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EMPLOYMENT LAW BULLETIN

DECEMBER 2022

Welcome to Wrigleys' Employment Law Bulletin, December 2022.

In this final Employment Law Bulletin of the year, we take the opportunity to look back on some of the most interesting and important employment law cases of 2022. We also provide a useful summary of key legislative changes from 2022 along with expected upcoming developments.

Our case law round up includes significant new cases on holiday leave and pay and when an individual will qualify for these workers rights, useful reminders of what makes a fair redundancy process, a salutary case on the risks of avoiding collective bargaining, and a recent decision involving protection for "gender critical" beliefs.

If you missed our recent virtual **Employment Brunch Briefing** covering this round up of the employment law year, please register on our website to watch the recording.

Looking ahead to our next **Employment Brunch Briefing**, I do hope you can join us on **7 February 2023** when our wonderful guest speaker, Lauren Chiren, CEO of Women of a Certain Stage, will be delivering a session for employers on **demystifying menopause and normalising women's life stages**. Click the link below to book your place.

In the meantime the employment team at Wrigleys wishes you a peaceful Christmas and a happy New Year!

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

Forthcoming webinars:

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 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.

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Employment Legislation Update 2022

Article published on 22 December 2022

We recap the key employment legislative changes of 2022 and look ahead to 2023.

On Tuesday 6 December 2022 we hosted our Employment Law Brunch Briefing 'What's new in employment law?' where we looked back at the key employment law cases and decisions and legislative changes of 2022 and looked ahead at what employment law legislation developments we can expect to see in 2023. If you missed this briefing, you can register on our website to view the recording at https://www.wrigleys.co.uk/events/recorded-webinars/.

Below we highlight the key legislative changes in 2022 and legislative expectations for 2023.

Labour Market Enforcement Strategy 2023 to 2024

At present, there are four main enforcement bodies: the Employment Agency Standards Inspectorate ('EAS'), the Gangmasters and Labour Abuse Authority ('GLAA'), the HM Revenue and Customs National Minimum Wage Enforcement Team ('HMRC') and the Health and Safety Executive ('HSE').

In December 2018, the government's Good Work Plan announced the government's intention to bring forward proposals for a new single labour market enforcement agency. In 2021, the government proposed to create an agency with increased powers to enforce employment rights and increase employers' compliance with such rights. The agency would protect workers in relation to labour exploitation, modern slavery, the National Minimum Wage and holiday pay for vulnerable workers. Primary legislation will be required to set up the new agency. However, it is not yet known whether such legislation will be introduced.

In addition, there was a call for evidence by the Director of Labour Market Enforcement in March 2022 regarding the compliance and enforcement for GLAA, HMRC and EAS. At the moment the government appears to be suggesting these three agencies will be combined into a single agency whilst the HSE will remain distinct and separate.

It is not known when the Labour Market Enforcement Strategy for 2023 to 2024, which was due to be delivered to the government in the autumn of 2022, will be published.

Human Rights Act 1998 reform

In December 2020, the government launched an independent review into the Human Rights Act 1998 ('HRA'). The review examined the structural framework of the HRA rather than the rights themselves (set out in the European Convention on Human Rights, to which the UK is a signatory ('EHCR')). Separately, the Parliamentary Joint Committee on Human Rights concluded in July 2021 that HRA did not require amendment.

However, in December 2021 the Ministry of Justice published the consultation 'Human Rights Act Reform: A Modern Bill of Rights' which considered replacing the HRA with a 'Bill of Rights'. In June 2022, the government introduced the Bill of Rights Bill 2022-23 to Parliament with the aim of doing this. The Bill proposes a new domestic human rights framework based around the EHCR.

Despite having its first reading in June 2022, the Bill was dropped prior to its second reading by the Truss government. However, following his reappointment as Justice Secretary under Rishi Sunak, Dominic Raab has since confirmed that the Bill will proceed through Parliament in 2023.

The Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) (Amendment) (No.2) Regulations 2022

From 1 July 2022, the above Regulations expanded the groups of people who can sign statements of fitness for work for the purposes of Statutory Sick Pay and social security claims. The Regulations mean that registered nurses, occupational therapists, physiotherapists and pharmacists can now issue sick notes. The purpose of expanding the authorising groups for sick notes was to reduce GP workloads and therefore make it easier for patients to secure an appointment.

Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022

On the 21 July 2022, the above Regulations came into force making it easier for businesses to engage agency workers to replace workers on strike. However, in September, the Trades Union Congress ('TUC') reported the government to the International Labour Organisation alleging that the engagement of temporary workers to conduct the duties of workers on strike significantly damages the right to strike. The TUC also brought separate judicial review proceedings challenging the new legislation. On 14 December 2022, the High Court granted permission for a judicial review and the case is expected to be heard in March 2023.

Employment status consultation

In July 2022, the government published its response to a consultation on whether the three current employment statuses (that of independent contractor, worker and employee) were fit for the modern economy. Most respondents agreed that issues remain with the current model of employment status. However, overall there was little consensus on how these concerns should be addressed.

As a result, the government has not implemented any legislative changes on the matter. Instead it has published new non-statutory guidance designed to help clarify the aspects of the different employment statuses. This includes an explanation of how employment status determines the employment rights individuals are entitled to, the factors which determine an individual's employment status and how employment status should be determined for different sectors.

The government also confirmed it will not seek to unify the definition of employee for tax and employment purposes. Presently, an individual can be declared to be an employee by the tax tribunal for tax purposes, but such a finding will not necessarily mean the same individual would be found to be an employee by an employment tribunal, or vice-versa. This position is set to continue.

Future of work review

During the Spring and Summer of 2022, Matt Warman MP led the first phase of the Future of Work review. The review consists of two phases: the first is a high-level assessment of the key strategic issues facing the future UK labour market and the second phase will provide a more detailed assessment of key areas.

On 1 September 2022, Matt Warman MP recommended that that the government consider four key areas in greater detail: artificial intelligence and automation, skills, place and flexibility, and worker's rights. You can find the full response here.

At present, no timeframe for the implementation of the second phase has been given, but it is not unreasonable to expect further progress in 2023.

Disability workforce reporting

In December 2021, the Minister for Disabled People launched a consultation on disability workforce

reporting, which had been promised as part of the National Disability Strategy in July 2021. The consultation aimed to explore disability workforce reporting for larger employers who employ over 250 employees, with a focus on publication of the proportion of employees who identify as disabled.

However, on 14 November 2022, the government announced it had no current plans to introduce mandatory disability pay gap reporting. A full response on the above consultation remains outstanding.

The Exclusivity Terms for Zero Hours Workers (Unenforceability and Redress) Regulations 2022

On 5 December 2022, the above Regulations came into effect meaning that employers cannot prevent workers who earn less than the 'lower earnings limit' (which for the financial year 2022-2023 is £123 per week) from seeking other employment if they wish.

If an employer dismisses an employee who currently earns less than £123 a week for breaching an exclusivity term, the Regulations give the employee the ability to bring a claim for automatic unfair dismissal. There is no minimum length of service required by the employee to bring this claim.

Looking ahead to 2023

We have highlighted in the above where more progress is expected in 2023. The following employment legislative developments are also expected.

A statutory Code of Practice on dismissal and re-engagement

The Code of Practice was proposed following the P&O Ferries redundancy affair in March 2022. This will seek to tackle controversial 'fire and rehire' practices sometimes used by employers to force through (often less favourable) changes to workforce contracts. Courts and tribunals will be required to consider the Code when determining relevant cases. In addition, they will have the power to award an uplift of up to 25% of an employee's compensation where the Code applies and where the employer unreasonably fails to follow it.

On 3 November 2022, Lord Callanan confirmed that the government intends to publish the draft statutory code of practice in 'the near future', suggesting it will be further progressed in 2023.

Information Commissioner's Office ('ICO') consultations

The ICO's consultation on monitoring at work guidance closes on 11 January 2023. In addition, the ICO's consultation on information about workers' health closes on 26 January 2023.

These consultations are expected to contribute to new guidance to replace the Employment Practices Code to better reflect changes in UK Data Protection law since GDPR and the Data Protection Act 2018. The guidance will aim to help employers consider the data protection issues surrounding recruitment and selection, employment records, monitoring at work and information about workers' health.

Retained EU Law (Revocation and Reform) Bill

This Bill proposes that EU-derived secondary and retained direct EU legislation will become invalid on 31 December 2023 unless expressly preserved by ministerial order. This potentially means that many regulations impacting employment practices, such as the Fixed Term Employee Regulations 2022, the Working Time Regulations 1998 and the Agency Worker Regulations 2010, would no longer have EU Directive underpinning and that related European Court of Justice case law on those matters would no longer have effect in the UK judicial system.

This will make it easier for courts and tribunals to depart from existing EU-derived domestic case law. Legal commentators have raised concerns that if the Bill becomes law and legislation is allowed to lapse at the end of December 2023, significant questions will arise for employers on many aspects of employment law and enforcement.

The Bill is currently awaiting its third reading in the House of Commons.

The Employment Bill

This Bill was originally described in the Queen's Speech to Parliament of December 2019. As described in the Speech, the intention of the then Johnson government was to wrap up several employment issues into this piece of legislation. This included ensuring workers got the tips they received, extending the protections for pregnant women and women on maternity leave against redundancy and making flexible working a default right and to create a single employment rights enforcement agency.

The Bill has not been set out since, though several private members' bills and other consultations have sought to bring the issues the Bill was expected to cover forwards. Some of these have been highlighted above.

- Allocation of Tips Bill: will have its third reading early in 2023. The Bill ensures that tips, service charges and gratuities paid by customers are fairly allocated to workers.
- Paternity (Leave and Pay) Bill: will have its second reading early in 2023. It aims to extend eligibility to paternity leave and pay, and to make provision for more flexibility in the timing and notice period for paternity leave.
- Neonatal Care (Leave and Pay) Bill: is due to have its third reading early in 2023. It aims to make provision about leave and pay for employees with responsibility for children receiving neonatal care.
- Flexible working: on 5 December the government published its response to consultation on flexible working - Making flexible working the default. The government has confirmed it intends to introduce legislation to:
    - Require an employer to consult with an employee if it is considering rejecting a flexible working request
    - Permit employees to make two requests in a 12-month period instead of one
    - Reduce the time an employer has to respond to a request from three months to two
    - Remove the requirement on the employee to specify how the employer might deal with the effects of the request.

A private members bill setting out these changes is already being processed through Parliament and has the government's backing.

"Self-employed contractor" found to be a worker can claim for all unpaid holiday pay on termination

Article published on 17 February 2022

Four-week holiday entitlement carries over where right is denied, whether or not worker takes unpaid leave.

Our regular readers may remember the long-running case of Mr Smith, whose contract with Pimlico Plumbers described him as an independent contractor. After the termination of his contract, Mr Smith brought a number of claims requiring worker status. The Supreme Court determined in 2018 that Mr Smith was a worker and not a self-employed contractor. Our report on this judgment can be found in the June 2018 edition of our Employment Law Bulletin which is available on our website.

Following this decision, an employment tribunal decided Mr Smith's claim for pay for holiday which he had accrued but not taken since August 2005 was out of time. This was on the basis that Mr Smith had not brought his holiday pay claim within 3 months of the last underpayment by the employer (the date on which he should have been paid for a period of leave taken).

Mr Smith argued that the principles of the European Court of Justice (ECJ) case of *King v Sash Window Workshop (2018)* should be applied. In that case, the ECJ held that a worker is entitled on termination to be paid for any accrued annual leave under the Working Time Directive, where the worker has been discouraged from taking holiday because it would have been unpaid. As Mr Smith brought his claim within 3 months of the termination of his contract, he argued that his claim was in time.

The tribunal did not agree and distinguished the case of Mr King. It noted that Mr King's case concerned the right to carry over until termination annual leave that is not taken because an employer fails to remunerate annual leave. Mr Smith, on the other hand, had been able to take and had taken leave, although it was unpaid.

The EAT agreed.

Case details: *Smith v Pimlico Plumbers*

Workers denied the right to paid leave are entitled to bring a claim on termination whether unpaid leave has been taken or not

The Court of Appeal has now allowed Mr Smith's appeal, enabling him to claim for holiday pay stretching back to 2005. Lady Justice Simler made clear that European Union law establishes a "single composite right" to 4 weeks' paid annual leave. A worker who takes unpaid leave when the employer refuses pay for such leave is not exercising the right to paid leave.

The judgment notes that under the Working Time Regulations 1998 (WTR) workers lose the right to statutory leave which is untaken at the end of the leave year. However, it makes clear that the worker will only lose the right if they have actually had the opportunity to take paid leave.

An employer would have to show that it "specifically and transparently gave the worker the opportunity to take paid annual leave, encouraged the worker to take paid annual leave and informed the worker that the right would be lost at the end of the leave year. If the employer cannot meet that burden, the right does not lapse but carries over and accumulates until termination of the contract, at which point the worker is entitled to a payment in respect of the untaken leave."

Lady Justice Simler held that Mr Smith's claim was in time because he was denied the opportunity to exercise the right to paid leave throughout his engagement. Pimlico Plumbers had not shown that it had given Mr Smith the opportunity to take paid leave and encouraged him to do so. The right therefore carried over and accumulated until termination of the contract, at which point Mr Smith was entitled to a payment in respect of the unpaid leave.

As an appendix to the judgment, the Court of Appeal has suggested that the following words are read into Regulation 13 of the WTR:

"Where in any leave year an employer (i) fails to recognise a worker's right to paid annual leave and (ii) cannot show that it provides a facility for the taking of such leave, the worker shall be entitled to carry forward any leave which is taken but unpaid, and/or which is not taken, into subsequent leave years."

Implications for employers

The key significance of this decision is for organisations engaging with individuals who are

expressed to be self-employed contractors or consultants, but who may be found to be workers at a later date, and who have been denied the right to paid annual leave. (See our article from February 2021 for further detail on worker status: Supreme Court confirms that Uber drivers are workers after denying appeal which is available from our website.) Where arrangements with these individuals are long-standing, employers could find that they are facing claims for very significant amounts. It is reported that Mr Smith's claim for historic holiday pay is in the region of £70,000.

Claims for holiday pay are most commonly brought in the employment tribunal as claims for unlawful deduction from wages. Such claims must be brought within 3 months of the deduction (the date of the incorrect payment), or the last in a series of deductions. The Deduction from Wages (Limitation) Regulations 2014 set a 2-year limit on the arrears which can be claimed due to a series of deductions. This considerably reduces the risk to employers facing claims for holiday pay where there is a series of deductions.

However, it is important to note that the decision in Mr Smith's case means that workers who have been denied the right to paid leave can bring a claim for all of their unpaid holiday pay on termination, whether or not they have actually taken unpaid leave. This will not be a claim in relation to a series of deductions, but one single deduction crystallising on termination.

This case only applies where the claimant has been denied the right to paid leave altogether. It will not apply where the claimant has received holiday pay but been underpaid for it. It also applies only to the 4-week "Euro leave" under the Working Time Directive and Regulation 13 WTR. It does not apply to the additional 1.6 weeks' paid leave under Regulation 13A WTR.

It is possible that this judgment will be appealed.

The exit of the UK from the European Union does not impact on this decision, as the fundamental rights or principles of the European Union law underpinning the right to 4 weeks' paid leave are retained in UK law. That is not to say that the Government might not bring forward legislation impacting on these rights in future.

Cricket club groundsman required to provide personal service was self-employed

Article published on 28 February 2022

Claimant was in business on his own account and not entitled to holiday pay or notice pay.

There have been a number of high profile cases dealing with employment status and associated rights in the last few years. Not least of these is the long-running case of *Smith v Pimlico Plumbers*, on which we recently reported the latest Supreme Court judgment: Self-employed contractor found to be a worker can claim for all unpaid holiday pay on termination (available from our website).

Key questions for courts and tribunals in these cases include the following, based on the statutory definition of a "worker":

- Whether the individual undertakes under the contract to perform work personally (rather than being able to send a substitute to carry out the work); and if so
- Whether the other party to the contract is a client or customer of a profession or business undertaking carried on by the individual.

Employment status is a fact-dependent question, and the courts must consider the whole picture, including the written contract and the reality of the working arrangements. Case law on this question focuses on the extent to which the individual is controlled on a day to day basis by the purported employer and integrated into its organisation. It also considers whether the contract

includes mutuality of obligation: an obligation on the employer to provide work and an obligation on the individual to accept it when offered. Having a requirement for a minimum number of hours' work each week will be one factor weighing against self-employment.

Many recent cases have determined that the claimant had worker status, even though the contract expressly stated otherwise. This can also be the case where the individual is providing their services through their own company. See for example our case report from September 2019: Can someone who is paid through their own limited company be a worker or employee? (available from our website).

By contrast, a recent case heard in the EAT upheld an employment tribunal decision that an individual was not a worker or employee and was not entitled to paid holiday or statutory minimum notice on termination, even though the contract required him to carry out some of the work personally.

Case details: ***Waters v The Mote Cricket Club***

The claimant, Mr Waters, had a long association with the Mote Cricket Club, as player, member, committee member and volunteer. He occasionally carried out paid casual work for the club, assisting the directly employed groundsman.

Mr Waters set up his own business, Green Hand Gardens (GHG), in 2011 and took out a shorthold tenancy on property at the club to store his equipment and from where he carried on his business. GHG carried out gardening work and maintained a cricket pitch for another club.

Following the employed groundsman's departure, the club engaged a contractor, but this arrangement was short-lived. GHG then entered a contract with the club. The contract set out in detail requirements for the upkeep of club's cricket pitches. As well as some off-season work, the contract required GHG to provide a minimum of 60 hours' work per week from March to October each year, and for Mr Waters personally to work for 40 of these weekly hours. The club's equipment was to be used in the first instance, and GHG equipment only with club authorisation. GHG was to submit monthly invoices for an agreed fixed amount. Additional hours were not remunerated.

During the contract, Mr Waters expressed his discontent with the terms of the contract and asked that the requirement for work to be carried out personally be reduced. He also asked the club to take him on as an employee rather than a contractor. The club gave notice to terminate the contract just over two years after it commenced.

Mr Waters brought claims to an employment tribunal for holiday pay and notice pay, and sought to amend his claim to include a claim for unfair dismissal. At a preliminary hearing, an employment tribunal found that Mr Waters was not a worker or an employee and so dismissed his claims. On appeal, the EAT agreed.

The EAT noted that the tribunal had carefully considered the requirement on the claimant to carry out work personally under the contract, as this was a factor weighing against self-employment status. However, it made clear that a person will not meet the statutory definition of a worker if they are obliged to carry out work personally, but the other party to the contract is in the position of a client or customer of their business.

The tribunal had made several findings which indicated that the club was a customer of GHG:

- the claimant was not under any control or supervision as to how and when he performed the work;
- he was expected from time to time to provide his own equipment;
- the claimant was already running a business of a similar kind and the work which he engaged to perform for the club could be incorporated within that business (turnover for the business

was in the region of £40,000 per annum, which included £22,000 from the club);
- the claimant was not integrated into the club's organisation;
- there was a requirement of personal service, but the claimant was clearly expected to provide someone else to perform the additional work;
- the claimant did in fact engage others to provide work under the contract;
- there was no evidence that the club ever checked that the claimant was in fact carrying out the minimum hours; and
- the claimant was able to carry out work for others and wished to reduce his personal commitment so that he could increase these opportunities.

In the light of these findings, the tribunal concluded that Mr Waters was self-employed as the club was "genuinely a customer or client of the claimant's business, albeit a very significant one".

Comment

Given the fact-dependent nature of decisions on employment status, it is helpful to note the factors the tribunal took into account when deciding against worker status in this case.

When entering into contracts with self-employed individuals, it is important to appreciate that a requirement to provide personal service can strongly indicate worker status. For this reason, parties entering such contracts will often avoid a requirement for personal service, including a substitution clause which allows the individual to send someone else to carry out the work when they are unwilling or unable to do so. They may also avoid stating any minimum working time requirement and focus instead on the level of service, tasks or project which must be completed.

However, as the EAT highlighted in this case, a requirement for an individual to perform work personally can be a feature of a contract for services, as long as the relationship between the parties is found to be one of contractor and customer. In assessing whether the individual is genuinely in business in their own account, a tribunal will consider factors such as whether they have bargaining power over the contractual terms, whether they market their services to others or carry out work for others, and whether they take a financial risk in the arrangement.

There are significant risks in mislabelling a worker or employee contract as self-employment and organisations should take professional advice at the outset to mitigate these risks. The risks include unbudgeted demands for unpaid PAYE, National Insurance Contributions, enforcement action relating to pension auto-enrolment, and employment tribunal claims relating, for example, to statutory paid holiday, working time and rest breaks, statutory sick pay, National Minimum Wage, notice pay and unfair dismissal.

School re-organisation case provides insight into fair redundancy process

Article published on 10 March 2022

What are the hallmarks of a fair redundancy process?

Re-organisation and redundancy processes can be tricky. Part of the issue is that there is no one-size-fits-all fair process which every employer should follow. Unlike disciplinary and grievance processes, there is no statutory guidance to follow in redundancy dismissals. Instead, there are general principles gleaned from decades of unfair dismissal case law. There may also be relevant redundancy and redeployment policies which the employer should follow, and which may be contractual. For academy trusts, these may have transferred across from the local authority on academy conversion.

In this article, we consider some of the hallmarks of a fair redundancy process in the light of a

recent Court of Appeal judgment in the context of a school closure and re-organisation.

This article does not cover the additional collective redundancy consultation obligations of employers who are contemplating 20 or more dismissals at one establishment within a 90-day period. If you would like more detail on these and on other aspects of the redundancy process, you may wish to register on our website to access our recorded Employment Law Breakfast Briefing: Redundancy - getting the process right.

Fairness is judged in the round

Before setting out on a re-organisation / redundancy exercise, it is useful to be aware of the way an employment tribunal will approach an employee's claim that their redundancy dismissal was unfair.

The tribunal will focus first on whether there was a fair reason for the dismissal. In redundancy cases, the focus will initially be on whether there was in fact a genuine redundancy situation and whether the dismissal was by reason of redundancy.

Secondly, the tribunal will consider the overall fairness of the dismissal. In doing so, the tribunal will take into account all the circumstances of the dismissal, including "the size and administrative resources of the employer's undertaking" and whether the employer acted reasonably or unreasonably in treating the reason for the dismissal as a sufficient reason to dismiss the employee.

In practice, this means that the tribunal will take evidence on the re-organisation / redundancy process which was followed and assess whether this was fair when taking into consideration the wider context. Employers with considerable resources, such as larger schools and academy trusts, will often be held to a higher standard by tribunals and be expected to carry through a more rigorous process.

Steps a tribunal will expect to see in a fair redundancy process

Although there is no simple checklist for every scenario, case law suggests that the following are markers of a fair redundancy process:

- Consulting with employees and their representatives on the business case for re-organisation / redundancy, and the proposed timetable and process (including selection pools, processes and criteria);
- A transparent, fair, objective and non-discriminatory selection process;
- Meaningful individual consultation with those at risk of redundancy;
- Serious consideration of alternatives to redundancy, including seeking suitable alternative employment for those who are at risk of redundancy; and
- A right of appeal of any redundancy dismissal decision.

Case details: ***Gwynedd Council v Barratt & Hughes***

The Court of Appeal has recently upheld an unfair dismissal decision in the context of school closure and re-organisation.

The two claimants were P.E. teachers employed by Gwynedd Council to work at a community secondary school (School 1). In 2015, the council decided to re-organise education provision by closing School 1 and nine primary schools in its catchment area, and opening a new community school for pupils aged 3 to 16 (School 2).

Staff were informed that their contracts would terminate at the end of the school year, that they would be able to apply and interview for roles at School 2, and that unsuccessful candidates would

be made redundant if they were not redeployed.

The Claimants applied for positions at School 2, but they were unsuccessful and external candidates were appointed to the new roles. The claimants were dismissed on the ground of redundancy. The claimants queried the lack of an opportunity to make representations about the decision and the lack of an appeal process, correctly pointing out this was their contractual right. The chair of the governing body of School 1 apologised but stated that the lack of an appeal did not disadvantage the claimants as an appeal could not have reversed the decision to close the school.

The claimants brought claims for unfair dismissal which were upheld by an employment tribunal.

On appeal, the Employment Appeal Tribunal and subsequently the Court of Appeal both agreed with the tribunal that the dismissals were not fair in all the circumstances.

Key learning points

This case highlights the following useful learning points when planning for redundancy and re-organisation:

- an irreversible business decision (here a decision by the council to close a school) is not the same as an individual redundancy decision being inevitable;
- alternatives to redundancy for the individual should always be considered, and this will usually include giving those at risk of redundancy priority over external candidates for any suitable alternative vacancies;
- asking employees to apply for their existing jobs or equivalent jobs can be found to be unfair in some circumstances;
- employees who are at risk of redundancy should be properly consulted and allowed to make representations; and
- it is advisable to offer a right of appeal in all redundancy dismissals even though there is no statutory right of appeal, and even where there is no contractual right of appeal.

There are some circumstances where it will be appropriate to ask employees to apply for and interview for a role in a redundancy scenario. For example, this could be the case where a number of employees have been selected for redundancy and there is only one suitable alternative vacancy (which is not the employees' current role) available for these employees.

The special protections for those on maternity leave who are selected for redundancy should not be overlooked. For more detail, please see our article from October 2020, Can we make an employee redundant during maternity leave or offer changed terms on her return to work? (available from our website).

Lack of belief in "transgenderism" is protected but doctor was not discriminated against

Article published on 20 July 2022

Policy on use of service users' preferred pronouns was a proportionate means of achieving a legitimate aim.

In October 2019, we reported on the Employment Tribunal's decision in the case of Dr Mackereth, a doctor engaged through a contractor, Advanced Personnel Management Group (UK) Limited (APM), to work as a health and disability assessor for the Department for Work and Pensions (DWP). See our article, Doctor who refused to use pronoun chosen by transgender patients was not discriminated against (available on our website). The EAT has now published its decision on Dr Mackereth's appeal.

Dr Mackereth is a Christian who believes that God created only males and females and that a person cannot choose their gender. During his induction he made clear that he would not refer to transgender people by their preferred pronoun as was required by a DWP policy. Alternative roles and procedures were explored which would not require Dr Mackereth to work with transgender people, but these were not found to be feasible. Dr Mackereth decided he could not work under the DWP policy and APM confirmed that he would not be able to work in the role.

Dr Mackereth brought claims for harassment, direct discrimination and indirect discrimination against both the DWP and APM.

The tribunal decision

The tribunal dismissed all the doctor's claims. It held that Dr Mackereth's beliefs were not worthy of respect in a democratic society, not compatible with human dignity and conflicted with the fundamental rights of transgender individuals, and that they were not therefore protected under the Equality Act 2010.

The tribunal also found that, had the doctor's beliefs been protected, the DWP would have been able to defend the indirect discrimination claim as the policy was a proportionate means of achieving a legitimate aim. This was because the harm to vulnerable service users of accepting Dr Mackereth's stance would have outweighed the discriminatory impact on the claimant.

The EAT decision: *Mackereth v DWP*

Dr Mackereth's belief is protected

The EAT overturned the tribunal's decision that Dr Mackereth's Christian belief or his lack of belief in "transgenderism" were not protected.

The EAT noted that the tribunal had come to its decision before the judgment of the EAT in *Forstater v CGD Europe and others* (see our article on this decision: Claimant's gender critical belief is protected under the Equality Act on our website). The EAT stated that the tribunal had imposed too high a threshold when considering whether the belief was worthy of respect in a democratic society, compatible with human dignity and did not conflict with the fundamental rights of others. It noted that the *Forstater* decision made clear that minority beliefs should be protected, even where those beliefs might offend or shock others. It agreed that a belief will meet the threshold for protection if it does not destroy the rights of others.

Dr Mackereth was not discriminated against

However, the EAT went on to agree with the tribunal that Dr Mackereth had not been discriminated against on the basis of his belief or lack of belief.

On the direct discrimination claim, the EAT held that the tribunal had been entitled to draw a distinction between Dr Mackereth's beliefs and the way he wished to manifest those beliefs. It found that any health and disability assessor who refused to use service users' preferred pronouns would have been treated the same way, regardless of their beliefs.

On the indirect discrimination claim, the EAT held that the tribunal had properly weighed the discriminatory impact on Dr Mackereth against the impacts on vulnerable service users of not insisting that he follow the policy. It noted that the tribunal had considered whether less discriminatory alternatives would be feasible, such as triaging transgender people to ensure they were not seen by Dr Mackereth. However, it decided that the tribunal was entitled to find that the particular sensitivities for transgender people accessing the service meant these alternatives would in themselves cause offence.

Comment

This case reflects the current case law on so-called "gender-critical" beliefs. Dr Mackereth has expressed his intention to appeal. We are still awaiting the decision of the employment tribunal in *Forstater* as to whether the claimant was discriminated against on the basis of her protected belief.

Employers should continue to take what steps they reasonably can to prevent workplace discrimination and harassment. This will include putting in place clear and well-communicated codes of conduct, policies, and statements of organisational values, organising induction and regular update training on equality and diversity, and taking robust action to deal with breaches of such codes and policies.

A key learning point from this case is the importance of being able to justify policies and practices which put groups sharing a protected characteristic at a disadvantage. This means being clear about the aims of the policy and explaining how it meets the needs of the organisation, commissioners / stakeholders, service users and customers. It also means thinking through policies to ensure that they do not go further than is necessary to meet those aims. When an employee raises concerns about a policy or way of working, employers should consider whether there are alternative approaches which would avoid the discriminatory impact on the employee. Documenting these thought-processes and considerations at the time will assist employers where employees go on to bring discrimination claims.

Statutory minimum holiday pay cannot be pro-rated for part-year staff

Article published on 23 August 2022

Supreme Court: all workers are due 5.6 weeks' paid annual leave no matter how many weeks they work.

Working out holiday leave and pay for workers with variable hours is a tricky business. Over the years, employers have used short-cuts to try to ensure that zero hours and variable hours staff are getting their holiday pay. For example, paying staff an additional 12.07% of pay for each hour worked. The problem with these kind of short-cuts is that they are far removed from the way the law works and can lead to workers not receiving their leave entitlement, or the correct pay for that leave.

Statutory minimum holiday leave

It is important to understand that the law on holiday leave and the law on holiday pay are different.

Taking holiday leave first, the Working Time Regulations (WTR) provide for 5.6 weeks' minimum paid leave per year. The contract may provide a more generous entitlement to paid leave, but this is a statutory floor below which holiday entitlement for workers and employees cannot fall.

Holiday pay: a week's pay for a week's leave

The WTR states that workers should be paid a week's pay for a week's leave. It is the Employment Rights Act 1996 which sets out the rules on working out what is meant by a week's pay. Broadly, there are two different ways in which a week's pay is calculated.

For those with normal working hours, a week's pay is simply what the worker earns if they work their normal hours in a week. (Although this has been complicated by case law which means that any regular payments made on top of pay for normal hours should also be included in holiday pay.)

For those with no normal hours, or whose pay varies because of the amount of work done, or the time when it is done, a week's pay is the average of remuneration paid over a reference period. This was previously 12 weeks before the date of the holiday leave. Since 6 April 2020, the reference period has been extended to the 52 weeks before the leave is taken. In working out the average, no account is taken of weeks during which no work is done and the employer must go as far back as 104 weeks to find the last 52 working weeks. Where the worker has not worked for the employer for that long, the average should be calculated from all their worked weeks to date.

The problem with the 12.07% calculation

12.07% is commonly used to calculate holiday entitlement and/or pay for variable hours workers. It is a holiday accrual rate and comes from the following calculation: 5.6 weeks' leave divided by the number of working weeks in the year (52 – 5.6 = 46.4).

This percentage may be accurate to calculate holiday leave entitlement, but only where a worker has statutory minimum leave and works for all of the other weeks in the year.

The problem with this calculation is that it is inaccurate if there are weeks during the year when the worker is not working and is not on holiday. For example, a worker who has 5.6 weeks' holiday entitlement but works only 30 weeks during the year should have the following leave accrual rate: 5.6 divided by 30 = 18.67%.

Rolled up holiday pay

Paying an additional amount on top of pay each month for holiday pay (known as "rolled up holiday pay") is not compliant with the way paid leave works under the WTR. This is because holiday pay should be paid at the time leave is taken rather than effectively being paid in lieu during the contract.

The reason for this is that the fundamental purpose of the European Working Time Directive, which the WTR implemented in the UK, is to protect the health and safety of workers. Paying rolled up holiday pay can disincentivise workers from taking leave, as they do not actually have to take leave to receive holiday pay.

Case details: *Harpur Trust v Brazel*

We reported on the Court of Appeal's judgment in this case in 2019. For details of this please see How should holiday pay be calculated for term-time only workers? (available on our website).

Mrs Brazel is a term-time only visiting music teacher on a zero hours contract. She is paid holiday pay three times a year and designated leave days in each school holiday period. Her leave entitlement was worked out at 12.07% of hours worked and paid at her hourly rate.

Mrs Brazel brought a claim for unlawful deductions from wages to an employment tribunal. She argued that she was owed 5.6 weeks' paid holiday, without pro-rating, and that the trust should have used the statutory reference period to work out her average weekly pay. She calculated that her leave accrual rate should have been about 17.5% and that she had been underpaid by around £235 per term.

The Supreme Court decision

The Supreme Court handed down its judgment on 20 July this year. The key points clarified in the judgment are that:

- all workers who are on contract throughout the holiday year are entitled to the statutory minimum of 5.6 weeks' paid annual leave under the WTR – this minimum entitlement cannot

be pro-rated to reflect the number of weeks worked; and
- to work out holiday pay, average weekly pay should be calculated over the statutory reference period just prior to leave being taken (discounting all non-worked weeks).

Implications for employers

Mrs Brazel's case particularly applies to part year workers on a year-round contract who have no normal hours. These are workers who have some unpaid non-worked weeks each year. That could include seasonal, term-time only and zero hours contract staff on ongoing contracts who have some weeks each year where they are neither working nor on holiday.

This case has not changed the law on holiday leave and pay. It simply clarifies the existing law and highlights that the practice of applying 12.07% of additional pay to account for holiday pay for variable hours workers is likely to be non-compliant with the WTR.

This case is the end of the litigation process and the law on this point is now settled. The law will only change if parliament legislates to do so in future.

Claims for unlawful deductions from wages must be brought within 3 months of the last in a series of deductions. Where a correction is made, workers will usually not be able to bring an employment tribunal more than 3 months after that correction. There is also a backstop of two years on arrears which can be claimed as unlawful deductions from wages.
Employers should review their current contracts and holiday entitlement calculations to determine whether their practice is compliant with the law. We recommend that employers seek legal advice to assist with assessing risks and making changes to leave and pay calculations going forward.

The risks of seeking to avoid collective bargaining

Article published on 23 September 2022

EAT: Unilateral imposition of a pay rise outside collective bargaining was an unlawful offer.

It seems we are heading into a further period of uncertainty for employers and employees characterised by tough negotiations and consultations on pay, benefits and job security. In these difficult times, it is vital that good relationships are nurtured and transparent communication between employers, unions and staff is prioritised.

Employers with recognised trade unions, or where unions are seeking recognition, should also be aware of the significant legal risks of bypassing union negotiations on terms which are to be determined by collective bargaining.

We reported in November 2021 on the Supreme Court's decision in the case of *Kostal UK Ltd v Dunkley and others*. For more detail, please see our article: Employers should exhaust collective bargaining procedures before making direct offers to workers (available on our website).

When will a direct offer to employees be unlawful?

Under section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), a direct offer of terms by an employer to a member of a trade union which is recognised or seeking to be recognised will be unlawful where:

a) the effect of the offer, if accepted, would be that the workers' terms, or some of those terms, will not be determined by collective agreement (this is known as the "prohibited result"); *and*
b) the employer's sole or main purpose in making the offer is to achieve the prohibited result.

In *Kostal* the Supreme Court made clear that offers can be unlawful if there is a real possibility that the term would otherwise have been determined by collective agreement, such as when the steps set out in a procedural agreement are not yet complete.

It also stated that offers can be unlawful where the effect of acceptance would only be a temporary removal of the term from collective bargaining and where the term will be determined by collective bargaining in future.

What are the penalties for making an unlawful offer?

The fixed penalty awards for unlawful offers are increased each year. Since April this year, claimants can be awarded £4,554 for each separate unlawful offer. An employer which makes a number of unlawful offers to a large group of workers could therefore face very significant financial liability.

Collective bargaining procedure must be exhausted

Kostal was found not to have exhausted the agreed collective bargaining procedure, and so there was a real possibility that the terms in question would otherwise have been determined by collective agreement. The procedural agreement in *Kostal* included a final step of referring the dispute to Acas for conciliation. This had not been done.

The Employment Appeal Tribunal (EAT) has now upheld the decision of a tribunal that an employer made unlawful offers to members of a recognised trade union in order to avoid collective bargaining where the collective bargaining agreement did not include a clear final step of this kind.

Case details: ***Ineos Infrastructure and others v Jones and others***

Unite was a recognised trade union of the Ineos group. Pay, hours and holiday terms were subject to collective bargaining but, unlike in *Kostal*, the collective bargaining agreement did not include clear procedural steps and did not have a dispute resolution procedure applicable to collective bargaining.

A series of pay negotiation meetings took place in 2016 and 2017. These resulted in the employer making a "best and final offer" of 2.8%. Unite's members authorised the union to return to talks to seek an improved offer. Its position was that it could not recommend a pay increase to its members of less than 3%. The tribunal found that there was an expectation by both parties that there would be a 'next stage' if the pay negotiations resulted in an impasse or failure to agree.

Ineos considered that the relationship with Unite had broken down and was unwilling to continue negotiations. Ineos wrote directly to workers stating that a pay increase of 2.8% in line with its latest offer would be implemented. It stated that it had given notice to terminate the collective bargaining agreement with Unite but that it was happy to negotiate with a works council or alternative union.

An employment tribunal found that Ineos had made unlawful offers under section 145B TULRCA.

The EAT agreed with the tribunal that the offers were unlawful and dismissed the employer's appeal.

Can the unilateral imposition of a pay increase be an unlawful offer?

Ineos argued that it had not made an offer to its workers (and so could not have made an unlawful offer) when it wrote to them to inform them of the pay increase, and that this was rather a unilateral promise not requiring acceptance. The EAT did not agree.
The EAT agreed with the tribunal that the letter included a statement of intention to vary contractual terms as to pay. The unilateral imposition of the pay increase was the implementation

of an offer which had already been made and this offer was accepted by the employees by continuing to work.

Did the offer have the prohibited result?

The EAT agreed that the offer had the prohibited result as its acceptance meant pay terms were not determined by collective bargaining. Importantly, it noted that the tribunal had found that collective bargaining negotiations were not at an end when the offer was made and it was likely that agreement would have been reached had negotiations continued. Evidence showed that the two sides were not far apart and that the difference between them was "not worth falling out over".

Was the employer's sole or main purpose to achieve the prohibited result?

The EAT agreed with the tribunal's findings that Ineos' main purpose in making the offer was to achieve the prohibited result. These findings were based on inferences drawn from evidence that the employer sought to "get rid of Unite" and that it in fact gave notice to terminate the collective bargaining agreement.

Comment

Ideally, collective bargaining agreements will include a clearly staged procedure. However, this is not always the case. As with Ineos, the agreement may imply that a series of negotiation meetings should be undertaken, but have no indication of what happens when an impasse is reached or what marks the end point of negotiations.

The Supreme Court in *Kostal* commented that employers who genuinely believe negotiations are at an end will not be found to have made a direct offer with the sole or main purpose of avoiding collective bargaining. Italso made clear that any agreed procedure for attempting to resolve an impasse in negotiations should be followed before direct offers are made to workers.

Employers seeking to show they genuinely believed negotiations were at an end would need good evidence that the collective bargaining process was exhausted before the offers to workers were made. Where no clear procedure is agreed, how can the employer evidence that the collective bargaining process is at an end? Such evidence might include minutes of meetings evidencing the employer's genuine commitment to the bargaining process, written evidence of any impasse in negotiations, setting out in writing a formal failure to agree, and evidence of any relevant dispute resolution step being followed.

Employers who are considering making offers to workers outside of a collective agreement are strongly advised to take legal advice at an early stage.

Redundancy consultation: what should employers consult on and when?

Article published on 21 October 2022

EAT: Redundancy dismissal of fixed term employee was unfair due to lack of consultation on pooling and selection.

In these uncertain times, some employers are unfortunately having to make difficult decisions about staffing, including carrying out redundancy exercises. A recent case in the Employment Appeal Tribunal provides a timely reminder of some of the fundamental principles of a fair redundancy process.

There is no statutory guidance (such as an Acas Code of Practice) on fair redundancy processes,

although Acas has published useful non-statutory guidance on redundancies. In order to understand what a tribunal might consider fair or unfair in such a process, we need to consider guidance from case law in this area. Employers should also ensure they follow any relevant redundancy policy and/or collective agreement.

Steps the tribunal will usually expect to see in a fair redundancy process

The leading case on fair redundancy processes (Williams v Compair Maxam Ltd), indicates the importance of the following steps. (Please note that there are additional statutory requirements where 20 or more dismissals are contemplated within a 90 day period.)

- Warn employees of the possibility of redundancies in good time;
- Consult on the following before making any decisions:

    a. the business case for redundancy; and
    b. the proposed timetable and process (including selection pools, selection processes and selection criteria);

- Conduct a transparent, fair, objective and non-discriminatory selection process;
- Conduct meaningful consultation with those at risk of redundancy, including consultation on any selection scoring / decisions;
- Seriously consider alternatives to redundancy, including seeking alternative employment for those who are at risk of redundancy; and
- Offer a right of appeal of any redundancy dismissal decision.

Where employers take a different approach, they will need to be able to evidence good reasons for doing so.

A recent case has highlighted the crucial role of consulting with individuals about pooling and selection criteria at a stage when consultation can still influence decision making and before selecting an employee for redundancy.

Case details: ***Mogane v Bradford Teaching Hospitals NHS Foundation Trust***

The claimant, Ms Mogane was employed as a Band 6 nurse by the NHS trust on a series of one-year fixed term contracts and she had more than two years' service. The trust decided that the number of staff in the research unit in which she worked should be reduced for financial reasons. The unit staff included another Band 6 nurse whose fixed term contract expired after that of the claimant.

The trust decided that Ms Mogane should be made redundant on the basis that her contract was due to be renewed soonest. There was no consideration of pooling Ms Mogane with the other Band 6 nurse and no selection criteria were applied. Consultation did take place after this decision was made; this was focused on seeking alternative employment for the claimant. A Band 5 role was offered to her, but Ms Mogane refused the role on the basis that it was a lower band and she did not have the particular qualification required for the post.

An employment tribunal found that the dismissal was fair but this decision was overturned by the Employment Appeal Tribunal (EAT).

Employer should have consulted on proposed pool and selection criteria

The EAT reiterated the importance of employers carrying out consultation with employees at a point where it can be meaningful; in other words when it can still influence the decision-making.

The EAT commented that the employer had made an "arbitrary choice" of redundancy pool based solely on the date on which the claimant's fixed term contract would have ended and

as a consequence it had made the decision that the Claimant should be dismissed before any consultation took place.

Learning points

This case is a useful reminder that:

- Those on fixed term contracts who have two years' service can bring an ordinary unfair dismissal claim and should not be treated differently to employees on permanent contracts;
- It is important to understand that there are two steps in the selection process:

  c. the first to decide on the pool of employees from whom those at risk of redundancy will be selected; and
  d. the second to apply the selection criteria or conduct the selection process to those in the pool;

- Employers should consult on proposals for these two steps at the outset of the process and before decisions are made; and
- Consultation should always take place on the proposed pool for redundancy, even where the number of employees in the pool is one.

It may have been possible for the employer in this case to carry out a fair redundancy dismissal by pooling together the two Band 6 nurses and applying fair and non-discriminatory criteria to both in order to select one for redundancy. However, in skipping a key element of the consultation process and applying an arbitrary method of selection, the employer's decision to dismiss was found to be unfair.

Further information

This article does not cover the additional statutory collective redundancy consultation obligations of employers who are contemplating 20 or more dismissals at one establishment within a 90-day period. For more information on these obligations, you may wish to register to access our recorded webinar available on our website: Redundancy - getting the process right.

If you would like advice as an employer on any aspect of redundancy consultation and dismissal, please get in touch.

If you would like to contact us please email
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