave
- If based on contractual term it should be an equal pay claim
- Exclusion for enhanced terms based on pregnancy and childbirth applies – no claim for indirect discrimination possible
- In any event, men not put at a particular disadvantage, and policy was justified

Parnaby v Leicester City Council

- Caretaker dismissed for long-term absence due to work-related stress
- Two separate periods of illness, six months each, with a six month gap
- Tribunal finds no disability – condition has not lasted for a year and condition improved when he was dismissed
- EAT send back – had to consider position assuming he would not have been dismissed
- ET also needed to consider whether condition was ‘likely’ to recur – test was whether it ‘could well happen’

Tesco Stores Ltd v Tennant

- Employee goes off sick with depression September 2016
- Brings claim in September 2017
- ET finds she became disabled on 6 September 2017 when condition had lasted a year
- EAT says she can't claim for disability discrimination for acts before the date she became disabled
- Technicality – employee failed to appeal on point that at some stage it must have been expected that the condition would last for 12 months

Chief Constable of Norfolk v Coffey

- PC refused transfer because of hearing loss
- Not disabled as no real effect on her life or work
- Court of Appeal finds direct discrimination – employer perceived her as having (or being likely to develop) the elements of disability
- No need to have actual belief that she was disabled within meaning of the Equality Act

Scott v Kenton Schools Academy Trust

- Spanish teacher is complicit in his Head of Department's cheating of controlled assessments
- Found to have anxiety disorder affecting his judgment
- Employer dismisses anyway
- ET finds fair dismissal and no discrimination. No proof that anxiety led to his misconduct
- EAT says 'causation' is a wider test than that. Has the misconduct 'arisen in consequence' ?
- Finding of fair dismissal upheld, but discrimination case sent back to fresh Tribunal

iForce v Wood

- Worker given final written warning for refusing to work near the warehouse door
- Claims disability discrimination – believed that working near the door was colder and damper and would worsen her arthritis
- Employer shows that temperature at warehouse door is not any lower
- EAT holds this means that her unfavourable treatment was not ‘because of something arising in consequence of her disability’

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