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NEWSLETTER

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EMPLOYMENT BULLETIN

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COURT OF APPEAL CONFIRMS CAC JURISDICTION OVER EUROPEAN WORKS COUNCILS POST BREXIT

Summary: The Court of Appeal has confirmed that the Central Arbitration Committee (CAC) had jurisdiction to hear a complaint from a European Works Council (EWC) about the employer's failure to inform and consult, even though the employer had designated its German business as the central management because of Brexit. The amended Transnational Information and Consultation of Employees Regulations 1999 (TICER) continue to apply to EWCs where central management remains in the UK (*easyJet PLC v easyJet EWC*).

Key practice point: The decision confirms that where an EWC was established before the end of the Brexit transition period and central management remains in the UK, the employer must continue to operate the EWC in accordance with the Transnational Information and Consultation of Employees Regulations (TICER), even where it is obliged to run a parallel EU-based EWC under the requirements of the EU Directive on EWCs.

Background: Prior to Brexit, TICER imposed EWC consultation obligations where, under Regulation 5, either (1) "central management" was actually situated in the UK, or (2) central management was "deemed" to be in the UK, because it was designated as such or there were more employees in the UK establishment than any other member state establishment. Regulation 5 was amended with effect from exit day (31 December 2020), to remove limb (1) but limb (2) was retained. Regulation 4(1) was amended to say that the provisions of TICER apply "*only where, in accordance with regulation 5, the central management is situated in the United Kingdom*". The case centered on how amended Regulation 4(1) should be interpreted.

Facts: The CAC Panel hearing the case decided that the CAC had jurisdiction to hear a complaint from the easyJet EWC in relation to the employer's failure during 2020 to inform and consult with the EWC about redundancy proposals, even though the employer had designated its German business as the central management with effect from exit day. The CAC found that Regulation 4(1), applying TICER, was not confined to situations where the central management was deemed to be situated in the UK on the basis of amended Regulation 5; it applied if central management was in fact situated in the UK, as in this case. The EAT upheld the CAC's decision; the employer appealed.

Decision: The Court of Appeal dismissed the appeal and concluded that the EWC which existed prior to exit day continued to exist for all purposes set out in the amended TICER. The CAC had jurisdiction to hear the EWC's complaint and, in the absence of any legislative change, will have jurisdiction in relation to any future complaint by the EWC.

The Court of Appeal rejected the employer's argument that Regulation 4(1) applied only where central management was deemed (under Regulation 5) to be in the UK. The Court's view was that the wording of Regulation 4(1) appeared to cover instances of central management in fact situated in the UK and it was clear from other provisions of amended TICER, and the Government's Explanatory Memorandum at the time, that existing EWCs continued to operate under TICER despite the amendments to Regulations 4 and 5.

The Court of Appeal accepted that practical difficulties may arise from the existence of two EWCs operated by the same undertaking (an EWC was created in Germany with effect from 31 December 2020 in order to comply with the EWC Directive). However, the Court did not consider the position to be "wholly unworkable" and the practical difficulties had to be set against the protection of employees in the UK via the existing EWC.

REGULATIONS ALLOWING AGENCY WORKERS TO REPLACE WORKERS TAKING INDUSTRIAL ACTION RULED UNLAWFUL

Summary: The High Court has quashed Amending Regulations which had removed the restriction on employment businesses supplying temporary workers to cover striking workers, thereby reinstating the restriction (with effect from 10 August) (*R (on the application of ASLEF and others) v Secretary of State for Business and Trade*).

Facts: The Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022, which came into force in July 2022, revoked Regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003. Regulation 7 prevented an employment business from supplying an employer with temporary workers to perform the duties normally performed by a worker on strike or taking industrial action, or the duties normally performed by any other worker assigned to cover the striking worker. Several trade unions challenged the Government's decision to make the Amending Regulations on two grounds: (1) that they were unlawful because of the Secretary of State's failure to comply with a statutory duty to consult with representative bodies; and (2) because the Amending Regulations violated trade union rights protected by Article 11 of the European Convention on Human Rights.

Decision: The High Court decided that the Amending Regulations were unlawful, on the basis of ground (1) of the challenge. The Court found that the decision to revoke Regulation 7 was not informed by, or tested against, the views and the evidence of bodies which were representative of the interests concerned. At the time, the Government had said that it had considered the responses to its 2015 consultation on hiring agency staff during strike action. However, the High Court found that, even if the Government could rely on consultation which had taken place nearly seven years earlier, the Government's decision was not in fact informed by the responses to that consultation. In addition, the Government was wrong to decide not to consult further. The High Court did not express a view on the second ground.

INJUNCTION TO ENFORCE NON-COMPETE COVENANT REFUSED BECAUSE OF DELAY

Summary: The Court of Appeal confirmed a High Court decision not to grant an interim injunction to enforce a 12-month non-compete covenant, due to the employer's delay in applying for the injunction (*Verition Advisors (UK Partners) LLP v Jump Trading International Ltd*).

Key practice point: This decision is the latest in a number of recent cases where injunctions have been refused because employers have not acted promptly where they believe a post-termination restriction has or may be breached.

Facts: The employee resigned on 30 March 2022 and, following 12 months spent on garden leave, was due to start employment with a competitor in April 2023. The non-compete clause in the employee's contract was unusual – it allowed the employer (Jump) to specify, within 20 days of termination, the length of the restriction at between zero and 12 months from the termination date. On 31 March 2022, Jump informed the employee that a 12-month non-compete period would apply, ending on 30 March 2024. The employee made it clear that this was not acceptable and wrote to Jump in November 2022 saying that he did not believe that the non-compete was enforceable. Jump replied in March 2023 reiterating its position that he would be in breach of the covenant if he worked for the competitor. In April 2023, Jump applied for an interim injunction to enforce the non-compete.

Decision: The High Court refused the application. There had been significant delay, including an unexplained gap of four months in which Jump had failed to reply to the employee's letter asserting that the covenant was unenforceable. If an application had been made earlier, an expedited trial could have been arranged. There would also have been the possibility of arbitration under a clause in the contract. The delay, and the prejudice the employee would suffer by a further atrophy of his skills in the market, tipped the balance against the injunction being granted. Instead, the High Court ordered a speedy trial. The Court of Appeal upheld the High Court's decision.

In deciding whether or not to grant the injunction, both the High Court and the Court of Appeal discussed the potential enforceability of the non-compete clause – a restrictive covenant will be unenforceable unless shown to extend no further

than is reasonably necessary to protect the employer's legitimate business interests. The High Court suggested that the clause might be found to be unreasonable because the employee did not know the period of restriction until receipt of the notice from the employer, after termination. However, the Court of Appeal regarded it as similar to a covenant which imposes a restriction for a fixed period of 12 months but expressly gives the employer a discretion unilaterally to reduce the length; such a clause would not be unenforceable merely by virtue of the discretion to reduce or waive the restraint period. Ultimately, both Courts decided that the clause was not obviously unenforceable, so an injunction might have been granted but for the delay.

Analysis/commentary: The Government announced earlier this year that it will legislate to apply a statutory limit of three months to non-compete clauses. The proposed legislation will not affect the ability of employers to use notice periods or gardening leave, or to use non-solicitation or confidentiality clauses, nor will it extend to non-compete clauses in workplace contracts such as shareholder agreements. Please see our Employment Bulletin May 2023 for more details.

EAT GUIDANCE ON DISCRIMINATION BECAUSE OF MANIFESTATION OF BELIEFS

Summary: The Employment Appeal Tribunal (EAT) decided that an Employment Tribunal should not have rejected the religion or belief discrimination claim brought by a teacher who was dismissed for Facebook posts criticising the teaching of gender fluidity (*Higgs v Farmor's School*). The Tribunal should have determined whether there was a sufficiently close connection between her conduct and her beliefs, and then conducted a proportionality assessment in order to decide whether the school's actions were because of, or related to, the manifestation of her protected beliefs, or were instead a justified objection to the manner of that manifestation.

Key practice point: The case was sent back to the tribunal for a rehearing to determine whether the employer's actions were proportionate and therefore non-discriminatory. However, the EAT gave general guidance on assessing whether an employer's actions which restrict rights to freedom of belief and expression are proportionate. This may be helpful for employers faced with a situation where there has been a controversial manifestation of beliefs, as well as for the drafting of policies on diversity and on employees' social media use.

Facts: The school received complaints that Facebook posts by their pastoral administrator demonstrated that she held homophobic and transphobic views. Following an investigation and disciplinary hearing, the employee was dismissed for gross misconduct, for breaching the school's conduct policy. She claimed direct discrimination and harassment on grounds of religion and belief. The Employment Tribunal found that her beliefs could be protected under the religion and belief provisions of the Equality Act 2010 but that she had not been discriminated against or harassed because of those protected beliefs but because of inflammatory language used in her posts, which could have led readers to believe that she held homophobic and transphobic beliefs. The employee appealed.

Decision: The EAT allowed the appeal and ordered the case to be reheard. The Tribunal had not taken the right approach. It had to decide whether the school's actions were because of, or related to, the employee's manifestation of her beliefs (which would be discriminatory) or were a justified objection to the manner of that manifestation (which would not).

Analysis/commentary: In its guidance on proportionality assessment, the EAT set out factors to be taken into account, including the tone used by the worker and their understanding of the likely audience, the impact on the employer's ability to run its business and reputational risk, and whether the worker has made clear that the views expressed are personal. Another relevant factor mentioned by the EAT was whether the limitation imposed "*is the least intrusive measure open to the employer*", suggesting that it may be difficult to show that dismissal was a justified response.

PROPOSED AMENDMENTS TO PATERNITY LEAVE

The Government has published a response to its 2019 consultation on proposals to support families and has decided to make amendments to paternity leave, taking effect "in due course". Eligible employees will be able to take the current paternity leave entitlement (of up to two weeks) in two separate blocks of one week, and at any time in the first year after birth/placement for adoption, rather than in the first eight weeks only. The notice requirements will also be amended; an employee will be required to give notice of intention to take leave 15 weeks prior to the expected week of childbirth and then 28 days' notice of dates prior to each period of leave.

The response states that the Government is not proposing any further changes to parental leave at this time, apart from amendments under the recent Protection from Redundancy (Pregnancy and Family Leave) Act 2023. The existing regulations provide that, before making an employee on maternity/adoption/ shared parental leave redundant, an employer must offer a suitable alternative vacancy where one is available with the employer or an associated employer. Regulations under the new Act will extend this protection to pregnant women and those returning from maternity/adoption/shared parental leave. Although the detail will be confirmed in the regulations, the Government has suggested that the protections will apply from notification of pregnancy until 18 months after the birth, and that the same "window" will apply to parents on maternity/adoption/shared parental leave. No date has yet been announced for the new protections to take effect.

HORIZON SCANNING

What key developments in employment should be on your radar?

2023/24	• 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 • Strikes (Minimum Service Levels) Bill: minimum service levels on specified services • Proposed removal of the bonus cap applicable to banks, building societies, and PRA-designated investment firms 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 • 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
31 December 2023	Retained EU Law (Revocation and Reform) Act 2023: abolition of general principles of EU law and changes to UK courts' approach to retained EU case law ("assimilated case law")
April 2024	Carer's Leave Act 2023: entitlement to one week's unpaid leave per year for employees caring for a dependent with a long-term care
May 2024	Employment (Allocation of Tips) Act 2023: obligations on employers to deal with tips, gratuities and service charges, including having a written policy and keeping records
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 • Statutory Code of Practice on Dismissal and Re-engagement • Economic Crime and Corporate Transparency Bill: failure to prevent fraud offence • 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/placement for adoption

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); *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); *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)

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