SLAUGHTER AND MAY/

NEWSLETTER

JUNE 2023

EMPLOYMENT BULLETIN

QUICK LINKS

WITHDRAWAL OF CHECK-OFF ARRANGEMENT WAS BREACH OF CONTRACT NOT ACCEPTED BY EMPLOYEES

Summary: The Court of Appeal has confirmed that the unilateral withdrawal of an arrangement for the deduction of payment of union subscriptions at source was a breach of employees' contracts. On the facts, the employees had not accepted the change by continuing to work for some years after (*Cox v Secretary of State for the Home Department and other cases*).

Key practice point: The decision confirms the high standard set by case law for employers to demonstrate that employees have accepted a variation to employment contracts by continuing to work. If employees, individually or collectively, object to a contractual change prior to or at the date of the change, the mere passage of time will not, in itself, lead to the inference that the objection has been withdrawn or that the employees have accepted the change.

Facts: In a number of government departments, there was a longstanding "check-off" facility under which civil servants could authorise their employer to deduct union membership subscriptions from their salaries at source. The check-off arrangement was contained in various documents including staff handbooks and a civil service Code of pay and conditions. Several departments unilaterally withdrew the facility. In three separate cases, the employees succeeded in their claims, made several years later, that they had a contractual entitlement to check-off, the courts finding that the provisions had been incorporated into contracts of employment and that the employees had not accepted the breach, despite continuing to work after check-off was withdrawn. The employing departments appealed.

Decision: The Court of Appeal, hearing three cases together, rejected the appeal on contractual entitlement. The courts had been entitled to find that the individual employees had not unequivocally accepted the variation of their contractual terms, nor had they waived any past breaches.

The Court of Appeal followed the principles of implied agreement to changes of terms and conditions established in the leading case of *Abrahall v Nottingham City Council* in 2018. (The Court of Appeal in *Abrahall* found that a pay freeze imposed by the employer was invalid, even though the employees did not bring tribunal claims until two years later.) The Court of Appeal in *Cox* confirmed that the employer was unable to demonstrate that there was an unequivocal acceptance of the variation. The Court explained that, if all that had happened was that the variation had been implemented, the employees had continued to work and nothing was done for over five years, it might have been possible to have taken the view that the individual employees had at some stage accepted the variation. However, in all three cases, there had been protest organised by the PCS union, including a collective grievance against one department and litigation against another. The Court found that it did not matter that the protests were made prior to the variation being implemented; the facts, taken as a whole, indicated that the individual employees had not, by their conduct, accepted the variation and the passage of time before litigation was started did not alter the position.

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

Although the union could have done more to ensure that the employing departments understood that they had not abandoned their protest and that they regarded the litigation against one department as a test case relevant to all the employers, the protest and the litigation were both strong pointers that the union, and its members, did not accept the variation of the contract. The fact that the employees had set up direct debits for payment of union dues was not significant – it was consistent with employees wanting to maintain the benefits of union membership rather than accepting a variation of their contracts of employment.

The Court of Appeal was critical of the employers, commenting that they should have presented the change as a contractual variation to which they were seeking the agreement of the individual employees. They should also have made it clear that the continued working would be treated as acceptance of the variation - employees are not obliged to notify their employer if they object to a variation.

Analysis/commentary: Relying on implied acceptance of a contractual change will always involve some uncertainty for the employer as to its effectiveness, particularly where the change is wholly detrimental to employees. Employers who choose to go down this route should make it clear to employees that if they continue to work, they will be taken to have agreed to the proposed change. A better approach will often be to implement the change via express agreement. A third option - dismissal and re-engagement on the varied terms - is currently the subject of Government proposals to introduce a Code of Practice on Dismissal and Re-engagement. Consultation on the draft Code closed in April but the Government has not yet indicated when it might come into force. Although the Code will not create any new legal obligations, it will have statutory force in the sense that a court or employment tribunal will take it into account when considering relevant cases, such as unfair dismissal. Employment tribunals will have the power to increase an employee's compensation by up to 25% if an employer unreasonably fails to comply with the Code. One potentially helpful aspect of the draft Code is that it says that employees working under protest should make it clear to the employer at regular intervals that they do not agree to the changes. For a detailed analysis, please see our Employment Bulletin February 2023.

NEW FAMILY LEAVE RIGHTS AND PROTECTIONS

Three Government-supported Private Members' Bills on family leave have recently received Royal Assent. All three require further implementation legislation which the Government says it intends to introduce "in due course":

- **Protection from Redundancy (Pregnancy and Family Leave) Act.** The existing regulations on maternity and parental leave provide that, before making an employee on maternity leave (or adoption or shared parental leave) redundant, an employer must offer a suitable alternative vacancy where one is available with the employer or an associated employer. The obligation arises when the employee is told that the role is at risk of redundancy. Regulations under the new Act will extend this protection to cover not just those on leave but also pregnant women and those returning from maternity leave (or adoption or shared parental leave). Although the detail will be outlined in the regulations, the Government has said that the protections will apply from when a woman tells her employer she is pregnant until 18 months after the birth. The same window will apply to parents on maternity leave (or adoption or shared parental leave). For more on the implications of this new measure, please see our Employment Bulletin November 2022.
- **Carer's Leave Act.** Employees will have a "day one" entitlement to one week's unpaid leave each year to provide or arrange care for a dependant with a long-term care need (relating to an illness or injury lasting at least three months, a disability or old age). Employment protections will mirror those applying to other family-related leave. The Act is expected to come into force in April 2024.
- **Neonatal Care (Leave and Pay) Act.** Eligible employees will be entitled to 12 weeks' paid leave to care for a child receiving neonatal care. The Government has said it expects the leave and pay entitlements to apply from April 2025.

Analysis/commentary: Once the Government has issued the necessary further legislation and confirmed start dates, employers will need to think about reviewing their existing policies on family leave and redundancy and updating their handbooks.

GUIDANCE ON RESPONDING TO DATA SUBJECT ACCESS REQUESTS

The Information Commissioner's Office (ICO) has published new guidance for employers on subject access requests (SARs). The ICO's accompanying press release reports that, in the last year, 15,848 complaints relating to SARs were reported to the ICO, an indication of the significance of this area of data protection.

The guidance is in the form of Q&As which, although they reflect existing ICO guidance on the right of access, contain helpful examples on the various exemptions that may allow employers to withhold or limit the information they supply when responding to a SAR. The guidance stresses that exemptions must be applied on a case-by-case basis and employers must justify and document the reasons for relying on them. The exemptions include:

- **Information about other people** – for example, if the employer is providing notes that related to the worker's performance, details about the performance of others can be redacted. Similarly, an employer could decide not to disclose the witness statements relating to a disciplinary issue if they were given with the expectation of confidentiality and redaction would not prevent the writer's identity from being disclosed.
- **Confidential references.** There is an exemption for confidential references provided (or received) for employment purposes. The Q&A says that employers should make it clear in privacy statements, staff handbooks or policies that they treat references as confidential.
- **Management information.** Employers can withhold personal information processed for management forecasting or planning about a business, if disclosure is likely to prejudice the conduct of the business. For example, if during a restructuring exercise, a SAR asks about redundancy selection pools, an employer might decide to withhold the information and respond that it cannot confirm nor deny that it holds the information.
- Information included in a record of intentions in **negotiations with workers** (about a severance package, for example) can be withheld, but only if complying with the SAR could prejudice the negotiations. This is likely to apply only during the negotiations and the employer must demonstrate how the negotiations would be prejudiced.

The Q&As highlight other issues for employers to consider:

- An employer can refuse to comply with a SAR if it can show that it is "manifestly unfounded or manifestly excessive". The "manifestly unfounded" exemption will only apply if the SAR is malicious or the individual clearly has no intention of exercising their right of access. To rely on "manifestly excessive", the employer must assess whether the request is "clearly or obviously unreasonable". This is a difficult balancing act, based on whether the SAR is proportionate when weighed against the costs of compliance, with the employer's resources a relevant factor. An important point to note is that a request is not necessarily excessive merely because it asks for a large amount of information.

  Although not mentioned in the Q&As, there is a helpful amendment in the Data Protection and Digital Information (No. 2) Bill currently going through Parliament; as drafted, the Bill would change the threshold for refusing a request from "manifestly unfounded or excessive" to "vexatious or excessive".
- The time limit for responding (ordinarily within one month of receipt) can be paused while the employer clarifies the request, but only if the business processes a large amount of information about the individual. The employer can ask for additional details about the SAR but cannot make the individual narrow their request. The one-month time for response can be extended by a further two months if the employer can show that the request is "complex".
- SARs do not have to be in a particular format – all the worker needs to do is make it clear, verbally or in writing (including by social media), to anyone in the organisation, that they are asking for their own personal information. Employers should therefore ensure that they have a designated contact for SARs, and that staff are made aware of the contact details.
- A settlement agreement cannot override SAR rights and an employer cannot refuse to comply with a SAR simply because there is an ongoing grievance or proceedings in an employment tribunal.
- If an employer uses social media platforms, these must be searched for personal information in response to a SAR.

HORIZON SCANNING

What key developments in employment should be on your radar?

2023/24	• Protection from Redundancy (Pregnancy and Family Leave) Act 2023: power to extend circumstances in which employers must offer suitable alternative employment to parents at risk of redundancy • Strikes (Minimum Service Levels) Bill: minimum service levels on specified services Private Members' Bills with Government support: • Worker Protection (Amendment of Equality Act 2010) Bill (to come into force one year after Royal Assent): duty to take reasonable steps to prevent sexual harassment of employees; protection from harassment by third parties • Workers (Predictable Terms and Conditions) Bill: right to request a more predictable working pattern • Employment Relations (Flexible Working) Bill: amendments to the flexible working request process; separate secondary legislation to make the right to request a "day one" right
2023/24	Proposed removal of the bonus cap applicable to banks, building societies and PRA-designated investment firms
April 2024	Carer's Leave Act 2023: entitlement to one week's unpaid leave per year for employees caring for a dependant with a long-term care
May 2024	Employment (Allocation of Tips) Act 2023, providing for obligations on employers to deal with tips, gratuities and service charges
April 2025	Neonatal Care (Leave and Pay) Act 2023: entitlement for eligible employees to 12 weeks' paid leave to care for a child receiving neonatal care
Date uncertain	• Proposed three-month limit on non-compete clauses in employment and worker contracts • Proposed amendment of TUPE to allow small employers, and all employers where a transfer of fewer than 10 employees is proposed, to consult directly with employees if there are no employee representatives • Proposed amendments to the Working Time Regulations, including to provide that employers do not have to keep a record of daily working hours, to allow the use of rolled-up holiday pay and to merge the basic and additional statutory annual leave into a single entitlement • Statutory Code of Practice on Dismissal and Re-engagement • Economic Crime and Corporate Transparency Bill: failure to prevent fraud offence

We are also expecting important case law developments in the following key areas during the coming months:

Employment status: *Griffiths v Institution of Mechanical Engineers* (EAT: whether a trustee of a professional body is a worker for whistleblowing protection); *HMRC v Professional Game Match Officials Ltd* (Supreme Court: whether referees were employees for tax purposes)

Discrimination / equal pay: *Kocur v Angard Staffing Solutions Ltd* (Supreme Court: whether agency workers were entitled to same treatment on vacancies as directly recruited employees); *Element v Tesco Stores* (Court of Appeal: whether an evaluation exercise that had rated the claimants and their comparator jobs as equivalent amounted to a Job Evaluation Study for the purposes of an equal pay claim)

Redundancies: *USDAW v Tesco Stores Ltd* (Supreme Court: whether implied term prevented employer from dismissing and re-engaging employees); *R (Palmer) v North Derbyshire Magistrates Court* (Supreme Court: whether administrator could be prosecuted for failure to notify Secretary of State of collective redundancies); *easyJet plc v easyJet EWC* (Court of Appeal: whether CAC has jurisdiction to hear European Works Councils complaints post-Brexit where central management is situated in the UK); *Olsten (UK) Holdings Limited v Adecco Group EWC* (Court of Appeal: whether the EAT erred in finding that collective redundancies in two countries did not have to share a common rationale to be "transnational" and imposing a penalty for the employer's failure to comply with a requirement to inform and consult its EWC)

Industrial action: *Mercer v Alternative Future Group Ltd* (Supreme Court: whether protection from detriment for participating in trade union activities extends to industrial action); *UNISON v Secretary of State* (High Court: whether removal of the restriction on employment businesses supplying temporary workers to cover striking staff was lawful); *Independent Workers of GB v CAC* (Supreme Court: whether Court of Appeal was correct to find that Deliveroo riders did not fall within the scope of the trade union freedom right under Article 11 of the European Convention on Human Rights because they were not in an employment relationship)

Unfair dismissal: *Fentem v Outform* (Court of Appeal: whether bringing forward the termination date on payment of a contractual PILON was a dismissal); *Hope v BMA* (Court of Appeal: whether dismissal for raising numerous grievances was fair); *Accattatis v Fortuna Group (London) Ltd* (EAT: whether it was automatically unfair to dismiss for concerns about attending the office during lockdown)

Working time: *Chief Constable v Agnew* (Supreme Court: whether a gap of more than three months in a series of unlawful deductions from holiday pay breaks the series)

CONTACT

- PHIL LINNARD
- PARTNER
- T: +44 (0)20 7090 3961
- E: Phil.Linnard@SlaughterandMay.com

- PHILIPPA O'MALLEY
- PARTNER
- T: +44 (0)20 7090 3796
- E:Philippa.O'Malley@SlaughterandMay.com

- LIZZIE TWIGGER
- SENIOR COUNSEL
- T: +44 (0)20 7090 5174
- E: Lizzie.Twigger@SlaughterandMay.com

- DAVID RINTOUL
- SENIOR COUNSEL
- T: +44 (0)20 7090 3795
- E: David.Rintoul@SlaughterandMay.com

- SIMON CLARK
- ASSOCIATE
- T: +44 (0)20 7090 5363
- E: Simon.Clark@SlaughterandMay.com

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650