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EMPLOYMENT LAW BULLETIN

JANUARY 2020

Welcome to the January edition of our employment law bulletin.

We start the New Year by considering the impact on employment rights of the new political landscape and our upcoming departure from the European Union. We also cover the implications of the Government's latest announcement on the National Minimum Wage / National Living Wage rates from 1 April 2020.

We look at recent cases of interest in the Employment Appeal Tribunal, employment tribunal and county court.

In ***Pazur v Lexington Catering Services Limited***, the EAT considered whether a threat to dismiss an employee was made because he refused to work without a rest break.

The employment tribunal case of ***Casamitjana v League Against Cruel Sports*** hit the press earlier this year because of a preliminary decision that ethical veganism is a protected belief under the Equality Act 2010. We consider the implications of this first instance decision.

Although not an employment case, we also cover the interesting Equality Act case of ***Mander v Windsor and Maidenhead RBC*** in which the County Court decided that a couple was discriminated against on the ground of race when seeking to adopt and going through a pre-registration of interest process.

And in our Question of the Month for January, with an increasing number of employees working from home, we cover what employers need to know before they agree to such arrangements.

Forthcoming events:

- **Employment Breakfast Briefing - Preparing for the employment tribunal**
  4th February 2020, Radisson Blu, Leeds
  For more information or to book

- **We are exhibiting at: EdExec Exhibition - School Business Management and Leadership Conference**
  27th February 2020, Radisson Blu Hotel, Manchester Airport, M90 3RA
  For more information or to book

- **Employment Breakfast Briefing - Unfair dismissal: an update**
  7th April 2020, Radisson Blu, Leeds
  For more information or to book

- **SAVE THE DATE: Employment Law Update for Charities**
  2nd June 2020, Hilton City , Leeds
  For more information or to book

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Where next for employment rights?

Will leaving the EU and the new political landscape mean more or less protection for workers?

The election of a new government in December has arguably brought more certainty to the political landscape. The Withdrawal Agreement Bill has now passed all its stages in Parliament and been given Royal Assent. The UK will therefore leave the European Union on 31 January 2020, with a transition period running until 31 December 2020.

EU/EEA workers who have not yet applied for settled status and are resident in the UK before the end of the transition period can do so until 30 June 2021. Otherwise, EU/EEA workers who wish to live and work in the UK in the future look likely to be subject to the same skills-based immigration rules as other foreign workers. A Migration Advisory Committee report on this proposed immigration system was finally published on 28 January and it is expected that the Government will follow most of its recommendations. Further details of the consultation and report are available here.

However, since employment rights were removed from the Withdrawal Agreement Bill and referred to instead in the non-binding Political Declaration, there is now no guarantee that employment rights will develop in alignment with those available to EU citizens. Recent Government announcements have confirmed that it is intended that the lower courts (not only the Supreme Court) will be able to "roll back" EU legal rulings after the UK's departure from the EU. This may mean that UK employment law will begin to diverge from EU law, although such divergence may be limited by the terms of any future trade agreement between the EU and the UK.

The Queen's speech in December promised a new Employment Bill and gives some indication of the new Government's initial priorities. The Queen's speech included reference to:

- a right for all workers, such as those on zero hours contracts, to request a more predictable and stable contract after 26 weeks' service;
- the right for parents to take extended paid leave if their babies require special neonatal care;
- extended redundancy protection for pregnant women which will begin when the employee notifies her employer of the pregnancy and end six months after maternity leave;
- a new right to one week's leave for unpaid carers; and
- a new approach making flexible working the default unless employers have a good reason not to grant it.

This shows a clear focus on family friendly rights and protection for workers in the gig economy. As such these plans chime with legislative changes coming into force from April this year, including statutory paid leave for bereaved parents, the right to a written statement of employment particulars from day one for all workers and employees and changes to the calculation of holiday pay for workers with variable hours.

There is an interesting tension between the Government's stated intentions to diverge from EU regulation and its announcements on employment protections. It is difficult at this point to predict whether future employment law changes in this Parliament will increase or reduce protections for workers and whether they keep step with, fall behind or move ahead of those available to EU citizens.

Government announces new National Minimum Wage and National Living Wage rates

Recommendations of Low Pay Commission accepted subject to parliamentary approval.

At the end of December, the Department for Business, Energy and Industrial Strategy responded to Low Pay Commission recommendations for minimum rates of pay. BEIS has accepted all of the Low Pay Commission's recommendations. Subject to parliamentary approval, the following rates will come into force from 1 April 2020:

- The National Living Wage for workers aged 25 and over will increase from £8.21 to £8.72 per hour
- The National Minimum Wage (NMW) for those aged 21 to 24 will increase from £7.70 to £8.20 per hour
- The NMW for those aged 18 to 20 will increase from £6.15 to £6.45 per hour
- The NMW for those aged 16 and 17 will increase from £4.35 to £4.55 per hour
- The apprentice rate for those aged under 19 or in the first year of an apprenticeship will increase from £3.90 to £4.15 per hour
- The Accommodation Offset is set to increase from £7.55 per day to £8.20 – this is the maximum daily amount which an employer can take into account when calculating whether NMW has been paid, where accommodation is provided to a worker.

BEIS notes that the National Living Wage will be set at 60% of median earnings and that the NMW rate rises are above the rate of inflation.

In September last year, the chancellor, Sajid Javid, pledged that the NLW will be increased to two-thirds of median earnings within five years, provided economic conditions allow. He also pledged to extend the NLW rate to those aged 23 and over from 2021, and to those aged 21 and over within five years. On the basis of this pledge, the NLW is expected to rise to around £10.50 an hour by 2024.

Comment

This announcement is no surprise given the Government's existing pledges concerning low pay and the minimum wage. It might also be seen as an early attempt to reassure voters at the outset of the new parliament that lower paid workers will not be left behind. Employers, on the other hand, will be concerned about the impact of these increases on employment costs, including the pressure to raise the pay of workers currently paid above the minimum rate to preserve pay structures. Third sector employers may in particular have concerns that these increases could be a factor in job losses and contract loss to larger organisations.

Interestingly, a recent independent study of the impact of minimum wages internationally (commissioned by former chancellor Philip Hammond) concluded that minimum wages across the world have a "very muted effect" on employment, while significantly increasing the earnings of low paid workers. It recommended that a more ambitious minimum wage policy should be implemented along with clear guidelines for the Low Pay Commission to recommend and evaluate policy changes should evidence suggest in future that increases in the minimum wage have led to significant job loss.

Threat to dismiss employee for refusing to work for client after Working Time Regulations breach was a detrimental act

EAT: threat was materially influenced by employee's refusal to work at site after rest break refused.

Under the Employment Rights Act 1996 ('ERA') workers are protected from detriment if they refuse to comply with a requirement that is imposed, or proposed to be imposed, by their employer which contravenes the Working Time Regulations 1998 ('WTR'). In order to benefit from the protection, the worker must clearly communicate that his or her refusal is materially based on the fact that the requirement contravenes the WTR.

If an employee is dismissed for the principal reason that the employee refused to comply with a requirement which contravenes the WTR, that dismissal will be automatically unfair under the ERA.

A recent case has considered these issues where an employer threatened to dismiss an employee after he complained about not being afforded rest breaks in accordance with the WTR and was subsequently dismissed.

Case details: ***Pazur v Lexington Catering Services Limited***

Mr Pazur worked as a kitchen porter for LCS, who sent him to various sites. Mr Pazur complained about working on a site ('Site A') due to non WTR-related conditions in which he was asked to work. Separately, Mr Pazur was asked to work a shift on another client site, but left work 30 minutes early because he was refused a rest break by the chef ('Site B'). Mr Pazur complained to LCS about the chef's general treatment of him and specifically complained of the lack of a rest break.

A few weeks later Mr Pazur was asked to return to Site B by LCS. Mr Pazur explained that he did not want to work on Site B again and referred to his complaint about the chef and that he had been refused rest breaks. A manager of LCS then contacted Mr Pazur and said that he could either go to Site B as requested or he would no longer have a job. Mr Pazur explained he would rather have no job than go back to Site B, to which the manager responded: 'Your P45 will be sent to you good luck.'

LCS belatedly organised a disciplinary procedure, which Mr Pazur did not attend, and summarily dismissed Mr Pazur for gross misconduct. Mr Pazur brought a tribunal claim for wrongful dismissal, detriment and automatic unfair dismissal under s.101A ERA (because he did not have enough service for an unfair dismissal claim under s.94 ERA). Specifically, Mr Pazur said that the message he received threatening him with losing his job was a detriment and that his subsequent dismissal was linked to his refusal to comply with a requirement which contravened the WTR and was therefore automatically unfair.

Tribunal decision

At first instance the tribunal upheld the wrongful dismissal claim on the basis LCS had no proper grounds for summarily dismissing Mr Pazur. The tribunal held that dismissal occurred when Mr Pazur's manager made the response referencing his P45, not when LCS later dismissed him for gross misconduct, which the tribunal found to be a 'sham' process.

Although the tribunal had accepted that LCS was proposing to impose a requirement on Mr Pazur to work without a rest break in contravention of the WTR, it noted that Mr Pazur had made a number of complaints about his treatment at Sites A and B that were not related to his WTR rights. As a result the tribunal considered that there was insufficient evidence that Mr Pazur had communicated a refusal to attend Site B because of a requirement in contravention of the WTR. For this reason his detriment claim failed.

Because of the evidence that LCS's decision to dismiss Mr Pazur was also for reasons unconnected to the WTR, including his refusal to work at Site A, the tribunal did not find that LCS's decision to dismiss Mr Pazur was for the principal reason of his refusal to comply with a requirement contrary to the WTR being imposed on him (i.e. to attend Site B), so his unfair dismissal claim also failed.

Mr Pazur appealed both decisions.

EAT decision

The EAT looked closely at what the tribunal had concluded about why Mr Pazur had refused to work at Site B.

In the part of its judgment where it considered the wrongful dismissal claim, the tribunal had found as fact that Mr Pazur's reason for refusing to return to Site B was due to the requirement to work without a rest break in contravention of the WTR. In considering the appeal the EAT reasoned that LCS could therefore, at best, argue that Mr Pazur had communicated his refusal to return to Site B both because of the contravention of the WTR and his more general concerns about the chef. In addition, the original tribunal had held that Mr Pazur's refusal influenced LCS's actions and in the view of the EAT this met the required 'material reason' for the claim of detriment to be upheld.

On the question of automatically unfair dismissal the EAT concluded that it was not clear on the evidence whether the principal reason for Mr Pazur's dismissal was his refusal to return to Site B because he would be required to work contrary to the WTR. This was because LCS had asserted that other issues had contributed to Mr Pazur's dismissal which were unrelated to the WTR. The EAT remitted this question to tribunal in order to make a finding on the unfair dismissal claim.

Wrigleys comment

Perhaps the main learning point for employers is the re-emphasis that this case draws to the importance of rest breaks. By law, workers are entitled to an uninterrupted break of at least 20 minutes if they work more than 6 hours in a day. Ultimately, it was LCS's decision to command Mr Pazur to work in an environment where his right to a rest break had not been upheld previously, and to threaten him with the loss of his job when he refused, that led to all of the time and legal expenses incurred in fighting Mr Pazur's case through the tribunals.

Busy periods and stretched resources will not provide employers with an excuse for failing to comply with the WTR or for subjecting their workers to a detriment if they should refuse to work in contravention of the WTR. Employers can find useful information about the WTR online via government resources and ACAS. If a particularly tricky WTR issue arises, we recommend employers take legal advice to avoid potential claims.

It is also worth noting the problems the manager's message to Mr Pazur caused in this case. Here, a blunt threat followed by a single line of text dismissed Mr Pazur, but it left the precise reasons as to why Mr Pazur had been dismissed wide open to interpretation, which in turn gave Mr Pazur room to bring his claims.

Ethical veganism is a philosophical belief subject to protection under the Equality Act 2010

Employment tribunal judge was 'overwhelmingly' satisfied that ethical veganism met the necessary tests.

Religion and belief is one of the nine protected characteristics set out in the Equality Act 2010 (the Act). A belief means any religious or philosophical belief and includes a lack of belief. However philosophical belief is not defined in the Act. Courts and tribunals have therefore sought to test the concept and set out what a claimant must show for a 'philosophical belief' to be established for the purposes of the Act.

Case law has identified several key markers: i) the belief must be genuinely held; ii) it must be a 'belief' and not just an opinion or view based on the present state of information; iii) it must relate to a 'weighty and substantial' aspect of human life and behaviour; iv) the belief must be sufficiently cogent, serious, coherent and important; and v) the belief must be worthy of respect in a democratic society and not incompatible with human dignity or conflict with the fundamental rights of others.

Judgments in philosophical belief cases have broadly suggested that a belief in a political philosophy or doctrine might qualify and that a philosophical belief may be based on science, but they have also specifically accepted beliefs in Scottish independence, anti-fox hunting and anti-hare coursing to be protected as philosophical beliefs.

Vegetarianism has qualified as a protected belief where it is linked to a personal code of ethics and to following the teachings of Hinduism and Vaishnavism, although in that particular case, the vegetarianism was in the context of manifesting a religious belief. In contrast, a recent case held that vegetarianism, as an option, was not itself a protected characteristic given its lack of coherence, in terms that some may simply become vegetarian as a lifestyle choice whilst others may do so for medical reasons.

An employment tribunal has recently considered the issue whether ethical veganism is protected as a belief under the Act.

Case details: ***Casamitjana v League Against Cruel Sports (as yet unreported)***

Mr Casamitjana is an ethical vegan, meaning he not only follows a vegan diet but he opposes the use of animals for any purpose. This informs many aspects of his life from his diet and what products he wears or uses to how he travels and so on.

Mr Casamitjana enquired about his employer's pension funds and concluded that funds were invested (in his view) unethically in companies which harmed animals, offending his beliefs.

After informing LACS about this, Mr Casamitjana set about making alternative arrangements for his pension to be invested in ethical funds. He believed that his discovery would similarly offend his colleagues, suspecting they were unaware of how their pension funds were invested.

Despite LACS's repeated instructions not to do so Mr Casamitjana sent an email to all of LACS's staff notifying them of his discovery and providing a table, of his own creation, which set out alternative fund options. LACS viewed Mr Casamitjana's email as providing financial advice to colleagues in breach of an express and repeat instruction not to do so.

Mr Casamitjana was subsequently dismissed for gross misconduct and he brought claims for indirect discrimination, direct discrimination, harassment and victimisation as a result of his

belief in ethical veganism.

One key question was therefore whether ethical veganism is a philosophical belief for the purposes of protected characteristics under the Equality Act.

Preliminary hearing

The employment tribunal judge ruled that Mr Casamitjana's belief in ethical veganism met the tests set out above; that they were 'important' and 'worthy' of respect in a democratic society and did not infringe on the rights of others. Ethical veganism is therefore, at least as presented in Mr Casamitjana's case, a philosophical belief for the purposes of protected characteristics within the Equality Act.

Comment

This case has yet to determine whether or not Mr Casamitjana's dismissal was discriminatory on the basis of his ethical veganism. LACS maintains that Mr Casamitjana's beliefs were irrelevant to his dismissal.

It will not be lost on readers that this case has appeared as one element in a wider conversation on veganism. With a number of food outlets and individuals pledging to take part in 'Veganuary' the topic is particularly prominent at this moment, and sits in the wider context of the debate around climate change and environmental issues which have increasingly dominated the news and public debate in the last 18 months.

This is a first instance decision and may be appealed. However, this case demonstrates a tribunal's readiness to place ethical veganism within the remit of the protections contained in the Equality Act and means employers will, for now, need to consider ethical veganism in much the same way they do other protected characteristics.

Couple seeking to adopt were discriminated against on the grounds of race

EIntroduction of race criterion in pre-registration of interest interview process was direct discrimination.

The Equality Act 2010 provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. Race is a protected characteristic, which includes colour, nationality, ethnic or national origins.

The Act applies to those providing services to the public, or a section of the public.

The Crown Court has recently ruled on an interesting case concerning a British couple seeking to adopt through their local adoption agency in the UK who were prevented from completing the registration process and advised that they had better prospects of adopting a child from India.

Case details: ***Mander v Windsor and Maidenead RBC***

Mr and Mrs Mander were both born in the UK and are both British citizens. They identify as part of the wider Sikh community, with an Indian heritage background.

After several unsuccessful years of trying for a child, Mr and Mrs Mander decided to look into adoption. They approached Adopt Berkshire (AB), their local adoption agency (which came

under the purview of Windsor and Maidenhead Royal Borough Council). The Manders told AB that they were open to adopting a child of any ethnicity and that they would prefer to adopt a child of pre-school age.

Whilst engaging with AB the Manders took part in two calls as well as an initial visit and an initial visit review. After each one of these they were told that they would not be invited to complete a 'Registration of Interest' (ROI) because:

- the children awaiting adoption were white-British and there weren't any children of Indian or Pakistani descent; and
- there were sufficient white-British approved prospective adopters, making it unlikely that the Manders would be able to adopt due to a policy which preferred to place children with parents of the same, or similar, ethnic background.

Instead, AB advised the Manders to consider adopting from India and gave them the relevant adoption agency contact details.

The Manders submitted a claim for unlawful direct discrimination on the grounds of race, specifically on the basis of their national or ethnic origins and/ or their colour, amongst other things.

Court ruling

The County Court found that the 'initial visit review' introduced by AB was contrary to their own policy and procedure on adoption recruitment. The court also referred to statutory guidance on adoption for local authorities, which also stipulated that a ROI must not be refused on the grounds of ethnicity and culture.

It was found that ethnicity and culture were relevant under the statutory guidance when matching children with prospective adopters, but not when considering recruitment and suitability of prospective adopters. At court, AB staff admitted that they had considered the Manders' race when they refused to progress them to the ROI stage.

As a result the claim for direct discrimination on the grounds of race was upheld and AB were ordered to pay £18,000 in damages and £60,000 in special damages to cover the cost of the Manders' inter-country adoption following AB's decision.

Comment

Knowing that statutory guidance to adoption agencies prioritised matching children and prospective parents of the same or similar ethnic background, it appears AB was trying to be helpful to the Manders in this case by advising they look to adopt from another country.

Nonetheless, AB's mistake was to make assumptions that led to the Manders being prevented from becoming part of the adoptive pool, even if once part of the pool they had little likelihood (in AB's view) of adopting a child. In this case, the decision to exclude the Manders from ROI should have been more obviously wrong given guidance on this point.

Whilst not an employment case, it serves to reinforce the point that what organisations might consider to be acting in the best interests of all parties may in practice be discriminating on the basis of a protected characteristic. Employers should remain alert to this possibility.

Question of the month: What does an employer need to bear in mind when considering homeworking?

Homeworking is becoming increasingly popular but employers should consider a number of important issues before agreeing to it.

Flexible working is now a well established practice, with more employees regularly either working from home for part or all of the week. Whilst there is no legal entitlement for an employee to work from home there is at least an obligation on an employer to consider how it may work, for example as part of a flexible working request, reasonable adjustments or assisting with a phased return to work following sickness absence. Homeworking can provide mutual benefits. Aside from reducing overheads for employers, it can also help to recruit and retain staff, create an engaged workforce and improve motivation and work-life balance and help employees save costs and time on commuting.

In practice, homeworking can be dealt with very differently from one employer to the next. This in part will depend on the nature of the job or the employer's approach to what equipment they are willing to provide. However, as well as ensuring that the employee can do the job from home, employers need to bear in mind some tricky issues and be mindful of certain obligations.

Is an employer obliged to pay for equipment?

Outside of health and safety (see below) there is no obligation on an employer to provide any equipment, but at the very least an employer should consider providing, or contributing to the cost of, communications equipment such as laptops and phones. Employers may consider this the best way to ensure the homeworker can be effective away from the office and that the devices used comply with the employer's data security standards.

There may also be a need to consider the more subtle costs of working at home, such as heating, telephone and internet connections. The degree to which this is provided will really depend on negotiation. Often, what is felt 'fair' in terms of covering costs will depend on how much time is spent working at home and the degree to which homeworking is something the employee wanted or that the employer required. If an employee works the majority of their time at home at the employer's request, it might be more appropriate for the employer to contribute to the running of the home during working hours.

Health and safety considerations

Employers have a general obligation to provide a safe working environment. This will extend to making health and safety assessments for homeworking employees (i.e. not workers or independent contractors) in respect of their 'work activities' and take measures to reduce any risks. In practice, this means considering the type of work being undertaken, the associated tools and equipment, and what risks are posed by the homeworking environment.

Where the employee is an office worker the risks are likely to be minimal. But an employer should not assume that the homeworking environment is safe. For instance, what if the employee's home office is in the attic accessed via a ladder or has no emergency exit? Or what if the employee's home has damp issues? What if the employee doesn't have a desk and chair set up at home and they plan to work from the sofa, what might the long-term effects of that be?

Employers have a degree of scope in how they carry out the assessment. Some employers will ask the employee to carry out their own, perhaps annually, but this relies on the employee to accurately identify any risks. For this reason, some employers will send someone independent to make these assessments.

Other forms of homeworking, such as activities involving machinery or chemicals, will naturally present a more obvious risk that the employer will need to mitigate carefully, including via issuing personal protective equipment (PPE) and ensuring that tools and materials are handled in accordance with health and safety rules and any relevant legislation.

Employers also need to consider their specific duties to new and expectant mothers in a home environment and should review the potential mental health implications that homeworking will, or may, result from the employee feeling isolated from the employer and their colleagues. As concerns evolve around employee mental health and wellbeing employers may need to take account of the suitability of home working more generally.

Useful information about homeworking is available from the Health and Safety Executive's website.

Data protection and confidential information

It is vital that employers consider how they meet their obligations under the data protection regime and how they secure sensitive information when considering homeworkers.

One way of doing this is by providing devices to the employee on the understanding that the property and information stored on those devices is and remains the property of the employer. Employers should ensure that it is a term of the employment contract that the employer can demand the return of the equipment at any time and that the employee is specifically obligated to return it at the end of their employment.

Employers also need to think about the practical implications of homeworking on data protection and commercial sensitivity. For instance, what risk to security is there if an employee is using home or public wifi and how is hard copy information kept at home? For these reasons an employer might want to put in place rules and protocols on password protection, locking computers when not using them and the provision or use of a locked office or filing cabinets.

Again, for an employer's protection it is best to set out clearly the employer's rights of access to devices, electronic and hard copy files and to intellectual property rights during employment and on its termination.

Best practice

Homeworking can be a useful tool for both employers and employees. Both need to think carefully about what homeworking conditions entail on a case-by-case basis. An employer in particular needs to take account of their contractual and statutory obligations.

Employers can help navigate the issues identified above by having a clear homeworking policy in place, which should ideally be tailored to think about the specific issues an employee working from home will create for their employer.

Employers should also put in place a homeworking agreement. Ideally, this agreement would cover each party's rights and obligations in respect of equipment, health and safety, data protection and confidentiality to ensure the employee clearly understands what is expected of them.

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