SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

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NEW RATES AND LIMITS AND CHANGES TO THE RIGHT TO REQUEST FLEXIBLE WORKING

We have updated our Employment Rates and Limits document. This document summarises the various statutory rates of payment and limits on compensation for the main types of employment claim, applicable from April 2024. We have also included a summary of the time limits and qualifying service requirements for claims, as well as a reminder of the various collective consultation timeframes.

The new increased compensation limits for Employment Tribunal claims include:

- A revised figure of £700 (up from £643) for the maximum amount of a week's pay. This figure is used to calculate awards including statutory redundancy payments and unfair dismissal basic awards, so the maximum is now £21,000 (up from £19,290).
- A maximum unfair dismissal compensatory award of £115,115 (previously £105,707), or 52 weeks' actual pay if lower.

The new limits apply where the "appropriate date" (effective date of termination, for dismissals) is on or after 6 April 2024.

Several employment law changes took effect this month – see our Horizon scanning section below. The legislation on the right to request flexible working has recently been completed, confirming that the changes apply to requests made from 6 April 2024. Employees no longer have to have 26 weeks' continuous service to make a request and the procedure for dealing with requests has changed; in particular the time period for administering the request is now two months not three and a request can only be refused (on the existing and unchanged specified business grounds) if there has been consultation with the employee. Employees can bring tribunal claims for procedural failings; there may also be potential discrimination claims if a request is refused.

LACK OF PROTECTION FROM DETRIMENT FOR PARTICIPATION IN INDUSTRIAL ACTION IS INCOMPATIBLE WITH EUROPEAN CONVENTION ON HUMAN RIGHTS

Summary: The Supreme Court has issued a declaration that Section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), which protects workers from detriment connected with trade union activities, is in breach of the European Convention on Human Rights in failing to cover participation in industrial action (*Secretary of State for Business and Trade v Mercer*).

Key practice point: Section 146 is likely to be amended to provide some protection against employer sanctions, short of dismissal, in response to an employee's participation in industrial action. This may take time because (as the Supreme Court acknowledged) there is no simple solution to the problem. There are a number of policy questions, such as whether protection against detriment should be given to all industrial action or only to official industrial action and whether it should extend to long-running official industrial action, given that the

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protection against dismissal expires after 12 weeks. In the meantime, employers will want to be cautious when contemplating action (the removal of discretionary benefits, for example) during industrial action.

Background: Section 146 provides that employers must not subject employees to a detriment for the sole or main purpose of deterring them from "*taking part in the activities of an independent trade union at an appropriate time*". Previous cases had found that this did not cover participation in industrial action, even though dismissal for participating in industrial action which is "protected" (in other words, compliant with the balloting and notification rules of TULRCA) is automatically unfair under a different part of TULRCA.

Facts: A trade union representative was involved in organising a series of strikes. She was suspended from work for speaking to the press about the strike action. The Employment Appeal Tribunal (EAT) found that, in order to make it compatible with Article 11 of the European Convention on Human Rights (which protects the right to take industrial action), Section 146 had to be read as if it included participation in industrial action. However, the Court of Appeal overturned the EAT's decision, deciding that there was a clear intention to exclude industrial action from the scope of Section 146 and that the gap in protection could not be resolved by interpreting Section 146 as if it included industrial action. The trade union representative appealed to the Supreme Court.

Decision: The Supreme Court decided to exercise its discretion to make a declaration, under the Human Rights Act 1998, that Section 146 is incompatible with Article 11, insofar as it fails to provide any protection against sanctions (short of dismissal) intended to deter or penalise trade union members from taking part in lawful strike action organised by their trade union.

The Supreme Court agreed with the Court of Appeal that:

- It is clear that Section 146 does not cover participation in industrial action - the phrase "at an appropriate time" refers to trade union activities undertaken outside working hours, or with the employer's consent, whereas industrial action is generally undertaken during working hours for it to be effective.
- It is not possible to interpret Section 146 in a way which is compatible with Article 11. Whilst agreeing that Article 11 may require some protection from detriment short of dismissal, the Court rejected the representative's argument that it requires universal protection from all detriments. There was no single, obvious legislative solution that would ensure compliance with Article 11 while at the same time maintaining an appropriate balance between the competing rights of employers and workers. There might need to be an enquiry to look at the policy issues and establish the legislative solution.

However, unlike the Court of Appeal, the Supreme Court decided that it could make a declaration that Section 146 was incompatible with Article 11.

PROPOSED LEGISLATION ON NON-DISCLOSURE AGREEMENTS

The Government has announced that legislation to stop the use of non-disclosure agreements (NDAs) to prevent the reporting of crime will be introduced "as soon as parliamentary time allows". Full details of the legislation have not yet been published but the Government says that it will clarify that:

- NDAs will not be legally enforceable if they prevent victims from reporting a crime. Disclosure will be permitted if it is relevant to criminal conduct and for the purpose of reporting a crime or accessing support or advice.
- "Information related to criminal conduct" can be discussed, without fear of legal action, with:
    - police or other bodies which investigate or prosecute crime
    - qualified and regulated lawyers
    - other support services such as counsellors, advocacy services or medical professionals operating under clear confidentiality principles.

These proposals were originally put forward in 2019, after a consultation on the regulation of confidentiality clauses. At that time, as well as confirming it would legislate as outlined above, the Government said it would require the limitations on confidentiality clauses to be included in the written statement of employment particulars and in settlement

agreements, and that for a settlement agreement to be valid, individuals would have to receive advice on those limitations. The latest announcement makes no mention of these further restrictions.

Analysis/commentary: The scope of the proposed legislation, in particular what will be covered by "information related to criminal conduct", is not yet clear. This is a sensitive area, with recent expression of concerns about the imbalance of power and potential abuse of NDAs in the employment context, so employers should seek advice at an early opportunity.

FAILURE TO OFFER TRIAL PERIOD IN ALTERNATIVE ROLE WAS BREACH OF DUTY TO MAKE REASONABLE ADJUSTMENTS

Summary: The Employment Appeal Tribunal (EAT) has decided that the dismissal of an employee with a disability without offering a trial period in an alternative role was a breach of the duty to make reasonable adjustments (*Rentokil Initial UK Ltd v Miller*).

Key practice point: The decision confirms that the duty to make reasonable adjustments for an employee with a disability is not confined to adjustments to the employee's job to remove or reduce the disadvantage. It can extend to offering a trial period in a different role and the employer may have to demonstrate that providing an alternative role on a trial basis was not a reasonable step for it to take.

Facts: The claimant was employed as a pest control technician, described as a "field role". In the months after he was diagnosed with multiple sclerosis, adjustments and modifications to his working arrangements and terms and conditions were made. However, eventually his employer concluded that there was no viable way in which he could continue in that role, and the possibilities for moving into a different role were explored. He applied for a service administrator role but, following a process involving an interview and written tests, the recruiting manager decided not to offer the claimant that role. A capability meeting concluded that there were no adjustments that could be made that would enable him to remain in his existing field role and, as there was no other suitable alternative role for him, he was dismissed. The Employment Tribunal upheld his claims of failures to comply with the duty to make reasonable adjustments, discrimination arising from disability, and unfair dismissal. The employer appealed.

Decision: The EAT dismissed the appeal. The employer had breached its duty to make reasonable adjustments by dismissing the claimant without having offered a trial period in a different available role. That would have been a reasonable step to avoid the disadvantage. The EAT declined to follow observations in a 2008 case, *The Environment Agency v Rowan,* that a trial period could not in itself amount to a reasonable adjustment because it was concerned with the process of determining what steps should be taken rather than having practical consequences in terms of preventing or mitigating the difficulties faced by the employee. The EAT decided that, as the legislation on reasonable adjustments refers simply to a duty to take "*such steps as it is reasonable to have to take to avoid the disadvantage*", there is no restriction on what form those steps might take. It is well established that the proposed step does not have to be guaranteed to work. Any change which would or might avoid the disadvantage is in principle capable of amounting to a reasonable adjustment.

The EAT went on to explain that, as the claimant had identified a role that could potentially be appropriate, this was sufficient to pass the burden to the employer to show why it should not be reasonably expected to have given the claimant at least a trial period. The Employment Tribunal had been entitled to take the view that although the claimant's poor performance on the written tests may have given the employer some concerns, those worries could have been met by offering him a trial period. The EAT also said that it would not be enough for the employer to show that the claimant was considered not to have performed well enough by the standards that the recruiting manager would ordinarily apply in a competitive exercise; the performance assessment would have to be such that it would not be reasonable to put him into the new role, at least on a trial basis. It was also relevant that the decision had been based purely on the recruiting manager's assessment and was not taken by a manager who had knowledge of how the claimant had performed in his current role.

ENFORCEMENT NOTICE TO STOP EMPLOYER USING BIOMETRIC DATA

The Information Commissioner's Office (ICO) has announced that Serco Leisure and associated organisations have been issued with enforcement notices ordering them to stop using facial recognition technology and fingerprint scanning to

monitor employee attendance. Serco, as controller, had failed to establish a lawful basis for processing under the UK General Data Protection Regulation (GDPR) and a separate condition for processing special category biometric data and had failed to process data both lawfully and fairly.

The employer had introduced biometric technology in order to monitor attendance, having found that manual sign-in sheets and radio-frequency ID cards were prone to error and had been used inappropriately. Because biometric data constitutes special category data when it is used to uniquely identify individuals (as it was in this case), under the UK GDPR the processing must be necessary, justified and proportionate and an extra condition under Article 9 of the UK GDPR must be satisfied.

The employer had produced a data protection impact assessment (DPIA) and a legitimate interests assessment, purporting to rely on the UK GDPR's Article 6(1)(b) (contractual necessity) and Article 6(1)(f) (legitimate interests) processing grounds. It stated that the processing was necessary to ensure employees were paid correctly for the time they had worked. For the extra condition for special category biometric data, they sought to rely on Article 9(2)(b) ("employment, social security and social protection"), on the basis that they needed to comply with regulations on working time, national living wage, right to work and tax and accounting. The ICO rejected this analysis, finding that although recording attendance times might be necessary to fulfil obligations under employment contracts, the processing of biometric data was not necessary to achieve that purpose - less intrusive means could be used to verify attendance. The employer had failed to demonstrate why less intrusive methods were not appropriate, or to provide evidence of widespread abuse of alternative measures and why disciplinary action to curb that abuse had not been considered.

The employer had failed to give appropriate weight to the intrusive nature of the monitoring and the risks to employees. Employees were not given clear information about how they could object to the processing, or about any alternative methods of monitoring attendance. On the contrary, the Standard Operating Procedure said that the use of the biometric technology was a requirement and that employees could be subject to disciplinary action if they refused to use it. The enforcement notice also points out that, given the imbalance of power between the employer and its employees, even if employees had been informed that they could object to the processing, the ICO considered that they might not have felt able to do so.

In addition, the employer had failed to identify (including in its DPIA), at the time it began processing, the specific legal obligation or right on which it was relying. It had also failed to produce an appropriate policy document, required by the Data Protection Act 2018 where there is reliance on an Article 9 condition.

The ICO has also recently published new guidance on biometric data, explaining (for all organisations, including employers) how data protection law applies to the use of biometric data in biometric recognition systems. Our colleagues in the Data Privacy team have posted a blog about this new guidance.

Analysis/commentary: The enforcement notice demonstrates ICO's ongoing focus on this area, not just on the use of biometric data but on employee monitoring generally, and its willingness to take action. In particular, the action emphasises that the ICO sets a high bar for intrusive processing being deemed "necessary". Last year the ICO issued guidance on monitoring workers; we covered this in our October 2023 Bulletin. The accompanying Press Release commented on the widespread view that monitoring in the workplace is intrusive. The guidance makes clear that the principles of fairness, transparency and accountability require employers to have policies and procedures in place and brought to the attention of employees on a regular basis and that monitoring is unlikely to be necessary or proportionate if there is a less intrusive method available. Employers should be aware that the use of biometric data is also coming under increasing focus from European data protection authorities; for example, the Spanish authority recently issued guidance that effectively prohibits employers' use of biometrics for logging workers.

PROTECTION AGAINST DISMISSAL CAN APPLY WITHOUT FORMAL NOTICE TO TAKE PARENTAL LEAVE

Summary: The Employment Appeal Tribunal (EAT) has decided that an employee does not have to have given formal notice in order to have "sought" to take parental leave, so as to gain protection from dismissal or detriment (*Hilton Foods Solutions Ltd v Wright*).

Key practice point: What is meant by "sought" to take leave was a novel point for the EAT. Similar wording is in regulations governing other family leave, so this decision would apply to these types of leave.

Facts: The claimant was dismissed, purportedly for redundancy. He claimed automatic unfair dismissal because he "took or sought to take" parental leave, under the Maternity and Parental Leave etc Regulations 1999. He had not given notice but had informal discussions with various personnel, including his line manager, about taking parental leave and had subsequently told HR that he would be seeking parental leave. He described the response to his enquiries as "negative". The employer applied to strike out the claim on the basis that he had not complied with the notice provisions in the Regulations. The Employment Tribunal rejected the application and the employer appealed.

Decision: The EAT dismissed the appeal. The Regulations do not require an employee to have given notice in order to have "sought" to take parental leave. Although giving notice is necessary for entitlement to parental leave, it is not the only way for employees to demonstrate that they have "sought" to take it. Previous cases on parental leave established that the legislation should be interpreted widely and in accordance with its purpose. The EAT did not specify at what stage an employee would achieve the right to protection - it depends on the circumstances.

HORIZON SCANNING

What key developments in employment should be on your radar?

April 2024	Removal of requirement that an employee must have 26 weeks' service to make a request for flexible working and amendments to the flexible working request process
April 2024	Amendments to the Working Time Regulations, including to provide that employers do not have to keep a record of daily working hours and to allow the use of rolled-up holiday pay
April 2024	Regulations under the Protection from Redundancy (Pregnancy and Family Leave) Act 2023, to extend the circumstances in which employers must offer suitable alternative employment to parents at risk of redundancy
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
April 2024	Changes to paternity leave to allow it to be taken in two separate blocks of one week, and at any time in the first year after birth or placement for adoption
July 2024	Statutory Code of Practice on Dismissal and Re-engagement expected to be in force
July 2024	Employment (Allocation of Tips) Act 2023 expected to come into force: obligations on employers to deal with tips, gratuities and service charges, including having a written policy and keeping records
July 2024	Amendment to Reg 13A 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
September 2024	Workers (Predictable Terms and Conditions) Act 2023 expected to come into force: right to request a more predictable working pattern

October 2024	Worker Protection (Amendment of Equality Act 2010) Act 2023 expected to come into force: duty to take reasonable steps to prevent sexual harassment of employees
April 2025	Neonatal Care (Leave and Pay) Act 2023 expected to come into force: 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 • NDAs to be unenforceable if they prevent victims from reporting a crime • Economic Crime and Corporate Transparency Act 2023: failure to prevent fraud offence for large organisations

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

Employment status: *HMRC v Professional Game Match Officials Ltd* (Supreme Court: whether referees were employees for tax purposes)

Discrimination / equal pay: *Rollet v British Airways* (EAT: whether the Equality Act 2010 protects against indirect associative discrimination); *The Royal Parks Ltd v Boohene* (Court of Appeal: whether end-user had indirectly discriminated against contract workers on grounds of race by paying them a lower minimum level of payment compared to direct employees); *Bailey v Stonewall Equity Limited* (EAT: whether a campaigning group had instructed, caused or induced religion or belief discrimination by the employer); *Randall v Trent College Ltd* (EAT: whether worker's treatment was belief discrimination or was treatment because of objectionable manifestation of belief); *Higgs v Farmor's School* (Court of Appeal: whether dismissal was because of the manifestation of protected beliefs, or a justified objection to the manner of manifestation)

Redundancies: *USDAW v Tesco Stores Ltd* (Supreme Court: whether implied term prevented employer from dismissing and re-engaging employees); *ADP RPO UK Ltd v Haycocks* (Court of Appeal: whether redundancy dismissal was fair in absence of workforce consultation)

Industrial action: *Jiwanji v East Coast Main Line Company Ltd* (EAT: whether a pay offer directly to staff during collective negotiations was an unlawful inducement)

Unfair dismissal: *Fentem v Outform* (Court of Appeal: whether bringing forward the termination date on payment of a contractual PILON was a dismissal); *Accattatis v Fortuna Group (London) Ltd* (EAT: whether it was automatically unfair to dismiss for concerns about attending the office during lockdown); *Charalambous v National Bank of Greece* (Court of Appeal: whether a misconduct dismissal was fair when the decision to dismiss was taken by a manager who did not conduct the disciplinary hearing)

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