Employment Law Update January 2024

DOWNS
SOLICITORS AND NOTARIES

Welcome to our newsletter providing a snapshot of recent employment and HR law developments.

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- Changes to holiday rights, working time rules and TUPE
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- Tribunal's approach in "heat of the moment" resignation case was wrong
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- New rules on flexible working and redundancy protection to apply from April
- Anxiety about attending Court was a disability
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New Equality rules come into effect

In November the government laid before Parliament two sets of important regulations both of which came into force on 1 January 2024. The first make changes to the Equality Act 2010 (EQA) to preserve certain worker rights arising from decisions under EU law that would have otherwise ceased to have effect due to Brexit legislation. The Equality Act 2010 (Amendment) Regulations 2023 make the following changes to the EQA:

1. The definition of 'disability' will provide that the required significant effect on a person's ability to carry out normal day to day activities will include consideration of their ability to fully participate in working life on an equal basis with other workers.
2. The right to claim associative indirect discrimination. This is where someone, who does not have a protected characteristic (e.g. sex, race, disability etc.) but nevertheless shares the same disadvantage in relation to an employer's provision, criteria or practice as persons who do have a protected characteristic.
3. Direct discrimination claims can be brought against someone who makes statements about not recruiting people with certain protected characteristics even where there is no active recruitment process occurring or identifiable victim.
4. Discrimination in employment related to breastfeeding will come within the protected characteristic of sex.
5. Equal Pay claims can be made using a pay comparator who works for a different employer provided that the same body is responsible for their terms.

The first change in the list above potentially widens the definition of disability in some cases significantly. In relation to the second, to give an example of potential associative indirect discrimination, previously only women have been able to succeed in indirect sex discrimination

claims where an employer's working arrangements have placed them at a disadvantage because of their childcare responsibilities. Women as a group have long been accepted as having greater childcare responsibilities than men and therefore the protected characteristic of sex applied. Under the amended EQA, men with childcare responsibilities that place them at the same disadvantage could bring a claim even though they do not have the relevant protected characteristic of sex.

Changes to holiday rights, working time rules and TUPE

The other new regulations that came into force on 1 January 2024 are the Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023. These make important changes to the Working Time Regulations 1998 (WTR) and the Transfer of Undertakings (Protection of Employment) Regulations 1998 (TUPE). As with the EQA changes referred to in the previous article, some of these provisions incorporate into legislation workers' protections derived from EU law that would otherwise have been lost due to Brexit legislation. The WTR are amended so that:

1. Employers may use a holiday accrual method for irregular-hours and part-year workers (including some agency workers) based on 12.07% of hours worked in the previous pay period. Furthermore, they can use a rolled-up rate of holiday pay for such workers.
2. The calculation of holiday pay for the 4 weeks' holiday under regulation 13 (i.e. that derived from the EU Working Time Directive that applied pre-Brexit) must include all elements of a worker's normal pay e.g. commission and regular overtime.
3. Workers are entitled to carry over untaken holiday to subsequent holiday years in certain situations including where they have not been able to take holiday due to sickness or statutory leave (e.g. maternity leave).
4. The rules allowing for carry forward of holiday not taken because of Covid shall cease to have effect after a transitional period ending 31 March 2024.
5. There is clarification that with regards to workers' working time and rest breaks, employers must only maintain adequate rather than comprehensive records.

The 12.07% holiday accrual method and rolled up holiday pay has long been used in certain sectors despite rolled-up holiday pay being declared unlawful in 2006 and the Supreme Court's decision in the case of *Harpur Trust -v Brazel 2022* that a 12.07% holiday accrual method was unlawful in a case involving a part-year worker. These changes will therefore be welcomed by employers in those sectors.

In relation to business transfers, TUPE is amended to allow employers to consult directly with affected employees rather than employee representatives in cases where the employer has less than 50 staff or, in any case, where less than 10 staff will transfer. Previously, in all cases where the employer had 10 or more employees the duty to consult was with a trade union or existing employee representatives if they were in place or, if not, to arrange for the election of employee representatives for consultation purposes thereby often making the transfer process more complicated and time consuming.

Failure to consult at a formative stage made dismissal unfair

In a recent Employment Appeal Tribunal (EAT) judgment, *De Bank Haycocks -v- ADP RPO UK 2023*, the claimant had been dismissed during Covid. He was one of a team a 16 working in recruitment at a time when demand for staff from the client they worked for dropped by 50%. ADP decided at the end of May 2020 to reduce its workforce and in early June 2020, using subjective selection criteria provided by its US parent company, it assessed the team with the claimant scoring the lowest. On 18 June 2020 ADP decided to reduce the team by 2. The claimant was invited to a consultation meeting on 30 June 2020 to discuss the redundancy

situation and he was told he could suggest alternative ways of dealing with the drop in demand. There was a further meeting on 8 July 2020 and at a final meeting on 14 July 2020 when he was given a letter terminating his employment. Throughout this process the claimant was unaware of the scoring of himself and his colleagues although by the time of his appeal meeting on 10 August 2020 he had seen his scores although not his colleagues. The employment tribunal found the dismissal was fair and rejected the claimant's criticism regarding the selection process. The claimant appealed arguing that the tribunal had failed to consider ADP's flawed consultation. The EAT upheld the appeal. In reaching its decision it carried out a review of the many authorities in unfair dismissal cases involving redundancy over the past 40 years. It found, on the facts of the case, that there was a failure to consult employees at a formative stage when their input could have had an influence on ADP's decision making in relation to the redundancy exercise. Whilst the appeal carried out by ADP had been done fairly it could not cure this earlier flaw in the process.

This judgment is an important reminder of the significance of consultation in a redundancy dismissal case. Clearly there was individual consultation with the claimant before he was dismissed but the view of the EAT was that this was insufficient and, on the facts, the failure to engage with employees at an earlier stage when their views could have made a difference rendered the process flawed. In our experience, employers often overlook consultation with staff in redundancy situations or pay it only lip service. This case illustrates the risks of not giving consultation in a redundancy context proper consideration.

Tribunal's approach in "heat of the moment" resignation case was wrong

In another recently published EAT decision, *Omar -v- Epping Forest District Citizens Advice 2023,* the claimant had brought claims of unfair and wrongful dismissal arguing that his employer was not entitled to rely on his verbal resignation which he did not intend to be valid. On 19 February 2020, Mr Omar had verbally resigned in the heat of the moment after clashing with his line manager. He claimed that later that day in a conversation with the CEO she recognised that he wanted to continue in his job. Two days later the CEO told Mr Omar that his line manager did not wish to work with him and therefore his resignation stood. He was asked to confirm the resignation in writing which he agreed to do but did not and instead he tried to retract it. The employer refused and treated his employment as terminating on a month's notice from 19 February 2020. The employment tribunal found that Mr Omar's resignation had been effective and dismissed his claims. However, on appeal, the EAT found that the Tribunal's analysis of the case had been flawed and it had failed to make appropriate findings of fact including in relation to whether Mr Omar had really intended to resign by his verbal statement on 19 February 2020 which was the key issue. The case was remitted to another tribunal for a full rehearing.

The decision is a reminder that verbal resignations are to be treated with caution. Generally, employees indicating an intention to resign should be asked to confirm the position in writing before the employer takes any further action.

Minimum wage increases announced

Accepting the Low Pay Commission's recommendations, in November the government announced the national minimum wage increases that will come into effect from 1 April 2024:

- National living wage (for those aged 21 or over) - £11.44 (9.8% increase).
- 18-20 year old rate - £8.60 (14.8% increase).
- 16-17 year old rate - £6.40 (21.2% increase).
- Apprentice rate - £6.40 (21.2% increase).

The national living wage has been extended to cover workers aged 21 or above, previously it covered only those aged 23 or above.

Carer's Leave

The draft Carer's Leave Regulations 2024 were laid before Parliament in December and will introduce a new employment right from 6 April 2024. Under the new law, employees will be able to take up to a week's unpaid leave in any rolling 12 month period to provide or arrange care for a dependent with a long-term care need. The leave may be taken in days or half-days or a block of one week. Employers can postpone the taking of the leave for a short period if the request would be disruptive to the employer's operations.

Parties could not cap compensation in contract

In an EAT judgment published in December the employer was appealing against a compensation award of c.£1.6 million made against it in its former chief investment officer's successful claims of whistleblowing detriment and unfair dismissal. The compensation for such claims is uncapped although the amount awarded must be 'just and equitable in all the circumstances'. In this regard, the employer sought to rely on a clause in the employee's contract which stated that the employee would receive net compensation of £270,000 if his employment was terminated after a year's service. The EAT dismissed the appeal. It found that, on a proper reading of the contract, the £270,000 was a sum to be paid to the claimant if his employment was terminated as consideration for him agreeing to restrictive covenants in the contract. It did not seek to limit what a tribunal could award and, in any case, the parties could not fetter the tribunal's power when awarding compensation except as expressly set out in the legislation (e.g. allowing parties to use settlement agreements to settle employment disputes).

New rules on flexible working and redundancy protection to apply from April

In December the government laid regulations before Parliament implementing the Employment Relations (Flexible Working) Act 2023 under which the right to request flexible working becomes a day one right from 6 April 2024. Previously, employees required 26 weeks' service to be able to make a request under the law. Some large employers, such as Tesco, have already allowed staff to request flexible working from the start of their employment.

Separate regulations were laid before Parliament which, if passed, from 6 April 2024 extend certain protection to pregnant employees and those taking maternity, adoption or shared parental leave. Currently, the right for redundant employees to be offered any suitable alternative vacancies in priority to others applies to employees only during those types of statutory leave. The new rules extend the protection to employees during pregnancy and for 18 months from the start of any maternity, adoption or shared parental leave.

Anxiety about attending Court was a disability

The EAT's judgment in *Williams -v- Newport City Council 2023* published in November considered the test for disability under the EQA. Ms Williams was a social worker. Her role involving assessing foster carers meant she might need to occasionally appear in Court. In 2016 a judge was highly critical of her during a hearing leaving her traumatised about the possibility of having to appear in Court in future. In 2017 a change at work made the prospect of Court appearances more likely and Ms Williams was signed off work

with work-related stress. She remained off work and her GP, in February 2018, stated that she was likely to fully recover provided the employer could remove the need for Court appearances. It declined to do this and Ms Williams was dismissed for capability reasons after having been absent for 18 months. The employment tribunal found that Ms Williams was not a disabled person under the EQA because from around August 2017 she could carry out her duties except attending Court but this was not a normal daily activity (as per the EQA definition). The EAT allowing the appeal found that the tribunal's approach was wrong. The employer's decision not to remove the possible need for Court appearances meant that the claimant could not work at all due to her intense anxiety related to this. The tribunal should therefore have concluded that she was a disabled person under the EQA.

New ICO guidance published for public consultation

The Information Commissioner's Office recently published guidance on its website on 'Keeping employment records' and 'Recruitment and selection'. This follows their guidance on using workers health information published last year and is part of an overhaul of its employment practices' guidance since the GDPR's introduction. This latest guidance is subject to public consultation until 5 March 2024 so some changes may be made to the final versions of the guidance in due course. The guidance is very detailed, the document relating to recruitment and selection runs to 68 pages and includes a section on data protection issues arising from the use of AI in recruitment.

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