SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

QUICK LINKS

GOVERNMENT CONSULTATION ON THE RIGHT TO REQUEST FLEXIBLE WORKING

The Government has published a consultation - *Making Flexible Working the Default* - on reforming the rules on the right to request flexible working. The consultation closes on 1 December 2021 but the accompanying impact assessment suggests that April 2023 may be the earliest that any changes come into force.

The consultation proposes to make the right to request flexible working a "day one" right by removing the current 26-week qualifying period. The qualifying period was introduced in part because of the potential business burdens of administering statutory requests for flexible working. However, the Government's post-implementation review did not find evidence of unreasonable cost burdens on employers.

The consultation also considers:

- Whether the existing business reasons for refusing a statutory request for flexible working remain valid. These are unlikely to change, given that the Government says it is "broadly content" with the current list of reasons:
    - extra costs that will be a burden on the business;
    - the work cannot be reorganised among other staff;
    - others cannot be recruited to do the work;
    - flexible working will negatively affect quality or performance or ability to meet customer demand;
    - there is a lack of work during the proposed working times;
    - the business is planning structural changes.
- Whether employers should have to set out, when rejecting a request, that alternatives have been considered (making the change for six months only, for example). Although the legislation allows a temporary arrangement to be agreed between employee and employer, the Government believes that the ability to request a contractual change for a defined period is under-utilised.
- The administrative process. The Government wants to explore whether to allow employees to make more than one statutory request per year and to review the three-month deadline for responding to a request.

In addition to consultation on these specific issues, the Government's new Flexible Working Taskforce will consider flexible working more generally.

The Government confirms that it will not be introducing a legal requirement to publish a flexible working statement – a proposal raised in its 2019 consultation on transparency of flexible working and family leave policies. Another proposal from that consultation - a statutory requirement for employers to say in job adverts whether flexible working is

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available – is also unlikely to proceed, the Government indicating that the removal of the qualifying period will serve the same purpose.

The Government has also responded to its March 2020 consultation on **unpaid leave for carers**, confirming that it will introduce a "day one" right to carer's leave for employees. This will be brought in "when Parliamentary time allows" – unlikely to be before April 2022. Details of the leave include:

- The leave will consist of one week (five working days) of unpaid leave per year.
- The leave will rely on the carer's relationship with the person being cared for, broadly following the definition of dependant used in the right to time off for dependants. Employees would self-certify their right to leave.
- The person being cared for would have to have a long-term care need, defined as a long-term illness or injury, a disability as defined under the Equality Act 2010, or issues related to old age, with limited exemptions from the requirement for long-term care, such as in the case of terminal illness.
- The leave will be available to take flexibly (i.e. from half-day blocks to a whole week).
- Employees will be required to give notice, in line with the requirements for annual leave (notice that is twice the length of time being requested as leave, plus one day). Employers will be able to postpone the leave request, where they consider that the operation of their business would be unduly disrupted.
- Employees taking carer's leave will be protected from detriment and dismissals for reasons connected with exercising the right will be automatically unfair.

Childcare will not come within the scope of the new right (except where the child has a disability or other long-term need) but the Government intends to publish the results of its 2019 consultation on reforming parental leave and pay later this year.

Analysis/commentary: The flexible working consultation does not propose any change to the principle of a right to request flexible working, as opposed to an entitlement to it. Nor does it suggest that the current limited sanctions for breach of the statutory procedure should be strengthened. However, employers need to be aware of potential discrimination claims if a flexible working request is refused. In a recent case, an Employment Tribunal awarded almost £185,000 compensation for indirect sex discrimination (covering loss of earnings and pension contributions and injury to feelings) to a sales manager whose flexible working request, to accommodate her childcare responsibilities, was refused for business reasons (including planned structural changes). The Tribunal found that the requirement to work full-time placed more women with children at a substantial disadvantage than men with children and the employer had not shown justification - that the refusal was proportionate to the need of the business to maintain successful relationships with customers. Nor had it shown why the planned structural change was relevant. Although the employer's caution about changing the make-up of the team, in a time of commercial uncertainty, was understandable, the difficulty of making adjustments did not convincingly outweigh the discriminatory impact.

DISMISSAL FOR CRITICISING COLLEAGUE ABOUT PROTECTED DISCLOSURE NOT AUTOMATICALLY UNFAIR

Summary: The Employment Appeal Tribunal confirmed that an employee who was dismissed for questioning a colleague's professional competence in relation to the subject matter of protected disclosures was not automatically unfairly dismissed. The Tribunal had been entitled to find that she was dismissed for the inappropriate manner in which she criticised her colleague, not for raising protected disclosures (*Kong v Gulf International Bank (UK) Ltd*).

Key practice point: In *Jhuti*, the Supreme Court held that a dismissal purportedly for poor performance (the real reason was whistleblowing) was automatically unfair even though the dismissing manager acted in good faith, because the motivation of the manager who had engineered the dismissal could be imputed to the employer: see our Bulletin December 2019. In this decision, the EAT confirms that the general rule is that only the decision-maker's motivation can be attributed to the employer. *Jhuti* will be applied relatively rarely, in cases where there is clear manipulation. However, the decision is another reminder of the need for caution when dismissing following a whistleblowing incident and the importance of separation of reasons for dismissal from the subject matter of the protected disclosure.

Facts: A draft audit report prepared by K, the Head of Financial Audit at a bank, raised concerns that a legal agreement relating to a financial product did not provide sufficient protection against risk. These communications amounted to protected disclosures under the whistleblowing protection legislation in the Employment Rights Act 1996. The Head of Legal at the bank (H), who had been responsible for the agreement, disagreed with K's view. A discussion and exchanges of emails followed. H considered that K had impugned her integrity. A collective decision was taken by the Head of HR, the CEO and K's line manager that K should be dismissed. The termination letter referred to H's view that K had questioned her integrity and said that K's approach was entirely unacceptable, fell well short of the standards of professional behaviour expected and was contrary to the principles of treating colleagues with dignity and respect. This had prompted a wider review identifying other incidents, leading to the conclusion that key stakeholders no longer wished to work with K and trust and confidence had been lost.

K's claim of automatic unfair dismissal for having made protected disclosures was rejected by the Employment Tribunal. It found that the principal reason for dismissal was her conduct in questioning H's professional awareness and that it would not be a correct application of *Jhuti* to attribute H's motivation to the bank. K appealed.

Decision: The EAT dismissed the appeal. The Tribunal had correctly concluded that attribution of motivation was not appropriate in this case. None of the three essential requirements set out in *Jhuti* applied:

1. The person whose motivation is attributed to the employer sought to procure the employee's dismissal because of the protected disclosure.
2. The decision-maker was "peculiarly dependent" on that person as the source for the underlying facts and information about the case.
3. The person's role or position was such that it would be appropriate to attribute their motivation to the employer.

Although H was part of the senior management team, K had a distinct reporting line to her line manager and there was no suggestion that H had responsibility for her. The EAT pointed out that whether H had rightly or wrongly perceived K to have questioned her integrity, this was not the sort of manipulation that should lead to an attribution of her motive to the bank.

The EAT also held that the Tribunal was entitled to find that the principal reason for the dismissal was K's conduct and to treat that reason as separable from the protected disclosures. K's criticism of H's awareness or integrity was not a necessary part of the disclosure. The three managers who took the decision to dismiss were motivated not by the protected disclosures but by the view that they took of K's conduct, which they considered to be an unacceptable personal attack on H's abilities, and reflective of a wider problem with interpersonal skills.

COURT OF APPEAL SETS OUT CORRECT APPROACH TO MUTUALITY OF OBLIGATION FOR EMPLOYMENT STATUS

Summary: In a long-running case about the tax status of football referees, the Court of Appeal held that single assignments with sufficient "mutuality of obligation" could be contracts of employment even though there was no obligation under the overarching contract to accept those assignments (*HMRC v Professional Game Match Officials Limited*).

Key practice point: This decision has implications for employers taking on contractors on an occasional basis, including those who must now make employment status assessments under the IR35 "deemed employment" tax regime for workers using their own personal service companies (see analysis below). Absence of mutuality of obligation in relation to the overarching contract may not be sufficient to prevent a contract of employment – the individual assignments may themselves have sufficient mutuality of obligation.

Facts: HMRC had issued determinations for tax and National Insurance contributions (NICs) on the basis that Professional Game Match Officials Limited (PGMOL), the body overseeing the management and administration of refereeing, was the employer of part-time referees. The First-tier and Upper Tax Tribunals decided that, as the overarching agreement between PGMOL and a referee allowed PGMOL to cancel an appointment without limit and without committing a breach of contract, and the referee could decide not to take up the appointment, there was insufficient "mutuality of

obligation" in both the overarching contract and the match-specific engagements entered into between the referees and PGMOL for them to be deemed to be employment contracts.

Decision: HMRC's appeal was successful. The overarching contract was not a contract of employment, as it did not require PGMOL to offer work, or the referees to do it. However, the Tax Tribunals had incorrectly elided the mutuality of obligation necessary to show that an overarching contract is a contract of employment with the mutuality that is necessary to show that a single engagement is a contract of employment. Previous cases establish that the fact that there is no obligation under the overarching contract to offer, or to do, work (if offered), or that there are clauses expressly negating such obligations, does not mean that the single engagement cannot be a contract of employment. The nature of each contract is a distinct question and a single engagement can give rise to a contract of employment if, in fact, work which has been offered is done for payment.

The Court of Appeal also clarified that the ability of either side to pull out before the start of an engagement (in this case, the match) did not negate mutuality of obligation. The contract subsists (with its mutual obligations) unless and until it is terminated by one side or the other.

On another key test for employment status – whether there was a sufficient "framework of control" – the Court said that the fact that PGMOL could not "step in" while the referee was actually officiating, was irrelevant – the particular work was clearly not susceptible of practical control. The Court also commented that the need for control does not require an employer's directions to be enforceable (in the sense that there is an effective sanction for their breach). There were many features of the relationship which could show that there was a sufficient framework of control – for example, PGMOL's disciplinary role and power to promote and demote, provisions about promoting products and services, match day procedures and annual fitness tests.

The Court decided that the case should be sent back to the Tax Tribunal to consider again whether there was sufficient mutuality of obligation and control for the individual contracts to be contracts of employment.

Analysis/commentary: From April 2021, the off-payroll working rules (IR35) for engaging independent contractors through intermediaries such as personal service companies (PSCs) were extended to large and medium sized private sector employers. IR35 ensures that contractors, who would have been employees if they provided their services directly to the client, pay broadly the same income tax and NICs as employees. Under the new rules for the private sector, the end user (client) rather than the intermediary is now responsible for determining whether IR35 applies. In the event that the new rules do apply, they shift the obligation to make deductions for income tax and NICs onto the party that is closest in the contractual chain to the PSC (whether that party is the end client which contracts directly with the PSC or another intervening intermediary in more complicated contractual arrangements).

HORIZON SCANNING

What key developments in employment should be on your radar?

5 October 2021	Deadline for reporting 2020 gender pay gap data
2022	Statutory entitlement to one week's unpaid leave for employees who are carers

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

- **Employment status:** *Stojsavljevic v DPD Group* (EAT: whether individuals working under franchise agreements were workers); *Stuart Delivery Limited v Augustine* (Court of Appeal: whether delivery courier with right of substitution is a worker); *Angard Staffing Solutions Ltd v Kocur* (Court of Appeal: agency workers' rights); *Nursing and Midwifery Council v Somerville* (Court of Appeal: whether an irreducible minimum of obligation is a prerequisite for worker status); *HMRC v Atholl House* (Court of Appeal: whether the IR35 rules applied to a presenter providing services through a personal services company)

- **Discrimination / equal pay:** *Lee v Ashers Baking Co* (European Court of Human Rights: whether refusal to provide cake supporting gay marriage is discrimination in provision of goods and services); *Higgs v Farmor's School* (EAT: whether a Christian employee's gender critical beliefs were protected under Equality Act 2010)
- **Trade unions:** *Kostal UK v Dunkley* (Supreme Court: whether direct negotiations with individual employees about terms and conditions amounted to unlawful inducement); *Mercer v Alternative Future Group* (Court of Appeal) and *Morais v Ryanair DAC* (EAT): whether protection from detriment for trade union activities extends to participation in industrial action
- **Vicarious liability:** *Chell v Tarmac Cement and Lime* (Court of Appeal: whether employer vicariously liable for consequences of employee's practical joke in the workplace)
- **Whistleblowing/detriment:** *UCL v Brown* (Court of Appeal: whether disciplining a trade union rep employee for failure to comply with an instruction was a detriment).

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