WRIGLEYS
SOLICITORS

EMPLOYMENT LAW BULLETIN

NOVEMBER 2022

Welcome to Wrigleys' Employment Law Bulletin, November 2022.

We begin this week with an update on a Private Members Bill passing through parliament which would give employees the right to take paid time off to attend fertility treatment.

We also report on new Regulations in force from 5 December 2022 banning exclusivity clauses for workers who earn less than the lower earnings limit. This extends protections which are already in place for all those on zero hours contracts.

Our case law report this month concerns a little-known exception to the general rule that employees need two years' continuous employment in order to bring an unfair dismissal claim. This applies where the principal reason for the dismissal is, or relates to, the employee's political opinions or affiliation. In *Scottish Federation of Housing Associations v Jones*, the Employment Appeal Tribunal in Scotland considered whether a dismissal because of a failure to be politically neutral might benefit from this exception.

I hope you can join us for our next free virtual **Employment Brunch Briefing on 6 December**. This will be a round up of case law from the last 12 months along with recent and upcoming changes to employment legislation. Please click the link below to sign up.

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

Forthcoming webinars:

6 December 2022 | 10:00 - 11:15 | Virtual
Wrigleys' Employment Brunch Briefing
What's new in employment law?
Speakers: Alacoque Marvin and Michael Crowther, solicitors at Wrigleys Solicitors
Click here for more information or to book

7 February 2023 | 10:00 - 11:15 | Virtual
Wrigleys' Employment Brunch Briefing
Demystifying Menopause and normalising women's life stages
Guest speaker: Lauren Chiren - CEO, 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

1. The Fertility Treatment (Employment Rights) Bill: It's time to support staff undergoing fertility treatment
2. Extension to the ban on exclusivity clauses comes into force on 5 December 2022
3. Unfair dismissal claim relating to political opinion or affiliation can be brought without two years' service

The Fertility Treatment (Employment Rights) Bill: It's time to support staff undergoing fertility treatment

Article published on 25 November 2022

If passed into law, the Bill would give employees a statutory right to take time off work to attend fertility treatment clinic appointments.

According to the Human Fertilisation and Embryology Authority around 60,000 people in the UK use fertility services each year. However research published last month by the Fertility Network UK found that 55% of employees going through fertility treatment, or experiencing fertility issues, do not receive adequate support from their employers. And only 25% of those surveyed believed that their employer had implemented a supportive workplace policy. These statistics are a key indicator that it is time for new legislative measures.

The Fertility Treatment (Employment Rights) Bill ('the Bill') has been introduced in Parliament. The Bill would require employers to allow an employee to take paid time off work to attend fertility treatment appointments. In addition, an employee who has a "qualifying relationship" with a person receiving fertility treatment would be entitled to take unpaid time off work to accompany the person to the appointments.

An employee would have the right not to be subjected to any detriment by any act, or any deliberate failure to act, by their employer in connection with their right to take time off work to attend fertility treatment appointments. If an employee is dismissed for attending these appointments, it would be regarded as an unfair dismissal.

A Bill which focuses on these issues is overdue. Other countries have been more forward thinking in their approach to supporting employees experiencing fertility problems. For example, Malta has adopted fertility legislation allowing 100 hours of paid leave for couples undergoing IVF - 60 hours for the woman and 40 for the partner. Whether the UK Parliament supports the Bill will be clearer following the second reading which is due to take place on 25 November 2022.

A Fertility Workplace Pledge ('the Pledge') has been launched alongside the Bill, designed to benefit individuals and couples going through fertility treatment. Several large UK employers have signed the Pledge which means they will:

- Implement a workplace fertility policy to increase transparency and reduce the stigma surrounding fertility issues;
- Appoint a fertility ambassador to encourage open conversations and promote internal support;
- Provide training for line managers to improve their understanding of the physical, emotional and financial impacts of fertility treatment; and
- Give staff the right to request flexible working so that they can attend fertility clinic appointments.

In due course we will see how effective the Pledge is and whether Parliament supports the Bill. These measures are a positive step towards ensuring that fertility treatment (and its impact) is more understood and sensitively handled in the workplace.

For more information, see our article 'Should employers have a policy for staff going through IVF and assisted conception?', where we discuss the benefits of having a workplace fertility policy and the potential discrimination claims employers could face in connection with how employees undergoing fertility treatment are treated.

Extension to the ban on exclusivity clauses comes into force on 5 December 2022

Article published on 29 November 2022

Ban will extend protection to workers on low incomes.

As reported in our May article (Extension on the ban on exclusivity clauses announced) the government consulted on extending the prevention of the use of exclusivity clauses in zero-hours workers' contracts and agreed to apply the ban to those workers earning less that the Lower Earnings Limit ('LEL'). In the current financial year 2022-2023, the LEL is £123 a week.

The ban extension reflects an acceptance from the government that employers should not be able to restrict the earning potential of those workers who have few guaranteed working hours and thus only low guaranteed earnings from seeking employment elsewhere whilst they are not working.

The Exclusivity Terms for Zero Hours Workers (Unenforceability and Redress) Regulations 2022 (the Regulations) shall come into force on 5 December 2022. The Regulations define 'exclusivity terms' as any contractual term which prohibits a worker from doing work or performing services under another contract or arrangement, or which prohibits a worker from doing so without their employer's consent.

The Regulations make it automatically unfair to dismiss an employee if the reason or principal reason for the dismissal is they breached an exclusivity term. This is a 'day one' protection, meaning no qualifying period of employment is required to benefit from it. Employees are also protected from any detrimental treatment by their employer if they breach an exclusivity term, meaning employers cannot surreptitiously enforce exclusivity clauses by taking action other than dismissal. If a tribunal finds that a detriment occurred, it may award as much compensation as it considers 'just and equitable', up to an amount equal to the basic and compensatory awards available for unfair dismissal.

Unlike employees, workers do not benefit from protection against unfair dismissal. However where an employment tribunal finds that a zero hours or low earning worker was subjected to a detriment (which could include termination of the contract) because they breached an exclusivity term in their contract, it can award compensation up to an amount equal to the unfair dismissal basic and compensatory awards.

Comment

Many employers in the third sector have moved away from zero hours contracts in recent years due the reputational and retention risks of using a form of contract which does not offer a predictable income. Employers should seek legal advice to review their guaranteed hours contracts and working arrangements to ensure that provisions which prevent or limit staff from carrying out work for other employers do not fall foul of the Regulations.

As noted in our article in May, the extension of the ban will be welcomed by workers seeking to boost their incomes who may otherwise have been prevented from doing so by an exclusivity clause in their contract.

However, it should be noted that the LEL threshold, which is as far as the ban extension goes, does not represent a significant income and there may be workers who remain frustrated by their employers who demand their workforce cannot work for other employers despite offering comparatively little in terms of guaranteed hours and pay.

It is also debateable to what extent the workers and employees who will benefit from this

protection will be aware of it and how they can access the legal support they might require to enforce these protections.

Unfair dismissal claim relating to political opinion or affiliation can be brought without two years' service

Article published on 23 November 2022

EAT: Dismissal for lack of political neutrality would not relate to political opinion or affiliation.

There are a number of circumstances in which employees can bring an unfair dismissal claim without having two years' continuous employment.

One of these is if the principal reason for the dismissal is, or relates to, the employee's political opinions or affiliation (section 108(4) Employment Rights Act 1996 (ERA)).

This exception to the qualifying length of service for unfair dismissal claims arose from the 2013 European Court of Human Rights case of Redfearn v United Kingdom which held that UK law was incompatible with Article 11 of the European Convention on Human Rights (Convention). This concerns the right to freedom of association and includes the right to join political parties.

A dismissal because of or relating to political opinion or affiliation will not be *automatically* unfair (unlike for example health and safety or whistleblowing related dismissals). This means that the tribunal will consider not only whether there was a fair reason for the dismissal but also whether the dismissal was fair in all the circumstances, including the process followed by the employer. However, where an employee has been dismissed in breach of the Article 11 Convention right, it is likely that the dismissal will be found to be unfair.

Other claims where qualifying length of service does not apply

Unfair dismissal claims can also be brought before two years' continuous employment where dismissal relates to (amongst other things):

- pregnancy or childbirth
- "blowing the whistle";
- health and safety related activities;
- trade union activities;
- exercising various time off rights; and
- asserting a statutory right under the ERA.

In addition, many other claims have no requirement for any particular length of service. These include claims for discrimination (which can be brought even before employment commences), breach of contract, unlawful deduction from wages, and detriment claims including those in relation to fixed term or part time status.

When will dismissal relate to political opinion or affiliation?

The *Redfearn* case concerned a bus driver who was a member of the BNP. Mr Redfearn was not dismissed *because of* his political opinions or affiliation, but because of operational difficulties arising from these. In other words, the dismissal *related to* his political opinions and affiliation. Section 108(4) applies where the dismissal is either because of or relates to the employee's political opinions or affiliation.

A recent EAT case has considered how far this protection extends and whether it applies where a dismissal is because of the employee's failure to be politically neutral: will this be a dismissal

relating to political opinions and affiliation?

Case details: Scottish Federation of Housing Associations v Jones

Ms Jones was employed by the Scottish Federation of Housing Associations (SFHA) as Head of Membership and Policy. Her employment contract included a clause headed "Political Activity". She was not prohibited from joining a political party but was prohibited from having a "formal role" of a political nature. A few months into her role, Ms Jones informed her employers that she wished to stand as a candidate for Scottish Labour at the next general election. SFHA did not consent and Ms Jones withdrew her candidacy. Ms Jones was dismissed around six months after her employment commenced.

Ms Jones brought a claim to an employment tribunal, arguing that she has been unfairly dismissed in relation to her political opinions and affiliation. She also alleged that she had been discriminated against on the basis of her philosophical belief that "those with the relevant skills, ability and passion should participate in the democratic process".

At a preliminary hearing, the tribunal decided that Ms Jones would be able to rely on section 108(4) ERA to bring her unfair dismissal claim if she could show that she had been dismissed because she sought to stand for election. The tribunal was of the view that the claimant's political opinions and affiliation to the Labour Party would be related to her dismissal if this were to be the case, as without such opinions and affiliation she would not have sought to stand as a candidate.

The tribunal also found that Ms Jones' philosophical belief was protected under the Equality Act 2010.

The Employment Appeal Tribunal (EAT) agreed that Ms Jones' belief was a protected belief under the Equality Act as it: was genuinely held; was not an opinion or viewpoint based on the present state of information available; was a belief as to a weighty and substantial aspect of human life and behaviour; attained a certain level of cogency, seriousness, cohesion and importance; and was worthy of respect in a democratic society, was not incompatible with human dignity and did not conflict with the fundamental rights of others.

However, the EAT did not agree that Ms Jones could rely on section 108(4) ERA to bring her unfair dismissal claim without two years' service. The EAT noted that the legislation was designed to apply to dismissals arising from the content of a person's political opinions or the particular political party to which they are affiliated. The EAT held that the alleged reason for the dismissal here was not the content of Ms Jones' political opinions or membership of a particular political party, but a failure to be politically neutral. The EAT determined that this did not relate to Ms Jones' particular political opinions or affiliation.

Risk of claims relating to political opinions and affiliation

A requirement to remain politically neutral (or at least not to publicise political opinion and affiliation) applies to some roles in the public and third sector, particularly where the employee in question is senior and interacts with Government departments as part of their role.

It is important to note that the employee in this case was not prohibited from joining any political party or holding certain opinions (which would have been potentially in breach of her Article 11 rights). Rather she was prohibited from taking a formal role in a political party.

In cases where section 108(4) ERA is relied upon to bring an unfair dismissal claim, the tribunal will assess the fairness of the dismissal in the round. To mitigate the risks of a claim, employers should ensure that a fair disciplinary process is followed, even where the employee has not yet reached two years' service. The fair and non-discriminatory reasons for action taken should be carefully documented as part of this process.

Employers should seek legal advice before carrying through a dismissal or other detrimental action which might relate to a requirement not to engage in political activity or to be politically neutral. Although this EAT decision suggests a dismissal relating to a breach of a requirement to be politically neutral will not fall into the scope of section 108(4) ERA, it is possible that a dismissal arising from political activity could be found to be unfair in some circumstances.

Commentators have noted that this is a rather narrow interpretation of section 108(4) ERA and it may be that future cases will explore further the reach of this provision.

If you would like to contact us please email
alacoque.marvin@wrigleys.co.uk

www.wrigleys.co.uk