

26 April 2023

Hollie Ball and Sophie Smith

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Employment Law Update – April 2023



Case Law updates

Hollie Ball

Discrimination on grounds of disability

McQueen v The General Optical Council

- The Claimant had a number of disabilities (dyslexia, symptoms of Asperger's Syndrome, neurodiversity and partial hearing loss)
- Claimant disciplined for aggressive behaviour after having “meltdowns” at work.
- ET found that the disabilities had not played a part in the behaviour – discrimination claim failed

On appeal

- The Claimant appealed the said that the Tribunal had failed to consider whether his disabilities had played a part in his conduct at work.
- EAT held - Tribunal had correctly found that the relevant conduct by the Claimant was not in consequence of his disabilities.

Mr K Preston v E.on Energy Solutions Limited

- A complaints resolution manager was disabled due to primary reading epilepsy, a rare form of epilepsy stimulated by reading.
- The Claimant experienced health issues unrelated to his disability for which he was signed off work.
- Refused to return to work when the medical evidence said he was fit to do so and was subsequently dismissed.
- ET Held – R did not know about the disadvantage the C was placed at by his disability. There was therefore no duty to make reasonable adjustments before sick leave and the R put in place reasonable adjustments after that time.
- EAT - found that an employer had no duty to make reasonable adjustments before they had knowledge of the disadvantage to the employee.



Morgan v Buckinghamshire Council

- Supervising social worker.
- Autism spectrum disorder, dyslexia and other matters.
- She was dismissed for her conduct, having given a child gifts without her manager's authority and because a case note she had written was considered to be inappropriate.
- She brought claims for unfair dismissal and disability discrimination.
- The Employment Tribunal found that she was not unfairly dismissed, and that her dismissal was capable of justification under section 15(1)(b) of the Equality Act 2010, as a proportionate means of achieving a legitimate aim.
- The appeal was dismissed. The Claimant's breach of professional boundaries was a potentially serious matter and dismissal was not disproportionate.

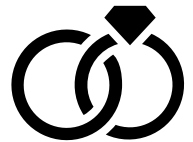
Hilaire v Luton Borough Council

- The Claimant was disabled by reason of depression and arthritis.
- In a redundancy situation, the Claimant was invited to an interview and responded with a fit note, stating that he could not attend any meetings or interviews.
- The Respondent asked the Claimant when he would be able to attend an interview and he did not respond, despite reminders. Thirteen candidates had been interviewed so a deadline of 23 September was put in place. The claimant responded on 20 September that he was too ill to attend at interview.
- ET dismissed the failure to make reasonable adjustments claim
- The Employment Appeal Tribunal held that the Tribunal had failed to consider how the Claimant's disability could have affected his ability to participate in an interview, as opposed to simply attend. However, they found that he did not participate because he had lost confidence in his employer, not because of his disability.
- Slotting in?

Discrimination on grounds of marriage

Ellis v Bacon & Advanced Fire Solutions

- Ms Bacon was married to a fellow Company director, Mr Bacon
- Ms Bacon told Mr Bacon she wanted a divorce
- False allegations raised against Ms Bacon
- Unfair dismissal and direct discrimination on grounds of sex, marriage
- ET – upheld marital discrimination
- EAT
 - The question is not whether she was badly treated because she was married to a particular person.
 - Appeal allowed (with a heavy heart)



Sex discrimination

Earl Shilton Town Council v Ms K Miller

- Females were told to use male toilets as female toilets were in a different part of the building and were difficult to access.
- There was no lock on the male toilets door and inadequate sanitary facilities.
- Direct sex discrimination claim

The Employment Appeal Tribunal held

- The Claimant was treated less favourably than men in not being provided with toilet facilities adequate for her needs.

Discrimination on grounds of religion

Randall v Trent College Ltd and others

- Delivered a sermon in which he stated that pupils did not have to accept "the ideas and ideologies of LGBT activists" where they conflict with Christian values but should make up their own minds. The Claimant was dismissed but reinstated on appeal.
- The Claimant was made redundant approximately 1 year later as part of a restructuring of the school.
- The Claimant alleged that the redundancy had been artificially orchestrated and brought claims of religious discrimination, harassment and unfair dismissal against a school.
- Treatment did not relate to his beliefs rather than way he expressed them
- Redundancy exercise was genuine



Unfair Dismissal - Redundancy

Teixeira v Zaika Restaurant Ltd

- Claimant was made redundant from Zaika restaurant during COVID
- No procedure followed = unfair dismissal
- Polkey reduction?
- ET – Claimant was a pool of one – 100% likelihood that had a fair procedure been followed he would have been selected and dismissed – no compensation payable.
- EAT
 - It cannot be said there was only one outcome
 - Remitted to the same ET



Unfair Dismissal – Time limits

Meaker v Cyxtera Technology UK Ltd

- Heavy manual night role – back injuries
- Without prejudice correspondence – 5 February 2020 (received 7 February 2020)
- PILON and holidays paid – 14 February 2020
- Was the letter sufficient to amount to termination?



Legal updates

Sophie Smith

April 2023



Recruitment and Retention

- Flexible working arrangements
 - Focus on improving your culture
 - Invest in H&W initiatives
 - Improving communication with employees
 - Include employees in decision making
 - Utilise flexible working practices
 - Improve management skills
 - Investment in career progression
 - Think about “upskilling your current workforce
- Paid or unpaid sabbaticals
 - Invest in your brand
 - Develop a digital presence
 - Pay increase
 - Performance based bonuses
 - Increased holiday entitlement
 - Health cash plans
 - Lump sum cost of living payment
 - Practical tips and support: energy saving, reducing food bills etc
 - Bring forward pay increase

"Amazon to cut another 9,000 jobs in new round of layoffs" – says Guardian (20 March 2023)

"Majority of job losses are at large retailers such as Tesco and Asda according to Centre for Retail Research" – 20 February 2023

"Google workers in London stage walkout over job cuts – Reuters" (4 April 2023)

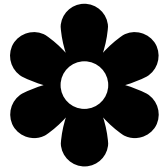
Recent Changes

Exclusivity clauses: ban extended to low-income workers

- The Exclusivity Terms for Zero Hours Workers (Unenforceability and Redress) Regulations 2022 came into force on 5 December 2022
- The new regulations extend the ban of exclusivity clauses to **low-paid workers who earn less than £123 per week.**
 - The regulations make it automatically unfair for employees to be dismissed for a reason relating to a breach of an exclusivity term. They create a right for workers not to be subjected to a detriment for a reason relating to a breach of an exclusivity term.
 - In effect, any exclusivity clauses in affected pre-existing contracts are now void and unenforceable.

The Spring Budget

- Improved support for disabled people in the workplace
- Measures to help long term sick and disabled people remain in (or return to) employment
- Expansion of free childcare
- Returnerships
- Consulting on tax incentives for employer occupational health investment



**Health and Safety Executive
Report (November 2022) recorded
that in 2021/22:**

“36.8 million working days have been lost due to work-related illness and workplace injury”

“17 million working days were lost due to stress, depression or anxiety in 2021/2022”

“Stress, depression and anxiety amounted to 51% of work-related ill-health”

New ACAS Guidance: Reasonable Adjustments for Mental Health



Acas has published new guidance and resources to help support employers and employees when handling reasonable adjustments for mental health at work, including practical steps and what considerations they should be aware of.

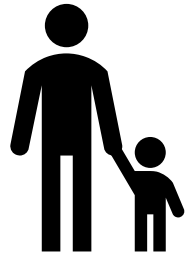
Reasonable adjustments are changes an employer makes to remove or reduce a substantial disadvantage related to an individual's disability.

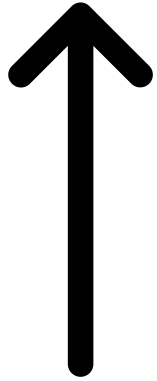
The advice covers:

- What reasonable adjustments for mental health are
- Examples of reasonable adjustments for mental health
- Requesting reasonable adjustments for mental health
- Responding to reasonable adjustments for mental health requests
- Managing employees with reasonable adjustments for mental health
- Reviewing policies with mental health in mind

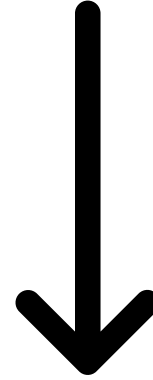
The guidance: <https://www.acas.org.uk/reasonable-adjustments-for-mental-health>

- Expansion of free childcare
 - The government is expanding **30 hours a week of free childcare for 38 weeks a year** for eligible working parents of **children aged 9 months to 3 years**.
 - This will be rolled out in phases from April 2024. This is in addition to the 30 hours a week already provided for eligible working parents of 3 to 4 year olds.





Vacancies are high



Low unemployment
levels



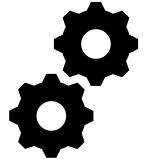
In November 2022, 13.3% of businesses surveyed by the ONS reported experiencing a shortage of workers

Businesses report difficulty recruiting employees with relevant skills say Federation of Small Businesses

- A programme to improve access to retraining and allow older workers to return to the workplace or engage with a second career
- The government has confirmed that rather than offering any new courses or initiatives, returnerships will promote ***existing*** programmes such as:
 - accelerated apprenticeships;
 - sector-based work academy programme (SWAP) placements; and
 - skills bootcamps – (free, flexible courses of up to 16 weeks for adults aged 19 or over)

These are already available

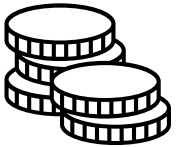
- The Returnerships programme will be supported by **£63 million** for several existing programmes between 2023 and 2025.



Changes to Minimum Wage – 1 April

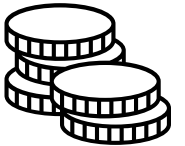
- ✓ Workers aged 23+: £10.42/hr (from £9.50)
- ✓ Workers aged 21-22: £10.18/hr (from £9.18)
- ✓ Workers aged 18-20: £7.49/hr (from £6.83)
- ✓ Workers aged 16-17: £5.28/hr (from £4.81)
- ✓ Apprenticeship rate: £5.28/hr (from £4.81)

- ✓ Accommodation offset: £9.10 (from £8.70) – (i.e. limit on what an employer can charge a minimum wage worker for accommodation)



Changes to Other Statutory Rates

- On **2 April**, statutory maternity, paternity, adoption, shared parental and parental bereavement pay increased to £172.48 p.w
- On **6 April**, statutory sick pay increased to £109.40 p.w



Injury to Feelings Awards Increase – 6 April

- Lower band £1,100 to £11,200
- Middle band £11,200 to £33,700
- Upper band £33,700 to £56,200 (with the most exceptional cases of discrimination capable of exceeding £56,200)



Upcoming legislation

Flexible Working – Changes on horizon

Employment Relations (Flexible Working Bill)

- Government concluded consultation with stakeholders and published a report on its findings and proposals in December 2022
- Current rules are here → Employment Rights Act 1996 (s.80) & Flexible Working Regulations 2014
- Qualifying employees have the right to request flexible working

Flexible Working - What does this mean?

Current position	Proposed Changes
Right to request flexible working after 26 weeks' of service	Day one right
Employees can make one request in 12 months	Employees can make two requests
Employers must respond in three month time frame	Employers must respond in two month time frame
No requirement to consult	Employers will be required to consult with their employee, to explore the available options, before rejecting an employee's flexible working request
Requirement for employees to set out the effects flexible working and how this might be dealt with	No requirement to set out these effects

- The Home Office have announced plans to introduce **a new failure to prevent fraud offence, which is intended to apply to large organisations.**
- Under the proposals, where an employee commits a specified fraud for an organisation's benefit, **the organisation shall be guilty of an offence and be prosecuted unless it can show that it had in place reasonable measures to deter that fraud.**
- The new offence is not intended to apply to small and medium sized businesses.

Employer Liability for Fraud

- Further guidance will be published in the future but you will likely need to review your policies and procedures, in a similar way to equal opportunities, to evidence you are instructing employees of the correct behaviours.
- The offence will come into force after both the Economic Crime and Corporate Transparency Bill receives Royal Assent and the government has published guidance.
- If convicted, an organisation can receive an unlimited fine.

Fire and Rehire Statutory Code

- The Code emphasises that employers should only use “*fire and rehire*” as “*a last resort*”, following thorough and open information and consultation processes.
- Employers should take time to revisit their plans and to re-consider whether dismissal and re-engagement would be “*truly necessary*”, if there are any alternative options which could achieve the same objectives, and if their proposals could disproportionately impact employees with particular protected characteristics.
- The Code does not impose any binding legal obligations on employers but the Employment Tribunal would be required to take the Code’s provisions into account when deciding relevant claims
- The Tribunal could increase or decrease certain Tribunal awards by up to 25% where employers or employees have unreasonably failed to comply with the Code

What should employers do?

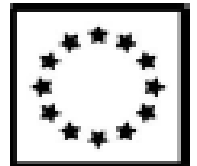
- Effectively share information with employees.
- Consult employees and their representatives early on in the process.
- The Code emphasises that employers should provide “*as much information regarding the proposals as is reasonably possible*” to employees and their representatives in order to facilitate meaningful consultation and with a view to reaching an agreement.
- Do not adopt a formulaic approach.
- Do not use threats of dismissal as an intimidatory tactic during difficult negotiations.

The Retained EU Law (Revocation and Reform) Bill

- The Retained EU Law (Revocation and Reform) Bill, or “Brexit Freedoms Bill,” is moving through the UK Parliament
- On 9 March, the House of Lords concluded their detailed review of the bill.

What next?

- It is unknown which employment rights will be kept, changed or removed.
- This leaves a lot of uncertainty for employers.
- In the meantime, employers will have to wait for concrete policy proposals to be put forward.



The Retained EU Law (Revocation and Reform) Bill

- This will repeal the majority of retained EU law unless legislation is specifically introduced to retain it
- The legislation would expire on 31 December 2023 (but this could be extended to 2026)
- This could radically reshape the employment law landscape

- The government could potentially be removing legislation on:
 - TUPE
 - Paid annual holiday
 - 48 hour working week
 - Part-time worker regulations
 - Fixed-term worker regulations
 - Agency worker regulations
 - Maternity and Parental Leave Regulations

Questions and answers

Thank you

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