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EMPLOYMENT LAW BULLETIN

JANUARY 2023

Welcome to Wrigleys' Employment Law Bulletin, January 2023.

As Government plans to legislate to extend the right to request flexible working, we start this month by taking a look at the recent findings of the Flexible Working and the Future of Work project, a study of flexible working post lockdown, funded and led by the Equal Parenting Project at the University of Birmingham and the University of York.

We report on the potentially wide-reaching impact on employment law of the ***Retained EU Law (Revocation and Reform) Bill***, the draft legislation which aims to remove EU law from UK legislation by no later than 31 December 2023.

We consider the recent case of ***Garrod v Riverstone Management Ltd*** in which the EAT considered when "without prejudice privilege" will apply so that settlement discussions will not be admissible in a court or tribunal. The question in this case was whether the contents of a grievance constituted an existing dispute which these discussions were attempting to resolve.

As we head into the first national teachers' strikes in England and Wales in a decade, we also include two articles focusing on industrial action in the education sector. We consider the potential impact of the ***Strikes (Minimum Service Levels) Bill***, which would create a mechanism for statutory minimum services levels to be enforced during strike action in a number of key services, including health, fire and rescue, transport, border security and education. We also provide a legal briefing for school leaders on the upcoming action.

Our next free virtual **Employment Brunch Briefing** takes place on 7 February. We are delighted to be joined by Lauren Chiren, CEO of Women of a Certain Stage. Lauren's goal is to support employers and individuals to successfully navigate menopause. It would be great if you could join us for what promises to be an inspiring, informative and interactive session. Please click the link below to reserve your place.

– Alacoque Marvin, Editor **alacoque.marvin@wrigleys.co.uk**

Forthcoming webinars:

7 February 2023 | 10:00 - 11:00 | Virtual
Wrigleys' Employment Brunch Briefing
Demystifying Menopause and normalising women's life stages
Guest speaker: Lauren Chiren, CEO of Women of a Certain Stage
Click here for more information or to book

If you would like to catch up on previous recorded webinars, please follow this link.

Contents

Has Covid-19 changed how we work?

Article published on 30 January 2023

Flexible working has become a regular part of the post-Covid-19 working world.

The rise in flexible working

There has been a marked shift in working practices since the pandemic with many employers and employees adopting a flexible working approach. New research by the Equal Parenting Project (the Study) found that 59.5% of managers believe working from home improves the productivity of employees. Other types of flexible working are also associated with an increase in productivity. 44.1% of managers felt part-time work increased productivity and 43.7% felt that compressed hours had the same effect. Despite this, 41.9% of managers still regard long hours as being crucial for career progression.

The change in attitudes towards working from home has altered how organisations view their office space. The Study found that 33.7% of managers reported that their organisation had reduced or was planning to reduce the amount of office space available. These organisations will likely be hoping to reap the financial benefits of downsizing. In addition, remaining office space is often being repurposed. 9.7% of managers said there were fewer shared offices, 21.8% said there was more space for events and/or workshops and 12.4% said there was more space to encourage wellbeing.

The Study recommends that organisations should assume that all jobs will be available for some form of flexible working. This includes adding the relevant information to job advertisements and introducing mechanisms to ensure that the commitments of the organisation are met. In addition, it recommends that policymakers should encourage larger companies (with over 250 employees) to report on the use of flexible working as part of gender pay gap reporting and make this information widely available to the public.

The impact of workplace policies on parenting choices

Flexible working policies impact the parenting choices of employees. The Study found that 78% of managers believe caring responsibilities should be shared between both parents; however, only 40% said that their organisation supports parents to do this. This may partly be due to only 43% of managers receiving advice or training to help the organisation support employees who are balancing work and their childcare responsibilities.

In addition, it is particularly important to support fathers with caring responsibilities to ensure gender equality in the workplace. Following Covid-19, fathers may be more likely to request flexible working in the future. This could be due to the rise in working from home which allowed them to be more involved in the daily life of their children whilst still being able to work their required hours and/or meet potential targets.

Overall, it seems as though there is a clear disconnect between managers' views on shared parental responsibility and the steps taken by organisations to support parents, and in particular fathers, who are navigating parenthood. The Study recommends that organisations should actively encourage men of all ages to work flexibly and be vocal about it so that this working practice can be integrated into the working culture.

Monitoring staff working at home

The considerable shift in employees choosing to work from home has meant organisations have had to adapt their supervision methods. Amongst the managers surveyed, 27% reported that they have downloaded computer software to monitor the performance of employees. In addition, some

managers surveyed reported that they have taken steps for their organisation to monitor staff emails (28%), staff phone calls (14.7%) and staff typing (5%). Despite taking these measures, only 17% of managers agreed that surveillance improves employee productivity.

Consulting with staff who are working remotely

The fallout from Covid-19 has also influenced processes of consultation and engagement. The Study found that organisations rely on informal employee feedback (46.6%), trade union representation (28.6%) and non-union staff representation (10.1%). This may demonstrate that organisations are seeking to either create, maintain or improve open conversations with staff, especially as employees are often less visible in the office space due to the rise of flexible working.

Government response to consultation on flexible working

The government's response to the 2021 consultation, *Making Flexible Working the Default*, describes how there is no 'one size fits all' approach to work arrangements and the increase in flexible working is a clear way to support staff with caring responsibilities whilst also boosting workforce diversity. The government supports the Employment Relations (Flexible Working) Bill (currently at the Report Stage in the House of Commons) which would give legal effect to most of the proposals covered in the consultation. These include making the right to request flexible working apply from the first day of employment, requiring employers to consult with staff on flexible working options before rejecting a request, and developing guidance on dealing with temporary requests for flexible working.

Next steps for employers

The change in attitudes towards flexible working since the pandemic has significantly altered workplace practices. These look set to become a permanent part of the world of work. There is clear shift towards greater flexibility, particularly when it comes to accepting home-working arrangements.

However, there is work to be done to maximise the potential for increased staff productivity, engagement and retention through embracing flexible working practices as a permanent feature of organisational practice. Employers need to make sustainable adaptations to their staff management and communication processes, finding ways to encourage a culture of transparency and trust in remote and hybrid teams. There is also work to be done to promote equality, diversity and inclusion through openness to flexible working practices for a wider group of employees.

The Retained EU Law (Revocation and Reform) Bill

Article published on 11 January 2023

What is the potential impact of the Bill on Employment Law in the UK?

The Retained EU Law (Revocation and Reform) Bill (the 'Bill') aims to revoke all retained EU law on 31 December 2023 unless specific steps are taken to preserve individual laws.

To help understand the impact of the Bill, we've set out below a summary of the Bill's contents and their main function.

- The Bill sets out that all domestic legislation made under the European Communities Act 1972 and all retained EU legislation (i.e. the laws preserved and incorporated directly into English and Welsh law when the UK left the EU) will be revoked unless either a Minister or devolved authority has preserved it prior to that date

- The Bill also confirms that:
  - the principles of EU law supremacy will no longer be part of domestic law from the start of 2024 and that when higher appellate courts are deciding whether to depart from retained EU case law, they should take account of the following principles:

    1) the fact decisions in an EU court are not (unless otherwise provided) binding

    2) any changes of circumstance relevant to the retained EU case law, and

    3) the extent to which the retained EU case law restricts the proper development of domestic law.

  - there would also be a new case reference procedure, allowing the lower courts and tribunals which are bound by retained case law to refer points of law to a higher court within the UK which would have the power to depart from that retained case law if they consider it to be of general public importance

The potential impact of the Bill

It is difficult to know what the impact of the Bill will be. The Bill is subject to change as it passes through both Houses of Parliament and it is interesting to note recent reports in the national press from government sources suggesting that it will not be possible for the government to properly review and scrutinise all EU-derived UK legislation in time to meet the current deadline of 31 December 2023 and that the deadline for revocation of these laws will be pushed back.

The Bill's aim of removing EU-derived secondary legislation such as the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), the Working Time Regulations 1998, Agency Workers Regulations 2010 and Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 would have a particular impact on UK employment law as the existing case law interpreting this legislation currently provides relatively clear and stable guidance and direction on key aspects of employment law for employers and employees.

This means the rights developed using EU principles, such as the right to 'normal pay' whilst on holiday, are potentially under threat or at the very least could be left with significant question marks over them.

If this legislation is repealed by the Bill then settled concepts such as the meaning of 'establishment' or when an employer is 'proposing to dismiss' in collective redundancy situations could resurface in litigation. This could trigger a period of uncertainty which could last for several years due to lengthy delays in employment tribunals.

Considerations for Employers

The effect of the Bill as currently drafted is to automatically erase the supremacy of EU law and EU-derived UK legislation from domestic law. However, these laws, and rulings from the European Court of Justice on how they should be interpreted, run through many key areas of employment law and help to establish and clarify employment rights and obligations.

Ideally, the government should review all EU-derived legislation either to ensure that its removal poses no threat to the clear understanding of these areas, or to act in accordance with the Bill to exclude EU laws from the Bill's effect to avoid unnecessary confusion. However, the reality is that several thousand such laws and regulations exist and it seems unlikely that the government can devote sufficient resources to perform the necessary review of all laws before the end of 2023. In addition, as currently drafted the Bill does not grant Parliament the right to review these laws, leaving the final decision of any review with government ministers.

The ambitions of the Bill to remove EU law from domestic legislation by no later than 31 December 2023 appear unlikely to be realised. Provided the Bill passes Parliament, the deadline for revocation of EU law is likely to be pushed back into later years to allow for some kind of review to be completed.

Employers should keep a look out for news regarding the progress of the Bill and for legal commentary on the latest developments so that they may try to stay ahead of the potential issues removal of longstanding employment laws could cause.

Will the without prejudice rule apply to make settlement negotiations inadmissible as evidence?

Article published on 13 January 2023

EAT decision confirms guidelines on when a grievance might constitute an existing dispute.

Settlement agreements are a tool employers can use when seeking to resolve workplace problems. They can lead to a relatively quick resolution for all parties concerned and may avoid the need for lengthy internal procedures and expensive litigation in tribunals and courts.

To encourage parties to settle disputes themselves (avoiding the need for a tribunal or court to do it), the 'without prejudice rule' (the 'rule') can be used which means that any discussions about settlement will be 'off the record' and are not admissible as part of litigation should a court or tribunal later become involved.

However, the rule will only apply in specific circumstances and can be lifted in cases where it is abused. When determining if the rule applies, the following case law-established guidelines will help determine the issue:

1. the rule only applies if there is an existing dispute between the parties *at the time* of the communication *and* that communication is a genuine attempt to settle the dispute in question;
2. the rule can apply to pre-litigation communications if the parties contemplated, or might reasonably have contemplated, that litigation would ensue if they did not agree;
3. the mere fact an employee raises a grievance is not determinative of whether there is a 'dispute'; and
4. the rule cannot be used to exclude evidence of 'perjury, blackmail or other unambiguous impropriety'.

A recent case considered an argument by a former employee that the rule should not apply, and that evidence of settlement negotiations should be included as part of her claim.

Case: Garrod v Riverstone Management Ltd [2022]

Mrs Garrod went on a period of maternity leave and a few months after returning she informed RML she was pregnant again. Not long afterwards, she submitted a formal grievance. She alleged, amongst other things, that she had not be able to return to the same job she left before going on maternity leave; that she had faced bullying and harassment by senior manager colleagues; and that those managers had discriminated against her on the basis of pregnancy and maternity.

Shortly after this Mrs Garrod went off work sick and was contacted by a HR representative of RML and invited to a meeting. At the meeting, Mrs Garrod was asked who she felt should oversee her grievance and what she hoped to achieve in terms of outcomes. The HR representative then said he was going to have a without prejudice conversation with Mrs Garrod and subsequently offered her a settlement under which her employment would terminate and she would receive a package of

£80,000.

Further correspondence did not lead to a settlement. Eventually Mrs Garrod's grievance was not upheld and she resigned from her job. She then brought claims for discrimination on the grounds of maternity, harassment, and for constructive unfair dismissal.

As part of her claim, Mrs Garrod introduced evidence regarding her meeting with the HR representative and the settlement offer, alleging that the HR representative had made it clear he did not care about her grievance and that his conduct was further evidence of her mistreatment and the discrimination she faced.

RML applied to amend Mrs Garrod's particulars to remove mention of the offer on the basis that the without prejudice rule applied and, accordingly, the settlement offer should not form part of the record of the case. A tribunal judge ultimately agreed with RML.

Mrs Garrod appealed that decision, arguing that:

i) the without prejudice rule did not apply because there was no 'dispute' between the parties at the time the settlement option was introduced;

ii) if there was a dispute when settlement was raised it did not involve termination of her employment as Mrs Garrod was seeking to remain in employment; and

iii) there was unambiguous impropriety on behalf of RML when settlement was introduced, meaning the without prejudice rule should be lifted in respect of the meeting.

The EAT's decision

The EAT dismissed all three grounds.

On ground i), the EAT ultimately found that the tribunal was entitled to find as a matter of fact that there was a dispute between the parties at the time the HR representative of RML and Mrs Garrod met. Mrs Garrod had submitted a grievance mentioning harassment, discrimination, breaches of statutory rights and so on. She had also referred in her grievance to ACAS mediation or Early Conciliation if her concerns could not be resolved internally. The tribunal noted that Mrs Garrod had a legal background and found that she must have understood that she was referring in her grievance to potential claims.

For ground ii) the EAT agreed with the tribunal that the disputes advanced in the grievance and in the subsequent litigation were one and the same. There was no need for the dispute to be "in relation to termination" for an offer including termination to be covered by the rule.

Finally, on ground iii) the EAT dismissed arguments that the tribunal had set the bar too high when it considered whether RML's behaviour met the 'unambiguous impropriety' standard. Referring to case law, the EAT noted that the without prejudice rule would only be lifted in 'the very clearest of cases' and that the importance of maintaining the rule meant that only the most grave behaviour (on a par with perjury and blackmail) would result in it being lifted. The EAT commented that the act of simply making a settlement offer including termination of employment falls far below the threshold for unambiguous impropriety, even though it might, from the claimant's point of view, suggest a discriminatory attitude.

Comment

This case highlights that it is crucial for employers to consider whether there is an existing dispute before any mention of settlement occurs. The question is whether the contents of a grievance or other complaints suggest that the employee is contemplating or might reasonably contemplate

litigation arising from their concerns.

It also means employers need to be especially careful where the option of settlement arises in other circumstances. For example, if the employee is subject to disciplinary investigations and the employer wants to introduce settlement before a formal process is engaged, it is worth discussing with a specialist employment law adviser the best way to approach this and whether the offer of settlement could be viewed as prejudging the outcome of the formal process, whether the without prejudice rule is engaged, and if other options should be considered.

Further information

For further information on the without prejudice rule and protected conversations in the context of grievances, please see our article What should employers do if an employee raises a grievance about being offered a settlement agreement? (available on our website).

Proposed minimum service levels during strike action may impact on education sector

Article published on 17 January 2023

Workers identified as having to provide minimum service would not be protected from dismissal for taking strike action.

The Government has brought forward a bill which, if passed, would impose minimum service levels during strike action in a number of sectors, including education.

The Strikes (Minimum Service Levels) Bill (the Bill), which had its first reading on 10 January 2023, would enable the Secretary of State to make "minimum service regulations" in relation to health services, fire and rescue services, education services, transport services, decommissioning of nuclear installations, management of radioactive waste and spent fuel, and border security.

Where minimum service regulations are put in place, employers facing strike action would be able issue a "work notice" identifying individuals who are required to work during the strike in order to ensure those minimum levels of service, and the work those individuals must carry out. The employer would be obliged to consult with the trade union before any such work notice is issued.

The Bill sets out amendments to the current strike legislation which increase the risks of taking strike action for trade unions and workers.

In general terms, if a strike is lawful trade unions are protected from being sued by employers for losses arising from inducing workers to strike. The minimum service level legislation would bring in additional requirements which trade unions have to meet for a strike to be lawful. If passed, the Bill would mean that trade unions who had failed to take reasonable steps to ensure that identified members of the union complied with a work notice would be liable for losses arising from that failure. Employers could also apply to the court for an injunction to stop strike action where work notice requirements were not complied with.

Employees who are dismissed because they have taken strike action can be found in some circumstances to have been automatically unfairly dismissed. The proposed legislation would mean that employees would not benefit from this protection if they had taken strike action after they have been identified in the work notice as having to work during the strike.

Comment

It remains to be seen whether the Bill is passed by Parliament, and then whether minimum service

regulations are in fact put in place in relation to each of the sectors listed above. A separate bill providing a mechanism for minimum transport service levels to be imposed (where they are not otherwise agreed between employers and unions) was introduced in Parliament in the Autumn and is awaiting its second reading.

What would minimum service levels in the education sector entail, and would workers or unions be able to challenge such an assessment? Given the knock-on effect on working parents potentially having to provide childcare on strike days, would they require a minimum staffing level to enable all primary age children to attend school? Would they require all classes preparing for external examinations to be delivered as usual? Would they involve the provision of remote education in line with Covid-related measures? Or would they simply require sufficient staffing for all pupils to be able to attend school on strike days?

It has been reported that the Government does not plan to impose minimum service levels in the education sector if voluntary agreements on such levels can be reached, and that the Department for Education is currently redrafting its outdated non-statutory guidance from 2016 on Handling Strike Action in Schools.

Trade unions across different sectors have very strongly criticised these proposals, pointing out that unions and employers already work together to ensure that a minimum level of service is provided in sectors where ceasing work could endanger life. They have also suggested that the threat of dismissing workers would not be credible where staffing levels are already seriously stretched. Employers should be aware that the law setting out protections for employees who are dismissed for taking strike action is very complex and they should seek legal advice before taking such a step.

Strike action in schools: a legal briefing for academy trust leaders

Article published on 23 January 2023

NEU members will take strike action in February and March.

With the announcement last week that the NEU ballot for strike action passed the required thresholds, academy trust leaders will be taking key decisions in preparation for the proposed strike days. In this briefing, we provide an overview of some of the key legal issues for academy trust leaders to be aware of when planning for the impact of strike action.

The full list of proposed strike days has been published by the NEU and is available at: https://neu.org.uk/press-releases/neu-take-strike-action-over-pay. There are seven days of strike action planned, but some of these are restricted by region and so the number of strike days impacting on an individual school will be four.

Updated DfE guidance on handling strike action in schools

In a timely move, the Department for Education (DfE) published its updated non-statutory guidance on Handling Strike Action in Schools (DfE Strike Guidance) on the day the NEU strikes were formally announced. This is a useful document which sets out the answer to some key questions trust leaders will now be asking.

Contingency Planning

Minimum service levels

The DfE Strike Guidance sets out an expectation on headteachers to take all reasonable steps to

keep the school open for as many pupils as possible. However, this is guidance only and there are, at the moment at least, no legal requirements for schools to provide a minimum level of service during strike action.

For information on the Strikes (Minimum Service Levels) Bill which progressing through the parliamentary stages, please see our recent article: Proposed minimum service levels during strike action may impact on education sector.

Asking staff about their intentions to strike

Schools and academy trusts can ask staff to let them know whether they intend to strike. However, there is no requirement for staff to inform their employers of their intentions, either in advance or on the day itself and staff should not be pressurised into providing this information. The NEU has advised its members not to provide this information to schools.

Staff who are non-union members may also decide to join the strike action. Similarly, they cannot be required to inform their employer of their intention to strike.

Redeploying staff

Staff whose terms and conditions incorporate the School Teachers Pay and Conditions Document (STPCD) cannot be required to cover colleagues who are striking as this is a foreseeable event. It may be possible, however, to redeploy members of staff to other duties and/or trust schools, as long as this is permitted under their contract.

Staff who are employed wholly or mainly to cover staff absences can be asked to cover the lessons of striking colleagues, but may in some cases be taking strike action themselves.

There is no requirement to provide the curriculum as normal on strike days, and so it is possible to organise alternative activities which do not require the same level of staff supervision. Academy trust leaders should of course assure themselves that any such activities can be safely run, in terms of both health and safety and safeguarding obligations. They should also ensure compliance, where relevant, with the staffing ratio requirements in the Statutory Framework for the Early Years Foundation Stage.

Engaging agency staff and directly employing staff to cover strikes

Following the repeal of Regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 in July 2022, it is now possible for employers to engage agency workers to cover striking staff. The significant demand for agency staff on strike days should of course be anticipated, and trusts should take early action to check availability before relying on agency workers.

Trusts can enter into direct employment contracts with staff to cover those on strike. Volunteers can also be deployed to work in schools on strike days.

It is important to note that the safer recruitment requirements in Keeping Children Safe in Education must continue to be complied with, and that the relevant DBS checks are in place for all individuals who will be carrying out regulated activity.

Making a decision to restrict attendance or to close a school

For academy trusts, the decision as to whether to close or to restrict attendance will be one for the trust, taking into account the DfE Strike Guidance. The trust may delegate this decision to the principal of each school under its scheme of delegation which, as required by the Academy Trust Handbook, must be published on the trust's website.

Partial closure: prioritising certain pupils

In updated guidance which chimes with that issued for partial closure during the Covid pandemic, where schools and trusts decide to restrict attendance, they are asked to prioritise the needs of vulnerable children and young people, the children of critical workers, and pupils due to take public examinations and other formal assessments.

Remote education

The DfE Strike Guidance also asks headteachers to consider arranging for remote education in line with Providing remote education: guidance for schools. In making such arrangements, academy trust leaders should be mindful of the STPCD cover restrictions when asking staff to provide remote education where this is in fact a request to cover striking colleagues.

Impacts on those taking strike action

Pay and pensions

Striking staff will lose a day's pay for each day of strike action. The NEU has confirmed that it will not pay strike pay to members. The calculation of a day's pay for these purposes will be governed by the contract. Teachers whose contracts incorporate the Conditions of Service for School Teachers in England and Wales (the Burgundy Book) will have 1/365th of their pay deducted for each strike day. Strike days are not counted as pensionable service under the Teachers' Pension Scheme.

Legal protections for staff relating to lawful strike action

Employees who have participated in lawful strike action are protected from dismissal for taking such action in certain circumstances. These provisions are far from straight-forward and academy trusts should seek legal advice when contemplating dismissal or detrimental treatment which might be seen as constructive dismissal following strike action.

Non-union members who decide to strike alongside their NEU colleagues take the benefit of the same legal protections. On the other hand, NASUWT has made clear to its members that any such action would be unofficial as it does not have a legal mandate to instruct members to strike, and that NASUWT members would not be protected from dismissal for joining the strike (https://www.nasuwt.org.uk/news/industrial-action/when-other-unions-take-industrial-action.html).

Reputational issues and the expression of political views

In the current climate, there are of course strong views on both sides of the debate on public sector pay. Academy trust leaders and heads may well support the union campaigns to see fully funded pay increases which are more in line with inflation. Academy trust leaders will also have at the forefront of their minds concerns about further lack of continuity of provision on pupils who have been impacted by unprecedented disruption to their education and examinations in recent years, as well as the financial impact on their parents and carers of having to take time off work when schools are forced to close.

It will be important to ensure that any engagement on behalf of the academy trust with the media and with stakeholders on the issue of strike action complies with internal policies and procedures and remains focused on the best interests of the trust.

The principles of good governance set out in the Governance Handbook require all trust boards and headteachers not to promote one-sided political views, and this should be borne in mind when expressing views on behalf of the trust.

Further information

The following Statutory Codes of Practice bring together the complex legal rules on what constitutes a lawful strike and what unions and staff can and cannot do when picketing:

Code of Practice on Industrial Action Ballots and Information to Employers

Code of Practice on Picketing

Supporting leaders

It is possible that there will be further strike action in coming months as the NASUWT and NAHT have both expressed an intention to re-ballot staff after missing the threshold for turnout in their recent ballots. This wave of strike action comes as another significant burden for school and trust leaders, following as it does the crisis management of the Covid pandemic and the impact of energy and other costs on school budgets.

Academy trusts should as ever be mindful of the additional pressures strike action places on the leadership team and do what they can to provide wellbeing and practical support for those tasked with steering the trust through this extended period of challenge.

Seeking timely legal advice can help to support trust and school leaders to mitigate risk and to make difficult decisions with confidence.

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