SLAUGHTER AND MAY/

NEWSLETTER

JULY 2021

EMPLOYMENT BULLETIN

QUICK LINKS

UPCOMING EMPLOYMENT BILL: LATEST DEVELOPMENTS

The Government has confirmed that its Employment Bill will be published "when Parliamentary time allows". We have also been given an indication of some of the possible contents:

- The time required to break a period of continuous service for the purposes of entitlement to employment rights will be extended from one week to four weeks. This amendment was discussed in a recent Parliamentary debate on employment rights, triggered by a report from the Advisory, Conciliation and Arbitration Service (Acas) which raised concerns that dismissal and re-engagement of employees ("fire and rehire") has been used to break continuity of service. The Minister confirmed that the Government has asked Acas to produce guidance for employers, to "send a clear message" that all other options should be exhausted before considering dismissal and re-engagement, and that the Government will look at further measures if necessary.
- The creation of a single enforcement body for employment rights, combining the roles of three existing bodies: HMRC National Minimum Wage Enforcement, the Gangmasters and Labour Abuse Authority and the Employment Agency Standards Inspectorate. The new body will also take on the enforcement of statutory sick pay, ensuring that "vulnerable workers" (not defined) get statutory holiday and sick pay "without having to go through a lengthy tribunal process".
- Redundancy protections for mothers will be extended. The legislation currently provides that, before making an employee on maternity leave redundant, an employer must offer a suitable alternative vacancy where one is available with the employer or an associated employer. This protection is to be extended to cover pregnant women and those returning from maternity leave (for six months after return to work).

There has been no confirmation that the Bill will contain anything on worker/employee status. However, a recent Report from the Parliamentary Work and Pensions Committee on changes in the world of work calls on the Government "urgently" to enhance the rights of workers in the low-paid and gig economy, in particular by updating and clarifying the definition of employment.

Meanwhile, the Court of Appeal, in the long running case of *The Independent Workers Union of Great Britain v The Central Arbitration Committee*, has confirmed that Article 11 of the European Convention on Human Rights did not entitle Deliveroo riders, who were independent contractors, to statutory trade union recognition. It was accepted that the riders had a genuine right of substitution and this prevented them from being regarded as providing "personal service". Consequently they were not "in an employment relationship" with Deliveroo, as required by Article 11. However, the Court of Appeal noted that there may be other cases involving gig economy workers where, on different facts, Article 11 could apply.

One Bunhill Row
London EC1Y 8YY
United Kingdom

T: +44 (0)20 7600 1200

"CHILDCARE DISPARITY" ASSUMED IN DISCRIMINATION CLAIMS

Summary: When considering a discrimination claim based on changes to working hours, the Employment Tribunal should have applied an established assumption - the "childcare disparity" - that women are less likely than men to be able to accommodate flexible working patterns, because of childcare responsibilities, and are therefore at a disadvantage (*Dobson v North Cumbria Integrated Care NHS Foundation Trust*).

Key practice point: Tribunals will continue to assume that policies on working hours are more likely to have a disproportionate impact on women. The childcare disparity means that claimants do not have to provide supporting evidence in circumstances where factors relating to childcare put them at a disadvantage, although it will still be open to the employer to show objective justification of the indirect sex discrimination. Employers should take account of this when making decisions on work patterns.

Facts: The claimant was employed as a community nurse working fixed days. Following a review, the Trust introduced a requirement that the nurses worked flexibly, including at weekends. The claimant was unable to comply because of caring responsibilities. She was dismissed and claimed unfair dismissal and indirect sex discrimination. The Employment Tribunal dismissed her claims, finding that there was no evidence that the "provision, criterion or practice" (PCP) of working flexibly put women at a particular disadvantage compared to men. The claimant appealed.

Decision: The Employment Appeal Tribunal (EAT) allowed the appeal and ordered the claims to be reheard. The Tribunal should have taken "judicial notice" of the fact that more women than men tend to have childcare responsibilities and so are more likely to be unable to comply with flexible working requirements. It was wrong to treat the claim as unsupported by evidence. The EAT noted that the childcare disparity has been taken into account by courts for many years and although many societal norms have changed over time, this has not been the case with the childcare disparity. The EAT went on to comment that in this case, where the PCP was to work flexibly including at weekends, and the nurses were not able to choose working hours or days, it was likely that the claimant would be able to show group disadvantage.

EXECUTIVE ENTITLED TO BONUSES FOR PROJECTS COMPLETED AFTER REDUNDANCY

Summary: The Court of Session (the Scottish equivalent of the English High Court) interpreted the bonus provisions in the contract of employment between a construction company and a former director as meaning that his entitlement to bonuses survived the termination of his employment (*Loudon v Stewart Milne Group Ltd*).

Facts: The claimant was a director in the Strategic Land Division. His employment contract had provided for bonuses where new land was "*identified and introduced*" by him to his employer or "*included by agreement….where an appropriate amount of time had been devoted to*" the acquisition of new land and/or obtaining planning permission. Payment of a bonus was conditional on planning permission or land purchase. The contract provided that, in the event of retirement or leaving employment by agreement, bonuses would remain payable. After he was made redundant, the claimant asked the Court for declarations that he was entitled to bonuses in respect of a number of sites.

Decision: The Court granted the declarations – the bonuses survived the termination of the employment contract. The contract drew a distinction between when the bonus was earned and when it was paid. The timing of the payment was linked to the grant of planning permission or land purchase but the bonus was earned by the claimant's work in identifying and introducing the land. If the condition for payment was satisfied after termination, the claimant had earned the bonus and was entitled to payment once the condition was satisfied.

The Court commented that the contract had to be interpreted in accordance with the factual matrix of the construction industry. Strategic land proceeds on a long time scale. A bonus scheme that ceased to pay out on termination of employment, far from being an incentive to promote strategic land projects, would be an incentive for an employee to focus instead on short-term projects where planning permission or land purchase could be swiftly obtained. The Court also noted the general principle that an employer should not be allowed to frustrate a bonus by terminating the employment contract.

Analysis/commentary: Service agreements should set out the circumstances where the employee will not be entitled to receive a bonus, including where the employee has left employment, or is under notice of termination. The courts will not imply such a clause so it must be expressly included.

GENDER CRITICAL BELIEFS WERE PROTECTED

Summary: The EAT held that an employee's gender critical beliefs, including a belief that sex is immutable and should not be conflated with gender identity, were protected philosophical beliefs under the Equality Act 2010 and that therefore the employee could bring a discrimination claim based on a protected characteristic. The Tribunal was wrong to find that the beliefs did not meet one of the criteria for protection (*Forstater v CGD Europe*).

Practical impact: The EAT's decision confirms that the threshold for establishing one the main criteria for the protection of a philosophical belief (that the belief is worthy of respect in a democratic society) presents a low barrier. However, the decision establishes only that the belief is protected – the Tribunal will go on to consider whether the treatment of the claimant was because of that belief.

Background: Religion or belief (religious or philosophical) is a protected characteristic under the Equality Act 2010. The EAT in *Grainger plc v Nicholson* set out the five criteria to be applied in determining whether a belief qualifies for protection. The belief must be:

1. genuinely held;
2. a belief and not an opinion or viewpoint;
3. as to a weighty and substantial aspect of human life and behaviour;
4. attaining a certain level of cogency, seriousness, cohesion and importance; and
5. worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others.

Facts: The claimant became involved in a personal capacity in a debate about proposed reforms to the Gender Recognition Act. Her employer, a not-for-profit think tank, received complaints that some of her tweets were transphobic. When her consultancy was not renewed, she brought a claim for discrimination on grounds of religion or belief. At a preliminary hearing, the Tribunal decided that the employee's beliefs did not meet the fifth *Grainger* criterion and were not therefore protected under the Equality Act. The claimant appealed.

Decision: The EAT allowed the appeal, saying that a philosophical belief would be excluded from protection for failing to satisfy the fifth *Grainger* criterion only if the expression of the belief would be akin to Nazism or totalitarianism. Gender critical beliefs, which were widely shared, and which did not seek to destroy the rights of trans persons, clearly did not fall into that category. The Tribunal had recognised that the claimant's belief was in accordance with UK law. While her belief might have been offensive to some, and had the potential to result in the harassment of trans persons in some circumstances, the EAT concluded that it fell within the protection of the Equality Act.

Analysis/commentary: The EAT made clear that it was not expressing any view on the merits of either side of the transgender debate; and that its decision did not mean that those with gender critical beliefs can "misgender" trans persons with impunity, or that trans persons do not have protections against discrimination and harassment under the Equality Act. Depending on the circumstances, employers can be vicariously liable for acts of harassment and discrimination against trans persons committed by other employees in the course of employment.

HORIZON SCANNING

What key developments in employment should be on your radar?

1 July 2021	Employers now contribute to the Coronavirus Job Retention Scheme
19 July 2021	Most COVID-19 restrictions expected to end

30 September 2021	Scheduled end of the Coronavirus Job Retention Scheme
5 October 2021	Deadline for reporting 2020 gender pay gap data

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); *Professional Game Match Officials Ltd v HMRC* (Court of Appeal: whether referees were employees for tax purposes); *Angard Staffing Solutions Ltd v Kocur* (Court of Appeal: agency workers' rights)
- **Discrimination / equal pay:** *Efobi v Royal Mail Group* (Supreme Court: test for shift of burden of proof); *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); *Pitcher v Oxford University* (EAT: whether policy of retirement at 67 was justified)
- **Redundancy:** *Gwynedd Council v Barratt* (Court of Appeal: whether selection procedure on restructuring was fair)
- **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)

CONTACT

- PADRAIG CRONIN
- PARTNER
- T: +44 (0)20 7090 3415
- E: Padraig.Cronin@slaughterandmay.com

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

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

- KATHERINE FLOWER
- SENIOR COUNSEL
- T: +44 (0)20 7090 5131
- E: Katherine.Flower@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