Employment law highlights from 2024

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

Employment contracts

- **Do not make promises you cannot keep! Employer restrained from dismissing employees for purpose of removing a permanent contractual entitlement.** In Tesco Stores Ltd v USDAW and others the Supreme Court ruled that an implied term prevented a private sector employer from dismissing and offering to re-engage employees on new terms, where the objective was to withdraw a contractual payment intended to be a permanent benefit. The Supreme Court took the unusual step of restoring an injunction which prevented Tesco from dismissing the employees for the purpose of removing the entitlement, albeit that dismissal for other lawful reasons would still be possible. You can read more about the decision in our briefing here.

- **Flexibility clauses allowing changes to be made to a job role are subject to an implied term that they will be exercised honestly, rationally and not in an arbitrary or capricious way.** In McCormack v Medivet Group Ltd the High Court decided that a CEO's decision to reassign a senior employee's core responsibilities to others with the intention of moving her into a new role in future amounted to repudiatory breaches of contract entitling the employee to constructively dismiss herself.

Although the employer had expressly reserved rights to vary the employee's role and responsibilities, these reserved rights were not without limit. The Court held that it is implicit that an employer must exercise such powers honestly, rationally and for the purpose for which they were conferred (namely, good management). Here, the CEO's decision to reallocate the employee's responsibilities with immediate effect exceeded these limitations. You can read more about this decision in our briefing here.

Whistleblowing

- **Who falls within the scope of whistleblowing protection?** Back in 2019, in the case of Gilham v The Ministry of Justice, the Supreme Court held that even though judicial office holders are not workers they are protected under whistleblowing laws. To deny them rights because of their occupational status would breach their rights under Article 14 of the European Convention on Human Rights. This year, in Sullivan v Isle of Wight Council, an external job applicant sought to rely upon Gilham to claim whistleblowing protection. However, the EAT rejected this argument, holding that her status as a job applicant was not analogous to that of a judicial office holder. Further, an external job applicant was not in the same position as an internal job applicant (whose right to bring a whistleblowing claim stems from their existing worker status). But whilst external job applicants are out, charity trustees are – potentially – in scope. In MacLennan v British Psychological Society, the EAT applied Gilham and held there was a strong argument that charity trustees had an occupational status similar to workers. The case has been remitted to the Employment Tribunal to consider again.

- **The knowledge required by a decision-maker in a whistleblowing dismissal claim.** The vexed question of when a dismissal or detriment is causally linked to a protected disclosure arose in several cases this year. In Nicol v World Travel and Tourism Council the EAT held that in order for employers to be liable for a whistleblowing dismissal, the dismissal decision-maker must have some knowledge of the content of the protected disclosure. It is not sufficient for someone else in the business to know about the protected disclosure (although it has previously been established by the Supreme Court in Jhuti that in exceptional circumstances the hostile motivations of someone who influenced the decision-maker may be attributed to the employer).

- **And what about knowledge in whistleblowing detriment claims?** A similar approach was taken to whistleblowing detriment claims in the case of Williams v Lewisham and Greenwich NHS Trust. Here, the EAT said that an employer will not be liable for whistleblowing detriment where the decision-maker does not know about the protected disclosure. In such circumstances, it cannot be said that they have been materially influenced by the protected disclosure – and this would be the case even if someone who *did* know about it had sought to influence their decision (meaning the Jhuti exception that applies to dismissal claims does not apply to detriment claims). Yet, somewhat confusingly, in First Greater Western Ltd v Moussa, the EAT reached a different view when it held that an employer *may* be liable for whistleblowing detriment where a decision-maker had no knowledge of the protected disclosures but was influenced by a "collective memory" of the whistleblower as a troublemaker.

- **Confusion reigns over whether an employers can be vicariously liable for "detriment of dismissal" claims**. In the 2018 landmark decision of Timis and Sage v Osipov the Court of Appeal held that it was open to employees to bring claims for whistleblowing detriment against individual co-workers who were party to the decision to dismiss them and claim losses flowing from the detriment of dismissal. Although not claimed in Osipov, the Court indicated that the employer could be vicariously liable for such detriment claims and also face a separate unfair dismissal claim. However, this year, in Wicked Vision v Rice, the EAT held while an employee may bring a "detriment of dismissal" claim against an individual co-worker, it is *not* possible to claim that an employer is vicariously liable for such detriment. Instead, an employee is limited to claiming unfair dismissal against the employer. Yet, just a few months later, the EAT reached a different view in the case of Treadwell v Barton Turns Development Ltd. Following Osipov, the EAT held that employees may claim the employer is vicariously liable for the detriment of dismissal and Wicked Vision was wrong to say otherwise. Both decisions have been appealed with the Court of Appeal hearing is scheduled for October 2025.

Family-friendly

- **Flexible working became a Day 1 employment right and the request process was adjusted in favour of employees**. On 6 April 2024, the right to request flexible working became a Day 1 employment right and the process for making requests was made more favourable to employees. Employees may now make up to two requests per year (rather than one) and no longer have to explain what

effect they think the requested change would have on their employer. Employers are now required to consult with employees before refusing requests and have just two months (rather than three) to make a decision unless an extension is agreed. Alongside these reforms, Acas revised its statutory code of practice on flexible working and its non-statutory guidance. You can read more about the reforms and the Acas code and guidance in our briefings here and here.

- **Flexible working requests and the dangers of overlooking menopausal symptoms**. In Johnson v Bronzeshield Lifting Ltd the Employment Tribunal held that an employer's failure to take into account an employee's menopausal symptoms when considering her flexible working request was a repudiatory breach of trust and confidence which resulted in her constructive unfair dismissal. In reaching its decision, the Tribunal emphasised that the hours an employee works has a major impact on their life and it matters how flexible working applications are dealt with – the outcome is not the only thing of importance. You can read more about this decision here.

- **Relaxation of the paternity leave regime**. For babies born on or after 6 April 2024, the paternity leave regime was relaxed to permit fathers to take their two weeks' statutory paternity leave in two separate blocks of a week (rather than as a single block) within a year of the birth (rather than within eight weeks). On top of this, the notification regime was simplified to allow fathers more flexibility about telling their employer when they wished to take the leave. You can read about the changes in full in our briefing here.

- **Dismissal for seeking to take parental leave**. In Hilton Foods Solutions Ltd v Wright an employer applied to strike out a claim brought by a former employee that he had been automatically unfairly dismissed because he had sought to take unpaid parental leave. The employer argued that the employee had not complied with the formal notice requirements for requesting parental leave and had only raised the matter informally. As such, he could not be regarded as having sought to take parental leave. The EAT upheld the Tribunal's refusal to strike out the claim, agreeing that there was no requirement that formal notice must have been given in order to be viewed as having "sought" to take parental leave. The claim will now proceed to a full hearing.

- **New right for those with caring responsibilities to take leave**. On 6 April 2024, employees with caring responsibilities gained a new Day 1 employment right to take up to one week's unpaid leave per year in order to provide or arrange care for their dependants with long term care needs. You can read more about the new right in our briefing here. Government and Acas guidance for employers was published to accompany the new regime and you can read more about that in our briefing here.

- **Special treatment in redundancy situations extended to pregnant employees and those returning from family leave**. From 6 April 2024, pregnant employees and those returning from certain types of family leave were given priority in redundancy situations for any suitable alternative vacancy, thus affording them the same special treatment given to women absent on maternity leave. The protection applies to pregnant women from the date they notify their employer of the pregnancy and

to family leave returners for a period which typically runs for 18 months from the date of birth (or adoption placement). Where an employer fails to give such employees priority status, this gives rise to a claim of automatic unfair dismissal. You can read about the changes in full in our briefing here.

- **Redundancy, maternity leave and suitable alternative employment**: in Carnival Plc v Hunter the EAT had to consider whether the rules on priority status for suitable alternative vacancies in a redundancy situation were engaged. Here, the EAT decided that the rules were *not* engaged in circumstances where there was a straightforward reduction in the number of roles from 21 to 16 – this was because the 16 roles were already occupied and did not amount to "alternative" roles.

Discrimination and harassment

- **The Equality Act 2010 was amended to reflect EU discrimination law principles.** On 1 January 2024, the Equality Act 2010 was amended to reflect certain EU discrimination law principles which would otherwise have been lost as a result of Brexit. Chiefly, the changes expanded rights and protections during pregnancy, childbirth, maternity and when breastfeeding. You can read more about these and the rest of the changes in our briefing here.

- **New duty to prevent sexual harassment at work came into force.** On 26 October 2024 the new duty to prevent sexual harassment at work came into force, requiring all employers to take reasonable steps to prevent sexual

harassment of workers in the course of their employment, including where the harassment is perpetrated by third parties. Breaching the duty may lead to enforcement action by the EHRC and to an uplift to compensation of up to 25% in relevant claims. Accompanying the new duty, the EHRC updated its guidance on harassment at work. You can read about the new duty and guidance in our briefings here and here. You can also catch up on our in-depth webinar on the topic here.

- **Claimants in indirect discrimination claims do not need to have the protected characteristic in question.** In British Airways plc v Rollett and others the EAT held that individuals may bring claims of indirect discrimination despite not sharing the protected characteristic of the disadvantaged group, provided that they suffer the same disadvantage. This means the class of workers who may potentially claim indirect discrimination may be broader than it first appears. You can read more about this decision here. Employers should also note this principle was codified in the Equality Act 2010 on 1 January 2024 (see above).

- **Reasonable adjustments and job interviews.** In Glasson v The Insolvency Service the EAT held that an employer had not failed to make reasonable adjustments for a disabled employee in an interview process. The employee had a stammer and applied for a new role. He was interviewed by video conference and was given more time to answer questions so as to accommodate his stammer (at his request). The EAT upheld the Tribunal's decision to reject the claim. Although the employer knew of the disability, it did not know that the employee was disadvantaged in the interview process (save for the

need for extra time which had been granted). Nor were there any "alarm bells" present that meant the employer should have been fixed with constructive knowledge of such disadvantage – on the contrary, his performance was competent. Accordingly, the duty to make reasonable adjustments was not engaged.

- **Allowing a trial period in an alternative role or pausing a dismissal decision until a merger is finalised may both be reasonable adjustments**. In Rentokil Initial UK v Miller the EAT held that offering a trial period in a new role may constitute a reasonable adjustment for a disabled employee. This may be the case even where the employer considers that the employee is not particularly well-suited to the role. You can read more about this decision in our briefing here. Meanwhile, in Cairns v Royal Mail Group the EAT held that it may have been a reasonable adjustment to delay the dismissal of a disabled postman who could no longer perform his role, pending an imminent merger which may have given rise to an alternative role.

- **Gender critical belief discrimination continues to be a hot topic.** 2024 saw a spate of gender critical belief discrimination cases. In Meade v Westminster City Council and Social Work England the Employment Tribunal held that a social worker who held gender critical beliefs had been harassed by both her employer and regulator. In Phoenix v The Open University the Employment Tribunal held that a Professor who held gender critical views suffered discrimination and harassment when employer failed to protect her from harm by colleagues. And in Adams v Edinburgh Rape Crisis Centre the Employment Tribunal held that the employee

had been subjected to discrimination because of her gender critical beliefs and had been constructively dismissed. However, in Orwin v East Riding of Yorkshire Council the Tribunal held there was no discrimination when a gender critical employee was dismissed for using a deliberately provocative email signature to protest against the concept of gender self-identification.

- **The threshold for when a belief is protected under the Equality Act 2010 came under scrutiny.** In Miller v University of Bristol the Employment Tribunal held that an academic's anti-Zionist belief was protected under the Equality Act 2010 and his subsequent dismissal was discriminatory and unfair. Crucially, the Tribunal held that the employee's opposition to Zionism was confined to opposition to the exclusive realisation of Jewish rights to self-determination within a land which is home to a substantial non-Jewish population. It was not opposition to the idea of Jewish self-determination or a Jewish state *per se*. Accordingly, his belief was held to be worthy of respect in a democratic society and qualified as a protected belief. In contrast, in Thomas Surrey and Borders Partnership NHS Foundation Trust and anor the EAT held that an employee's anti-Islamic belief was not protected because it amounted to a "*disdainful and prejudiced focus on Islam*", including a desire to forcibly remove Muslims from the UK. As such, it was not worthy of respect in a democratic society and was not protected. This was the case even though the EAT has previously said (in the case of Forstater) that only the most extreme beliefs akin to Nazism or totalitarianism would be excluded from protection. However, the EAT did suggest that the bar for exclusion may have been set too high in Forstater and that, in future, beliefs espousing intolerance or discrimination

might also fall outside the protection

- **Christians and negative views on homosexuality: terminating a contract was not discriminatory but retracting a job offer was.** In two cases this year, employers took action after Christian individuals expressed negative views about homosexuality on Facebook. In Omooba v Michael Garrett Associates and anor, an actor was dismissed from playing the role of a lesbian character following a social media storm about the comments she had made on Facebook. The EAT upheld the Tribunal's decision that the termination was not because of the actor's beliefs or the way she had manifested them. Rather, the theatre was concerned about adverse publicity and audience protests, which could affect the success of the production. Therefore, the termination was not discriminatory. In contrast, in Ngole v Touchstone Leeds the Employment Tribunal held that the withdrawal of a job offer from a candidate who had made such comments on Facebook was directly discriminatory. After it had withdrawn the offer, the employer invited the candidate in for a second interview to provide reassurances to them, but it did not end up reinstating the offer. The Tribunal found that the withdrawal of the job offer prior to the second interview was not proportionate and the employer should have invited the candidate to provide assurances *before* withdrawing the offer.

Working time and holidays

- **Wide ranging reforms were made to the Working Time Regulations 1998 (WTR)**. On 1 January 2024, the WTR was amended to relax certain record-keeping requirements for

employers, clarify what counts as "normal pay" for holiday pay and spell out when employers must permit holiday to be carried over into a new holiday year and for how long. In April 2024, further changes came into force governing how annual leave was accrued and paid for irregular hours and part year workers. You can read about all of these changes in full in our briefing here. Detailed guidance was published to accompany these changes and you can read more about that in our briefing here.

- **In holiday pay claims, a gap of three months between deductions does not necessarily break the series**. In British Airways plc v De Mello the EAT considered whether the exclusion of certain allowances from holiday pay amounted to unlawful deductions from pay. In doing so, the EAT considered when a series of deductions may be broken and whether employers are entitled to designate the order in which different types of leave may be taken. Applying the Supreme Court's decision in Agnew from 2023, the EAT held that a gap of three months or more does not necessarily break the series of deductions. The EAT also held that in Agnew the Supreme Court did not exclude the possibility of an employer designating the order of annual leave (save that it could not be done retrospectively). However, the EAT said that the exercise of any such power could not be relied upon to make a worker's position in relation to a time limit less favourable than it would have been if the employer had *not* designated the order of leave. You can read more about this decision in our briefing here.

TUPE

- **New flexibility to inform and consult with staff directly about a TUPE transfer**. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**) protect employees' rights when the business or undertaking for which they work transfers to a new employer, either when the business changes owner or a service transfers to a new provider. Before such a transfer, the outgoing employer must inform and consult with representatives of the affected employees. These can be existing representatives (e.g. trade union representatives) or ones that are elected just for this purpose. For TUPE transfers taking place on or after 1 July 2024, outgoing employers with up to 49 employees, or with any number of employees where a transfer of up to nine employees is proposed, may inform and consult with affected employees *directly* where there are no existing representatives in place. You can read more about this development in our briefing here.

- **Employer liability for discrimination does not transfer where the perpetrator transfers under TUPE, but the claimant does not**. In Sean Pong Tyres v Moore, the EAT rejected an employer's argument that liability for discrimination had transferred to the new employer under TUPE, alongside the perpetrator of the discrimination even though the claimant did not also transfer. The EAT held that the employer had primary liability under the Equality Act 2010 and this did not transfer with the perpetrator.

Dismissals

- **New statutory Code of Practice on dismissal and re-engagement in force**. On 18 July 2024 a new statutory

Code of Practice came into force regulating the practice of dismissal and re-engagement, also known as “fire and rehire”. The Code sets down rules to followed by employers about how to inform and consult with affected staff. The Code explains how the prospect of fire and rehire should be raised, the need to re-examine the proposal in light of staff feedback and next steps, whether that is imposing new contractual terms or moving to fire and rehire. A breach of the Code does not, in itself, expose employers to a legal claim. However, a breach may be taken into account by a Court of Tribunal in relevant claims and may also lead to an uplift to compensation of up to 25% in relevant claims. You can read more about the Code in our briefing here.

- **Dismissal for irretrievable breakdown of relationship fair despite no warning or right of appeal**. In Matthews v CGI IT UK Ltd the dismissal of an employee without any formal process being followed first was held to be fair. An employee’s grievance about mistreatment by a line manager was not upheld and the employee went off sick. During discussions about the prospect of returning to work, the employee was confrontational, intransigent and refused to choose between options offered to him. The employee threatened to raise further grievances, take legal action and imposed unacceptable conditions on his return to work. The employer decided the relationship was damaged beyond repair and dismissed the employee without warning or offering an appeal. The EAT agreed that this was a rare case where dismissal without any process was fair because following a process would have been futile in the circumstances.

- **Gross misconduct dismissal of City trader who had applied industry guidance was unfair and the employer's process was unreasonable**. In Weir v Citigroup Global Markets Ltd an Employment Tribunal held that the dismissal of a City trader for misleading the financial markets was unfair because he had been operating in line with industry guidance and his managers knew of his approach. Further, the employer's extremely lengthy disciplinary process was unacceptable, unreasonable and caused significant stress and worry to the employee. You can read more about this decision in our briefing here.

- **Redundancy consultation: traps for the unwary.** Two cases this year reminded employers of some of the key ingredients of a fair individual redundancy consultation. In Valimulla v Al Khair Foundation the EAT held that an employer's failure to consult with an employee about a proposed redundancy pool meant the dismissal was procedurally unfair. Further, the decision not to pool the employee with four other employees who performed the same role as the employee had to be looked at again by a new Employment Tribunal. In De Bank Haycocks v ADP RPO UK Ltd the Court of Appeal held that a fair redundancy process requires individual consultation to take place at a point when the employee still has a chance to influence the outcome. However, consultation with the wider workforce is not usually required in small-scale redundancy exercises. You can read about these decisions in our briefings here and here.

- **Could not saying "hello" to a colleague risk constructive dismissal?** The decision in Hanson v

Interactive Recruitment Specialists Ltd reminds employers that seemingly minor incidents can have a big impact. Here, the Employment Tribunal held that a manager's failure to say "hello" to a colleague was conduct likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Whilst the conduct by itself was not a fundamental breach of contract, it contributed to a breach which led to an employee's constructive dismissal. You can read more about this decision in our briefing here.

Settlements

- **Evidence of pre-termination negotiations inadmissible in unfair dismissal claim:** in Gallagher v McKinnon's Auto and Tyres Ltd, the EAT considered whether an employer's conduct during a pre-termination settlement discussion was improper, meaning the discussion would lose its privileged status and be admissible in Tribunal proceedings. The EAT agreed with the Tribunal that the employee was *not* placed under undue pressure by the employer calling him to the discussion under false pretences, telling him that a redundancy process would begin if he did not accept the settlement offer or by giving him just 48 hours to decide whether he wished to accept the offer in principle. Accordingly, the employer had not acted improperly and the discussion was inadmissible.

- **Unknown future discrimination claims may be waived in settlement agreements**. In Bathgate v Technip Singapore PTE Ltd, the Scottish Court of Session overturned a decision of the Scottish EAT and ruled that unknown

future claims may be waived in settlement agreements.The Court ruled that in order to be effectively waived, a future claim must be identified by either a generic description (e.g. “unfair dismissal”) or a reference to the section of the statute giving rise to the claim (e.g. “s.94(1) of the Employment Rights Act 1996”). Provided that the wording used is *“plain and unequivocal”* an unknown future claim may be settled. A few months later, the UK EAT applied this decision in the case of Clifford v IBM UK Ltd, where it was held that there was nothing in the Equality Act 2010 which precluded the settlement of unknown future claims, provided that clear language was used. If Parliament had intended to prevent the settlement of unknown future claims then it could have spelt this out in the Act, but it had not done so. Nor was there any basis for distinguishing Bathgate from Mr Clifford’s case – the fact that Mr Bathgate’s employment had ended, and Mr Clifford’s employment was continuing, was not pertinent. You can read more about these decisions here and here.

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