



General U.K. Employment Law Update

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Introduction

- Jonathan Bruck, Partner
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- Employment team:
 - Employer Clients
 - Workplace issues (and disputes)
 - Business immigration





Agenda

- **Webinar: General U.K. employment law update**
 - Recent significant HR/employment cases
 - Trends and developments related to the workplace
 - Other recent legal developments and forthcoming changes
- **Whistle-stop tour**
- **Questions (time-permitting)...but alternatively, we will separately pick up and respond if time runs out**

Recent Significant HR / Employment Cases

- Too many to cover all (45+ since our last webinar!)
- Cases:
 - Of most legal significance
 - Are of practical interest for day-to-day HR

Recent Significant HR / Employment Cases

- *Forstater v. CGD Europe and others.*
 - EAT: June 2021.
 - What amounts to ‘belief’ for the purposes of Equality Act 2010 (EA).

Law

- **EA: Protection from discrimination (less favourable treatment) because of a protected characteristic.**
- **‘Religion or belief’ is a protected characteristic under EA:**
 - What constitutes a ‘belief’?
 - EA: any religious or philosophical belief, and a reference to belief includes a reference to a lack of belief. Limited and unhelpful.
 - Case law – developed. Forstater – a potentially important development.

Recent Significant HR / Employment Cases

- ***Grainger plc and others v. Nicholson [2010]*: EAT Guidance on types of belief protected:**
 - The belief must be genuinely held.
 - It must be a belief, not an opinion or viewpoint based on the present state of information available.
 - It must be a belief as to a weighty and substantial aspect of human life and behaviour.
 - It must attain a certain level of cogency, seriousness, cohesion and importance.
 - It must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.
 - Controversial views that divide opinion and, for some, may offend and be deemed conflicting with rights of others?
 - Conflicting /contrasting case law at ET re: views on gender identity: *Mackereth v DWP [2018]* OR *Higgs v. Farmor’s School ET*

Recent Significant HR / Employment Cases

Facts

- **CGD Europe (CGDE):** European arm (based in the UK) of a not-for-profit think-tank based in America
- **Forstater:** a consultant – contract until December 2018
- **Forstater's beliefs:**
 - a person's sex is a material reality that should not be conflated with gender or gender identity
 - being female is an immutable biological fact, not a feeling or an identity
 - a trans woman is not in reality a woman
- **Engaged in debates on social media about gender identity. Critical of changing laws on the issue. Made remarks which some trans people found offensive**
- **Colleagues complained; contract not renewed**
- **ET claim: gender-critical beliefs are protected 'philosophical belief' + non-renewal of contract amounted to discrimination because of it**

Recent Significant HR / Employment Cases

Outcome:

- ET: Forstater's beliefs – not a 'philosophical belief' qualifying for protection, because her beliefs did not satisfy the test of being:
 - worthy of respect in a democratic society, not being incompatible with human dignity and not conflicting with the fundamental rights of others
- Factors:
 - Core belief – violated others' dignity and/or created intimidating, hostile degrading, humiliating or offensive environment for others
 - Aspects not supported by scientific evidence
 - She would refer to a person by the sex she deemed appropriate to her

[NOTE: claim that lack of belief (that everyone has a gender which may be different to their birth gender) was found to be a philosophical belief, but could only be protected if religious or philosophical in nature.] - Forstater

Recent Significant HR / Employment Cases

EAT:

- Forstater appealed.
- Decision:
 - EAT adopted the approach taken to freedom of thought, conscience and religion under Article 9, and freedom of expression under Article 10 of European Convention on Human Rights.
 - First assess whether it constitutes breach of Article 17 (engaging in any activity aimed at the destruction of the rights and freedoms of others). BUT, only 'gravest forms of hate speech' which incite violence or hatred amount to such a breach. Only those beliefs would fail to satisfy the test (worthy of respect in a democratic society etc....). E.g. Nazism; Extreme hatred.
 - Beliefs that are shocking or offensive to some/others can still be protected.
 - Forstater's beliefs:
 - Widely shared in society
 - Did not seek to destroy the rights of trans persons
 - Consistent with many existing English laws
 - EAT overstepped its position: adjudicated the merits and validity of Forstater's belief. Reality: irrelevant.
 - 'Lack of belief' – need not be religious or philosophical in nature, to qualify.

Recent Significant HR / Employment Cases

Comment

- ET still needs to decide whether there was any discrimination.
- Impact on trans rights and people with gender-critical views.
- **Big impact on definition of philosophical belief definition:**
 - Most beliefs that some might describe as extreme or controversial are ‘worthy of respect in a democratic society’ and so stand a chance of qualifying.
 - Less time needed by ETs in whether there is a protected ‘belief’; more time on the discrimination element....Potentially more claims?
 - Repercussions beyond employment: Service providers, landlords, educational bodies, trade unions and other associations should take greater care to avoid potential discrimination against existing or prospective staff, service users, tenants, students or members, based on their gender critical belief.

Recent Significant HR / Employment Cases

▪ *Aleem v. E-Act Academy Trust Limited*

- Disability discrimination.
- Is it a reasonable adjustment to pay an employee their salary when they are no longer carrying out their role?

Law

- An employer is under a duty to make reasonable adjustments where a disabled person is placed at a substantial disadvantage by:
 - an employer’s provision, criterion or practice (PCP);
 - a physical feature of the employer’s premises;
 - an employer’s failure to provide an auxiliary aid.
- Duty to *only* make ‘reasonable’ adjustments – fact-sensitive.

Recent Significant HR / Employment Cases

▪ *Aleem v. E-Act Academy Trust Limited*

Facts

- Science teacher
- Ill-health prevented her from continuing in the role of Science teacher
- Deemed fit to carry out a different role – Cover Supervisor (at lower salary)
- During probation and grievance process, E-Act made the reasonable adjustment of paying the salary of a Science teacher; salary reverted to lower level after approx. 6 months
- Mrs Aleem brought a claim for failure to make reasonable adjustments, alleging her employer should have, by way of a reasonable adjustment, continued to pay her at the higher rate

Recent Significant HR / Employment Cases

▪ *Aleem v. E-Act Academy Trust Limited*

Held (ET)

- ET dismissed claim:
 - It had been a reasonable adjustment to offer her the alternative role and pay her at the higher salary during probation, to enable her to return to work after sick leave.
 - It was not a reasonable adjustment to pay her at the higher rate indefinitely. ET took into account:
 - purpose of adjustment
 - cost of adjustment to employer
 - nature of employer's business (a publicly funded educational establishment with financial difficulties)
- Mrs Aleem appealed.

Recent Significant HR / Employment Cases

▪ *Aleem v. E-Act Academy Trust Limited*

Held (EAT)

- EAT dismissed appeal:
 - Not ‘reasonable’ to continue paying Mrs Aleem at the higher rate of pay indefinitely – no exceptional facts to justify continuation of higher rate.
 - E-Act made it clear that paying Mrs Aleem at higher rate of pay was a temporary adjustment, to facilitate return to work. No such consideration when Mrs Aleem passed her probation and grievance resolved.
 - The cost of paying Mrs Aleem at the higher rate, until retirement, could have had significant cost implications for the Respondent (running into six figures).
 - The ET was entitled to take into account the employer was publicly-funded and facing financial pressures.

Recent Significant HR / Employment Cases

▪ *Aleem v. E-Act Academy Trust Limited*

Comment

- Fact-dependent
- Balancing exercise
- Not just a question of cost - need to consider all relevant factors, including:
 - extent to which adjustment removes the disadvantage;
 - practicability;
 - financial cost to employer and potential disruption to employer's activities;
 - financial resources of employer;
 - availability of external financial or other assistance;
 - nature of employer and size of undertaking.
- If adjustment is temporary – importance of communicating clearly to employee

Recent Significant HR / Employment Cases

- **Gwynedd Council v. Barratt & ors**

- Unfair dismissal - allowing appeal in redundancy

Law

- Fair dismissal:
 - Fair reason; and
 - Fair process.
- Question for ET: did the decision to dismiss fall within the band of reasonable responses that a reasonable employer could have adopted?

Recent Significant HR / Employment Cases

▪ Gwynedd Council v. Barratt & ors

Facts

- Claimants were employed by local authority as teachers at a community school.
- Local authority proposed a re-organisation of education provision; closure of school 1, replacing it with school 2.
- All teachers at school 1 (including Claimants) told their employment would terminate (without consultation), unless they successfully apply for new roles at school 2, following competitive interview process.
- Claimants were made redundant, following unsuccessful applications for the new roles.
- Claimants not given a right of appeal – even with statutory right of appeal.

Recent Significant HR / Employment Cases

- **Gwynedd Council v. Barratt & ors**

Held

- ET held dismissals were unfair and not in band of reasonable responses, including because:
 - No consultation – merely communications leading up to dismissal
 - Effectively required to ‘apply for their own jobs’
 - Failure to provide appeal (only in ‘truly exceptional circumstances’ would it not be unfair)
- On appeal, EAT upheld ET decision:
 - No test of ‘truly exceptional circumstances’ - absence of an appeal one of many factors to determine fairness
 - Relevant that there was no consultation and no appeal
- On further appeal CoA upheld ET/EAT decisions:
 - Absence of appeal does not automatically render dismissal unfair, provided that the original selection process for redundancy was fair

Recent Significant HR / Employment Cases

▪ Gwynedd Council v. Barratt & ors

Comment

- If considering use of competitive interview process to make redundancies – ‘new’ roles should be different to the at-risk roles. ‘Forward-looking’ process (to identify capabilities for a different role) is acceptable
- Consult with at-risk employees in redundancy process
- Check for a statutory or contractual right of appeal – but sensible to err on side of caution in any event by allowing appeal

Recent Significant HR / Employment Cases

Round-up

Disability discrimination

- ***All Answers Ltd v. W and Another***
 - Court of Appeal.
 - Issue of ‘disability’.
 - Whether the effect of an impairment has lasted or is likely to last 12 months – a question based on facts/circumstances available as at the time of the alleged discrimination.
- ***Stott v. Ralli Ltd***
 - EAT.
 - Claim about something arising from disability (s15 EA). ET is entitled to reject claim when employer only knew about disability after the dismissal.
 - See also Secombe v. Reed

Recent Significant HR / Employment Cases

- ***Rooney v. Leicester City Council***

- *EAT.*
- *C – suffered from severe menopausal symptoms.*
- *ET erred in law by finding that she was not disabled and striking out disability discrimination and sex discrimination claims.*
- *Remitted to ET to consider final outcome.*

Recent Significant HR / Employment Cases

Religious discrimination

▪ *R (Cornerstone Fostering) v. Ofsted*

- Court of Appeal.
- Independent Fostering Agency. Registered carers required to be Evangelical Christians.
- Requiring carers to refrain from 'homosexual behaviour' = unlawful direct discrimination. Not a 'proportionate means of achieving a legitimate aim'.

Age discrimination

▪ *Pitcher v. University of Oxford / University of Oxford v Ewart*

- EAT.
- Uni's compulsory retirement policy (67).
- Proportionality of their retirement age (as a means of achieving a legitimate aim).
- Pitcher – justified / Ewart – discriminatory.
- Different results from different evidence being presented to different ET + fine. No single outcome necessary.

Recent Significant HR / Employment Cases

Unfair dismissal

L v. K

- Court of Session.
- Teacher – arrested (indecent images of children on home computer). Charges dropped.
- Still fair to dismiss for ‘some other substantial reason’ (SOSR). In some circumstances it is still reasonable to dismiss an ‘innocent’ employee if there is a genuine and substantial reason for it.

▪ *Fallahi v. TWI*

- EAT.
- Moore v. Phoenix Product Development.
- CEO dismissed due to SOSR (relationship breakdown). Dismissal can be fair, even if employer refuses an appeal.
- BUT, fact-dependant. Assume an appeal is required for all/most fair dismissals.

Recent Significant HR / Employment Cases

Whistleblowing

- ***Martin v London Borough of Southwark***
 - EAT.
 - ‘Qualifying disclosure’ – a structured five-stage approach is needed to determine if a qualifying disclosure has been made:
 - There must be a disclosure of information;
 - The worker must believe the disclosure is made in the public interest;
 - That belief must be reasonably held;
 - The worker must believe that the disclosure tends to show one of the matters in s43B(1)(a)-(f) Employment Rights Act 1996, e.g. a criminal offence has been committed;
 - That belief must be reasonably held.
- ‘Disclosure of information’ – just an allegation may not be enough. Disclosure must have sufficient factual content and specificity to be capable of showing offence or breach of the law has or will be committed.

Recent Significant HR / Employment Cases

Employment status

▪ *Stuart Delivery Ltd v. Augustine*

- Court of Appeal
- Worker status
- Moped courier found to be a 'worker': insufficient right of substitution.

General Employment Law / Workplace Trends and Developments

- Towards end of year.
- Tumultuous 18 months – workplace developments ‘unprecedented’ / ‘uncharted territory’.
- Hopefully at post-pandemic turning point.
- Good time to reflect on developed / developing trends.
- Core trends / developments.

General Employment Law / Workplace Trends and Developments

▪ ET claims:

- Volume remains relatively high. Roughly 3,000 new claims submitted a month (April to September).
- Our ET workload, busier than ever. Costs/fee regime means low to little risk for Claimants.
- ETs – still struggling to cope. Backlog of cases – high. (44,000 outstanding cases in first ¼ : 39% increase).
- Lacking admin resources and judges. Lacking investment.
- Mixed / Variable performance regionally: ETs in South-East (including London) overwhelmed / Midlands and North (Leeds stand-out!) better.

General Employment Law / Workplace Trends and Developments

- Situation improving:
 - Massive recruitment rounds: Various cohorts of judges
 - More admin staff. London Central apparently answering their phones!
 - Greater use of technology – Video hearings, a default for many types of claim.
- Back in September 2021 listed hearings of:
 - 1-2 days' duration:
 - mostly in the first half of 2022.
 - South East England and London South – routinely, the second half of 2022.
 - 3-5 days' duration:
 - Mostly second half of 2022.
 - Early 2023: London East, London South and North West England.
 - 6-10 days' duration:
 - Mostly second half of 2022.
 - London East: first half of 2023; London South and North West England: second half of 2023.

General Employment Law / Workplace Trends and Developments

- President of Tribunals: *'recognised that waiting times in England were unacceptably long'*.
 - Effect of delays:
 - Increased management time and costs for employers.
 - Logistical difficulties: Managing witnesses.
- Tips:
 - Do not wait. Frontloading prep work can save huge amounts of time later.
 - Gather witness evidence, whilst witnesses are still available and facts are fresh in mind.
 - Get the ET to order early schedule of loss (if interested in exploring settlement).
 - Be alert: ET process for sending out claims received – archaic (post and not addressed to anyone individual). Strict time limits for responses (28 days).

General Employment Law / Workplace Trends and Developments

▪ COVID-19 claims

- Plenty of ET judgments recently, dealing with COVID-19-related issues.
- HEALTH WARNING: First instance decisions – so no legal precedents set. All cases turn on their own facts.
- Indicator of the mood/approach of some judges.
- Judgments available online.

General Employment Law / Workplace Trends and Developments

- Automatic unfair dismissal: health and safety
 - *Rendina v. Royston Veterinary Centre Ltd*
 - Raising concerns about COVID-19 safety measures
 - *Gibson v. Lothian Leisure*
 - Raising concerns about lack of PPE
 - *Rodgers v. Leeds Laser Cutting Ltd*
 - Leaving workplace over concerns about infecting children

General Employment Law / Workplace Trends and Developments

- Automatic unfair dismissal: health and safety (continued)
 - *Accattatis v. Fortuna Group*
 - Requesting home working or furlough
 - *Montanaro v. Lansafe Ltd*
 - Remaining abroad at the start of the pandemic
 - *Moore v. Ecoscape UK Ltd*
 - Refusal to attend work
 - *Ham v. Esl Bbsw Ltd*
 - Refusal to deliver equipment to self-isolating manager

General Employment Law / Workplace Trends and Developments

- Unfair dismissal: misconduct
 - *Kubilius v. Kent Foods Ltd*
 - Refusal to wear a mask
 - *Moore v. Ecoscape UK Ltd*
 - Refusal to attend work
- Unfair dismissal: SOSR
 - *Meynell v. Stephenson*
 - Going to the pub shortly before lockdown (carer)
 - *Khatun v. Winn Solicitors*
 - Refusal to agree changes to employment contract

General Employment Law / Workplace Trends and Developments

- CJRS / Furlough
 - *Sharma v. Lily Communications Ltd* [deferred commission]
 - *Alves v. Team Support Staff Ltd / McFarlane v. City of Bradford Council* [pay before/under furlough]
 - *Handley v. Tatenhill Aviation Ltd / Collard v. STS Storage Systems Ltd / France v. Bannockburn Miners Charitable Society* [redundancy]
 - *Healy v. Start People Ltd / Bradley v. Cubone Ltd* [accrued holiday pay]
 - *Lough v. Taaks of Scotland Ltd and another* [no consent]
- Others: Sex discrimination / Victimisation / Whistleblowing

General Employment Law / Workplace Trends and Developments

- Employee relations themes:
 - Developing processes and policies for post-pandemic working patterns.
 - Managing employee expectations re: post-pandemic working patterns. Pre-emptive flexible working requests.
 - Post-pandemic restructuring and changes to terms of employment.
 - Increase in remote working – managing new ways of collaborating and managing other issues (employee monitoring; obligations to protect health and safety of employees; working from home).
 - Staff shortages / recruitment issues.
 - Behaviour at work-related social events (lead up to Christmas).

Other Legal and Forthcoming Developments

▪ Flexible working:

- 23 September – Government published consultation document: ‘Making flexible working the default’ – proposing reforms the existing right to request flexible working:
 - removing the requirement for 26 weeks’ qualifying service, making the right a “day one” right for employees.
 - whether changes need to be made to the eight business reasons for refusing a request, or to the administrative process underpinning the right.
 - seeks views on whether the employer should be required to suggest alternatives to the arrangement put forward by the employee, instead of rejecting a request outright.
- Consultation – closes 1st December.
- Significant proposals?
 - Still the same basic system/process – conversation between parties;
 - Do not extend to any automatic right for employees to work flexibly (just request).

Other Legal and Forthcoming Developments

▪ Pregnancy and maternity:

- 6 July 2020 - House of Commons Petitions Committee published a report making recommendations to amend family-friendly leave and rights in light of the COVID-19 pandemic. Included the proposed extension of the time limit for pregnant women and new parents to bring claims from three to six months after dismissal. Response due from Government Equalities Office.
- May 2021 – Gov confirmed it still intends to extend redundancy protection to mothers on maternity leave (until six months after the end of maternity leave).....*'as soon as parliamentary time allows'*.

▪ Menopause:

- 23rd July 2021: H of C committee enquiry into existing discrimination and law and workplace practice on this issue.
- Seeking views on whether further legislation is required to support employers put in place a menopause policy to assist employees.
- A growing issue that has received a fair amount of publicity.

Other Legal and Forthcoming Developments

▪ Sexual harassment

- 21st July: Gov response to 2019 consultation on sexual harassment in the workplace. Confirmed:
 - New duty for employers to prevent sexual harassment (and third party harassment) in the workplace [defence: ‘all reasonable steps’ taken to prevent harassment taking place]; and
 - New EHRC statutory code of practice on harassment.
- Consider extending the time limit for all discrimination claims, from three to six months (pressures on ETs).
- No firm timescales on implementation.

▪ Neonatal leave and pay

- 16th March 2020 – Government confirmed that it will legislate to introduce new statutory neonatal leave and pay entitlement (for up to 12 weeks) for parents of babies requiring neonatal care. Confirmed again in March 2021.
- Timescale for bringing in legislation: unclear.

Other Legal and Forthcoming Developments

▪ Disability:

- 28th July – Government published ‘National Disability Strategy’:
 - Steps to remove barriers faced by disabled people in all aspects of life, including the workplace:
 - Plans to launch consultations before the end of 2021 on workplace disability reporting (voluntary and mandatory).

▪ NMW (and carers)

- Royal Mencap Society v. Tomlinson-Blake (Supreme Court) – No NMW entitlement (for entire sleep-in shifts) for care workers expected to sleep at, or near, their workplace, and be available to be called on during the night.
- 23 April 2021 – Government guidance updated to clarify the position on NMW for sleep-in shifts, in light of that judgment.

Other Legal and Forthcoming Developments

▪ IR35 reform / Off-Payroll Working Rules

- Applied from 6 April 2021.
- Contractors working through personal service company (PSC).
 - Previous: contractors responsible for making their own employment status assessments to HMRC.
 - Now: Large /medium sized organisations engaging contractors via PSC – responsible for determining contractor’s tax status. Responsibility for tax compliance – shifts to the client.

▪ Health and safety detriments – Protection extended to workers

- Current: Employee can claim if subjected to detriment because of reasonable belief that being at work would place them or others in serious imminent danger (s44 ERA).
- Legislation – Extended to ‘workers’: 31st May. All ‘workers’ protected from that date.

Other Legal Developments

- **Gov responses to many consultations / legislation to implement proposals made by Gov. remain outstanding, including on:**
 - Other steps to address sex discrimination in the workplace (e.g. regulating/curbing use of NDAs).
 - Mandatory ethnicity gap reporting.
 - On the Taylor 'Good Work Plan' (e.g. regulating use of zero hour contracts; employment status).
 - Tips and gratuities for workers.
 - Post Termination non-compete clauses:
 - Gov consultation on measures to reform post termination non-compete clauses in employment contracts.
 - Extending ban on exclusivity clauses:
 - Extend ban on exclusivity clauses for those earning under £120 a week.

Other Legal Developments

- **Gender Pay Gap reports:** Were due 5 October 2021.

- **Vento bands: Claims presented after 6 April:**
 - Lower: £900 - £9,100
 - Middle: £9,100 - £27,400
 - Upper: £27,400 - £45,600

- **New statutory limits / payments after 4 April, including:**
 - SMP; SPP; SAP; ShPP: £151.97 per week.
 - Statutory redundancy pay (+ UD basic award): £544 weekly cap.
 - New NMW rates.
 - UD compensatory award statutory cap: £89,493 (or 52 weeks' gross actual pay, if lower).

Other Legal Developments

- New Acas guidance published (last week): ‘Making changes to employment contracts – employer responsibilities’
 - Fire and re-hire: in the news.
 - Guidance clearly focuses on deterring dismissals:
 - *‘You should only consider dismissing and offering to rehire someone on new terms (‘dismissal and re-engagement’) as a last resort. This is sometimes known as ‘fire and rehire’.*
 - *‘Proposing to dismiss and rehire an employee or worker is an extreme step that has significant risks’.*
 - *‘Even if you feel there is an urgent need to make contract changes, you should always carefully consider if it might be too early in negotiations to introduce a proposal to dismiss and rehire employees’.*
 - *‘If employees or their representatives feel it is still possible to reach a negotiated agreement, it’s likely they will view a proposal to dismiss and rehire as a threat’.*

THANK YOU!



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