Looking back at 2021 – An employment law update

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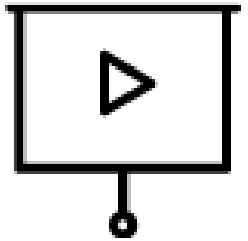

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Introduction & Connect with Us

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What we will talk about today

1. Fire and Rehire
2. Worker Status
3. Flexible Working
4. Claiming Back Sick Pay
5. Covid-19
6. Menopause
7. TUPE
8. Non-competes
9. Grievances
10. What's in the pipeline
11. Q&A

1. Fire and Rehire

- The practice of dismissal and re-engagement has become known as ‘fire-and-rehire’. It is an option to effect changes in the terms of employees’ contracts where they or their union will not agree to changes voluntarily.

- It involves dismissing employees and immediately re-engaging them on a new contract with new terms. During 2020 as so many businesses started failing, some employers used fire-and-rehire to achieve reduced terms for their employees as part of measures to safeguard the business.

ACAS Report

In October 2020, the Department for BEIS asked Acas to report on the use of fire-and-rehire practices. The results, published in June 2021 revealed the widespread use of firing and rehiring in a range of industries and sectors – in small, medium and large organisations – and in both unionised and non-unionised workplaces.

Whilst the Acas report did not reveal a prevailing view, some participants expressed concerns that fire and rehire practices were used as a "smokescreen" for diminishing workers' terms and conditions or as a negotiation tactic to threaten workers and undermine or bypass genuine consultation.

ACAS Report

Others felt its use was justified provided it was driven by a genuine business need and preceded by negotiations attempting in good faith to reach an agreement on the proposed changes.

The report highlighted its use to:

1. Minimise redundancies and maximise overall headcount reduction,
2. Harmonise terms and conditions, and
3. Introduce temporary or permanent flexibility into contracts in terms of working hours, shift patterns, payment entitlements and security of hours or employment

Government Bill

- On Friday 22 October 2021, a private member's bill, presented by the Labour MP, Barry Gardiner, was defeated in the Commons by Conservative MPs. The bill failed to gain sufficient support to progress beyond its second reading by 188 votes to 251.

- Whilst the bill did not prevent fire and rehire, as this might be necessary to prevent a company collapsing for example, the bill "encouraged both employers and workers to reach the best outcome and discouraged bad employers from threatening fire and rehire, where there is not a legitimate threat to the business that demands it."

Weetabix Strike

- Unite engineers at Weetabix factories in Kettering and Corby in Northamptonshire are currently taking strike action four days a week against company moves to attack their wages and terms and conditions.

- The union estimates this could cost some engineers a loss of wages amounting to £5,000 a year. This despite the fact that last year Weetabix turnover grew by 5 per cent to £325 million and profits leapt by almost 20 per cent to £82 million.

- Unite General Secretary Sharon Graham says: “These attacks are totally unjustified. They are a serving of corporate greed. And what’s more, although Weetabix deny it, we have irrefutable evidence that they are using ‘fire and rehire’ strategies.”

Take aways

- An employer which uses fire-and-rehire for as a pretext or for any non-genuine reason will be vulnerable to unfair dismissal claims.

- A Tribunal must assess the following:

  1. Whether an employer's reason is substantial or insubstantial.

  2. Whether there is evidence to support the employer's sound business reason.

  3. Whether the employer used fire and rehire as a last resort.

2. Worker Status

Uber BV and others (Appellants) v Aslam and others (Respondents) [2021] UKSC 5 On appeal from: [2018] EWCA Civ 2748

- The Supreme Court upheld the employment tribunal, Employment Appeal Tribunal and Court of Appeal decisions that, when the Uber drivers had the Uber app switched on and were ready and willing to accept passengers, they were ‘workers’.

- Uber’s main argument for the drivers being independent contractors and not workers was that there was a written contract between Uber and the drivers, and then another separate contract between the drivers and the passengers.

Uber BV and others (Appellants) v Aslam and others

- The Supreme Court disagreed with Uber's argument and asserted that Uber did contract with the passengers and engaged the drivers to carry out the bookings. It also held that when determining worker status, the starting point should not be the written agreement, because it is more important to focus on the purpose of the legislation which protects workers.

Uber BV and others (Appellants) v Aslam and others

The Supreme Court Judgment set out five key factors which underpinned the rationale for the decision:

1. Control over how much the drivers are paid for the work they do.
2. A requirement for its drivers to sign and accept a standard written agreement that governs the services performed by the drivers.
3. Control over the driver's choice about whether to accept or decline journey requests once they are logged onto the app.
4. Control over how the driver delivers their services.
5. A restriction on the level of communication between the drivers and passengers.

Worker Status continued - Johnson v Transopco Ltd

- The Claimant had used the Respondent's 'Mytaxi' app to source passengers, whilst still sourcing rides as a self-employed taxi driver. He could reject jobs offered through the app without penalty and ply his own trade instead, and could reject 'scrub' bookings already made without penalty in certain circumstances.

- From 2014, Mr Johnson worked full time in business on his own account as a black cab driver in London. He registered as a driver on the Mytaxi app in February 2017. Between April 2017 and April 2018, he completed 282 trips via the app at a total value of £4,560.48 (after commission). During the same period, Mr Johnson continued working as a self-employed black cab driver and earned £30,472.45.

- The Claimant brought various claims after the relationship ended. For these claims, he had to be at least a 'worker' (as defined in s230(3) Employment Rights Act 1996).

Johnson v Transopco Ltd

- The EAT rejected various grounds of appeal. The EAT was entitled to conclude that the Claimant and Respondent contracted with each other as two independent businesses, so the Respondent was a customer of the Claimant's business.

- The fact that Mr Johnson could provide his services as infrequently or as often as he wanted, could dictate the timing of those services, and was not subject to control by Transopco in the way in which those services were undertaken indicated a level of independence that was consistent with an independent contractor running his own business.

Take aways

- This case is a powerful reminder that employment and worker status cases turn on their own facts. A particular case may not be determinative of status issues involving a different platform, and it may not even be determinative of such issues in relation to different users of the same platform.

- The case also demonstrates that a tribunal may consider what amount of a claimant's total business activities it carries out for the respondent when determining employment status. This could have a significant impact in future cases given the rise in "multi apping" – that is, individuals working through platforms making themselves available to multiple potential work providers at one and the same time, then choosing to accept whichever piece of work is offered to them on the best terms.

3. Flexible Working

- The pandemic shifted and centralised the issue of flexible working for many employers and workers and, although perhaps temporary, in periods of fewer restrictions many employees returned to offices on a hybrid basis.

- A government consultation on making flexible working the "default position" ran from September to December 2021 and set out five proposals including making flexible working a day one right. However, the government's proposals do not introduce an automatic right for employees to work flexibly.

- Rather, the proposals include a number of measures to broaden the scope of the right, while retaining the basic system involving a conversation between employer and employee about how to balance work requirements and individual needs, potentially changing the statutory business reasons for refusing a flexible working request.

Flexible Working

- Some developing themes which employers may continue to face in 2022 include requests from employees to work flexibly abroad and the impact on wellbeing of continued working from home

- Following research about the significant amount of hidden overtime while working from home during the pandemic, there have also been calls for the government to introduce a "right to disconnect".

4. Claiming Back Sick Pay

- In a bid to support businesses during the recent surge in coronavirus cases, from mid-January the Government will be reintroducing the Statutory Sick Pay Rebate Scheme. The previous scheme ended on 30 September 2021.

- This means employers can seek reimbursement for Statutory Sick Pay for up to two weeks where staff have been off sick due to a coronavirus related absence. Currently employers pay £96.35 per week in statutory sick pay.

- The scheme only impacts small and medium sized business with fewer than 250 employees and is hoped that the reintroduction of the scheme will help alleviate some of the pressure felt by businesses during high levels of sickness absence caused by the new variant.

5. COVID-19 - VACCINATION

- Can you require employees to be vaccinated?
- Can you treat non-vaccinated employees differently?

Allette v Scarsdale Grange Nursing Home Ltd ET/1803699/2021

- **ET Held**: the summary dismissal of a care assistant working in a nursing home who refused to be vaccinated against COVID-19 was not unfair dismissal or wrongful dismissal, and the interference with the worker's Article 8 right to privacy was justified.
  ET: Emphasised A's refusal to comply with the management instruction to be vaccinated amounted to gross misconduct on the facts of this case. However refusal to be vaccinated not necessarily misconduct. Case was not a general indication that dismissal for refusing to be vaccinated against COVID is fair.
- **NB** The facts of the case were pre legislation in November 2021 mandating vaccination or exemption for care home workers.
- Mandatory vaccination extending to frontline health and social care workers April 2022.

Sick pay for self-isolating unvaccinated employees

- Wessex Water employees are being paid only (SSP) if they must self-isolate after being identified as a close contact of someone with COVID-19. Full company sick pay will still be paid to unvaccinated employees who have a positive COVID-19 test result.

- Ikea implemented similar policy in September 2021, with full company sick pay available for all employees who test positive for COVID-19 but only SSP available for those self-isolating after being identified as a close contact (unless company's mitigating circumstances exemption).

Take aways

- Argument that mandatory vaccination is an unnecessary invasion of an individual's Article 8 right to privacy, balancing of rights, particularly those most vulnerable to the virus.
- Different considerations will apply to a larger employer, where measures could be used such as redeployment, and to other sectors, where the legitimate aim of protecting vulnerable persons may not be a factor.
- Reasonableness of employee's reasons for refusal and how the employer deals with that refusal in the context of the surrounding circumstances, such as the available medical evidence and wider pandemic at the time.

Take aways

- Potential unfair dismissal and discrimination claims if employees dismissed for refusal to be vaccinated and dismissal not proportionate means achieving legitimate aim.
- Claims could also arise for treatment short of dismissal being discriminatory and/or in breach of contract.
- 2021 three-fold increase in the number of employment tribunal claims which cited health and safety concerns.
- Potential claims from employees dismissed for refusing to work for reasons related to COVID-19 or claim constructive dismissal due to unsafe working environments.
- BEIS review of whistleblowing legislation, 1 in 4 COVID-19 whistleblowers dismissed between Sept 2020 to March 2021.

6. Menopause at work

- Discriminatory treatment being experienced by employees including inappropriate comments, missing out on pay rises/ promotions and being managed out.
- Recent poll by *Research Without Barriers*:- 1 million women could quit due to lack of menopause support.
- 70% who took time off as a result of their symptoms (did not tell their employer the real reason why, 73% did not feel able to talk openly about their symptoms with colleagues,24% lack of support at work, 63% no workplace policy.

Tribunal cases

Merchant v BT (2012)

- M suffering from menopausal symptoms and dismissed for poor performance
- ***Held:*** failure to involve OH occupational health and assumptions made about M was sex discrimination.

Davies v Scottish Courts and Tribunal Service (2018)

- D suffering with perimenopausal symptoms, including memory loss.. Dismissed for gross misconduct
- **Held:** dismissal was both unfair and discriminatory because of something arising in consequence of her disability

Tribunal cases

A v Bonmarché Limited (2019)

- A's manager joked she was 'menopausal', referred to her as a 'dinosaur' and blamed mistakes made on her menopause. No reasonable adjustments made. A resigned following sick leave due to anxiety and depression.
- ***Held:*** direct age and sex discrimination and harassment

Rooney v Leicester City Council

- Disability " substantial and long-term adverse effect on their ability to carry out normal day-to-day activities."
- ***EAT Held:*** R was disabled: she suffered from the physical, mental and psychological effects for 2 years and severe peri-menopausal symptoms, including insomnia, light-headedness, confusion, stress, depression, anxiety, memory loss, migraines and hot flushes.

Menopause – a legally protected characteristic?

- 19 /01/22 the Women and Equalities Select Committee (WESC)- looking at introducing legislation, increasing awareness, guidance for employers to employees going through the menopause.

- A protected characteristic of menopause would make it unlawful to discriminate against someone because they are menopausal or perimenopausal or because there's a perception that they are

Take aways

What should employers do?

- Raise awareness, promote open culture
- Investigate when medical reasons are raised as a cause of poor performance or attendance
- Introduce policies and revise exist procedures to support menopausal employees in the workplace.
- Risks of unfair dismissal and sex, age, disability claims
- Reputational damage
- Potential unfair dismissal and discrimination claims if employees dismissed for refusal to be vaccinated and.

7. TUPE transfer to multiple transferees in Service Provision Change

- Client outsources services to a contractor to carry out on its behalf, reassigns the contract to another contractor or brings the services back “in house”.

- Activities now being carried out are as those carried out before fundamentally the same.

- Prior to the change there are employees assigned to an organised grouping in the UK.

- The principle purpose is to carry out “activities concerned” on behalf of the client.

- Those employees employed by the transferor automatically transfer to the transferee on their existing terms.

McTear Contracts Ltd v Bennett & ors UKEATS/0023/19; Mitie Property Services UK Ltd v Bennett & ors UKEATS/0030/19

Facts:

- A had a kitchen contract with Council's social housing.

23 employees worked on the kitchen contract in 2 teams.
Contract split into 2 areas and awarded to McTear and Mitie.
A first gave notice of redundancy to employees then withdrew those notices having taken the view that TUPE applied.

ET Held: employees transferred to either of new contractor based on an analysis of the geographical areas in which each team had worked during the preceding 12 months

Appeal

- **EAT Held**: in a transfer to multiple transferees the employment contract of a transferring employee could be split between each of the employees in proportion to the tasks they performed.

- No reason why an employee may not, following a service provision change, hold 2 or more employment contracts with different employers at same time, provided that the work attributable to each contract was clearly separate.

- Question of whether the claimants had transferred to McTear or to Mitie would have to be remitted to the same tribunal to re-consider on the facts.

Take aways

- Important now to assess where there is more than one contractor is whether it is possible to identity the activities that are transferring and whether they remain fundamentally the same albeit split between contractors.
- Where the services are being fragmented TUPE may not apply.
- Difficult factual analysis as to whether an employee's contract should be divided between multiple transferees and employers.
- In many cases, dividing a contract between multiple transferees will adversely impact an employee's rights or working conditions.
- Resulting dismissals could be automatically unfair under **TUPE** unless there is an ETO reason.

8. Post Termination Non-Competition Clauses

- Seek to prevent an ex-employee from working in the same field as your business for a period of time and usually within a geographic limit but can be worldwide
- Probably the most prohibitive and the most difficult to enforce as they prevent an employee from working.
- Should they be illegal?

What does the law currently provide?

- An employer is entitled to protect their legitimate business interests eg confidential information, trade connections, goodwill, clients and prospective clients, suppliers, employees and Intellectual Property.

- Employers can protect these interests after an employee leaves by relying on a contractual clause prohibiting an employee from joining a competitor post employment.

- Restricting an employee post-employment is more difficult.

- You must have a legitimate business interest to protect; and the restrictions should go further than reasonably necessary to protect your legitimate business interests.

Reform of non-competes??

- Dec 2020, BEIS consultation to reform post-termination non-competes in employment contracts.
- Consultation closed Feb 2021 and sought views on:
  - whether employers should continuing to pay employees for non-compete period?
  - requirement to confirm in writing the exact terms of non-compete clauses before employment commences,
  - introducing a statutory limit on the length of non-compete clauses, or
  - banning non-compete clauses altogether?

Take aways

Watch this space?

9. Grievances and dismissal
Hope v British Medical Association (EA-2021-000187)

Facts: H had raised various grievances against senior managers. H wanted to resolve his grievances informally with his line manager, who had no authority to resolve his grievances.

H refused to progress his grievances formally but also refused to withdraw them. Grievance hearing in his absence held grievances unfounded. H dismissed for gross misconduct for conduct during grievance process being frivolous, vexatious and an abuse of process.

EAT: upheld tribunal decision that it was fair to dismiss an employee for gross misconduct for raising vexatious grievances.

Take aways

- ACAS some acts, “gross misconduct”, so serious in themselves or have such serious consequences that they warrant dismissal without notice for a first offence.
- In determining whether dismissal is unfair also needs to be a consideration of whether the employer acted fairly in treating te employee's conduct as reason to dismiss in all the circumstances.
- Harder line on grievances? If grievance has not been resolved informally, can employer, in fairness, insist that the employee either withdraw it or pursue it formally to its conclusion.
- Repeated abuse of the grievance process may, depending on the circumstances, be seen as misconduct.
- **NB** Employers should be cautious in more sensitive cases susch as bullying and harassment where employees can be reluctant

Grievance and Extension of time
Wells Cathedral v Souter (EA 2020-000901-JOJ)

Facts: Claimants brought disability discrimination claims outside Tribunal deadlines.

One claimant had been diagnosed with cancer in Oct 2016 and had an extended period of absence from work, returning in Sept 2017. She brought an internal grievance in Aug 2018, regarding alleged capability which was rejected in Oct 2018. She resigned on 4 Jan 2019 and presented her claim on 26 Apr.

The other claimant claimed that, following a bereavement in Sept 2017, he had been forced to take compassionate leave and was then put on an unfair informal capability programme. He was signed off work with stress from Jan 2018 and presented an internal grievance in Jul 2018. No decision was made on the grievance. He resigned on 25 Apr 2019 and presented his claim on 26 Jul.

S123(1)(b) of the Equality Act 2010 "just and equitable" test

- **The EAT Held:** a tribunal can extend time for issuing proceedings in a discrimination claim where the Claimant has waited to issue proceedings while pursuing grievances.

- A tribunal must undertake a balancing exercise when determining whether it is just and equitable to extend time.

- In this case, the tribunal weighed up the following:
  - public policy in litigation of benefiting from the certainty and finality which the enforcement of time limits potentially provided.
  - genuine desire to use the grievance process to resolve differences internally(which is to be encouraged); and
  - delay would not prejudice the Respondents evidentially as the grievances meant they were aware of the allegations and could investigate and preserve evidence.

Take aways

- Employers should try and resolve grievances without delay where possible.

- **NB.** Be mindful of the Tribunal's ability to extend time limits in cases that claims may not be time barred.

What's in the pipeline for Employment Law 2022

1. Employment Bill

- The delayed, long-awaited Employment Bill that was promised in 2019 failed to make it to parliament in 2021. 2022 is expected to finally be the year in which the Bill will be passed.

- We can expect confirmation of the final plans in 2022 as the Government's consultation on this proposal closed in December 2021,and the next stage for this Bill, Second reading, is scheduled to take place on Friday 18 March 2022

Employment Bill

- In summary, the Bill will:

- Introduce a right for workers with variable hours to request a more stable and predictable contract after 26 weeks' service, including to negotiate pay and join trade unions and employee associations;

- extend protection for workers on maternity, adoption and shared parental leave, including extending redundancy protection to six months following a return to work from maternity, adoption or shared parental leave;

- introduce a week’s leave for unpaid carers;

What's in the pipeline for Employment Law 2022

2. Gender Pay Gap

- The rules governing gender pay gap reporting are set to be reviewed in 2022. But, in the meantime, the deadlines for submitting reports are expected to return to normal this year, having been extended in 2021 because of the pandemic.

- For public sector employers, the deadline is 30 March 2022 and for private sector employers and voluntary organisations, the deadline is 4 April 2022.

What's in the pipeline for Employment Law 2022

3. New rates and limits

From 1 April 2022, the new National Minimum Wage hourly rates rose to:

- From £8.91 to £9.50 for workers aged 23 and over;
- From £8.36 to £9.18 for workers aged 21 to 22;
- From 6.56 to £6.83 for workers aged 18 to 20; and
- From £4.62 to £4.81 for workers aged 16 or 17.

From 3 April 2022:

- Statutory maternity, adoption, paternity and shared parental pay rose from £151.20 to £156.66.
- SSP has gone up from £94.25 to £99.35.

Any Questions?

Next Event

Indirect Discrimination – A guide for employers

- In this webinar, David Rushmere and Grace Alabi from our Employment Law team will be examining indirect discrimination in practice and discussing how certain policies could be held to be discriminatory.
- When – 24 March 2022 9.30am – 10.30am
- Register - https://www.machins.co.uk/events/indirect-discrimination-a-guide-for-employers/

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