Employment law dispatches

Willans LLP | solicitors

January | 2022

At a glance

Cases covering:

- Flexible working
- Employee abuse of process
- Protected disclosures
- Global business mobility route
- Restrictive covenants

Happy New Year

As we look ahead to a brand new year, we're pleased to share the latest case news and updates from the world of employment law.

We'd also like to congratulate our colleague and team member, Jenny Hawrot on her recent promotion to partner at Willans LLP. Jenny, who has been with us since 2015, is an incredibly hardworking, dedicated and valued member of the employment team.

We hope you'll join us for our next webinar with CIPD on Monday 31 March and as always, please get in touch if you need our support.

What to expect in 2022 with Matthew Clayton

Menopause and the workplace

Matthew Clayton
Partner, head of employment law & business immigration

January is always a good time to look ahead at what's to come over the next 12 months. While COVID-19 is still dominating life for many employers, another topic at the forefront for many is 'menopause and the workplace'.

The structure of the workplace has changed dramatically in the last 50 years. Women between the ages of 40 and 55 are currently the fastest growing demographic in the workplace. In 2022, one in six workers will be a woman aged 50 or over – many of them at a senior level.

Menopause is getting increased media coverage and in October 2021 was debated in the House of Commons. Employment tribunals are also seeing a growing number of cases of unfair dismissal and sex and age discrimination claims brought by employees experiencing menopausal symptoms, who have suffered poor treatment by their employers.

Women undergoing the menopause or perimenopause can experience a wide range of symptoms including insomnia, headaches, anxiety, 'brain fog' and palpitations. Some women experience very mild symptoms, but for many the symptoms are more severe and can make working life challenging. According to a 2019 survey carried out by BUPA and the Chartered Institute for Personnel and Development (CIPD) three in five women (usually aged between 45 and 55) were negatively affected at work due to their menopausal symptoms, and almost 900,000 women in the UK left their jobs for the same reason.

Many commentators have suggested that the menopause and its symptoms may become a recognised protected characteristic in the near future, providing greater protection for a significant section of the workforce.

Many businesses have already gone a long way towards creating a more flexible and inclusive workplace; addressing issues that can arise for menopausal women is a next logical step on the way to creating a modern workplace that values female staff at the peak of their careers, which often coincides with menopause. Offering flexible working hours, the option to work from home or even a different workplace set-up can provide solutions to the problems caused by the menopause.

The best way to begin addressing the issues is to normalise menopause as a topic of consideration and discussion, which will help to create an inclusive working environment for employees at every stage of their working lives. Starting an open conversation about menopause and putting in place an effective menopause policy is the best way to engage employees and maintain their wellbeing and growth. Pre-empting the inevitable future developments of the law surrounding menopause can be cost effective in the long term in respect of hiring costs, and unnecessary tribunal costs, but it can also help you to maintain a strong and successful workforce, enabling you to get the most of out of your employees. ■

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Case law watch

with Jenny Hawrot & Hayley Ainsworth

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Dealing with flexible working requests

Under the Flexible Working Regulations 2014, employers have a three-month period to resolve flexible working requests submitted by employees; but can you agree to extend the 'decision period'?

This question was considered in *Walsh v Network Rail Infrastructure Limited*. In this case, the employee submitted a flexible working request in February 2019, meaning the three month decision period ended in May 2019. The flexible working request was rejected by Network Rail and the employee appealed the decision. There was a delay in arranging the appeal hearing, but eventually, the parties agreed to hold it in July 2019 – outside of the three-month 'decision period'.

The employee submitted a claim in the Employment Tribunal (ET) against the employer, alleging that as the request had not been resolved within the statutory three-month decision period, they were in breach of the Flexible Working Regulations. However, the ET held that because the employee agreed to attend the appeal hearing outside the statutory period, they had impliedly agreed to extend the period, and the claim failed.

The employee appealed this decision to the Employment Appeal Tribunal (EAT). The EAT overturned the ET's decision, finding that just because the employee had agreed to attend the appeal hearing outside of the three-month decision period, did not necessarily mean that they agreed to the extension. Any agreement to extend the decision period must be clearly expressed and not implied. Therefore, the employer was in breach of the Flexible Working Regulations.

What should I do?

When dealing with formal flexible working requests, it is imperative that employers comply with the deadlines set out in the Flexible Working Regulations. If you want to extend the deadlines, you should obtain the employee's express agreement, in writing.

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Temporary changes to 'Fit Note'

As a direct result of the current COVID-19 Omicron variant, and with a view to take the pressure off GPs, the Government has introduced new legislation allowing employees to self-certify sickness absence for up to 28 days, rather than the usual seven days. This means that employees only have to provide a 'fit note' from their GP if they have been ill for more than 28 consecutive days.

This is a temporary measure and only applies to periods of sickness starting on or before 26 January 2022. However, there is a suggestion that this may be extended, so watch this space.

Employees may be dismissed for abuse of process

In *Hope v British Medical Association,* the employee raised several grievances against senior managers. Despite trying, the grievances could not be resolved informally, but he refused to raise them formally, nor would he withdraw his grievances.

Nevertheless, the employer decided to proceed with a formal grievance process, and the employee refused to attend a hearing, which was held in his absence and the grievances were not upheld. As part of the formal grievance process, the employer concluded that the employee's conduct, including raising grievances and then failing to engage in the process, was frivolous, vexatious and amounted to abuse of process. As such, they instigated their disciplinary procedure and subsequently dismissed the employee for gross misconduct.

What should I do?

This ruling is encouraging for employers with employees who raise nuisance complaints with no intention of trying to resolve issues, or with the intention of trying to illicit a settlement payment. It confirms that employers would not necessarily be unreasonable to take disciplinary action against employees who raise such vexatious complaints.

However, the decision comes with a health warning as taking disciplinary action against an employee as a result of raising a grievance can give rise to a claim for victimisation and/or unfair dismissal. Each case will depend on its fact, and you should always seek advice before commencing any disciplinary action in response to a grievance.

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Protected disclosures

A recent case heard by the Employment Appeal Tribunal, *Martin v London Borough of Southwark* and others has clarified what a 'protected disclosure' may look like in whistleblowing claims.

For a worker to benefit from protection from detriment as a consequence of blowing the whistle under the Employment Rights Act 1996, they must have made a "qualifying disclosure". This means the employee must:

- Disclose information
- The information must relate to a "relevant failure" (for example breach of a legal obligation)
- Reasonably believe that the disclosure is in the public interest

In this case, Mr Martin was a teacher who raised concerns on several occasions, via email, that he and his colleagues were working too many hours, in excess of "statutory directed time". His emails did not make direct allegations of a specific legal breach, but rather, asked for explanations and consideration of queries about working time. Mr Martin subsequently claimed that he was subject to a detriment by his employer because he sent these emails, which amounted to a qualifying protected disclosure under whistleblowing legislation.

Initially, the tribunal dismissed the employee's claim on the basis that no protected disclosure was made. They believed that his emails amounted to queries, rather than 'disclosures of information'.

On appeal, the Employment Appeal Tribunal (EAT) found that the tribunal had not properly analysed whether Mr Martin had made a protected disclosure as per the legal test set out. In particular, the EAT found that the tribunal had wrongly identified the employee's emails as enquiries, rather than disclosures, which was an overly prescriptive application of the test.

What should I do?

This case is a good reminder not to take too narrow a view of what constitutes whistleblowing. Employers should take legal advice when any employee expresses concern that may amount to a qualifying protected disclosure, no matter what form it takes. Cases like this can result in unlimited compensation, so it is important to always follow good practice.

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Upcoming event | Thursday 31 March | 9.30am – 11.00am

Employment Law Update with CIPD

Join our employment team for an online event covering the latest updates on legislation, case law, immigration & the impact of COVID-19, as well as practical advice for your business. Book via the link below:

www.eventbrite.co.uk/e/employment-law-update-tickets-246750957757

The New Global Business Mobility Route – what to expect in 2022

In 2021, the Home Office announced its intention to bring the UK business mobility system up to date by consolidating current schemes. Under this proposal, overseas businesses will be able to transfer existing staff to the UK under one 'Global Business Mobility Route'.

The changes should, according to the Home Office policy paper, 'provide a modernised sponsorship process with intention to make the whole process easier to navigate and understand while substantially reducing the time it takes to bring someone to UK'.

The proposed Global Business Mobility Route is likely to include five subcategories of worker depending on the specific circumstances of the business and employee in question, as follows:

- Overseas businesses with a branch or subsidiary in the UK will be able to sponsor:

  a. senior or specialist workers – senior executives required to work for a UK entity or workers whose skills are required for the UK entity.

  b. graduate trainees on an UK placement as a part of the structure's training programme.

- Overseas businesses without any presence in the UK will be able to bring:

  a. service suppliers travelling to UK to deliver a service according to a UK trade commitment.

  b. secondment workers to the UK business for specific reason.

  c. UK expansion workers to facilitate the expansion of the overseas business to UK.

Importantly, under the proposals, overseas companies will be able to transfer a team of up to five 'UK expansion workers' to establish a UK entity, instead of just one worker, as is currently permitted under the Sole Representative of an Overseas Business visa route.

However, the 'UK Expansion Workers Visa' will only allow workers to stay in UK for two years instead of three years (with the possibility to extend for another two years) as is currently the case.

The launch of the Global Business Mobility Route is scheduled for spring 2022 and the final structure is expected early this year.

What should I do?

If you are you considering establishing an entity in the UK, or you plan to bring skilled workers to the UK from abroad, you should seek specialist advice. Our experienced immigration team is able to assist with such plans, so please do get in contact.

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A reminder of the importance of restrictive covenants

Restrictive covenants remain a challenging and nebulous area of law. However, drafted properly, they can be instrumental in protecting legitimate business interests.

The case of *Richard Baker Harrison v Brooks and Sambrook* is a reminder of the essential protection afforded to employers, by restrictive covenants, when they are fully enforced.

Richard Baker Harrison (RBH), a distribution company, brought a claim to enforce post-termination restrictions against two employees. Their contracts contained non-solicitation and non-dealing covenants of 12 and 9 months, respectively. The employees in question, who had been responsible for a number of key supplier relationships, set up a competing business during their last year of employment. After resigning from RBH they contacted clients directly to offer their services.

RBH claimed that the employees actively sought to divert business away from the company, in breach of the restrictive covenants in their contracts. The High Court found that the employees had breached not only the express contractual terms, but the implied terms of good faith and fidelity, as well as mutual trust and confidence.

As such, the court found that the enforceability of the covenants succeeded in their entirety, providing the employer with significant protection.

What should I do?

Ensure that your restrictive covenants are comprehensively drafted and consider what is appropriate in the context of your business and the role of the employee. One size does not fit all, and it's important that restrictive covenants are tailored for each employee. We recommend taking legal advice to ensure clauses are reasonably limited in time and geography, to increase their chances of enforceability.

Additionally, a key part of this case was the behaviour of the employees. It was clear from their actions that they had planned to divert business interests for some time before resigning. A court will consider the behaviour of the parties when making their decision, so it's good practice to maintain a moral high ground.

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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.

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