Reflecting on employment law cases and developments in 2020

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Employment Law News

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Dealing with the impact of the Covid-19 pandemic on the workforce has held the top spot on the HR to-do list for most of 2020. But what other developments should employers note from the last 12 months? Putting Covid-19 to one side, we've

picked out some interesting cases and other developments from 2020 for employers to reflect on as the year draws to a close.

Equality and discrimination

As usual, there has been a great deal of activity in the equality sphere:

- **Vegetarianism and veganism:** we learnt that whilst vegetarianism was not a philosophical belief capable of protection under the Equality Act 2010, ethical veganism was protected. At the tail end of 2019, the Employment Tribunal ruled in the case of Conisbee v Crossley Farms that the plurality of reasons for becoming a vegetarian (e.g. lifestyle, health, animal welfare, personal taste etc) meant it did not attain the necessary level of cogency, seriousness, cohesion and importance to qualify for protection as a philosophical belief. By contrast, the Employment Tribunal in Casamitjana v The League Against Cruel Sports decided that ethical veganism was worthy of protection. You can read more about these decisions in our briefing here. The protection of veganism could raise interesting employment law issues in 2021 where vegan employees refuse to have the Covid-19 vaccine on the grounds that it has been tested on animals.

- **Gender fluidity:** we also learnt that a belief that gender cannot be fluid is a belief worthy of protection in a democratic society. In the case of Higgs v Farmor's School an Employment Tribunal decided that a Christian employee's belief that gender cannot be fluid, and that an individual cannot change their biological sex, were beliefs worthy of respect in a democratic society and capable of protection under the Equality Act 2010. On the facts of the case, however, the employee had not been discriminated against because of her protected

beliefs. You can read the Tribunal's decision here. More recently, in the case of Taylor v Jaguar Land Rover Ltd, an Employment Tribunal decided that a gender fluid / non-binary employee had the protected characteristic of gender reassignment. The employee was awarded £180,000 damages in respect of the discrimination and harassment they had suffered. You can read the Tribunal's decision here.

- **Disability:** in Hill v Lloyds Bank plc, the EAT decided that the employer had discriminated against a depressed employee when it failed to guarantee a severance package in the event that it could not keep her from having to work with her alleged harassers again. It decided that providing such a guarantee would have been a reasonable adjustment for the employer to make and their failure to do so was discriminatory. The employee was awarded £7,500 damages and the employer was ordered to provide the guarantee to the employee. You can read more about this decision in our briefing here.

- **Sexual harassment:** in January 2020, the Equalities and Human Rights Commission published new and detailed guidance on sexual harassment and other forms of workplace harassment. Whilst the guidance is not a statutory code of practice, it is described as the authoritative and comprehensive guide to the law and best practice. This means it can be considered by an Employment Tribunal in relevant cases. The guidance recaps on the legal framework and considers steps for employers to take in preventing and responding to harassment. You can read more about the guidance in our briefing here.

- **Race:** in the case of Lamonby v Solent University an Employment Tribunal had to consider whether it was fair to dismiss an employee who had made remarks which betrayed a tendency to stereotype according to race,

even where such stereotypes were sometimes positive. The Tribunal concluded that ascribing certain abilities or talents (or the opposite of them) to a group by virtue of their nationality, race, ethnic or religious group was potentially racist and offensive. Despite the fact the employee had not intended to cause offence, the Tribunal found that dismissal was within the range of reasonable responses. You can read more about this decision in our briefing here. Race inequality issues came to the forefront of the HR agenda in the Summer in response to the Black Lives Matter movement. In this briefing we discussed the continuing underrepresentation of black people in senior positions in the UK and the calls for action to secure more diverse workforces.

- **Pay inequality:** in January 2020, the BBC journalist, Samira Ahmed, won her equal pay case against the BBC. We discussed the impact of that decision here and also we looked at the important role of gender pay gap reporting here. Although gender pay gap reporting was paused during the pandemic, it is firmly back on the agenda with legislation in the pipeline which aims to expand the obligation to smaller employers as well as introducing ethnicity pay reporting and a right to know what colleagues are paid. You can more read about these proposals in our briefing here.

Employment contracts and policies

- **New rules on statements of particulars:** on 6 April 2020, the rules governing statements of employment particulars were overhauled. The wider category of "workers" became entitled to receive a statement and statements had to be provided earlier and contain more information. Typically, employers comply with the requirement to provide written statements by providing an employment contract. Accordingly, employers had to update template employment contracts and prepare appropriate worker

contracts or statements. You can read more about this development in our briefing here.

- **Bereavement leave policies:** on 6 April 2020 a new law, known as "Jack's Law", was introduced to provide bereaved parents with a new right to 2 weeks' bereavement leave (and in some cases, pay) following the death of a child. In this briefing, we took a closer look at the new right and the preparatory steps employers needed to take.

Whistleblowing

- **Whistleblowing in the financial services sector:** earlier this year, Protect, the whistleblowers' charity, published a report looking at the recent experiences of whistleblowers in the financial services sector. In this briefing, we discussed the key findings including the typical wrongdoing raised by whistleblowers in the sector, where they were most likely to raise their concerns and the treatment they received. We also outlined five key learning points for employers in the sector.

- **Interim relief and Covid-related complaints:** in Morales v Premier Fruits (Covent Garden) Ltd, the employee sought interim relief (i.e. an order that he should get his job back pending the full hearing of the case) on the basis that he had been automatically unfairly dismissed because of his trade union membership or activities and/or because he had made whistleblowing disclosures about Covid-related matters. He was granted interim relief on the basis that it was likely that he would be able to show that he had been dismissed because of his trade union membership or activities rather than the whistleblowing disclosures. You can read more about this decision in our briefing here.

Vicarious liability

- **Deliberate data breach:** in an important and welcome decision for employers, the Supreme Court ruled that an employer was not vicariously liable for a significant data breach committed by a disgruntled employee. In Morrisons v Various Claimants it could not be said that there was a sufficient connection between the errant employee's authorised activities and the wrongful act of publishing the data on the internet. The fact that the employee's job merely provided him with the opportunity to commit the wrongful act was not enough to establish a sufficient connection. You can read more about this decision in our briefing here.

- **Practical jokes:** following on from the Morrisons decision, the High Court in the case of Chell v Tarmac Cement and Lime Ltd found that an employer was not vicariously liable for the actions of an employee whose practical joke injured a contractor in the workplace. It was expecting too much of an employer to implement a policy governing practical jokes or horseplay by employees. Although the prank that caused the injury happened in the workplace, it could not be said that there was a sufficient connection between the employee's authorised activities and the prank. You can read the High Court's decision here.

TUPE

- **Changing terms and conditions:** in Ferguson v Astrea Asset Management Ltd the EAT considered whether four company directors were entitled to rely on contractual terms which had been put in place shortly before a TUPE transfer which were designed to significantly improve their position after the transfer. The EAT decided that the changes, even though they were beneficial, were void because they were by reason of the transfer. You can read more about the EAT's decision in our briefing here.

- **Transfers to multiple employers:** in ISS Facility Services v Govaerts the ECJ decided, for the first time, that where there is a TUPE transfer to multiple transferees, a full-time contract of employment of a transferring employee can be split between the transfers into several part-time contracts on a pro rata basis. However, if splitting the contract is impossible, or worsens the working conditions or rights of the employee, then the contract may be terminated instead. You can read the ECJ's decision here.

Terminations

- **Redundancy processes:** in Gwynedd Council v Barrett, the EAT considered whether an employer can require a potentially redundant employee to go through a competitive interview process for an alternative role. In the wake of the coronavirus pandemic, some employers will be facing the prospect of reorganising their businesses and making redundancies. Employers in this position should take note of this decision which highlights the risks of getting the process wrong. You can read more about the EAT's decision in our briefing here.

- **Collective consultation:** in UQ v Marclean Technologies SLU the ECJ ruled on how employers should calculate numbers of redundancies for collective consultation purposes. In an onerous decision for employers, the ECJ ruled that employers have to look either side of an individual dismissal on a rolling 90-day basis to identify the relevant reference period. The reference period will be the period of 90 days which includes the individual dismissal, and which contains the greatest number of redundancy dismissals effected by the employer. Whether this will be read across into UK law is not resolved. You can read more about the ECJ's decision in our briefing here.

- **Misconduct dismissals:** If an investigating officer fails to pass on relevant information to a dismissing officer, could this undermine the reasonableness of the dismissing officer's decision? In Uddin v London Borough of Ealing the EAT said that it could, with the result that an employee accused of sexual assault was unfairly dismissed. The decision underlined the need for employers to ensure that their dismissal processes are unimpeachable and that both investigating officers and dismissing officers receive detailed training on the scope of their role. You can read more about the EAT's decision in our briefing here.

- **Procedural failings:** the decision in Gallacher v Abellio Scotrail Ltd shows that where there has been an irretrievable breakdown in relations between colleagues, an employer may be able to dispense with a formal dismissal process and still dismiss fairly. Although it will be unusual and rare for a dismissal to be fair without any procedure, the mutual loss of trust and confidence meant that following a formal process would have been futile and even damaging. You can read more about the EAT's decision in our briefing here.

Settlements and disputes

- **Termination payments:** from 6 April 2020, employer's class 1A NICs became payable on termination payments above £30,000. Termination payments remain completely exempt from employee's NICs. Employers must remember to factor in this extra cost when negotiating settlements with departing employees. You can read more about this development in our briefing here.

- **Breach of settlement terms:** if an employee breaches a confidentiality clause contained in a COT3 agreement or, more commonly, a Settlement Agreement, what are the employer's options? The answer is that it will depend on

the importance of the clause or the severity of the employee's breach. The High Court's decision in Duchy Farms Kennels Ltd v Steels offers a salutary lesson for employers on the need to draft settlement documents carefully. You can read more about the High Court's decision in our briefing here.

- **Tribunal disputes:** with the pandemic likely to intensify the backlog of employment tribunal claims, the Government introduced a raft of the changes designed to streamline the conduct of disputes and improve capacity within the tribunal system, including extending the length of Acas early conciliation to 6 weeks in all cases. You can read more about this development in our briefing here.

If you would like to know more about any of these developments please contact Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.[/et_pb_text][/et_pb_column][/et_pb_row][/et_pb_section][et_pb_section fb_built="1" _builder_version="3.26.6"][et_pb_row _builder_version="3.26.6"][et_pb_column type="4_4" _builder_version="3.26.6"][/et_pb_column][/et_pb_row][/et_pb_section]