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Employment Law Update

18 May 2022

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The Government Agenda

- No employment bill in Queen's Speech
- So what are the Government's intentions for:
  - Flexible working
  - Carer's leave
  - Neo-natal leave
  - Redundancy on return from maternity leave
  - Sexual harassment
  - Tips for waiters
- Better at announcing policies than implementing them
- And any Brexit deregulation opportunities?

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News story

New statutory code to prevent unscrupulous employers using fire and rehire tactics

A statutory code on the practice of 'fire and rehire' will clamp down on controversial tactics used by employers who fail to engage in meaningful consultations with employees.

From: Department for Business, Energy & Industrial Strategy
Published 29 March 2022

Today in Parliament (Tuesday 29 March) Labour Markets minister Paul Scully announced a new statutory code on the practice of 'fire and rehire'. The code will also clamp down on controversial tactics used by unscrupulous employers who fail to engage in meaningful consultations with employees.

The practice of 'fire and rehire' refers to when an employer dismisses a worker and rehires them on new, less-favourable terms. The government has always been clear that using fire and rehire as a negotiating tactic is completely unacceptable, and we expect companies to treat their employees fairly.

Will the Code say anything new?

Will the 25% uplift be extended to the protective award?

Will it only apply to fire and rehire?

What if the employer does not rehire?

Smith v Pimlico Plumbers Ltd
(Court of Appeal, 1 February 2022)

- Smith established he was a ‘worker’ in the Supreme Court back in 2018 - this is his claim for unpaid holiday pay
- EAT held his claim was out of time because it was brought more than three months after the last failure to pay him
- He argued that King v Sash Windows meant that he could claim for a continuing failure to pay him for the leave he took
- EAT said no – but Court of Appeal overturned that.
- If employer denies that worker qualifies for holiday pay then the worker can bring a cumulative claim for any unpaid leave over the duration of employment
- Note: two year back pay limit will not apply – this is a claim under the Working Time Regulations, not unlawful deductions from wages

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Holiday Pay in the Supreme Court

- **Harpur Trust v Brazel** –heard on 9 November 2021
  - Whether a casual & term time only music teacher should have her holiday entitlement pro-rated to reflect the fact that she didn't work through the whole year
- **East of England Ambulance Service v Flowers & others**
  - Calculation of holiday pay and the inclusion of voluntary overtime
  - Currently taken out of the list 'following communications from parties'
- **PSNI v Agnew** – backdating of holiday pay claims – also taken off the list but not actually settled

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Kocur v Anguard Staffing Solutions
(Court of Appeal, 17 February 2022)

- Agency Workers have a right under the 2010 Regulations to be informed of any vacancies with the end user
- Does that mean they have a right to apply for those vacancies and be considered on an equal basis?
- No says the Court of Appeal – if the Directive / Regs had intended that they would have said so explicitly
- So Royal Mail had to tell agency workers about the vacancies, but could also tell them they were not eligible to apply

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Kostal UK v Dunkley (Supreme Court, 27 October 2021)

- Employer makes pay offer direct to employees when negotiations with union hit stalemate
- Supreme Court holds that to be an unlawful inducement
- Employer cannot bypass collective bargaining process where there is a 'real possibility' of reaching an agreement
- Here the collective agreement set out a disputes process, which had not been exhausted
- As a result, the employer must pay £3,800 to each employee for each offer made (there were two) – total bill in excess of £400K

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Mercer v Alternative Future Group (Court of Appeal, March 2022)

- Employee suspended for taking part in industrial action
- Is that a detriment for taking part in union activities?
- EAT held it was – normal exclusion because activity did not take place outside working hours did not apply as in breach of Art 11 ECHR
- Court of Appeal overturn – our law is in breach of Article 11 but not possible for the law to be interpreted in a way that complies
- Issue likely to end up in Supreme Court (see also Ryanair DAC v Morais)

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Rodgers v Leeds Laser Cutting (EAT, May 2022)

- First case at EAT level on alleged health and safety dismissal arising from Covid
- Employee stayed away from work (March – April 2020) over concerns about virus and risk to his family
- Those concerns were general – not specific to the workplace
- Held that he did not stay away from work because of the danger as his concerns were too general
- He could also have taken other steps to reduce danger but had not done so.

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Vaccine hesitancy

- Dismissals based on a legal requirement to ensure vaccination should be fair – subject to reasonable procedure
- With that requirement now repealed (from 15 March 2022), issue is whether vaccine requirement is reasonable
- ET held it was in Allette v Scarsdale Nursing Home – but based on position of a care home in January 2021
- Blanket requirement unlikely to be justified – perhaps different for particular settings
- Key question will be advice from UKHSA (formerly PHE)

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Gwynedd Council v Barratt and others
(Court of Appeal 2 September 2021)

- Local authority closes one school and opens another
- Staff who were unsuccessful in applying for posts at new school were made redundant
- They were not given the right to appeal to the Governing body – did that make the dismissals unfair?
- Court of Appeal say absence of an appeal does not automatically make dismissals unfair
- But in this case, Tribunal was entitled to find the dismissal was unfair where employees were made to effectively apply for their own jobs with no ability to challenge if they were unsuccessful

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London Borough of Hammersmith and Fulham v Keable (EAT, 26 October 2021)

- Employee dismissed for making offensive comments at an anti-semitism protest
- Tribunal finds dismissal unfair:
- The interpretation placed on the comments by the employer was not put to him in the disciplinary
- Also outside band of reasonable responses:
  - comments made outside the workplace in his private capacity
  - He did not himself publish the comments;
  - Comments were not found by the Respondent to be anti-Semitic, or racist;
  - not alleged to be unlawful or criminal or libellous;
  - not alleged to have been expressed in an abusive threatening, personally insulting, or obscene manner;
  - Employee had the right to attend demonstrations in his own time and express his own opinions;
- EAT upholds finding of unfair dismissal

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L v K
(Court of Session, July 2021)

- Teacher dismissed when indecent images of children found on a laptop in his house
- Charged but not prosecuted (yet)
- Tribunal finds dismissal fair
- EAT says unfair – no reasonable belief in guilt
- Court of Session says Tribunal was right. Risk of his guilt was sufficient to amount to 'some other substantial reason' for dismissal

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Royal Mail Group Ltd v Efobi
(Supreme Court, 23 July 2021)

- Internal applicant for more than 30 jobs claims race discrimination over his lack of success
- At hearing employer does not call managers who made the decision in each case – and neither does he
- Claims that he was not obliged to prove anything – it was for the employer to prove there was no discrimination
- Supreme Court rejects that. Claimant must prove matters from which discrimination could be inferred
- Tribunal entitled not to draw adverse inference from absence of decision makers

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Walsh v Network Rail Infrastructure (EAT, 21 September 2021)

- When flexible working request is made, decision (including appeal) must be made within 3 months unless agreed otherwise
- Here the request was made in February and rejected in March. But there were problems arranging an appeal meeting.
- Agreed that appeal would take place on 1 July, but employee made ET application in June
- ET rejected it as premature
- EAT overturns – agreement to attend late appeal was not an agreement to extend decision period.
- Goes back to ET to determine the claim

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Woman wins £180,000 after boss wouldn't let her leave early to pick up daughter

Comment

Sam Courtney-Guy
Monday 6 Sep 2021 5:21 pm

51.1k SHARES

Alice Thompson tried to negotiate flexible working hours but was rebuffed due to cost and inconvenience

A female estate agent has won a sex discrimination claim against her employers after they refused to let her clock off early to collect her new baby from nursery.

Alice Thompson, from Weybridge, Surrey, was earning £120,000 a year as a full-time sales manager at Manors, a small firm in **London**, when she fell pregnant in 2018.

As the job required her to work until 6pm, when nurseries usually close, she asked to go part-time so she could work four days a week and finish at 5pm instead.

Case No: 2205199/2019

EMPLOYMENT TRIBUNALS

Claimant: Mrs A. Thompson
Respondent: Scancrown Ltd, trading as Manors

London Central Remote Hearing (CVP)
On: 22,23, 26,27 April 2021. Panel in discussion 28-30 April 2021.

Before: Employment Judge Goodman
Mr D. Shaw
Mrs J. Griffiths

Representation
Claimant: Ms. R. Barrett, counsel
Respondent: Ms. P. Hall, Peninsula Business Systems Ltd

JUDGMENT

1. The claim of discrimination because of pregnancy or maternity leave fails.
2. The claim of harassment related to pregnancy and maternity fails.
3. The unauthorised deductions claim (referral fees) fails.
4. The unfair dismissal claim fails.
5. The claim of indirect sex discrimination succeeds.

CASE MANAGEMENT DIRECTIONS

1. Remedy for indirect discrimination will be decided at an online hearing on **12 August 2021.**
2. The claimant is ordered to file an updated schedule of loss, and send the [illegible] in support thereof by **16 July.**

Dobson v North Cumbria NHS (EAT, 22 June 2021)

- Community nurse has caring responsibilities for her two disabled children – works two days a week
- Dismissed when she refuses to agree to work more flexibly – including occasional work at weekends
- ET dismisses indirect discrimination claim. In her team she was the only one (out of 9 women and one man) who could not comply
- EAT says wrong pool – should look at everyone PCP was applied to – all community nurses
- ET should also have taken judicial notice of 'childcare disparity' – women more likely than men to have caring responsibilities limiting availability for work
- Case sent back to be reconsidered

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Allen v Primark (EAT April 2022)

- Issue is whether requirement to be available for late shift rota was indirect discrimination
- Tribunal had to identify a ‘pool for comparison’ – looked at managers who might be asked to work late
- Small number – and more men were disadvantaged so Tribunal dismisses claim
- EAT says wrong pool – other managers were not ‘required’ to be available so not comparable
- But which pool is the right one?

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Sullivan v Bury Street Capital Ltd (Court of Appeal, 16 November 2021)

- Employee has a persistent delusion that he is being followed by a Russian gang
- He is dismissed for poor performance, which he attributes to the effects of that delusion
- Tribunal finds that although the delusion is persistent it has not usually had a 'substantial adverse effect'
- Where it has had that effect it has not lasted for a year or more – so not disabled
- Court of Appeal upholds finding. The fact that it had happened twice did not make it 'likely to recur'

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Gray v University of Portsmouth (EAT 24 November 2021)

- Employee off sick with combination of autism / stress
- Extensive efforts aimed at supporting a return to work – employee not always cooperative
- Employer eventually decides – after two years' of absence - to dismiss
- Tribunal finds no breach of S.15 – it was clear that dismissal was a proportionate means of achieving a legitimate aim
- EAT sends back – Tribunal needed to show it had made a proper assessment. What was the impact? Why did the employer decide it had reached the end of the line?

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Gender reassignment v Religion and Belief

- **Forstater v CGD Europe** now heard by Tribunal – was she excluded because of her gender critical beliefs?
- **Bailey v Stonewall** – currently being heard – as a barrister's career ruined by her beliefs on gender / sex issues?
- **Mackereth v Department for Work and Pensions** in the EAT in March – Doctor's refusal to use benefit claimants' preferred pronouns
- **Higgs v Formor's School** also in EAT – teacher dismissed for sharing offensive Facebook content
- Key issue is the difference between the belief (which is protected) and the expression of that belief (which might not be)

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