Employment law dispatches

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Welcome...

...to the latest issue of Dispatches, bringing you recent case news and updates from the world of employment law. You'll also find details enclosed on our next webinar, taking place on Thursday 23 June. We'll be discussing how organisations can support colleagues going through the menopause, and we'd be delighted if you could join us.

At a glance

Cases & news covering:

- redundancy & discrimination
- breaching a non-compete clause
- COVID-19 dismissal
- unfair dismissal
- Exclusivity clauses ban

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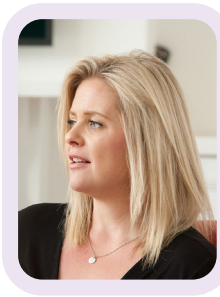

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Queen's Speech 2022 with Matthew Clayton

How does the Queen's Speech impact employment law?

The Queen's Speech was delivered by HRH the Prince of Wales on 10 March 2022, on the occasion of the opening of Parliament, setting out the priorities of the government in the forthcoming parliamentary session.

Unfortunately, the long-awaited implementation of the Employment Bill has not been announced. It seems that the rumours circulating prior to this year's speech were accurate, confirming that employment law reform is not high on the government's list of priorities for the upcoming year.

Announced in 2019, the new Employment Bill is expected to legislate for enhanced protection for pregnant women, paid carers, and zero hours workers, and to contain provision restricting restaurants, cafés and pubs retaining tips and service charges. Three years later, there is still no draft legislation, and we don't know when, or even if we will see the new bill on the government's agenda.

Nonetheless, employers and HR practitioners should pay attention to certain legislative announcements that were included in the Queen's Speech. Following P&O Ferries' largely criticised mass redundancies, the government proposed the Harbours (Seafarers' Renumeration) Bill designed to ensure that British ports have powers to refuse access to ferry services that do not pay their staff an equivalent to the National Minimum Wage while in UK waters.

In addition, the Brexit Freedom Bill is expected to give ministers new powers to overhaul EU law copied to the UK law following Brexit and allow more flexibility to amend such legislation. We will monitor this development and inform you of any changes to employment law that this may bring.

The government also plans to repeal the current Human Rights Act 1998 and introduce a UK Bill of Rights which shall 'restore the balance of powers between the legislature and the courts'.

According to the government's briefing note, there is also an ambition to encourage further private sector investment in employees' training, both for apprentices and for employees generally. This should include a re-assessment of the current tax system – including the operation of the Apprenticeship Levy.

Keep an eye out for our upcoming issue of Dispatches for more legislative updates as and when they happen.

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Case law watch

with Jenny Hawrot & Klára Grmelová

Redundancy tribunal ruled that a part-time working mother was discriminated against

In *Long v British Gas Trading Limited* the tribunal found that a part-time working mother of four was discriminated against and unfairly dismissed by her employer.

Mrs Long worked for British Gas as Intellectual Property ("IP") Counsel. She gave birth to her son, went on maternity leave, and shortly after had triplets. Given the fact that she had 4 children, one of them having 'significant additional needs', she returned to work on a part-time basis in 2017.

At first, she worked alongside another colleague who later resigned. Mrs Long then worked as the sole IP Counsel for the next six months, until a (male, and more junior) replacement was appointed.

Her line manager then became dissatisfied with Mrs Long's working time, expecting her to work outside of her contractual part-time hours, and claimed she lacked 'focus'. Despite her commitment and good performance, she was scored 'below expectations' at her annual performance review in 2018 and placed on a Performance Improvement Plan ('PIP').

Mrs Long was then put at risk of redundancy alongside her newly appointed, more junior male colleague, and was made redundant in July 2019. Mrs Long appealed against her redundancy but was unsuccessful.

One of the redundancy selection criteria used was 'focus', which she was scored 1/7 for. Mrs Long argued that selection criteria was detrimental to her as a working mother.

Mrs Long brought several claims against British Gas, and the tribunal ruled in her favour when it found that British Gas:

- failed to consult with employees over the redundancy selection criteria, and also failed to take into account the length of their respective service
- did not follow internal procedures by incorrectly applying the performance cap, and used wrong appraisal documents
- already held the view that Mr Long was always going to score lower due to her PIP
- unlawfully paid Mrs Long £2,000 less than her more junior male colleague as there were no 'market forces' that justified paying the male colleague more.

The tribunal concluded that Mrs Long was treated less favourably than a comparable full-time worker and had been directly discriminated against because of her sex.

What should I do?

Although this decision was made in the first instance, and is therefore not binding, there are certain points employers should learn from.

When selecting employees for redundancy, the selection criteria should be as 'objective' and 'measurable' as possible. This means that such criteria should be fair and based on measurable facts, unaffected by personal opinions. Employers should also consult with its 'at risk' employees about the proposed redundancy selection criteria, with a view to seek their agreement and avoid any discriminatory criteria.

You must undertake genuine and meaningful consultation. You should not form an opinion at the beginning of the process and no decisions should be made until the process is complete.

If you are using the argument of 'market forces' to justify paying someone more money, make sure you are able to give grounds for this decision and retain evidence of such.

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High Court upholds non-compete clause against a solicitor moving to competitor

In *Law by Design Ltd. v Saira Ali [2022] EWHC 426 (QB)* the High Court upheld a 12-month long non-compete clause against a solicitor attempting to move clients from their old employer to their new employer.

Ms Ali worked for Law by Design ('LBD') as a solicitor specialising in employment law, providing legal services mainly to NHS clients. She resigned from LBD in May 2021, after she was offered a position as partner at Weightmans LLP ('Weightmans').

Shortly before resigning, Ms Ali signed a service agreement ('SA') and a shareholders' agreement ('SHA'), both including a non-compete clause, restricting her ability to join another firm for a period of 12 months following the end of her employment. Ms Ali's lawyers claimed that the non-compete clauses were drawn too widely, lasted for too long, and were therefore unenforceable.

A business plan prepared by Ms Ali as a 'pitch' to Weightmans revealed that Ms Ali intended to 'transition' a significant number of LBD's clients to Weightmans. For LBD, a boutique employment law firm, this would mean losing over a third of its turnover and LBD therefore sought an injunction against Ms Ali, to prevent her from working for Weightmans.

The court considered material and territorial extent of the non-compete clause in SA and held that LBD was 'entitled to seek to protect its customers, connections and a significant range of confidential information,' which Ms Ali obtained throughout her employment.

The court also pointed out that the non-compete clause allowed Ms Ali 'to join a business anywhere in England and Wales that does not compete with LBD for NHS clients' located in a specified area, and was therefore enforceable against Ms Ali, and an injunction was granted.

What should I do?

Restrictive covenants are a tricky area, and they should be approached on a case-by-case basis. Ensure that your restrictive covenants are tailored to each employee and comprehensively drafted to consider what is appropriate in the context of your business and the role of the employee.

We would always recommend that you take legal advice to ensure clauses are reasonably limited in time, geography and scope, to increase the chances of enforceability.

Additionally, a key part of this case was the behaviour and intention of Ms Ali to 'transition' clients from her employer as shown in her business plan. A court will always 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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Update: exclusivity clauses ban extended

The government recently announced its intention to widen the ban on exclusivity clauses, which restrict staff from working for multiple employers, to now also cover workers whose earnings are below the Lower Earnings Limit (currently £123 per week).

The government hopes that this will not only allow low-paid workers to increase their income, but also widen the talent pool of job applicants who may have been prevented from applying due to an exclusivity clause in their current employment contracts. This could – the government suggests – help sectors such as hospitality and retail.

The change will influence around 1.5 million low-paid workers who may currently be restricted as to their ability to work for more employers if they wish to do so. The change is expected to be implemented later this year.

‘Demanding millennial’ unfairly dismissed

The recent tribunal judgment in *Patel v Lucy A Raymond & Sons Limited* has gained much media attention after it was revealed that Mrs Raymond-Williams, managing director of the respondent, dismissed an employee only a month into his employment because he was ‘too demanding, in common with his generation of millennials.’

The respondent was initially looking to recruit a qualified accountant with experience of the insurance industry, but instead hired Mr Patel who was a young accountant, only recently graduated, with limited experience in the field. Mrs Raymond-Williams made an exception in Mr Patel’s case as she was an advocate for dyslexic people, referring to Mr Patel as ‘blue-eyed boy, my project to show what people with dyslexia can achieve.’

Mr Patel was forced to work from home and was struggling with his work, taking longer than expected to complete his tasks and his colleagues started to express concerns to Mrs Raymond-Williams about Mr Patel’s ability to do the role.

Mrs Raymond-Williams dismissed Mr Patel only one month after he started, stating that she ‘had taken the wrong decision in giving a dyslexic person the job.’ Subsequently, Mr Patel brought a claim against the respondent on the grounds of age and disability discrimination.

The tribunal ruled in Mr Patel’s favour, finding that he was unfairly dismissed on the grounds of disability. The tribunal inferred from Mrs Raymond-Williams’ comment that Mr Patel’s disability (dyslexia) meant that he was not up to the job, and she therefore decided to dismiss him.

As to the claim of age discrimination, the tribunal held that Mr Patel was more distressed about a comment made by his employer, that he ‘had been given everything on a plate,’ than for being referred to as a ‘millennial,’ and therefore dismissed this aspect of his claim.

What should I do?

Employers have a duty to make reasonable adjustments for workers with disabilities, to enable them to carry out their role. We recommend that you take a proactive approach to accommodate your disabled workers, and seek advice on what, if any, reasonable adjustments can be made.

This case also shows how inappropriate comments used during dismissal procedure can be harmful to employers. You should be very careful not to make any inappropriate ‘throwaway’ comments towards staff, at any point during their employment.

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COVID-19: dismissal for refusal to return to work upheld

The EAT recently dismissed the employee’s appeal in *Rodgers v Leeds Laser Cutting Ltd.* where a tribunal found that the employee, who refused to attend work because of COVID-19 related concerns and the risk to his vulnerable children, was fairly dismissed.

Mr Rodgers worked in a large warehouse for Leeds Laser Cutting Ltd. (‘Leeds Laser’) when the first national lockdown was announced. To enable their workers to continue working, Leeds Laser carried out a risk assessment and introduced various safety measures in the warehouse, including staggered start/finish times, strict social distancing and the provision of protective equipment.

Mr Rodgers developed a cough and, as there was a case of COVID-19 amongst his colleagues, went home. He later informed Leeds Laser that he would stay off work until the lockdown eased as he had a child with serious health issues and a small baby.

He was dismissed for refusing to return to work, so he brought a claim of automatic unfair dismissal. He claimed that he refused to return to work as he reasonably believed that there was danger to health and safety arising out of the COVID-19 pandemic, which was serious and imminent, and which he could not reasonably have been expected to avoid.

The ET dismissed his claim and held that Mr Rodgers’ concerns about COVID-19 were not directly attributable to his workplace. The ET pointed out that Mr Rodgers didn’t wear a mask, left his home during self-isolation and worked in a pub during lockdown, which all contradicted his claim.

Mr Rodgers appealed the decision, but the EAT dismissed the appeal and stated that although the COVID-19 pandemic could, in principle, give rise to circumstances where an employee could reasonably believe to be in serious and imminent danger, Mr Rodgers failed to prove this, particularly as the business had taken precautionary steps to limit the risks.

What should I do?

This decision shows the importance of taking steps to reduce risks to health and safety in the workplace, and of taking appropriate action to any concerns raised by employees. When a health and safety concern is raised in the workplace, it should be treated carefully and considered in detail. You should also assess the relevant safety measures you have in place and consider the employee’s representations before taking any action.

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Employee called 'good girl' by line manager was unfairly dismissed

Recently, the employment tribunal in *Fricker v Gartner UK Ltd* highlighted how important it is to address cultural changes in the workplace, and that only a proactive approach to changing company policy can ensure statutory protection in discrimination cases.

The claimant – a single mother in her late 30s – worked for the respondent from September 2017 until January 2019, when she resigned claiming a constructive dismissal. She also brought a claim for direct sex discrimination, victimisation and sexual harassment following inappropriate behaviour from her line manager, Mr Giuseppe Ajroldi.

The claimant was subjected to unwanted behaviour from Mr Ajroldi throughout her employment. Initially, he would call the claimant a 'good girl' (despite her irritation) and commented constantly on her appearance and weight. In August 2018, Mr Ajroldi insisted on an overnight business trip with the claimant where he made unwanted sexual advances towards her. The claimant made it abundantly clear that she wanted him to stop the inappropriate behaviour towards her.

Although initially apologetic, Mr Ajroldi's attitude towards the claimant changed and he became aggressive towards her. He then attempted to subject the claimant to an unwarranted performance improvement plan, following which she raised a grievance against him. The claimant's grievance was dismissed confirming that 'nothing really happened' and if it did, it was 'in the circumstances of her own behaviour.' She resigned in January 2019.

The tribunal ruled in the claimant's favour and upheld her claims for constructive unfair dismissal and harassment. In its decision, the tribunal highlighted that language evolves over time and therefore words and phrases once seen as harmless are now regarded as 'racial, homophobic and sexist slurs.' The tribunal also pointed out that some phrases, while not taboo, can be generally regarded as inappropriate in the workplace. Therefore, referring to a woman in her late 30s as a 'good girl' was demeaning.

The employer attempted to defend itself by pointing to its equal opportunity policy but this was found to be unfit for purpose, very brief, outdated and 'merely aspirational.' Although it was claimed the policy had been reviewed in 2018, the tribunal found that unlikely, as it still referred to the Equal Opportunities Commission, which ceased to exist 11 years prior.

What should I do?

One thing to note about this case is the importance of not only having relevant policies in place, but also making sure that such policies are up to date, followed and employees are frequently trained on them. The tribunal rejected the respondent's defence as wholly without merit due to the out-of-date policy.

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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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