

Settlements of Future Claims (Bathgate v Technip UK Ltd)



The EAT recently gave an important decision on whether settlement agreements could settle future claims that had not arisen at the time that the settlement agreement was signed off.

The EAT ruled that any statutory claim could still be brought if the particular complaint had not arisen at the time of the deal, even if the wording in the agreement referred to it being in full and final settlement of all claims and particularised them individually. The EAT emphasised that settlement agreements could only settle matters where the facts and circumstances giving rise to the claim had already occurred.

On the facts of this case, this meant that an age discrimination claim could proceed because the facts that gave rise to this claim (a non-payment of wages due under a collective agreement) arose one month after the employee had signed a settlement agreement. Although the settlement agreement purported to have settled all claims, including age discrimination, this did not prevent a claim because the facts had arisen after the parties had signed the agreement.

It will be interesting to see whether this case is subject to a further appeal to the Court of Appeal. As a consequence of this ruling, it is important to recognise the limitations of settlement wording and it may be essential to clarify what facts and claims are within parties' knowledge within the agreement.

Retained EU Law (Revocation and Reform) Bill 2022/2023



Currently going through Parliament is the Retained EU Law (Revocation and Reform) Bill. The context is that the European Union (Withdrawal)

Act 2018 created retained EU law which was essentially confirming that any EU law in force at the time of the transition period would remain in force at the end of the transition period.

The bill's key provisions are to revoke EU derived subordinate legislation, retained direct EU regulations and decisions, repeal directly effective rights derived from EU Treaties and Directives, confirm UK law had priority over EU legislation where the two were in conflict and to restate as UK legislation any EU law that was to be kept. If passed, this will mean that many EU provisions will cease to have effect from the end of 2023.

Whilst it is not unexpected that a major review of EU law was to be undertaken, from an employment perspective, unless the government legislates to keep them, regulations dealing with Working Time, TUPE, Fixed Term Contracts, Part Time Workers, and Agency Workers could all disappear! It will be interesting to see what is retained and HR officers should look out for any announcements on EU derived employment law.

ACAS guidance on suspension of staff



ACAS has provided guidance on suspension of staff. It is imperative that employers act in accordance with its advice as it is likely that a failure to comply will mean that an employee will succeed with an unfair dismissal claim and might possibly also raise discrimination claims as well.

Menopause and discrimination



A recent House of Commons Committee report has emphasised that menopausal women are the fastest growing group in the workforce which means that the menopause and its impact and effects will impact on almost every employer.

It should be noted that apart from potential sex discrimination claims, recent case law has already noted that this can also in some instances amount to disability discrimination.

Consequently, HR should have in place policies to address this issue, and management and staff need appropriate levels of training.

Redundancy Selection Pools of one



The EAT has given useful guidance on how employers should approach a redundancy situation where there is only to be a pool of one employee.

The process should reflect that:

- a) Where there is more than one employee in a comparable role, the redundancy pool should not be set out until prior consultation has taken place.
- b) To be genuine, the consultation needs to be early enough to have a chance of influencing the outcome and it must not start after effectively earmarking an employee for a dismissal.
- c) The rationale for the selection criteria needs to be articulated and explained in a thorough and meaningful consultation process.
- d) Selecting an employee for redundancy because they are on a fixed term contract could be a breach of the Fixed Term Contracts less favourable treatment legislation and will need to be objectively justified.

The lessons to be learned are that consultation has to be real, done in good time with a real chance to influence the outcome and the outcome should not be seen as predetermined.

CV Fraud repayment of wages



An employee obtained a job through a false declaration as to their qualifications. They continued in their post for 11 years. If the employee had been honest, they would never have been appointed. The Supreme Court had to rule on how much the employee should repay for their fraud.

It ruled that any repayment award should be proportionate. It wouldn't be fair to ask for a 100% refund where the employee had performed their role successfully. Similarly, it would not be right for an employee to not to have to pay anything because they had done a good job, otherwise the individual would have profited through their own dishonest behaviour. The Supreme Court adopted a middle of the road approach and allowed a confiscation order of 38% of the wages that the employee had earned.

This is a controversial decision given that the individual seems to have benefited considerably.

Energy Blackouts



There is talk that there may be energy blackouts due to lack of energy. Hopefully, this won't happen, but managers need to think carefully about all of this as staff work at home and, for some of them, their flexible working arrangements mean they may be at a greater risk of being affected. Will you require staff to make up time if they are unable to work for these reasons?

Support for a Football Club is not a protected belief



Equality Act 2010

A Claimant was unsuccessful in arguing that his support for a football club (Rangers FC) was a protected belief under the religious or philosophical belief

section of the Equality Act 2010 and as such a dismissal in connection with support for a football club does not amount to discrimination.

Damages for distress due to data breach



There have been a number of cases which seem to indicate that minimal awards will be awarded even if there has been a data breach. Firstly, in a case involving Google, damages cannot be awarded unless there has been pecuniary loss or distress. Secondly, a recent case emphasised that adverse costs and summary judgment could be made against a Claimant if there was no evidence of distress beyond a minimal threshold. Finally, a court only awarded £250 for a very modest degree of distress in a case where a politician could be identified (although they were not named) as being a potential suspect in a police enquiry.

Long Covid- disability?



Mrs Quinn got covid on 11 July 2021 and subsequently had symptoms such as fatigue, shortness of breath, generalised aches and pains, headaches, and brain fog. She struggled with activities such as shopping and driving. She stopped socialising and exercising. She was signed off work for most of August and September but by then had already been dismissed on 27th July 2021. She was later diagnosed with long covid 6 weeks after her dismissal.

The Tribunal ruled that her condition had only lasted 2 and a half weeks before her dismissal. It did not accept that it would last or be likely to last 12 months.

Of interest were the Tribunal's broader remarks that the substantial majority of people who get covid do not have long term covid.

This is by contrast to another long covid case where the individual had been absent 9 months since contracting covid where a different tribunal ruled that it was a disability.

ICO new code on monitoring



The Information Commission (ICO) has just published draft guidance on monitoring employees at work. This will replace its Employment Practices Code 2011.

We are intending to provide further specific guidance and training on this. What I would point out at this stage is that there is already a recognition of a tension of monitoring where employees are working at home.

The Consultation will last until 11th January 2023, but it is self-evident that this is an important issue.

Lateness dismissal



The EAT confirmed that it is possible to dismiss an employee for repeated lateness even if there was no discernible impact on the employer's business.

The Employee had been regularly late at arriving to working although the reality was that it was only by a few minutes or so. The Employee was given a final warning and then continued to be late. Consequently, they were dismissed.

The EAT confirmed that the dismissal was well within the range of reasonable responses and that the employer did not have to prove any special 'knock on effect' on the business even though individually the transgressions were minor ones.

Agency Workers and Strikes

A new law is now in place (effective 21st July 2022) which means that where an employer is subject to industrial action, it can hire temporary agency staff to fill those roles. Previously 1970s legislation prohibited this.

Also, the government raised the amount of damages that can be awarded against a trade union to £1 million where a court rules that strike action is unlawful.

Extra rights for pregnant women and new parents.



The Protection from Redundancy (Pregnancy and Family) Leave Bill is currently progressing through Parliament.

The current law states that before making redundant an employee on maternity leave, shared parental leave or adoption leave, employers are obliged to offer them a suitable alternative vacancy where one exists in priority to anyone else who is provisionally selected for redundancy.

The new Bill will extend protection so that it applies to pregnant women before they start maternity leave and also after they return to work.

It will also protect new parents returning to work after adoption or shared parental leave.

The Bill will allow for regulations to be passed that will fill in the detail on how all of this is to be implemented but it seems for those who take maternity leave that this will mean that those who are pregnant may have a protected position for 18 months.

Unpaid carer's leave.



The Government is also proposing to introduce a week's unpaid carer's leave for employees with caring responsibilities. This will

enable employees to take a week's leave each year to provide care for a dependent. The detail will be provided through regulations but it seems that leave can be taken in half day periods but there will be notice provisions that an employee has to give to an employer.

Support with Employee Health and Disability



The Government has launched a new online service "Support with Employee Health and Disability" to help employers support disabled persons and those with health conditions

in the workplace. Their website is <https://www.support-with-employee-health-and-disability.dwp.gov.uk/support-with-employee-health-and-disability>. This seems to be a question-and-answer web-based service. It is aiming to assist with helping absence management, having conversations about work and about whether or not to return to work.

Local Government Exit pay



The Department for Levelling Up has confirmed that it plans to continue with further consultation on exit pay arrangements for local government workers and that it

will factor in responses to its 2020 consultation. Unfortunately, it doesn't provide any more detail than this brief announcement and hasn't set out any potential timeframe for implementation.

Transport Strikes (Minimum Service Levels) Bill



The Transport Strikes (Minimum Service Levels) Bill has been introduced into the House of Commons. The aim of this legislation is to

ensure that unions provide minimum levels of public transport coverage. If this doesn't happen, they will lose their immunity from liability for industrial action. The detail will be provided in subsequent regulations.

Contact Details

If you have any queries relating to this newsletter or wish to seek employment law advice, investigations or discuss training needs, please contact Andrew Brett: andrew.brett@norfolk.gov.uk, 01603 223101

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