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Employment Law Update

April 2023

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Strikes (Minimum Service Levels) Bill

- Minister will have power to specify minimum service levels for ‘essential services’ when there is a strike
- That will allow the employer to give the union a ‘work notice’ identifying those employees who are needed to meet the minimum service level
- Short timeframe (one week) for serving the notice
- Union must then take reasonable steps to ensure that the identified union members turn up for work
- How much use will this really be?

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Retained EU Law (Revocation and Reform) Bill

- Chaos looms!
- All EU based law in secondary legislation is repealed at end of 2023 unless specifically retained by a Minister
- Scope not entirely clear – but will cover TUPE, working time and holidays, agency workers, parental leave, fixed-term employees, part-time workers
- Will not cover collective redundancy consultation and Equality Act
- Sunset date of December 2023 looks wholly unrealistic
- But even if that date is put back – major changes made to interpretation of ECJ case law. Puts holiday pay back into doubt

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Employment Relations (Flexible Working) Bill

- Private Members Bill with Gov backing – now in HoL
  - Application need no longer state the effect it will have on the employer
  - Two applications per year instead of one
  - Obligation to consult employee before refusing application
  - Two months to determine application rather than three
- (Separately), requesting flexible working will be a day one right

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The Worker Protection (Amendment of Equality Act 2010) Bill

- Private members' bill with Government backing
- But press speculation that this may be dropped
- Makes employer liable for harassment from third parties unless it has taken all reasonable steps to prevent it
- No need for previous record of harassment from third party
- Also creates a duty to take reasonable steps to prevent sexual harassment (enforced by Equality Commission)
- Potential 25% uplift in compensation for sexual harassment if that duty has been breached

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Overheard conversations

- New provision inserted into Bill aimed at reassuring employers that they don't need to curtail conversations at work or among customers
- No need to take steps to prevent conversation if:
  - conduct constituting the harassment involves a conversation in which employee is not a participant, or a speech which is not aimed specifically at them
  - the conversation or speech involves the expression of an opinion on a political, moral, religious or social matter,
  - the opinion expressed is not indecent or grossly offensive, and
  - the expression of the opinion does not have the purpose of violating the employee's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for them (although it may have that effect)

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Three More Private Members Bills

- The Neonatal Care (Leave and Pay) Bill 2022
  - Up to 12 weeks' leave for parent of baby in neonatal care unit
  - Paid at lower rate of SMP
- Employment (Allocation of Tips) Bill 2022
  - Applies to hospitality
  - Service charges to be distributed 'fairly'
- Redundancy (Pregnancy and Family Leave) Bill 2022
  - Right to alternative work extended to those who are pregnant or returning from leave

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Draft Code of Practice dismissal and reengagement

- Consultation closed 18 April (in force by autumn?)
- Gives quite a detailed step by step guide to running a fair consultation on changing terms and conditions
- Emphasis on dismissal as ‘last resort’ but accepts the need to do so in order to achieve objectives
- Probably makes it harder to justify dismissal for not agreeing new terms
- Failure to comply with code can lead to 25% uplift in UD compensation (no effect on protective award)

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Lloyd v Elmhurst School Ltd (EAT, March 2023)

- Private school term time only classroom assistant, paid in 12 monthly instalments.
- For purposes of NMW – what are her ‘normal hours’
- Tribunal finds they are the hours of her actual work plus statutory holiday entitlement
- But EAT says normal hours are defined in the contract and don’t depend on whether work is actually done
- Contract badly drafted and suggests whole of school holidays are paid leave – if so she is paid below NMW

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Kong v Gulf International Bank (UK) Ltd (Court of Appeal 8 July 2022)

- Employee raises issue about use of financial compliance template
- Dismissed when that causes a breakdown in relationship with Head of Legal
- Reason was not the disclosure but the separate issue of how it was made – aspersions cast on Head of Legal's 'legal awareness', interpreted as an attack on integrity. Lack of emotional intelligence
- Court of Appeal find this was not a whistleblowing dismissal. The Tribunal had to be allowed to draw a distinction between the fact of the disclosure and the manner in which it was made.
- Otherwise "whistle-blowers would have immunity for behaviour or conduct related to the making of a protected disclosure no matter how bad".

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Rodgers v Leeds Laser Cutting Ltd (Court of Appeal, December 2022)

- Employee was a laser operator in large warehouse-like space
- In March 2020 – during first lockdown – he stopped attending work to protect vulnerable family members
- Dismissed a month later with a P45 – less than two years' service
- He claimed automatic UD – health and safety reasons
- Court of Appeal agrees with ET in rejecting claim:
  - reasonable belief in danger is enough – the danger need not be real
  - the danger must be in the workplace but need not be exclusive to it
  - In this case there was no reasonable belief of danger in the workplace

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Mogane v Bradford Teaching Hospitals NHS Foundation Trust (EAT June 2022)

- Trust identifies need to make one of two nurses redundant
- Decides that nurse with FTC due to expire nearest to redundancy date should be selected – pool of one
- Consultation focusses on alternative work.
- Not good enough says EAT – need to consult over the fact of the redundancy and the selection criteria to be used.
- Substitutes finding of unfair dismissal

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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

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Citibank NA v Kirk (EAT, August 2022)

- Employer restructuring means three MDs are reduced to one
- Mr Kirk is told that ‘your many years at the bank and hands on style counted against you. You are old and set in your ways’ – he was 55
- He claimed age discrimination but employer argued that the employee who was retained was 51
- EAT said Tribunal had not considered the employer’s case that both employees were in the same age bracket so that discrimination was implausible

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Cowie v Scottish Fire and Rescue Service (EAT, August 2022)

- Employer introduced special paid leave for absences related to coronavirus pandemic and shielding
- However it required employees to use TOIL allowances and annual leave before being given special paid leave
- FBU claims that was disability discrimination (S.15) and indirect sex discrimination
- EAT says no. The special leave was favourable treatment. The fact that it could have been even more favourable did not make in *un*favourable
- For the same reason there was no group disadvantage

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Hilaire v Luton Borough Council (EAT November 2022)

- Employee off sick with depression invited to redundancy selection interview
- EAT accepts that requirement for interview could amount to substantial disadvantage triggering duty to make reasonable adjustments
- In this case the evidence was that employee would have refused to attend anyway – so no actual disadvantage
- ET also entitled to find that only possible adjustment was to delay interview – and that would not have reduced the disadvantage

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Earl Shilton Town Council v Miller (EAT December 2022)

- Town council had limited toilet facilities – women's toilet was shared with local playgroup
- That meant women had to check that no children were in the toilet before they could go in
- We allowed to use men's toilet but that meant walking past a trough urinal
- Tribunal held that this was sex discrimination
- EAT agreed – no need to look at employer's motive or reasoning. Discrimination was inherent in the unequal provision

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Forstater v CGD Europe (2021, EAT)

- Gender Critical Feminist's contract not renewed – claims belief discrimination
- Tribunal finds her beliefs excluded – incompatible with rights of others
- EAT overturn – that criterion only applies where there is 'very grave threat' to Convention principles
- Her beliefs were protected – but was she discriminated against?

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Forstater v CGD Europe (ET, July 2022)

- Researcher loses out on contract renewal and possible employment out of concern about gender critical views
- EAT held those views were a philosophical belief
- She had expressed those views in Twitter threads and other discussions
- Expressed them forcefully but was prepared to avoid arguments in the workplace and to separate her views from employer's
- Tribunal finds it was the views themselves that were the reason for the treatment – direct discrimination

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Higgs v Farmor's School (ET, January 2021)

- Employee dismissed because of Facebook posts on trans rights and same sex relationships
- Tribunal finds beliefs were protected under Equality Act
- But not dismissed for those beliefs, but the concern that parents would think she was transphobic / homophobic
- Tribunal noted use of 'florid' language
- Case has now been heard by EAT – Church of England intervening

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Mackereth v Department for Work and Pensions (EAT, June 2022)

- Doctor excluded from DWP assessments because he refuses to acknowledge presented gender of patients
- Claims religious belief discrimination
- Tribunal rejects claim – beliefs not weighty, cogent or worthy of respect
- EAT finds he did have a qualifying religious belief
- But his beliefs were not the reason for the exclusion – his conduct was
- His behaviour was separable from his belief – not merely a manifestation of it

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Randall v Trent College Ltd (Employment Tribunal, February 2023)

- School chaplain disciplined for giving inflammatory sermons on LGBT issues in chapel
- Later made redundant following Covid cutbacks
- Tribunal finds no discrimination, harassment or victimization
- School entitled to object to him using a position of power to undermine the school's values
- Redundancy was a fair process and not prompted by his beliefs

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