Employment law highlights from 2023

What are the employment law highlights from the last 12 months? In this briefing, we reflect on some of the most interesting and important cases and developments for employers to remember as the year draws to a close.

Disability discrimination

- **Requiring disabled candidates to go through a competitive interview process**: in Hilaire v Luton Borough Council, the EAT held that competitive interview processes could disadvantage candidates with disabilities, for example, those suffering with depression, meaning the duty to make reasonable adjustments was triggered. However, it was also held that it will not always be a reasonable adjustment to dispense with the interview process altogether. You can read more about this decision in our briefing here.

- **Withdrawal of a job offer to disabled candidate**: an Employment Tribunal exercised its discretion in favour of a disabled claimant to allow an out of time disability discrimination claim to proceed. In Mackenzie v The Chief Constable of the Police Service of Scotland, the claimant argued that it was discriminatory to have withdrawn a job offer on the

basis that she was taking anti-depressants at the time. Even though the claim was brought over two years late, the Tribunal allowed it to go forward. Most employers would be unable to justify such an approach, but the particular demands on probationary police constables are likely to be key when analysing justification in this case. You can read more about this decision in our briefing here.

- **Could anxiety about performing part of your job role mean you are disabled?** In Williams v Newport City Council, the EAT concluded that an employee who was severely anxious about performing one part of her job role was disabled. Although the part of the role in question was not a normal day-to-day activity, her anxiety about it substantially and adversely affected her ability to perform her other normal day-to-day activities. This meant that she was disabled, and reasonable adjustments should have been made. You can read more about this decision in our briefing here.

- **Disciplinary action for unacceptable behaviour by disabled employee**: in McQueen v General Optical Council, the EAT upheld a decision that an employer had not discriminated against a neurodiverse employee when it disciplined him in connection with his aggressive and disruptive behaviour at work. Despite the employee's own view, the medical evidence did not indicate that the

unacceptable behaviour arose out of his disability. If it had, then the disciplinary action may have amounted to discrimination. You can read more about this decision in our briefing here.

- **New Acas guidance on making reasonable adjustments for mental health conditions**: for the first time, Acas has published specific guidance on how reasonable adjustments can be used for staff with mental health conditions. The guidance considers how adjustments should be agreed and the role that managers have in managing employees once adjustments are in place. In our briefing, we considered the key points for employers to note.

Other types of discrimination

- **Dismissal of a newly pregnant employee**: in Alcedo Orange Limited v Ferridge-Gunn, it was held at first instance that the dismissal of a newly-pregnant employee on performance grounds was, in fact, significantly influenced by the employee's pregnancy and pregnancy-related sickness. On appeal, the EAT said that the case cried out for an analysis of whether the decision was taken by a sole decision maker, a sole decision-maker who had been heavily influenced by the employee's line manager or whether the decision-maker and line manager

were, formally, joint decision-makers. In doing so, the EAT underlined the importance of scrutinising dismissal decisions in discrimination claims. You can read more about the decision in our briefing here.

- **Failure to notify employee on maternity leave about reorganisation and new job role**: in Smith v Greatwell Homes, an Employment Tribunal held that an employer's failure to notify an employee on maternity leave about a business reorganisation, and the new roles within it, was an act of maternity discrimination. The Tribunal concluded that the employer's approach was rooted in "lazy and unfair assumptions" about women absent on maternity leave. You can read more about the decision in our briefing here.

- **Employer failed to take reasonable steps to protect employee from harassment:** in Fahmy v Arts Council England, an Employment Tribunal considered whether an employee suffered harassment related to her gender critical beliefs and whether her employer was able to avoid liability on the basis that it had taken reasonable steps to prevent it. The Tribunal concluded that the employee had been harassed by colleagues and her employer's Dignity at Work policy and training was out of date, meaning that it had not taken "all reasonable steps" to protect her. In our briefing here, you can read more about the decision and the practical

steps employers can take to manage the risk.

- **Performance management of an employee suffering with menopausal symptoms:** in Lynskey v Direct Line Insurance Ltd, the Employment Tribunal decided that poor appraisal ratings, a written warning and ceasing enhanced sick pay were all discrimination arising from Ms Lynskey's disability of symptoms of menopause. The Employment Tribunal awarded Ms Lynskey compensation in the amount of £64,645. You can read more about the decision in our briefing here. Separately, this year the Government rejected recommendations to expand discrimination law to cover menopause explicitly – you can read more about this in our briefing here.

Day-to-day HR issues

- **Claims for underpaid holiday pay made easier**: in Chief Constable of the Police Service of Northern Ireland v Agnew, the Supreme Court ruled that a series of unlawful deductions from wages is not broken by gaps of three months or more between deductions, nor by the making of a lawful payment in between the unlawful payments. This decision makes it easier to succeed in claims where repeated deductions have been made from pay, for example, in underpaid holiday claims. You can read more about the Supreme Court's decision in our briefing here.

- **Consequences of refusing flexible working requests:** in Glover v Lacoste UK Ltd, the EAT said the rejection of a flexible working request on appeal resulted in a potentially discriminatory working pattern being applied to the employee. This was the case even though the employer had later changed its mind and the employee had not, in fact, ever had to work under the unwanted working pattern. Reversing the decision did not extinguish liability for indirect sex discrimination. You can read more about the decision in our briefing here.

- **Non-compete restrictions**: in Jump Trading International Limited v (1) Couture; and (2) Verition Advisors (UK Partners) LLP, the High Court held that an unusual non-compete covenant lasting for a period of up to 12 months at the employer's discretion could, in principle, be enforceable, even where the employee had already spent 12 months on garden leave. However, on the facts, the Judge declined to award an interim injunction due to the employer's excessive and unreasonable delay. You can read more about the High Court's decision in our briefing here. Separately, the Government has announced plans to legislate to limit non-compete restrictions to a maximum of three months – you can read about these proposals in our briefings here and here.

- **Employment contracts and bonus clawback provisions:** in Steel v Spencer Road LLP t/a The Omerta Group, the High Court ruled that provisions in an employment contract requiring repayment of a discretionary bonus where the employee resigned within three months of the bonus payment date were lawful and not a restraint of trade. The High Court also held that the lawfulness of such provisions is assessed in isolation, rather than looking at the cumulative effect of all restrictions within the contract, such as notice periods and post-termination covenants. The result was that the employee was obliged to repay a discretionary bonus of £187,500. You can read more about the High Court's decision in our briefing here.

- **Israel-Gaza conflict: what rights do employees have to express their political views on social media?** In this detailed briefing, we considered why the discussion of the Israel-Gaza conflict by employees on social media is potentially a problem for employers, the rights that employees have to express their political views and what measures employers can take in practice to manage the objectionable expression of views by employees.

- **Divorce and the workplace: what can employers do to support employees?** It is widely acknowledged that divorce is one of the most stressful life events that a person can ever go through. Given that most of those who

divorce are of working age, employers should take care to understand the needs of divorcing employees and the potential risk areas. In this briefing, we considered recent developments in this area, the ways in which divorce may affect an employee at work and what employers can do to help.

Dismissals

- **Employee unfairly dismissed for refusing to put intrusive work app on her personal phone**: in Alsnih v Al Quds Al-Arabi Publishing & Advertising, an Employment Tribunal ruled that a journalist was unfairly dismissed for refusing to install an "intrusive" work-related app on her personal phone, which would have left her unable to separate her work and home life. The employer should have considered alternatives such as providing her with a work phone or installing the app on her laptop. The Tribunal awarded compensation of almost £20,000 for the unfair dismissal. You can read more about the decision in our briefing here.

- **Redundancy dismissal was unfair because employer failed to give meaningful consideration to alternatives**: in Lovingangels Care Ltd v Mhindurwa, the EAT upheld a decision that a dismissal was unfair because the employer failed to give proper consideration to placing

the employee on furlough as an alternative to redundancy. Although the furlough scheme is long gone, this case reminds employers of the need to give careful consideration to alternatives to redundancy before proceeding to dismiss. A failure to do so may mean the decision falls outside the range of reasonable responses, with the result that the dismissal is unfair. You can read more about the decision in our briefing here.

- **Holding an employee to a heat of the moment resignation may amount to a dismissal**: in Omar v Epping Forest District Citizens Advice, the EAT set out detailed guidance on how resignations should be assessed and whether they bind the employee. Here, the EAT said the Employment Tribunal had been wrong to conclude that an employee who had resigned in anger for the third time in three weeks really intended to resign. You can read more about the decision and the takeaways for employers in our briefing here.

- **Dismissal of long-term sick employee:** in Garcha-Singh v British Airways plc, the EAT ruled that an Employment Tribunal was entitled to find that the dismissal of a long-term sick employee was fair. The fact that the dismissal was postponed seven times over the course of a year was to the employee's advantage and it could not be said that the employer had acted unreasonably. You can

read more about the decision in our briefing here.

- **Dismissal of employee who refused to attend work over Covid concerns**: in Rodgers v Leeds Laser Cutting Ltd, the Court of Appeal upheld a decision that an employee was not automatically unfairly dismissed on health and safety grounds when he was dismissed for refusing to attend work during the first Covid lockdown. The employee did not believe that he was exposed to danger within the workplace, and, even if he had, it would not have been a reasonable belief given all the precautions the employer had taken. You can read more about the wider implications of the decision in our briefing here.

Settlements

- **Are settlement offers always without prejudice?** In Scheldebouw BV v Evanson, the EAT upheld a decision that a settlement offer made by an employer in the context of amicable exit discussions was not without prejudice because there was no dispute between the parties at that stage. Accordingly, the fact of the offer could be referred to in Tribunal proceedings. By contrast, in Garrod v Riverstone Management Ltd the EAT held that a settlement offer made to an employee after she had complained about discrimination, but before she

had started legal proceedings, was without prejudice because a dispute was in existence by that point, and the employer's behaviour was not "unambiguously improper". As a result, the employee was unable to refer to the settlement offer in her legal claim. You can read more about these two decisions here and here.

- **Is it possible to settle future claims in settlement documents?** The general rule is that unknown future claims may not be validly waived in settlement agreements. However, two decisions this year illustrate that there are circumstances in which an employee may validly waive future claims. in Arvunescu v Quick Release (Automotive) Ltd the Court of Appeal ruled that a claimant could not proceed with a victimisation claim which had already arisen by the date he had entered into a COT3 settlement agreement with his employer. The broad waiver wording (which is permissible in COT3s but not settlement agreements) was sufficient to settle potential claims in existence as at the date of the COT3 agreement. In Clifford v IBM UK Ltd an Employment Tribunal Judge ruled that a waiver of future claims contained in a settlement agreement was effective in circumstances where it was made clear that the claimant could not bring future claims which arose out of similar matters to those that had been settled in the settlement agreement. You can read more about these two decisions here and here.

Employment law reforms ahead

From 1 January 2024

- **Working time and holiday:** on 1 January 2024, changes will be made to working time law. The law will be amended to: clarify record-keeping rules, specify what counts as "normal pay" and stipulate the circumstances in which annual leave may be carried forward into a new holiday year. Further, from **1 April 2024**, employers will be permitted to calculate the accrual of annual leave for certain types of workers on an "accrue as you go" basis and pay "rolled up holiday pay" throughout the year. You can read more about these reforms in our briefing here.

- **Informing and consulting about TUPE transfers**: also on 1 January 2024, changes will be made to TUPE. The law will be changed to permit employers to inform and consult directly with employees where it has up to 49 employees or where it is proposing a transfer of up to nine employees. This option will be available where there are no existing representatives available to consult with and it is intended to streamline the consultation process by avoiding the need to elect representatives. You can read more about this reform in our briefing here.

- **Equality Act 2010 to be amended to reflect EU discrimination law principles:** also on 1 January 2024, the Equality Act 2010 will be amended to reflect certain EU discrimination law principles which would otherwise have been lost as a result of Brexit. The changes relate to pregnancy, maternity and breastfeeding, indirect discrimination, making discriminatory statements, equal pay claims and the definition of disability. In our briefing, we explain the current position and how the legislation will change next year.

From 6 April 2024

- **Flexible working requests to become a Day 1 right and process to be enhanced:** on 6 April 2024, the Flexible Working (Amendment) Regulations 2023 will come into force and make the right to request flexible working a Day 1 employment right (rather than needing 26 weeks' service as is currently the case). Separately, the Employment Relations (Flexible Working) Act 2023 will introduce further reforms to the flexible working regime by way of secondary legislation expected to come into force in the first half of 2024 (on a date yet to be confirmed). These reforms are as follows:
    - Employees will no longer be required to explain what effect they think the requested change would have on their employer and how that effect might be dealt with.
    - Employees will be permitted to make two flexible

working requests per year rather than one.

- Employers will be required to consult with employees before refusing requests.

- Employers will have two months to make a decision on a flexible working request rather than three, unless an extension is agreed.

- Acas has announced it will publish a new statutory Code of Practice to accompany the revised regime. You can read more about these reforms in our briefing here.

- **Right to request more predictable working patterns**: earlier this year the Workers (Predictable Terms and Conditions) Act 2023 became law. The Act gives workers (and agency workers) a statutory right to request more "predictable" working patterns. Although the Act has passed into law, its provisions have not come into force straight away and separate regulations are still needed. The Government's press release indicated that the Act and accompanying regulations will come into force by Autumn 2024. Acas has announced it will publish a statutory Code of Practice to accompany the new regime. Our briefing explains what the new right involves and the steps that employers will need to take to prepare.

- **Enhanced protection in redundancy processes during pregnancy and after return from family leave:** earlier this year, the Protection from Redundancy (Pregnancy and Family Leave) Act 2023 became law. In the last few weeks, the Maternity Leave, Adoption Leave and Shared Parental Leave (Amendment) Regulations 2024 have also been published. From 6 April 2024, the Act and Regulations provide for special protection for pregnant women and those returning from certain types of family leave in redundancy situations. In our briefing, we outline where things currently stand and what steps employers should take next.

- **Right to unpaid carer's leave:** earlier this year, the Carer's Leave Act 2023 became law. In the last few weeks, the Carer's Leave Regulations 2024 have also been published. From 6 April 2024, the Act and Regulations provide for new rights and protections at work for employees who have caring responsibilities, chiefly, a right to one week's unpaid leave. In our briefing, we outline where things currently stand and what steps employers should take next.

Later or on a date to be confirmed

- **Employer's duty to prevent sexual harassment at work:** earlier this year, the Worker Protection (Amendment of Equality Act 2010) Act 2023 became law. It is due to come into force by **26 October 2024** (one year since the Act passed). The Act will impose a duty on employers to take reasonable steps to prevent sexual harassment in the workplace. Where an employer breaches this duty, employment tribunals may uplift compensation in relevant claims by up to 25%. The EHRC may also investigate suspected breaches and take enforcement action where needed. In our briefing we discuss the new duty and what employers will need to do to comply.

- **Right to neo-natal leave and pay:** earlier this year, the Neonatal Care (Leave and Pay) Act 2023 became law. The Act provides the pathway to new rights and protections at work for employees who are parents of babies requiring neonatal care. The precise scope and mechanics of the new rights will be set out in separate regulations. It is expected that these rights will not be brought into force before **April 2025**. In our briefing, we outline where things currently stand and what steps employers should take next.

- **Government plans to relax paternity leave rules:** earlier this year, the Government announced plans to introduce legislation to make it easier for fathers to take

paternity leave. It is not yet known when these changes will come into force. In our briefing we outline what is currently known about the proposals.

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.