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EMPLOYMENT LAW BULLETIN

AUGUST 2019

Welcome to the August edition of our employment law bulletin.

We take a brief look at some of the employment-related topics on which the Government is currently consulting. These include interesting proposals to extend redundancy protection for new mothers and to support people with long term health conditions in the workplace.

We cover the recent recommendations of the Women and Equalities Select Committee aimed at empowering regulators to enforce Equality Act rights and bring about institutional change rather than simply relying the impact of individuals bringing claims.

The Court of Appeal decision in ***Okedina v Chikale*** considers the circumstances where an employee will be able to rely on employment law protections even though the contract is illegally performed, in this case because the claimant did not have the right to work in the UK.

In ***Forbes v LHR Airport***, the EAT considered whether an employer was vicariously liable for harassment when an employee posted a racist image to Facebook.

And in our **Question of the Month** for August, we look at the correct way of calculating holiday pay for term-time only or other part-year workers following a recent Court of Appeal decision in ***The Harpur Trust v Brazel***.

Firstly, may I remind you of our forthcoming events:

- **Employment Breakfast Briefing: Dealing with employee grievances**
  1st October 2019, Radisson Blu, Leeds
  For more information or to book

- **Wrigleys Annual Charity Governance 2019**
  10 October 2019, Hilton City, Leeds
  For more information or to book

- **SAVE THE DATE - Northern Education Conference 2019**
  27th November 2019, Principal York, York
  For more information or to book

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Contents

Wherever you see the BAILII logo simply click on it to view more detail about a case

Have your say on work/family life balance, the gig economy and ill-health related job loss

The government is seeking public feedback on a number of work-related topics which may interest you

The Government is currently consulting on a range of different work-related proposals, a number of which stem from recommendations in the 2017 Taylor Review of Modern Working Practices, which led to the government's own 2018 Good Work Plan.

Consultations are a useful way to provide feedback on particular topics and represent a real opportunity for individuals and organisations to provide working knowledge and practical experience on the issues the government is seeking to tackle.

The government has also recently published consultation outcomes on the use of NDAs and extending redundancy protections for women and new parents.

Good Work Plan-related consultations

1. Proposals to support families

Views are sought on government proposals to support parents to balance work and family life. This includes consultation on reforming existing entitlements to parental leave and pay, a proposed new neonatal leave and pay entitlement, and whether employers should have a duty to consider if a job can be done flexibly and make that clear when advertising a role. There is also exploration of a proposal to require employers with 250+ employees to publish their family-related leave and pay and flexible working policies.

Consultation regarding proposed parental leave and pay closes on 29 November 2019, the rest of the consultation closes early on 11 October 2019.

1. One-sided flexibility – addressing unfair flexible working practices

The government is seeking views on the Low Pay Commission's proposals of December 2018 to address the issue of 'one-sided flexibility'. This issue exists within some parts of the labour market were employers misuse flexible working arrangements, creating an unpredictability in working hours, income insecurity and a reluctance among workers to assert basic human rights. The consultation considers:

- providing a right to a reasonable notice of working hours
- providing workers with compensation for shifts cancelled without reasonable notice
- what guidance government can provide to support employers and encourage best practice to be shared across industries.

This consultation is open until 11 October 2019.

1. Establishing a new single enforcement body for employment rights

The government is consulting on options for establishing a single enforcement body and whether this could improve enforcement for vulnerable workers and create a level playing field for the majority of businesses complying with the law.

The consultation closes on 6 October 2019.

Health is everyone's business: proposals to reduce ill health-related job loss

This consultation looks at different ways in which the government and employers can take action to reduce ill health-related job loss. This includes disabled people and people with long-term health conditions, who are at greater risk of falling out of work.

Government proposals aim to support and encourage early action by employers for their employees with long-term health conditions and improve employer access to quality, cost-effective, occupational health services.

The Department for Work and Pensions and the Department of Health and Social Care are keen to understand the effect of these proposals on:

- business
- individuals
- the occupational health profession

Consultation closes on 7 October 2019.

Consultation outcomes

The government has recently published the following consultation outcomes.

1. The use of NDAs in workplace harassment or discrimination cases

The government has stated that it will:

- legislate so that no provision in a confidentiality clause can prevent disclosures to the police, regulated health and care professionals and legal professionals
- legislate so that limitations in confidentiality clauses are clearly set out in employment contracts and settlement agreements
- produce guidance for solicitors and legal professionals responsible for drafting settlement agreements
- legislate to enhance the independent legal advice received by individuals signing confidentiality clauses, and
- introduce enforcement measures for confidentiality clauses that do not comply with legal requirements in written statements of employment particulars and settlement agreements.

Wrigleys helped to coordinate a combined response to this consultation after discussing the consultation questions with clients who attended our April Employment Breakfast Briefing.

1. Redundancy protection for women and new parents

The government proposes to:

- to extend the redundancy protection period for 6 months once a new mother has returned to work
- to afford the same protection to those taking adoption leave, and
- to extend redundancy protection for those returning from shared parental leave.

The design of the protection for returning from shared parental leave shall be consulted on separately.

Women and Equalities Committee suggest fundamental changes to enforce the Equality Act 2010

"Current model is dependent on individual enforcement rather than seeking institutional change" say Committee.

On 30 July the Women and Equalities Committee (WEC) published their report on the enforcement of the Equality Act 2010 (EqA'10) and the role of the Equality and Human Rights Commission (EHRC).

Generally, the WEC's view is that the current framework for enforcement of rights under the EqA'10 is too dependent on individuals bringing claims to enforce their rights and/or seek damages for infringements and that this is impinging on the desired effect of the EqA'10 in UK workplaces. As a result, the WEC has suggested fundamental changes in the way that EqA'10 rights are enforced in the UK, including much more proactive approaches from sector regulators and the EHRC.

Flawed focus on individual enforcement

The WEC's report recognises the limits of individual enforcement, in particular that money was a key driving factor for all parties to discrimination claims, rather than effecting change.

Individuals tend to start off in a weaker position vis-à-vis their employers because they are usually less able to fund claims for breach of the EqA'10 through the courts and tribunals system. This means that the vast majority of claims never reach a court or tribunal, either ceasing due to lack of funds or settlement. Even if a claim does reach a tribunal and wins, the result is usually an award of damages which may have a negligible effect on the employer in the sense that it does not force them to confront issues of discrimination within the organisation.

In the Committee's view, the net result is that particular behaviour within an organisation can potentially go unchallenged and unchanged, meaning the protections of the EqA'10 are often left unfulfilled and only act retrospectively as a result of an individual bringing a claim.

The WEC was provided with evidence suggesting that employers are not particularly concerned about their sector's regulators or the EHRC taking enforcement action against them.

Recommendations made by the Women and Equalities Committee

The WEC was quite critical of the EHRC and recommended that it take several steps to put it on a more proactive footing in regard to enforcement activity. Other key recommendations were that sector regulators should do the same and work strategically with the EHRC to promote institutional change. This included recommendations that the government put obligations on enforcement bodies such as regulators and ombudsmen to fully utilise their powers to secure compliance with rights under the EqA'10 in their respective sectors. This in turn would be underlined by a recommendation that the EHRC make enforcement bodies a primary target for investigation and enforcement action for failure to implement their duties.

Whilst the WEC did not want to remove individuals' rights to bring enforcement action, it considers that this should, ideally, be a last resort. To help individuals, the EHRC and enforcement bodies impose institutional change the WEC also recommended increasing penalties and consequences for employers who failed to uphold the principles of the EqA'10. This includes creating recommendations for a mandatory duty on private and public sector employers to protect workers from harassment and victimisation in the workplace, supported by a statutory code clearly setting out what the duty entails. Breach of this duty would carry

'substantial' financial penalties.

Other recommendations include helping individuals access legal aid for discrimination claims and helping individuals avoid costs orders purely because they refused to enter into a settlement agreement or non-disclosure agreement. Perhaps more significantly for employers, the WEC recommended that judgments of county court discrimination cases be published online (as is already the case with employment tribunal judgments), that discrimination claims should be able to attract exemplary damages, and that courts and tribunals should be given the power to make remedial orders requiring organisational change and wider recommendations.

Wrigleys' Comment

The WEC have come to some clear and provocative conclusions about the effect the EqA'10 has had on the workplace in the UK. If the recommendations made by the WEC are taken up by the government, employers could see a noticeable increase in their duties in regard to, and potential liabilities from, discrimination claims as well as the threat of action from sector regulators.

Could an employee claim breach of contract when she had been working illegally?

If someone is employed illegally, will they have any rights under the employment contract or any protection under employment law?

Employing someone who does not have the right to work in the UK can lead to civil and criminal penalties under sections 15 and 21 of the Immigration, Asylum and Nationality Act 2006 (IANA) (see details of these penalties below). Readers will be well aware of the obligation to carry out right to work checks to reduce the risks of employing an illegal worker. But if someone is employed illegally, will they have any rights under the employment contract or any protection under employment law?

Where a contract is prohibited by legislation from the outset, its terms will be void for "statutory illegality" and neither the employer nor the employee will be able to enforce its terms. In such cases, a tribunal will usually find that the employee cannot bring a statutory claim (such as unfair dismissal or discrimination). In exceptional circumstances, a tribunal may decide that there are public policy reasons for allowing such a claim, for example to protect the victims of human trafficking.

Contracts may also be illegal under common law where they are legally entered into, but the contract involves conduct which is illegal or contrary to public policy. For example, where the method of payment to a worker involves a fraud on HMRC or the worker has overstayed a visa. In such cases, an employer may be able to defend an employment-related claim if it can show that the employee both knew about and participated in the illegality.

In a recent case, the Court of Appeal considered whether a domestic worker who had been working in the UK illegally could bring claims flowing from her employment contract following her dismissal.

Case details: ***Okedina v Chikale***

Ms Chikale was brought to the UK in July 2013 to work for Mrs Okedina as a live-in domestic worker on a six-month visa. Both women are Malawian nationals. Ms Chikale remained in the UK and continued to work for Mrs Okedina after her visa expired. Ms Chikale did not know that

her right to remain or work in the UK had expired. The employer kept possession of Ms Chikale's passport and misinformed her that she was taking the proper steps to sort out her visa. The job entailed very long hours and low pay. Ms Chikale asked for a pay rise in July 2015 and was summarily dismissed.

Ms Chikale brought claims in the employment tribunal for unfair and wrongful dismissal, race discrimination, breach of the Working Time Regulations, unlawful deductions from wages (including breaches of the national minimum wage rules), holiday pay and a failure to provide written particulars and itemised payslips. The employer tried to defend the claims on the basis of that the contract was illegal and its terms could not be enforced. However, the tribunal decided that the contract was not prohibited by legislation and that Ms Chikale did not knowingly participate in her illegal working. The tribunal went on to uphold all of her claims apart from those relating to discrimination.

The employer appealed to the EAT and subsequently to the Court of Appeal on the specific point of whether the effect of sections 15 and 21 of IANA is to prevent an employee succeeding in claims arising out of a contract of employment at a time when the employee's leave to remain in the UK has expired. Both courts upheld the original decision of the tribunal in favour of the claimant.

The Court of Appeal clarified that sections 15 and 21 of IANA impose a penalty (on the employer only) in the event of employment in breach of immigration rules. These sections do not prohibit someone from being a party to a contract of employment or state that the terms of that contract will be unenforceable. The Court commented that not all cases of illegal working involve culpability on the part of the employee and that there are public policy reasons why innocent employees should not be deprived of all rights arising from the employment contract. The Court determined that the employment tribunal was right to reject the statutory illegality defence and to find that Ms Chikale had not knowingly participated in the illegal performance of the contract as she had been wholly unaware that she no longer had the right to work and remain in the UK.

The courts were clearly influenced in this case by the very poor treatment of the employee and her ignorance of her own immigration status. In cases where an employee or worker is aware that they have overstayed their visa, it is more likely that an employer's illegality defence will succeed.

Sanctions for employing an illegal worker

Civil penalties

A civil penalty may be imposed if an employer employs someone without the right to undertake the work in the UK for which they are employed. The maximum civil penalty is £20,000 for each individual.

An immigration officer can visit the employer and ask to check right to work documents and can interview individuals. A civil penalty notice can then be issued setting out the level of civil penalty. If no objections are received to the civil penalty, the notice will be published on a public register. A civil penalty can lead to the revocation or downgrading of an employer's immigration sponsorship licence.

An employer is excused from paying a civil penalty if it can show that it carried out the required right to work checks. This is called the "statutory excuse".

Criminal sanctions

An employer commits a criminal offence if it employs someone who it either knows is an illegal worker, or whom it has "reasonable cause to believe" is disqualified from the employment by reason of their immigration status. On summary conviction, an employer may receive an unlimited fine or period of imprisonment of up to six months (or both). Following conviction on indictment (at Crown Court), the employer may be subject to imprisonment for up to five years.

Dismissals by reason of statutory restriction

If an employment contract becomes illegal after it has started, the employee can be dismissed for the potentially fair reason of "statutory restriction". Employers should however be aware that dismissing an employee for statutory restriction following a failed right to work check may be unfair if it is later found that the employee did in fact have the right to work in the UK. Because of this, it is important that employers do all they can to establish that an employee does not have the right to work before dismissing on grounds of illegality. It is also important to follow a fair dismissal process including investigating the issue, meeting with the employee, allowing them to put their case and offering a right of appeal.

If an employee is dismissed for a statutory restriction, the contract comes to an end immediately and they are not entitled to notice pay. However, if there is doubt about the employee's right to work, employers who wish to proceed to dismissal may need to consider doing so with notice (or pay in lieu of notice) for "some other substantial reason" rather than risking a breach of contract claim for failing to pay notice.

Was an employer vicariously liable for workplace harassment via social media?

EAT provides useful guidance on a developing area of potential liability for employers.

Employers can be vicariously liable for the actions of employees under the Equality Act 2010 ('EqA'10'). The issue of vicarious liability for losses caused by the wrongdoing of an employee is often tested by the courts and tribunals, with decisions tending to show that vicarious liability is heavily dependent on the facts in the case. They key question for the courts will be whether the wrongdoing was sufficiently closely connected to the job the wrongdoer is contracted to do so that it is just to hold the employer liable for the losses caused.

A recent interesting decision has considered an employer's vicarious liability for harassment via social media.

Case details: *Forbes v LHR Airport [2019]*

Mr Forbes worked as a security officer for LHR Airport Ltd ('LHR'). His colleague, Ms Stevens, shared an image of a golliwog with friends on her Facebook page. A colleague who was a 'friend' of Ms Stevens on Facebook, later showed the image to Mr Forbes, who complained to his line manager. A formal grievance followed, ultimately resulting in Ms Stevens receiving a final written warning and Ms Stevens offering Mr Forbes an apology.

Later, Mr Forbes and Ms Stevens were posted on duty together, resulting in Mr Forbes making a formal complaint and bringing a claim of racial harassment, amongst other things, against LHR.

Relevant law regarding workplace harassment

Harassment occurs when someone engages in unwanted conduct related to a relevant protected characteristic which has the purpose or effect of either: i) violating B's dignity; or ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B (referred to as 'prohibited effects' below). Race is a protected characteristic.

When considering whether the unwanted conduct had the prohibited effect, a tribunal must take into account the subjective effect on the "victim" and whether it is reasonable for the conduct to have had that effect in the circumstances.

An employer will be found vicariously liable for harassment if the wrongdoer was acting in the course of their employment.

EAT's decision

Mr Forbes lost his tribunal case because Ms Stevens' actions were not found to have taken place in the course of her employment. Mr Forbes appealed.

Was the conduct in the course of employment?

On the facts, the EAT found that Ms Stevens had posted the image on Facebook outside of working hours and did not mention work or colleagues in the post. The majority of her friends on Facebook were not work colleagues. The EAT found that the tribunal was therefore entitled to find that this did not amount to an act carried out 'in the course of employment'.

What was the purpose / effect of the conduct?

The tribunal had accepted that the image posted on Facebook was offensive and caused Mr Forbes offence, but determined that by sharing the image Ms Stevens' did not have the purpose of creating the prohibited effect. This was because she later showed contrition and sincerely apologised for her actions and Mr Forbes was not a Facebook friend of hers nor was Mr Forbes directly linked to the offending post. The EAT held that the tribunal had conducted a reasonable review of all the other circumstances in the case and that this had entitled it to come to the conclusion it did. As a result, Mr Forbes' claim for harassment failed.

Could the tribunal take into account the later apology?

At appeal, Mr Forbes challenged the tribunal's inclusion of Ms Stevens' apology when considering if her Facebook post had the prohibited effect, because the apology came after she had posted the image. The EAT found that the tribunal was not limited to considering the circumstances existing at the time of the alleged act. This meant that Ms Steven's later apology could be taken into account when determining the purpose or effect of the act.

Conclusions

In reviewing the case, the EAT accepted that there may be circumstances where sharing posts or images on social media could be done in the course of employment, such as where a particular page or group is principally used for work purposes. The EAT also found that the mere fact an employer considers disciplinary action appropriate does not automatically mean the act itself occurred in the course of employment. Employers may find this useful when drawing up or reviewing social media and IT policies. For example, making clear that social media posts made outside of work can still attract disciplinary action, without risking vicarious liability for actions taking place outside of work.

This case also shows employers do have opportunities to de-escalate potential harassment claims if an employee has committed an act outside of work by trying to repair relations between the effected employees. However, this case also shows that where an act occurs during the course of employment, an employer must show it had taken proper steps to avoid that act occurring in the first place and cannot act after the event to undermine a vicarious liability claim.

Because of the increasing integration of social media in all aspects of people's lives, the issue of employer's vicarious liability for workplace harassment and bullying via social media will likely continue to develop. In this case the EAT was satisfied that the post was not made in the course of employment, but it also acknowledged that in theory it was possible for employers to be vicariously liable for employees' social media content. Precisely where the line will be drawn, we shall have to wait and see.

Question of the month: how should holiday pay be calculated for term-time only workers?

Court of Appeal confirms school was wrong to pay holiday pay at the rate of 12.07% of earnings.

Where does the 12.07% calculation for holiday pay come from?

Part-time workers are commonly paid holiday pay at the rate of 12.07% of earnings. But how do employers come to this figure?

First, it is important to be clear that holiday leave and holiday pay are calculated in different ways.

Holiday leave

The minimum holiday leave entitlement under the Working Time Regulations is 5.6 weeks per year. It can be tricky to calculate holiday leave entitlement at any particular stage of the year for workers who do not work full-time. Often, employers use a calculation of 12.07% of hours actually worked so that they can work out holiday leave entitlementas it accrues hour by hour. This calculation is based on a standard working year of 52 weeks minus 5.6 weeks (46.4 weeks): 5.6 is 12.07% of 46.4 weeks.

Holiday pay

It is also common for employers to use the same percentage for holiday paycalculations and so simply to pay 12.07% additional pay as holiday pay. However, as the case below highlights, this calculation will not always be compliant with the statutory rules for holiday pay set out in the Employment Rights Act 1996. Under these rules, a week's pay should be paid for a week's leave. Where a worker has variable hours, a week's pay is the average weekly pay over the last 12 working weeks before the holiday was taken. This calculation ignores any weeks during which the worker received no pay.

Because "part-year" workers, such as those who work only during school terms, work fewer than 46.4 weeks in a year but are still entitled to the 5.6 weeks' paid holiday, they will not be paid the correct holiday pay if the 12.07% calculation is applied.

Case details: *The Harpur Trust v Brazel*

Mrs Brazel worked under a term-time only zero hours contract as a visiting music teacher at Bedford Girls' School. She worked between 32 and 35 weeks per year. Her contractual and statutory paid holiday leave entitlement was 5.6 weeks. She was required to take all her leave during school holidays. Her holiday pay was calculated as 12.07% of her pay and was paid three times a year at the end of April, August and December.

The employment tribunal decision

Mrs Brazel brought a claim for unlawful deductions from wages, arguing that her holiday pay should be calculated under the week's pay provisions set out in the Employment Rights Act (applying the 12 week average) and not by paying her an additional 12.07% of pay. If Mrs Brazel worked 32 weeks in a year, the tribunal calculated that she would, by the 12 week average calculation, have been paid holiday pay at a rate of 17.5% of annual earnings. The tribunal dismissed the claim, determining that words should be read into the Working Time Regulations to ensure that the statutory entitlement to holiday pay is pro-rated, in effect capping paid holiday leave entitlement at 12.07% per cent of annualised hours and not so not favouring part-time workers.

The EAT decision

The EAT disagreed. It stated that Mrs Brazel was entitled to 5.6 weeks' paid leave under her contract and under legislation, and that the Employment Rights Act contains a clear mechanism for calculating a week's pay where there are variable hours. There was no basis on which to read words into the Working Time Regulations to pro-rate the 5.6 weeks' paid leave entitlement so that part-time workers were not treated more favourably than full-time workers. It pointed out that legislative protection works the other way around to protect part time workers from being less favourably treated than full-time workers.

Court of Appeal decision

The Court of Appeal agreed with the EAT. It considered the possible anomalies which could arise, such as a cricket coach who is employed on a permanent contract from year to year but works only 12 weeks a year. It confirmed that such a worker would be entitled to the statutory minimum of 5.6 weeks' paid leave at the rate of a week's pay (in other words, the coach would be paid 17.6 weeks' pay for only 12 weeks' work). The judgment makes clear that this would only apply where there is an on-going contract and so the worker accrues the full statutory minimum leave for the year. It would not apply for workers who are engaged on short-term contracts from time to time. The Court was clear that such extreme cases are not sufficient to require the application of the pro rata principle to all workers.

Wrigleys' comment

The school in this case was following non-statutory guidance from Acas on calculating holiday pay for workers with irregular hours. It is likely that this guidance will now be updated. Schools are advised to check whether their term-time only workers are receiving the statutory minimum paid holiday leave based on average pay over the last 12 paid weeks. It is possible that this decision may encourage term-time only staff or other "part-year" workers to bring unlawful deduction from wages claims for underpaid holiday pay (which would be limited to any arrears for the last two years) or breach of contract claims in the civil courts (for which 6 years of arrears might be claimed).

Chris Billington, Head of Wrigleys' Education team, commented: "The Court of Appeal judgment highlights some interesting anomalies in the paid holiday leave entitlement for permanent

but seasonal workers (such as those who work only in Summer holiday clubs). It is unusual for employers to have in place permanent contracts for staff who only work for a few weeks a year. However, as was acknowledged by the Court, schools may do so in some cases in order to cut the administrative burden of obtaining new DBS checks for each seasonal engagement. School employers will now need to weigh up the risks and benefits of such contracts and may consider moving to more short-term engagements."

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