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Employment Law Bulletin – July 2023 – Practical Perspectives

Automatic unfair dismissal – a day 1 risk

A recent employment tribunal case serves as a reminder that, although employees with less than 2 years' service do not have the right to claim ordinary unfair dismissal, they are still able to claim unfair dismissal if the reason for their dismissal is an automatically unfair one. In the case of Howson v Restore the claimant was employed as a manager at a charity shop. She worked 35 hours per week but was only paid for 30 hours per week by her employer. After having worked there for less than 6 months she queried this with HR and a director. Shortly after, she was invited to what was termed an 'informal meeting' at which she was dismissed. The tribunal found that the claimant's emails about her wages were "the principal reason for her dismissal" and that she had been automatically unfairly dismissed for asserting a statutory right.

The employer may have thought that formalities could be dispensed with as the employee had less than 2 years' service but, because the real reason for her dismissal was an automatically unfair one, it was still liable. Whenever employers are looking at dismissing employees with less than 2 years' service they should take time to consider any risks of automatic unfairness and also any discrimination risk as legal rights in both of these areas accrue from day 1 of the employment relationship.

Statutory minimum notice: an introduction

It is always best to expressly set out details relating to notice pay on termination of employment in the contract of employment itself. But what happens if nothing is put in writing? In such cases the parties would need to fall back on the minimum notice provisions which are set-out in common law and in sections 86-91 of the Employment Rights Act 1996. We have set-out below 5 key facts about these provisions:

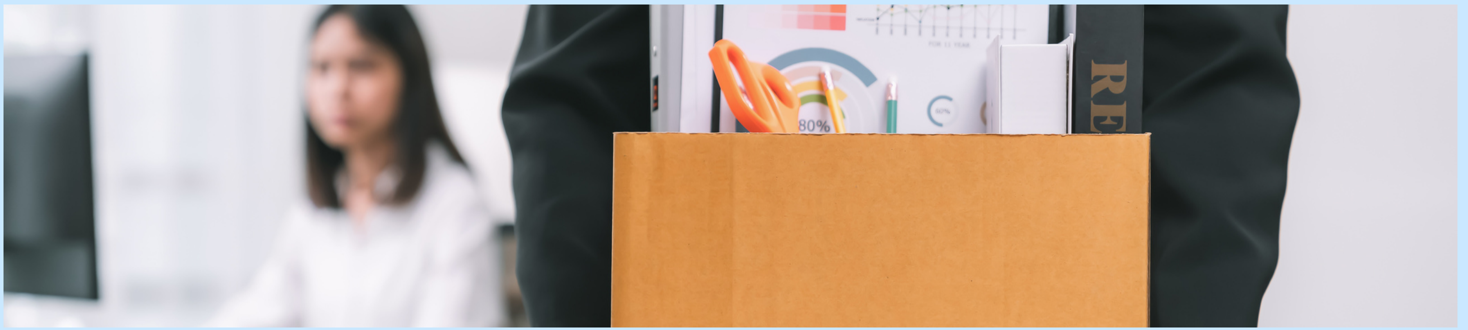
- The minimum notice which an employee must give to an employer after the first month of employment is 1 week. The minimum notice which an employer must give to an employee in the first year of employment (after the first month has elapsed) is 1 week, rising with each additional complete year of employment up to a maximum of 12 weeks after 12 years.

- Technically, there is no minimum notice period which must be given by either party in the first month of employment. If the contract of employment doesn't set out anything different then either party can usually (subject to the 'reasonable notice' point detailed below) end the employment with no notice during the first month of the relationship.

- Where it is reasonable to do so, the court may imply a longer notice period than the Employment Rights Act 1996 requires. What constitutes 'reasonable notice' is decided on a case-by-case basis looking at factors such as the typical notice period for the job; the notice period of any colleagues and the employee's status and seniority. For example, a one month 'reasonable notice' period was implied by the courts for a hospital manager (Hall v John Randall Associates) and a three month period was implied for a company director (Free Newspapers Limited v Urwin).

- There are quirky rules relating to the payment of notice pay where an employee is absent from work at the point that notice is given. They result in those with longer notice periods being potentially worse off. If the notice period to be given by the employer is statutory minimum notice or less than one week more than that minimum then, if an employee is absent during the notice period (either on family leave, sick leave or holidays), they are entitled to receive full pay for their notice period.

- If the notice period to be given by the employer is at least one week more than the statutory minimum then, if they are absent during the notice period due to sickness, family leave or holiday, they are only entitled to what they would usually receive for such absences (e.g. statutory sick pay, statutory maternity pay etc....).



Neonatal Leave and Protection from Redundancy Bills get Royal Assent

Under new laws which have recently received Royal Assent, parents will receive additional support in relation to neonatal care and additional workplace protection from redundancy during pregnancy and family leave.

Under the Protection from Redundancy (Pregnancy and Family Leave) Act, pregnant women and new parents will see an extension of existing redundancy protections, to cover pregnancy and a period of time after parents return to work. Currently, parents are only protected from redundancy whilst on maternity leave, adoption leave or shared parental leave.

The Neonatal Care (Leave and Pay) Act will allow parents whose newborn baby is admitted to neonatal care to take up to 12 weeks of paid leave, in addition to other leave entitlements such as maternity and paternity leave. The length of leave and statutory neonatal pay will be based on how long their baby receives neonatal care, and will apply if their baby receives neonatal care for more than seven continuous days before they reach 28 days old.

Both of these new laws will require secondary legislation to implement them so are not likely to come into effect until next year.

Harassment – you cannot be harassed if you were not aware of the conduct in question

In the recent case of Greasley-Adams v Royal Mail Group Limited the claimant attempted to argue that he had suffered harassment by reason of conduct which he was not aware of at the time it occurred. He only became aware of the conduct when it was revealed as part of a bullying & harassment investigation against him.

The Employment tribunal dismissed his harassment claim. The EAT agreed with the tribunal and held that these incidents could not have violated the claimant's dignity before the time at which he became aware of them. It also held that when he did become aware of them as part of the investigation into his alleged bullying, it was not reasonable for them to be considered as having violated his dignity.

This case confirms that harassment under the Equality Act 2010 takes place when the complainant becomes aware of the unwanted conduct, rather than when the conduct occurs.

Working in hot weather

The UK's historically wet and cool climate means that businesses here are not used to having to worry about hot weather and its impact on employees and workers. However, times are changing. Global temperatures are rising and the UK has seen record temperatures and prolonged hot spells both in 2022 and, most recently, in June 2023. What do employers need to know about working in hot weather? Here are some handy hints:

- There is no maximum temperature beyond which employees are not required to work in the UK. Regulation 7 of The Workplace (Health, Safety and Welfare) Regulations 1992 (the 1992 Regulations) states that the temperature in all workplaces inside buildings shall be 'reasonable'. There is no equivalent provision for outdoor workplaces.

- The Management of Health and Safety at Work Regulations 1999 require employers to make a suitable assessment of the risks to the health and safety of their employees and take action where necessary and where reasonably practicable. This obligation applies to the risks posed by extreme heat. Employers should assess the risk posed in their workplace and look at what mitigation measures they can put in place.

- Examples of measures which could be taken to reduce health and safety risk include the provision of fans; moving working hours where possible to avoid employees needing to work in the heat of the day; making sure that water is accessible at all times and relaxing rules on uniform.

- Employers should take special care when considering the risk posed by heat to pregnant workers and any employees with disabilities. If hot weather prevents a disabled employee from carrying-out their role then the employer would need to look at what adjustments it could reasonably make to allow that employee to be able to work.

Contributory fault in unfair dismissal cases

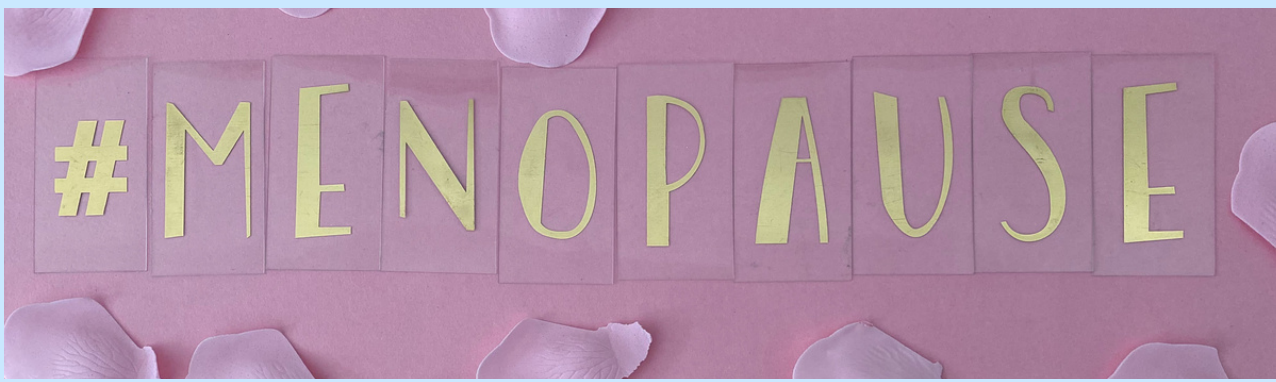
When a tribunal looks at the question of remedy (i.e. how much?) in an unfair dismissal case, one of the elements they must consider is whether there has been any contributory fault by the ex-employee: has the claimant, by their conduct, contributed to their dismissal. If a tribunal finds that they have, then this can lead to a reduction being applied to any award. In extreme cases the tribunal can even reduce compensation by 100% to take account of the claimant's contribution to their own dismissal (even though they have found it to have been unfair).

In Topps Tiles v Hardy, the Employment Appeal Tribunal was asked to review the approach that the Employment tribunal had taken to the concept of contributory fault. The Claimant had been dismissed for gross misconduct after shouting at a customer and allowing some drink to be spilled on them. The tribunal found that his behaviour arose from his disability and that his dismissal was unfair. It stated in its judgment on liability that the Claimant hadn't contributed to his dismissal "because we do not agree that a reasonable employer would treat the Claimant's handling of the episode, faulty though it was, as an act of gross misconduct".

The EAT stated that, when assessing contribution, there is a 3-stage test:

- Is there any blameworthy conduct by the claimant?
- Did it contribute to dismissal?
- If so, how much should the compensatory award be reduced by on a just and equitable basis?

Applying this test, the EAT decided that the tribunal had fallen into error. They had found culpable or blameworthy conduct (referring to the claimant's conduct as "faulty") but then came to the wrong conclusion on whether that conduct contributed to his dismissal. The tribunal had wrongly focused on the fact that the dismissal had been found to be unfair and, in error, concluded that this meant that the Claimant's conduct had not contributed to it. The Claimant's conduct obviously contributed to his dismissal. In fact, it was the whole reason for it. The tribunal had applied the wrong test.



BSI introduces a new standard on menopause and menstruation at work

The British Standards Institution (BSI) has introduced a new standard (BS 30416) aiming to support the health and well-being of all employees who menstruate or experience peri/menopause. The BSI notes that workplaces were first created at a time when women were only a minority of the workforce and were not prioritised by employers. Workplaces and working practices have therefore usually been designed by men, for men and workplaces have, even now, not always been transformed to accommodate or support the specific needs of those who menstruate or experience peri/menopause. It lists actions such as:

- Making adjustments to uniforms, PPE, working patterns, and artificial lighting.
- Providing suitable facilities in which employees can access menstrual products
- Creating a supportive culture
- Appointing workplace menstruation and menopause advocates
- Recognising that not all experiences of menopause and menstruation are the same

The new standard provides a useful jumping off point for employers who want to be supportive of these issues in the workplace but are looking for a framework from which to start.

Five things you should know about Statutory Sick Pay

Dealing with sickness absence takes up a lot of management and HR time. It can be difficult to navigate all the different considerations involved. One of those considerations is sick pay. Here are five things you should know about statutory sick pay:

1. Statutory Sick Pay (SSP) is the minimum payment which must be made to employees who are off-work due to sickness. The rate of SSP is set each year by the government and is currently £109.40 per week.
2. SSP is payable to employees. Workers and self-employed contractors are not eligible.
3. Employees are not usually paid SSP during the first three 'waiting' days (including non-working days) of any absence. The main exception to this is if the employee has received SSP in the previous 8 weeks and completed the three 'waiting days' for this earlier absence.
4. SSP is payable for up to 28 weeks of absence. Employees must give their employer a fit note from the 7th day of absence onwards in order to continue to be eligible for SSP.
5. Although employers are required to pay SSP to eligible employees, they are not able to recoup this cost from the government.

EU Law to remain on the statute books unless specifically revoked

The government has announced in a written statement to parliament that it is abandoning the sunset clause in the Retained EU Law (Revocation and Reform) Bill. As the Bill was originally drafted, almost all EU law would automatically be revoked at the end of 2023, unless a statutory instrument was passed to preserve it. That position is now being reversed, so that EU law will remain binding in the UK unless it is expressly repealed. The Bill will be amended to contain a list of the retained EU laws that the government intends to revoke on 31 December 2023 - but anything not on that list will remain valid. The list has been published and does not include any of the significant employment legislation. The only ones with relevance which are currently on the list for revocation on 31 December 2023 are:

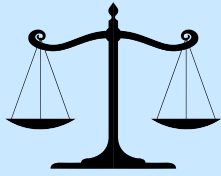
- The Community Drivers' Hours and Working Time (Road Tankers) (Temporary Exception) (Amendment) Regulations 2006
- The Posted Workers (Enforcement of Employment Rights) Regulations 2016; and
- The Posted Workers (Agency Workers) Regulations 2020

However, from 1 January 2024, UK courts will no longer be bound by decisions of the Court of Justice of the European Union, and will no longer be able to give those decisions priority over what UK legislation says. The most important impact is that – unless the government does something – it is very likely that the caselaw on holiday pay which has arisen over the last ten years will cease to be binding, and employers will no longer need to factor in commission and overtime when calculating holiday pay (unless your employment contracts require you to do so). We will keep you updated.

Always check your email recipients before hitting ‘send’

And finally, a man has revealed that he learnt he had been unsuccessful in a job application after the company’s HR department accidentally copied him into an email chain. After applying to work at a coffee company he received an email from the hiring manager which was not intended for him. He had been accidentally CC’d. According to a screenshot shared on the social media platform TikTok, the email read: “Well that’s interesting okay so let’s reject him…”

This error has had unintended reputational consequences for the coffee company - who have been called-out for their behaviour on social media. It also goes without saying that informing a candidate that they have not been successful by CC’ing them into internal correspondence discussing the rejection is not, in any way, best practice. A reminder, if one was ever needed, to check all recipients before pressing ‘send’ on communications, especially sensitive ones such as this!



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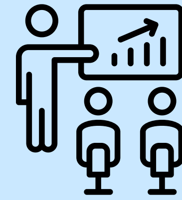

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