Reflecting on the employment law highlights from 2022

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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.

COVID-19

- **Employers learnt to live with Covid:** on 1 April 2022 the last Covid-related restrictions were withdrawn, and the Government moved to the next phase of the pandemic – "living with Covid". In this **briefing**, we discussed the impact of changes affecting the workplace, including the end of free Covid testing and the removal of the self-isolation requirements and special health and safety rules.
- **Dealing with reluctant returners:** as employers learnt to live with Covid, the focus quickly shifted to getting staff back into the workplace. On 26 April 2022, we held a webinar looking at how employers should deal with staff who were reluctant to return to the workplace after working from home during the pandemic. You can access both the recording of that webinar, together with the slide presentation used on the day, **here**.
- **The emergence of "Long Covid":** with an estimated 1.8 million people in the UK now suffering with Long Covid, employers also had to learn how to manage staff with the condition. In this **briefing**, we considered when Long Covid may qualify as a disability and the steps that employers may need to take as a result. We also looked at **Burke v Turning Point Scotland**, where it was decided that an employee who had suffered with Covid symptoms for around nine months was That decision can be contrasted with the outcome in **Quinn v Sense Scotland**,

where it was decided that an employee who was dismissed shortly after contracting Covid was not disabled, even though she did eventually develop Long Covid.

- **Disputes from the height of the pandemic reached the Employment Tribunals:** we considered the case of **X v Y**, where an Employment Tribunal decided that a claimant's fear of catching Covid, and her belief that she needed to protect herself and her partner from catching it, was not a protected belief for the purposes of discrimination law. We also looked at the case of **Rodgers v Leeds Laser Cutting Ltd**, where the EAT upheld a decision that it had not been unfair to dismiss an employee who refused to attend work because he was worried about catching Covid and giving it to his vulnerable children. This decision was appealed, and the Court of Appeal's decision is expected soon.

Equality

- **Disability and secondments:** we discussed the case of **Judd v Cabinet Office** where the EAT upheld a decision that an employer's withdrawal of an overseas secondment opportunity on health and safety grounds was not disability discrimination. The appeal turned on whether the employer had acted disproportionately in withdrawing the opportunity, and the EAT decided that there had been no viable alternatives available to the employer.

- **Breastfeeding, baldness and sex-related harassment:** in **Mellor v MFG Academies Trust** an Employment Tribunal held that a woman suffered harassment related to sex when her employer failed to provide a private room for her to express breastmilk. The employee was forced to express milk in the toilets or her car, which had the effect of creating an unwanted, degrading or humiliating environment for her. In **Finn v The British Bung Manufacturing Company Limited** an Employment Tribunal

held that calling a male employee "bald" on just one occasion was harassment related to sex.

- **Gender critical belief discrimination:** in the long-running and high-profile case of **Forstater v CGD Europe and others** an Employment Tribunal ruled that an employer directly discriminated against and victimised a worker who lost her role after she had made straightforward statements of her gender critical beliefs on Twitter and in the workplace. In our briefing we outlined the practical steps that employers could take to manage a potential clash of rights between gender critical and trans workers within the workplace.

- **Sham redundancy was discriminatory and subject to Acas Code:** we considered the decision in **Coulson v Rentplus Ltd**, where the EAT upheld a decision that the Acas Code of Practice on Disciplinary and Grievance Procedures applied to a sham redundancy dismissal that had been tainted by discrimination. The Code had been completely disregarded, meaning that a maximum 25% uplift to the compensation was justified.

- **Employer ordered to conduct and publish an equal pay audit:** in **Macken v BNP Paribas London Branch** – for the first time – the Employment Tribunal ordered an employer who had lost an equal pay claim to conduct, and publish the findings of, an equal pay audit showing whether it was paying men and women equally where required. The employer was also ordered to pay compensation of over £2 million to the female banker who brought the claim.

- **Pay reporting developments:** pay reporting was back in the spotlight this year. In this **briefing** from March, we looked at the announcement that mandatory ethnicity pay reporting would not be introduced and, instead, that employers would be encouraged to report voluntarily on ethnicity pay. In April, the latest round of gender pay

gap reports were published (following a hiatus during the pandemic) and in this **briefing** we looked at what the latest figures revealed and what the future holds.

General HR issues

- **Recruitment and CV lies:** in **R v Andrewes** the Supreme Court ordered the confiscation of almost £100,000 from a senior executive who committed "CV fraud" by making false representations and failing to disclose the truth about his qualifications and experience when he applied for and secured several senior posts.
- **Holiday pay:** in the case of **Smith v Pimlico Plumbers**, the Court of Appeal held that a worker was entitled to claim compensation for unpaid holiday covering the entire period of his engagement. This included both holiday that he did not take, as well as holiday that he did take but which had been unpaid. And in **Harpur Trust v Brazel** the Supreme Court ruled that permanent part-year workers (such as term-time workers) were entitled to 5.6 weeks' holiday per year, regardless of how many weeks they actually worked per year. Further, if they worked irregular hours, their holiday pay must be calculated as an average of pay earned over a reference period – any other method of calculation is not permitted.
- **Sick pay and malingering:** in a decision which highlights the perils of jumping the gun, the EAT decided in **Singh v Metroline West Limited** that an employer had committed a fundamental breach of contract when it withheld company sick pay from an employee who was suspected of malingering, but where no investigation had been undertaken into whether this was the case.
- **Safety at work and practical jokes:** in a welcome decision for employers, the Court of Appeal decided in **Chell v Tarmac Cement and Lime**, that an employer was not

liable for an employee's practical joke which injured a contractor working at its site. The Court decided that the prank had not been done "in the course of employment" and it was not realistic to expect employers to take steps to prevent horseplay in the workplace.

- **Suspending staff:** the Advisory, Conciliation and Arbitration Service published new guidance for employers on how to handle staff suspensions. In particular, it focuses on suspension during investigations. We outline the key points in this **briefing** and consider when suspension is appropriate, what alternatives might exist and what employers should do to support suspended workers.

- **Non-compete restrictions:** unusually, in the case of **Law by Design v Ali**, the High Court upheld a one-year non-compete restriction preventing a solicitor from going to work for a competitor. The employer's position was helped by the fact that it had issued the Service Agreement containing the covenant at the same time as awarding a pay rise. This demonstrated that payment was made in exchange for the employee's acceptance of the new covenant.

Termination

- **Dismissal for conduct related to whistleblowing:** in a decision helpful to employers, the Court of Appeal decided in **Kong v Gulf International Bank (UK) Ltd** that the dismissal of a whistleblower for conduct closely related to her whistleblowing disclosure was "genuinely separable" from the disclosure itself and, therefore, was not automatically unfair.

- **Dismissal for raising multiple grievances: i**n the case of **Hope v British Medical Association** the EAT upheld a decision that it had been fair to dismiss an employee who had raised multiple informal grievances and refused

to progress them or attend a grievance hearing. Importantly, the EAT noted that the proper purpose of grievance procedures is to resolve concerns, not to act as a repository for complaints to be left unresolved and resurrected at will. The decision has been appealed and is due to be heard by the Court of Appeal in 2023.

- **Using a PILON clause to bring forward termination date:** in the case of **Fentem v Outform EMEA Ltd** it was decided that an employer's use of a PILON clause to bring forward an employee's termination date after he had resigned did not amount to a dismissal and so the employee's unfair dismissal claim could not proceed. However, the Judge reached this decision reluctantly and only because the EAT was bound by previous authority on the point. The decision has been appealed and is due to be heard by the Court of Appeal in early February 2023.
- **When to start redundancy consultation:** in **Mogane v Bradford Teaching Hospitals NHS Foundation Trust and anor** the EAT held that redundancy consultation must commence at the formative stage of the process in order to be meaningful. Using an arbitrary selection criterion to place an employee into a redundancy pool of one was unfair and meant that consultation about the dismissal was futile, as it was inevitable that she would dismissed.
- **Voluntary redundancy and unfair dismissal:** the decision to make employees redundant is never easy and care needs to be taken to follow a lawful process in order to avoid the risks and costs of potential claims, particularly unfair dismissal. Offering voluntary redundancy can be a useful tool for employers, however, as the decision in **White v H-C One Oval Ltd** highlighted, it will not necessarily avoid the risk of an unfair dismissal claim.
- **Dismissal for persistent lateness:** in **Tijani v The House**

of Commons Commission, the EAT upheld an Employment Tribunal's decision that it was fair to dismiss an employee for being persistently late to work, even though sometimes this was by just two or three minutes. The EAT agreed that employees must be ready to start work from the time that they are paid, and employers are not required to show they have suffered any problems as a result of an employee's lateness before moving to dismiss.

- **Successful appeal meant dismissal vanished:** in **Marangakis v Iceland Food Ltd**, the EAT held that the dismissal of an employee "vanished" as a consequence of her successful internal appeal of a dismissal decision. In turn, this meant she could not proceed with her claim for unfair dismissal. To avoid this outcome, the employee should have withdrawn her appeal in no uncertain terms. Merely stating that she did not wish to return to work was not enough to constitute the retraction of an appeal.

- **Waiving claims in settlement agreements:** employers should take note of the EAT's decision in **Bathgate v Technip UK Ltd and others**, in which it was held that employees cannot waive the right to pursue claims which are unknown at the time of signing a settlement agreement. Attempts to secure a release from all potential claims by way of blanket or "kitchen sink" style waivers are also not effective.

Employment law reforms

- **Select Committee called for robust new menopause laws:** in September, the Women and Equalities Select Committee called for major reforms of the law on menopause and the workplace, including making menopause the tenth protected characteristic in the Equality Act 2010. We took stock of the recommendations in this **briefing**. Also

in September, we delivered a webinar where we took a deep dive into menopause and the workplace. You can access both the recording of that webinar, together with the slide presentation used on the day, **here**.

- **Countdown to bonfire of EU employment rights:** on 22 September 2022, the Government published the Retained EU Law (Revocation and Reform) Bill. The purpose of the Bill is to remove the presence and influence of EU law within UK law. This will affect all areas of law, including employment law, and could lead to a significant downgrading of workers' rights by the end of 2023. We considered what the Bill could mean for employment law in this **briefing**.
- **Pregnant employees and new parents to be protected in redundancy situations:** in this **briefing** we discussed the Government-backed Private Members' Bill which plans to expand special protection in redundancy situations to pregnant employees and those returning from maternity, adoption and shared parental leave. We also considered what the changes would mean for employers in practice.
- **Significant reform on the way for the law on harassment at work:** in this **briefing** we looked at plans to extend the liability of employers for harassment at work. Under the proposals, employers will have a mandatory duty to take all reasonable steps to prevent sexual harassment at work and may also be found liable for all forms of harassment (not just sexual harassment) committed by third parties.
- **More employment law reforms ahead:** with no sign of the Employment Bill promised in 2019, the Government has decided to pursue its reforms of the employment law landscape by way of support for a series of Private Members' Bills covering flexible working, carer's leave, neonatal leave and tipping practices. We explained the

proposals in this **briefing**. Since writing this briefing, the Government has published its **response** to an earlier consultation on flexible working and confirmed that the right to request flexible working will also be made a "Day 1" employment right.

Brahams Dutt Badrick French LLP are a leading specialist employment law firm based at Bank in the City. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.

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