Employment law dispatches

November | 2021

Willans LLP | solicitors

At a glance

Cases covering:

- Unfair dismissal
- Age discrimination
- Collective redundancy consultation
- Working Time Directive

Welcome

With the Budget announced and as autumn sets in we felt it was the perfect time to issue another update on the fast paced changes in employment law. In this issue we take a look at several recent employment law cases which we think you'll find of particular interest.

Our final webinar of the year takes place on 16 November - read on for more detail including a booking link. We do hope that you can join us.

As always, if you need us, get in touch - we'd be delighted to support.

Legislation update with Matthew Clayton

Make your staff green with ambition

'Green incentivisation' is something increasingly at the forefront of many employers' minds, and also worthy of particular focus at the moment, against the backdrop of the COP26 conference in Glasgow.

Incentivising directors and employees in a climate-friendly way is one step which you can take to make your business more sustainable. In the UK, according to research from Alvarez & Marsal, 61% of FTSE 100 bonus plans now have some ESG (environmental, social & governance) component. The research also found that the number of companies using an ESG measure in a long-term incentive plan increased from 15% last year to 32% in 2021.

If such efforts to meet ESG goals are to be seen as authentic and credible, then it is important to define concrete KPIs and target measurements. This may be easier said than done, since environmental impacts can be difficult to measure. But the criteria should be defined as closely as possible, especially if disputes over entitlement are to be avoided. If they are to be meaningful, climate-related targets also need to align with and reflect the overall objectives of the business, and be given appropriate weight. Whether and how to report on climate incentivisation efforts is also an important question, whether it's done for PR reasons, investor considerations or other disclosure requirements.

Many businesses are already using methods other than direct financial incentivisation to influence the behaviour of their employees towards lower carbon emissions. Cycle-to-work, car pooling, EV and other commuting-related schemes are increasingly common – as of course is the new-found prevalence of remote and/or hybrid working following the Covid-19 pandemic.

Those businesses which are seeing more employees returning to the workplace (or maybe they never left, as is the case with many manufacturing businesses) could think about ensuring that canteens serve locally sourced or meat-free food. An element of internal competition could be created between individuals or departments to reduce printing or increase recycling, with appropriate rewards.

Business travel is the big elephant-in-the-room. Meetings conducted via video conferencing are much more popular and accepted than they were two years ago, but it still can't be denied that a face-to-face meeting can often be preferable and more productive. Policies will need to be reviewed for meetings that have to take place in person, to ensure that surface rather than air travel is prioritised wherever possible.

Lastly, there is increasing focus on the existence of climate-conscious investment strategies and options within company pension schemes, and you may well already be experiencing pressure from your staff on these topics.

It's important not to ignore this pressure, because aligning with your employees' green agenda can be a powerful tool for your 'employer branding', helping to improve employee satisfaction as well as recruitment and retention of talent. However, whatever you do needs to be done in a clear and meaningful way rather than being seen simply as 'greenwashing'; and therein lies the challenge. ■

Matthew Clayton
matthew.clayton@willans.co.uk

Matthew Clayton
Partner, head of employment law & business immigration

Case law watch

with Hayley Ainsworth & Jenny Hawrot

jenny.hawrot@willans.co.uk
linkedin.com/in/jennyhawrot/

hayley.ainsworth@willans.co.uk
linkedin.com/in/hayleyainsworth/

Jenny Hawrot
Senior associate, solicitor

Hayley Ainsworth
Solicitor

Indirect discrimination can occur associatively

For the first time, an employment tribunal has decided that indirect discrimination can occur even when the employee to whom a PCP (provision, criterion or practice) has been applied does not have the relevant protected characteristic; but someone that they are associated with does, which consequently disadvantages the employee.

Historically, an employee could only successfully argue indirect discrimination if they themselves held the protected characteristic on which the discrimination was based. However, a recent case, *Follows v Nationwide Building Society* has suggested the tide is changing. Ms Follows was a senior lending manager who was based from home due to caring for her disabled mother. Despite being a homeworking employee, Ms Follows did attend the office a couple of days a week. During a redundancy process, the employer decided all senior lending managers must be office-based due to a change in nature of the work and the need for staff supervision. During consultation, Ms Follows stated that she would be unable to do this, and was subsequently dismissed.

The employer was found to be liable for unfair dismissal, indirect disability discrimination and indirect sex discrimination. The tribunal held that Ms Follows could claim indirect disability discrimination by association, as the requirement to no longer work at home on a full-time basis put her at a substantial disadvantage because of her association with her mother's disability as carer. The employer could not reasonably justify the requirement as Ms Follows had been successfully undertaking her role for 7 years.

What should I do?

This case is just a first instance decision so is not binding, but it is certainly one to watch, as it's likely to be appealed. However, you should still pay attention to findings like this as we transition back to more office-based working post-Covid. Pay attention to the individual circumstances of staff to address any barriers to their return to the office, and consider what is reasonable. ■

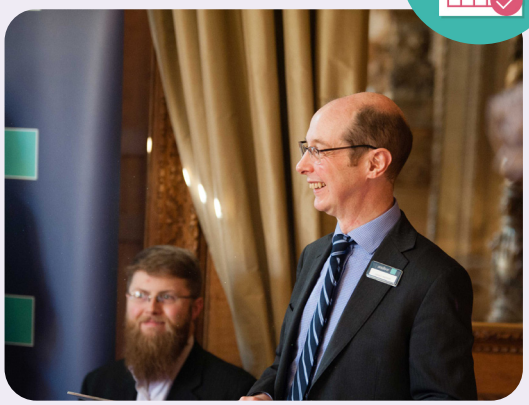
Don't miss: Upcoming free webinar

Join our employment law and dispute resolution teams for our final event in 2021. We'll provide a clear overview of current issues, with plenty of practical tips to take away:

Webinar | **Restrictive covenants: Drafting and enforcement**

Tuesday 16 November 2021

Book your ticket(s) by visiting our website's events page: willans.co.uk/events

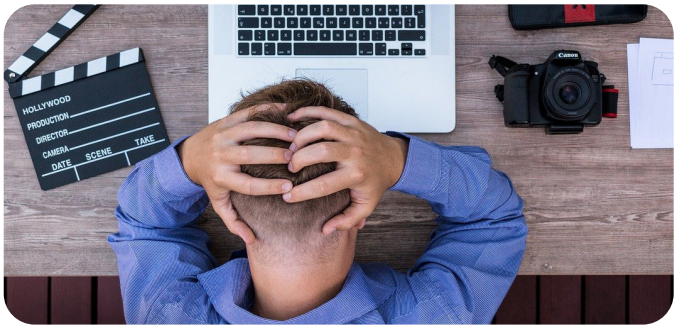


Covid-19: Employee unfairly dismissed on health and safety grounds

In *Ham v ESL BBSW Ltd*, Mr Ham, an area supervisor for the employer, was asked by his regional manager, who was self-isolating with suspected Covid-19 symptoms, to deliver goods to her house. Mr Ham refused on health and safety grounds. Mr Ham was subsequently dismissed for failing to follow instructions.

Mr Ham brought a claim for automatic unfair dismissal on the basis he had been dismissed for having taken steps to protect himself from danger which he reasonably believed to be serious and imminent. The tribunal held that he had been automatically unfairly dismissed, for that reason.

Employment tribunals are seeing a number of similar cases come through, with varying outcomes. In another case, *Rodgers v Leeds Laser Cutting*, the employee was unable to establish a reasonable belief in serious and imminent danger. However, in *Gibson v Lothian Leisure*, an employee who raised concerns about lack of PPE or other workplace measures and was summarily dismissed was found to have been automatically unfairly dismissed.



What should I do?

If an employee raises health and safety concerns in the workplace, the concern should be treated carefully and considered in detail. You should assess the relevant safety measures they have in place and consider the employee's representations before taking any action. Again, this is a non-binding tribunal decision so keep an eye out for developments.

Covid-19 lockdown: Sending a pregnant worker home not discrimination

In another Covid-19 related case, *Prosser v Community Gateway Association Ltd,* a tribunal found that a pregnant worker was not discriminated against when she was sent home and her return to work delayed during the Covid-19 pandemic.

Ms Prosser was a pregnant zero hours worker who was sent home in the early stages of the pandemic as her employer viewed her to be clinically vulnerable. Following a risk assessment, her return to work was delayed as her employer implemented various safety measures such as perspex screens and spacing of desks.

Additionally, Ms Prosser was informed that she would not be asked to undertake night shifts, which could involve unaccompanied travel to tenants' homes, lone working and the provision of physical support to tenants. During her time away from work she was paid in excess of her contractual entitlement, albeit one payment was mistakenly made late.

Ms Prosser filed a claim for discrimination and victimisation on the grounds of maternity. The tribunal dismissed her claim, finding that her employer's actions had been informed by public health advice and relevant Covid regulations. The employer had undertaken a formal risk assessment and the employer's motive was to protect Ms Prosser and her unborn baby.

What should I do?

This is an excellent example of the steps that employers can and should make to protect clinically vulnerable workers. Following government guidance, undertaking risk assessments and ensuring a vulnerable employee is not out of pocket are examples of ways an employer taking health and safety steps can protect themselves from a tribunal claim.

Firefighter's "standby time" may be classified as working time

In *XR v Dopravní podnik hl m Prahy*, the European Court of Justice (ECJ) considered whether rest breaks, during which a firefighter had to be on standby to return to duties within two minutes, constituted working time for the purpose of the Working Time Directive.

Under the Working Time Directive, working time means any period during which the worker is working, at the employer's disposal and carrying out their activity or duties. Whether time spent on-call or on standby constitutes working time has been a source of constant debate.

In this case, XR worked as a firefighter. During his 12 hour shifts he was entitled to two food and rest breaks of 30 minutes each. Between 6.30am and 1.30pm he was able to go to the canteen (which was approximately 200 metres from the workstation). However, he had to remain on standby to be picked up on two minutes' notice outside the canteen. These rest breaks were unpaid and only included in the calculation of working time if interrupted by a call-out.

XR challenged this, arguing that uninterrupted rest breaks also constituted working time. The ECJ considered whether a rest break was a period during which XR was "working, at the employer's disposal and carrying out his duties". The ECJ found that in fact XR was working during these rest breaks, due to the unforeseeable nature of possible interruptions, the length of rest break and the time within which the employee was expected to be available. These limitations significantly affected XR's ability to manage their own time and devote that time to their interests.

What should I do?

Though, as an ECJ case, this is not binding on UK courts, it does inform us as to where attitudes lie. If you have employees undertaking rest breaks during which they are expected to be on standby, you should consider all the circumstances under which their break may actually constitute work. ■

Two different conclusions on the same policy in age discrimination

In a pair of very unusual cases, the EAT has upheld two oppositely decided employment tribunal decisions on the same policy and involving the same employer. *Pitcher v University of Oxford* and *University of Oxford v Ewart* are two cases both concerning age discrimination, brought by former professors.

Both professors were subject to the same mandatory retirement under the University's Employer Justified Retirement Age (EJRA) policy, which required employees to retire at 67. The policy also allowed staff to apply to extend their employment beyond the mandatory retirement age.

Professor Pitcher was compulsorily retired at 67. He applied for an extension but it was refused, as the university did not consider there was a sufficiently clear advantage in retaining Professor Pitcher, which outweighed the benefit of creating a vacancy. Professor Ewart equally applied for an extension, which was accepted by the University, and he continued in an 80% pro rata role, on a two-year fixed-term contract. The extension was granted as the department had difficulties planning for his succession due to his work being marginal in nature. Professor Ewart request a further extension of three years, as there had been a delay to some of the projects that had justified the first extension. The extension was rejected, as the department took the view that the purposes of the first extension had been met.

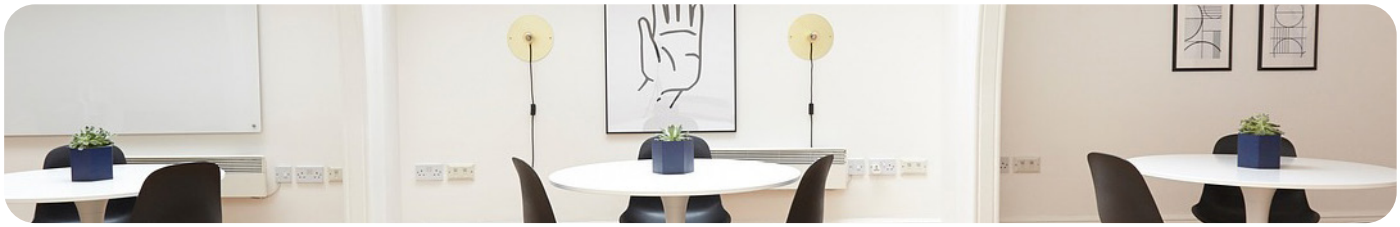
Both claimants brought claims for direct age discrimination and unfair dismissal. In both cases the tribunals found that the aims of the EJRA were legitimate objectives. However, in each case there were different findings on whether the EJRA was proportionate, and whether the policy effectively achieved its aims. In Pitcher, the tribunal found that the policy successfully achieved its aim of creating vacancies and the detriment to the claimant was mitigated by the receipt of a pension, and the ability to use University facilities and apply for grants; so the dismissal was not unfair. In contrast, in the Ewart case the tribunal found that the EJRA was not a proportionate way of meeting its aims, stating that it was "highly discriminatory" to dismiss someone merely for a protected characteristic. They found that the policy was not justified and that the dismissal was unfair.

The outcomes were appealed and the EAT considered two factors in particular that distinguished the tribunals' decisions. Firstly, in Ewart the tribunal had information in front of it that they did not have in Pitcher, such as a statistical analysis which shows the effect of the EJRA only increased vacancies by 2-4%. Secondly, there were factual differences impacting the decisions. As such, the EAT found that neither decision was legally wrong and dismissed the appeals.

What should I do?

This is an important reminder of why providing comprehensive evidence at tribunal is critically valuable. As an employer, you must be able to evidence why a policy assists in achieving a legitimate aim. It is also a reminder to pay close attention to the facts when deciding how to apply a policy and you should always consider whether decisions align with the original objective of the policy. ■

Collective redundancy consultation: liquidation not "special circumstances"



The latest chapter in Carillion Services Ltd's troubles has provided some clarification on when an employer may be able to escape liability for failure to collectively consult prior to making redundancies. In *Carillion Services Ltd v Benson*, it was found that compulsory liquidation does not constitute "special circumstances" for the purposes of the defence.

If there are special circumstances which render it not reasonably practicable for an employer to comply with its obligations to collectively consult, then the employer must take all such steps as are reasonably practicable in the circumstances.

Carillion went into liquidation in January 2018, resulting in thousands of redundancy dismissals. The company was obligated to undertake collective consultation, but did not, leading to several employees pursuing claims. Carillion argued that because it only became apparent that it would not survive in the days immediately preceding liquidation, when its lenders and the government informed Carillion that they would not provide further financial support, it was not reasonably practicable to consult.

The tribunal and the EAT rejected this, finding that Carillion had been on a downward path from mid-2017 and that the revelation that they wouldn't receive financial support did not constitute a "special circumstance". Insolvency because of a gradual decline of the business is not a special circumstance.

What should I do?

Do not leave it too late to undertake collective consultations if your business is facing financial trouble. Even if avoiding dismissals is impossible, the consultation process is still valuable, as it can mitigate the consequences of dismissals. ■

More news on our website www.willans.co.uk

Contact

For advice on any of the issues covered in this bulletin or any other area of law, please contact these people in the first instance.

Employment law

Matthew Clayton
matthew.clayton@willans.co.uk

Charities & not-for-profit

Nigel Whittaker
nigel.whittaker@willans.co.uk

Litigation & dispute resolution

Paul Gordon
paul.gordon@willans.co.uk

Nick Southwell
nick.southwell@willans.co.uk

Nick Cox
nick.cox@willans.co.uk

Corporate & commercial

Chris Wills
chris.wills@willans.co.uk

Rishi Ladwa
rishi.ladwa@willans.co.uk

Property & construction

Nigel Whittaker
nigel.whittaker@willans.co.uk

Alasdair Garbutt
alasdair.garbutt@willans.co.uk

Thornton Allen
thornton.allen@willans.co.uk

Divorce & family law

Sharon Giles
sharon.giles@willans.co.uk

Wills, trusts & probate

Simon Cook
simon.cook@willans.co.uk

Agriculture & estates

Robin Beckley
robin.beckley@willans.co.uk

Adam Hale
adam.hale@willans.co.uk

Residential property

Suzanne O'Riordan
suzanne.oriordan@willans.co.uk

Simon Hodges
simon.hodges@willans.co.uk

Contact details

Willans LLP | solicitors, 28 Imperial Square, Cheltenham, Gloucestershire GL50 1RH
+44 (0)1242 514000 law@willans.co.uk www.willans.co.uk

Stay connected: follow the firm on Twitter @ WillansLLP, search 'Willans LLP' on LinkedIn and Facebook