Employment Newsletter October 2022

COVID-19 health and safety dismissal

In *Rodgers v Leeds Laser Cutting Ltd* [2022] EAT 69, the first appellate judgment on the application of section 100 of the Employment Rights Act 1996 (ERA 1996) to a COVID-19 health and safety dismissal, the EAT upheld a tribunal decision that an employee was not automatically unfairly dismissed. Mr Rodgers had refused to return to work "until the lockdown had eased" because he was concerned about infecting his vulnerable children. The EAT dismissed Mr Rodgers appeal, finding that the tribunal made no error of law and had been entitled to find that he had not established a reasonable belief in a serious and imminent workplace danger on the facts.

Failure to provide workplace facilities to express breastmilk was sex harassment

In *Mellor v MFG Academies Trust* ET/1802133/21, an employment tribunal held that it was sex harassment for an employer to fail to provide a private space for an employee to express breastmilk at work, forcing her to express in the toilets or her car. However, the tribunal dismissed the employee's direct and indirect sex discrimination claims.

Interim enforcement of non-compete clauses

The Court of Appeal, in *Planon Ltd v Gilligan [2022]* EWCA Civ 642, dismissed an appeal from the High Court's refusal to grant an interim injunction to enforce a non-compete clause which was likely to prevent a former employee from working in his field 12 months. The court's views on the effect of delay are a reminder to those seeking injunctive relief that time is of the essence. The time from learning that a former employee is working for a competitor to seeking relief from the court should reflect, in a sense of urgency, the damage being done to the employer's business. The longer the delay to a court hearing the better the chance that the former employee may successfully argue that the damage is done and that the status quo should allow them to continue in their new employment.

Long Covid can amount to a disability

In *Burke v Turning Point Scotland* ETS/4112457/2021, a tribunal considered that the employee's long COVID symptoms were sufficient for him to be disabled within the meaning of section 6 of the Equality Act 2010.

Rowberry Morris solicitors

Statutory Cap on Unfair Dismissal Claims

In *Dafiaghor-Olomu v Community Integrated Care* [2022] EAT 84, the EAT confirmed that the statutory cap for compensation for unfair dismissal should be applied after any earlier payments made by the employer to the employee have been deducted from the total compensatory award. It is not yet clear whether this case will be appealed further. In the meantime, to avoid a similar outcome in future cases, the advice for respondents is not to make any compensation payments to claimants until after any appeals process has finally concluded. Although payment under a tribunal judgment or order must be made within 14 days, a respondent could seek a stay of any enforcement proceedings commenced by a claimant while an appeal was pending

Application of ACAS uplift

In *Rentplus UK Ltd v Coulson* [2022] EAT 81, the EAT upheld an employment tribunal's decision to award a 25% uplift to compensation for failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. The Tribunal rejected redundancy as the reason for dismissal and found that other reasons were also at play that amounted to a disciplinary situation for the purposes of the ACAS code. The EAT also provided guidance for tribunals when considering an ACAS uplift, in the form of a series of questions.

Veganism not a philosophical belief

In *Free Miles v The Royal Veterinary College* ET/2206733/2020, ethical veganism encompassing an obligation to break the law to relieve animal suffering was considered by an employment tribunal not to amount to a philosophical belief under section 10 of the Equality Act 2010.

Holiday pay

The Supreme Court also handed down the eagerly awaited judgment in *Harpur Trust v Brazel* [2022] UKSC 21, in which the court held that part-year workers (those who are employed for the whole year but only work some weeks and not others, such as term-time workers) are entitled to the full 5.6 weeks of annual leave

under the Working Time Regulations 1998 (SI 1998/1833) and that this should not be pro-rated. This means that the percentage method, where holiday entitlement for some casual workers is calculated at the rate of 12.07% of hours worked, has been comprehensively rejected and should no longer be relied on, leaving questions about how holiday entitlement should practically work for many workers with irregular hours.

Time off in lieu

In *Cowie and others v Scottish Fire and Rescue Service* [2022] EAT 121, the claimants had been entitled, before the COVID-19 pandemic, to "special leave" as a non-contractual benefit and benefited from a time off in lieu (TOIL) policy. The EAT found that it was not discriminatory for the respondent to make interim changes that required the claimants to use up their accrued annual leave and TOIL before being granted further paid special leave to cover COVID-19 related absences.

Gender critical beliefs

The employment tribunal in *Bailey v Stonewall and others* ET/2202172/2020 considered discrimination for gender critical philosophical beliefs. The tribunal held that the Equality Act 2010 protected not only the belief that women are defined by biological sex rather than gender identity but also the claimant's belief that gender theory, as proselytised by Stonewall, is severely detrimental to women (including that it denies them female-only spaces) and to lesbians (in that it labels them as bigoted for being same-sex attracted). It found that the claimant had been directly discriminated against and victimised by her chambers but rejected claims that Stonewall had instructed, caused or induced that discrimination.

The Retained EU Law (Revocation and reform) Bill

Earlier this year the government signalled its post-Brexit determination to review retained EU law. It has now published the Retained EU Law (Revocation and Reform) Bill (the Bill), which has potentially significant implications for UK employment law.

The Bill will “sunset” most retained EU law contained in secondary legislation such as regulations, meaning that unless such law is preserved in some form it will expire on 31 December 2023. The principle of directly effective EU rights will end on the same date. In the employment context, this could include legislation such as TUPE, the Working Time Regulations, rules for part-time, fixed-term and agency workers and some equal pay provisions. However, rights contained in primary legislation, such as the Equality Act, should not be affected.

It does not automatically follow that most employment related EU retained law will expire. Some retained EU law will be preserved and fully assimilated into domestic law and government departments will now embark upon a process of deciding what to preserve and what to allow to expire. There will be a period of uncertainty until there are further announcements about what retained EU employment law will be saved and what will be reformed or jettisoned.

Repealed IR 35

The repeal of 2017 and 2021 reforms from April 2023 was announced by the government as part of The Growth Plan 2022 presented by the chancellor of the exchequer in his "mini budget" statement to Parliament.

This follows promises by the new prime minister to review IR35, and is part of plans to promote economic growth by cutting red tape and taxes. The plan suggests that this change will cost the Treasury £1-2 billion of tax per annum.

On the face of it, this will be good news for many users and suppliers of contract workers, who will see this as an opportunity to revert to more tax-efficient ways of supplying and hiring those workers via personal service company (PSC) arrangements. That is because, under the current regime, users and suppliers risk being liable if in fact the PSC worker is "really" not self-employed, which is notoriously hard to be sure about – and the regime places all sorts of administrative obligations on them if they want to avoid that liability. Many end users have accordingly banned use of PSCs or substantially reduced their use of that workforce supply model.

Many workers will also see this as good news and an opportunity to supply their services in a way which increases take-home pay.

If you have any queries regarding this newsletter and its contents or need employment advice please contact a member of the Employment Team on employment@rowberrymorris.co.uk or by telephone on 0118 951 6621.
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