Employment law dispatches

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Willans LLP | solicitors

September | 2022

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 Wednesday 5 October. We'll be exploring what businesses can expect in the next 12 months, and we'd be delighted if you could join us.

As always, we're here if you and your business need our support.

At a glance

Cases & news covering:

- harassment
- holiday entitlement
- Long covid & disability discrimination
- gender critical views & discrimination
- right to work checks

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September's mini budget: Legislation updates

Off-payroll working rules revoked

On Friday 23 September 2022, the new Chancellor, Kwasi Kwarteng, announced that the government is intending to repeal the current off-payroll working rules (commonly known as the 'IR35').
These rules were introduced to the public sector in 2017, and more recently to the private sector in April 2021, and were designed to enable HMRC to recover tax and national insurance on contractors' earnings where contractors are actually working as 'employees'.

Under the current rules, the onus is on the end-user client, not the contractor, to assess the employment status and tax obligations, and to pay any applicable tax, in relation to contractor's earnings. However, the plan is for these rules to be repealed in April 2023, after which time they will revert back to the original system. This will mean that the individual contractor will be responsible for assessing their employment status, tax obligations and for payment of any applicable tax.

Kwarteng announced that this is to "achieve a simpler system" and to make it more cost effective for businesses. This proposed reform will have to pass through parliament to become law, but it may be worth contractors and businesses to start to think about a transitional plan in preparation for this change.

The Retained EU Law (Revocation and Reform) Bill

The government has also revealed its plan to bring forward the Retained EU Law (Revocation and Reform) Bill ('the Bill') which, if passed, will automatically repeal any retained EU law by the end of 2023.

'Retained EU Law' is a special category of UK law that was created at the end of the Brexit transition period. It is made up of pieces of EU legislation that were 'cut and pasted' onto the UK statute book so they continue to have effect.

Although the Bill was mentioned in this year's Queen's Speech, it was not believed to be high on the government's agenda, but the latest development has proved otherwise.

If passed, the Bill will remove all retained EU law, impacting hugely across all areas of law. Specifically, all employment rights and protections introduced by the EU since the 1970s will be deleted, including the right to paid holiday, the 48 hour maximum working week, the right to rest breaks, part time worker protections and many more. Further, the Bill will also repeal the principle of supremacy of the EU law making it impossible for UK tribunals and courts to use EU decisions to help to interpret domestic laws.
The question many are asking is: is now the right time for such uncertainty when many businesses are struggling to find skilled workers and recruitment has changed significantly?

According to the government, the aim of the Bill is to repeal the current 'special status' of retained EU law, allowing the government to amend, repeal or replace retained EU law more easily. Unless otherwise preserved, all retained EU law will expire on 31 December 2023 (although the Bill includes a mechanism allowing the government to extend the deadline up to 23 June 2026) but the government has given no indication as to which, if any, of the EU derived employment law rights it will retain.

It is too early to predict what the government will choose to retain and replace and what legislation will quietly be repealed by the end of next year, but we will closely monitor the developments, so watch this space.

If you have any questions regarding the upcoming changes, be sure to get in touch with our team of employment experts. ■

Free webinar | 5 October | 9.30am

Autumn employment law update

Considerations for your organisation.

With the fast-changing pace of employment legislation in the UK, our experienced employment lawyers are running a free webinar to talk you through the key topics that may impact your organisation over the next 12 months.

Register your interest at **www.willans.co.uk/events**

Case law watch

Major Supreme Court ruling finds paid holiday for part-year workers cannot be pro-rated

In a decision that will spur a change of approach for many employers, the Supreme Court has upheld the Court of Appeal's earlier decision in *Harpur Trust v Brazel* that part-year workers should not have their paid holiday pro-rated.

The Working Time Regulations 1998 (the WTR) provide that a full-time employee or worker is entitled to 5.6 weeks of paid holiday per year. Under section 224 of the Employment Rights Act 1996 (ERA), those working atypical hours will have their holiday pay calculated using their average earnings over the preceding 52 weeks. Any week in which the worker did not work, or earn wages, is ignored.

Previously, ACAS guidance stated that holiday pay entitlement for those working atypical hours should be calculated at 12.07% of the hours worked in the preceding week. This was on the basis that, when 5.6 weeks' statutory holiday is deducted from the 52-week calendar year, the working year amounts to 46.4 weeks. 5.6 weeks annual leave equates, therefore, to 12.07% of the working year.

In this case, Ms Brazel was a music teacher working for a school that was run by the Harpur Trust. Her contract was permanent, but 'term-time only'. Ms Brazel was paid for the hours she taught, which varied weekly, and she took holiday at the end of each term, in three tranches. In line with ACAS's (now removed) guidance, when calculating her holiday pay, the trust multiplied the hours Ms Brazel worked by 12.07%, and then multiplied that figure by her hourly rate of pay.

Ms Brazel brought an unlawful deduction of wages claim in the Employment tribunal, arguing that the correct approach in terms of her holiday pay was to apply the "week's pay" calculation set out in s224 of the ERA. The trust argued that, among other things, it was absurd that some who worked for a few days each year would be entitled to a larger percentage of holiday pay than someone who worked full time.

The matter went all the way to the Supreme Court, who rejected the practice of paying 12.07% of holiday pay per hour worked, and found that the entitlement to 5.6 weeks' holiday applies to full and part-year workers, without pro-rating. For those with no normal working hours, pay ought to be calculated by averaging the number of hours worked over the previous 52 weeks.

What should you do?

If you have employees or workers who work only part of the year, for example term-time workers, seasonal workers or those on zero-hour contracts, you should:

- review and amend contracts of employment and payroll processes for calculating holiday pay
- assess financial liability you may face for those staff members being paid using the previous method of 12.07% holiday pay per hour
- consider possible unlawful deductions from wages claims. Staff can seek to recover deductions made over the period of two years before the date of the claim.
- note that you may face arguments from outgoing employees that their accrued but unused holiday pay entitlement on termination of employment should be increased to take into account the underpayment of holiday pay which results from using the 12.07% method. This would not be limited to two years, but instead their claim could only go back a maximum of one year (i.e. for underpayment for 5.6 weeks statutory annual leave entitlement) or to the start of the current holiday year, or to the start of their employment if that is within the current holiday year.

If your business requires support on this or any other matter, get in touch with our team of employment lawyers. ■

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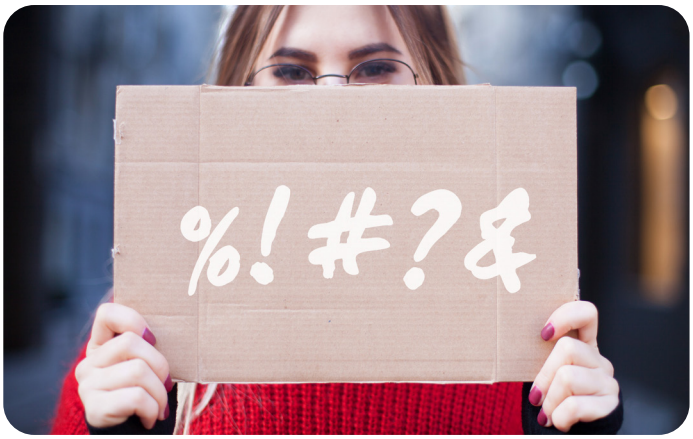
Calling a man 'bald' could amount to harassment



In the case of *Finn v the British Bung Manufacturing Company Limited and Mr J King*, the Employment tribunal held that insulting a male employee by calling him "bald" can amount to harassment related to sex under the Equality Act 2010.

In 2019 Mr Finn got into an altercation with one of his colleagues, during which his colleague called him a "bald c**t" and made violent threats towards him. At the time, Mr Finn decided not to pursue the matter further even though language used by his colleague was intimidating and unwanted. After another altercation, in May 2021, Mr Finn was dismissed for gross misconduct. Following his dismissal, Mr Finn brought a claim against the company for harassment related to sex under the Equality Act 2010.

The tribunal upheld Mr Finn's claim finding that, as baldness is much more prevalent in men than in women, there was a direct connection between the employee's sex (a protected characteristic) and him being called "bald". The language used by his colleague was clearly intimidating and unwanted and therefore it was found that Mr Finn was harassed due to his sex.

What should you do?

This case serves as an excellent reminder to employers (particularly if so called "banter" may be commonplace in the workplace) of the risk around using certain language.

It is important that employers ensure that adequate training and regular 'refreshers' are carried out with employees to keep everyone up to speed as to what kind of behaviour may amount to discrimination and/or harassment.

It is also beneficial for employers to deal with complaints and concerns as soon as possible and to ensure that they are investigated fully in accordance with their disciplinary and/or grievance procedures.

Has something similar happened in your business and you're uncertain about how to handle the situation? Get in touch with our employment experts and they will be able to help.

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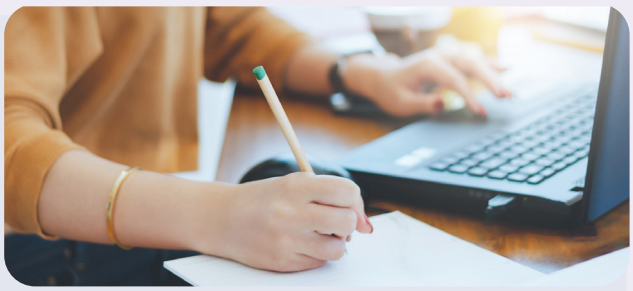
Free webinar | 29 November | 4pm

Right to work checks

Not carrying out the required eligibility checks on a job applicant before you employ them could be costly. Our experienced employment lawyers are running a free webinar to guide you through the key points to consider for carrying out right to work checks in your organisation and how to manage the process.

Register your interest at **www.willans.co.uk/events**



Covid-19 right to work checks to end on 30 September

The temporary adjustments to right to work ('RTW') checks are due to end on 30 September 2022 (inclusive). The interim measures were put in place in March 2020 to help employers during the covid-19 pandemic by allowing the use of digital means to carry out the RTW checks.

There is no need to carry out retrospective checks on those who had a covid-19 adjusted check between 30 March 2022 and 30 September 2022 (inclusive).

The government's guidance confirmed that organisations will have a defence against any civil penalty if the RTW check was carried out during this period in accordance with the covid-19 adjusted checks guidance.

The Home Office has previously extended the period during which employers could undertake adjusted RTW checks but there is no indication this will happen again. However, we cannot completely exclude this option, so watch this space.

For further information on this, join our employment and business immigration law team on 29 November 2022 for more in-depth overview of your right to work duties as an employer.

Covid-19: Long covid could amount to a disability

In *Burke v Turning Point Scotland*, the Employment tribunal found the claimant, who was suffering from 'long covid, was disabled within the meaning of the Equality Act 2010.

Mr Burke was employed by Turning Point Scotland as a caretaker for more than 20 years. He contracted covid-19 in November 2020 and initially only experienced mild symptoms. However, he later developed severe symptoms of fatigue and headaches, and was affected to a point where he had to lie down after having a shower and getting dressed. He also suffered with other symptoms attributable to long covid, including not being able to do basic daily chores such as shopping or cooking. He struggled to stand for long periods of time, experienced joint pain, loss of appetite and was not able to concentrate when watching TV.

Although he was keen to return to work, his symptoms were unpredictable with intermittent periods of ill health. Mr Burke remained off sick and was dismissed by his employer in August 2021 on the grounds of his ill health and the 'uncertainty around a potential return to work date'.

Mr Burke brought a claim in the Employment tribunal claiming that he was discriminated against on the basis of his disability – long covid.

The Equality Act 2010 defines disability as either a physical or a mental impartment that has a substantial and a long term adverse effect on one's ability to carry out normal day-to-day activities.

It's worth noting that this case was very fact specific with a number of issues to contemplate to determine whether Mr Burke was disabled or not. The tribunal had to consider vague GP notes, conflicting Occupational Health reports and the unpredictability of his symptoms while taking into consideration other aspects such as lack of monetary incentives on employee's part, all of which played a part in helping the tribunal reach its decision

The tribunal found that the claimant was suffering from a physical impairment - long covid - and was satisfied that this condition had an adverse effect on his ability to carry out day-to-day activities. Given that the effect was more than minor or trivial and could well have lasted at least 12 months, it could also be considered substantial and long-term. Mr Burke was therefore found to be disabled for the purposes of the Equality Act 2010 and is able to further pursue his claims for disability discrimination.

What should you do?

Although this is only a first instance decision, and therefore not binding, it is the first (and probably not the last) case dealing with the status of long covid and is therefore indicative. It also reminds us of the definition of disability under the Equality Act and how this test should be applied. It does not mean that all cases of long covid will amount to a disability as each case will turn on its facts, but it does open up the possibility that long covid can be classed as a disability.

When managing sickness absence relating to ongoing health conditions, including long covid, employers should always bear in mind that any health condition could amount to a disability under the Equality Act 2010 if its fulfils the criteria. To establish this, communication with employee is key, and employers should consider obtaining an Occupational Health or other medical reports. If the employee is disabled, employers will have a duty to make reasonable adjustments to enable that employee to undertake their role. Failure to do so may result in a disability discrimination claim.

If you have any business issues or queries that may relate to covid-19, do not hesitate to contact our helpful and approachable team of employment lawyers. ■

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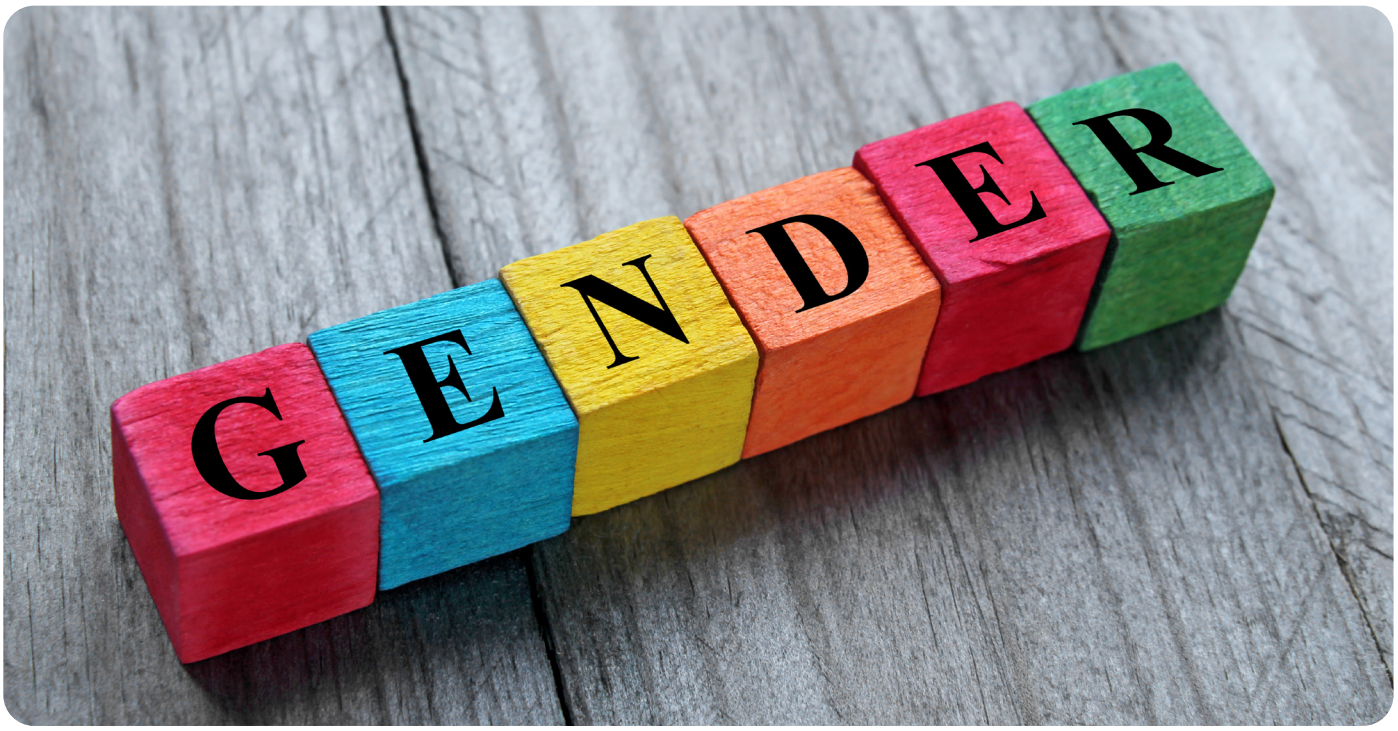
‘Gender critical’ beliefs could be a protected characteristic



In *Bailey v Stonewall and others*, the Employment tribunal upheld a direct discrimination and victimisation claim brought by a barrister in respect of her ‘gender-critical’ beliefs.

Ms Bailey worked as a barrister at Garden Court Chambers (‘Garden Court’). She holds several ‘gender critical’ beliefs, including that a female is defined by her biological sex (not gender) and that her sex is an immutable fact.

In December 2018, Garden Court signed up to a Diversity Champion programme (a LGBTQ+ employer’s programme) run by Stonewall. Ms Bailey complained about this, stating that it was intimidating to those who do not hold the same beliefs and that Garden Court was supporting “trans extremism”.

In October 2019 Ms Bailey set up an opposition ‘Lesbian Gay Alliance’ to combat this alleged “gender extremism”. She also took to Twitter to express her views. Consequently, numerous complaints were sent to Garden Court, stating that Ms Bailey’s opinions were transphobic and damaged Garden Court’s reputation, especially regarding trans rights.

As a result, Ms Bailey was subject to an investigation and was asked to delete her tweets. Garden Court also published a tweet confirming that they were investigating Ms Bailey and would take ‘all appropriate action’. The investigation found that Ms Bailey’s tweets were ‘likely to offend the Bar Standard Board’s code’.

Ms Bailey then claimed that Garden Court discriminated against her as her views amount to a belief under the Equality Act 2010, and as such were protected.

The tribunal did not have to decide whether Ms Bailey’s beliefs were correct. Instead, they examined whether her beliefs amounted to the protected characteristic of ‘belief’ under the Equality Act 2010, and if so, had she been discriminated against and victimised because of her beliefs. Using the Grainger test, the tribunal found that Ms Bailey’s gender critical beliefs amounted to a protected ‘belief’ as they were more than just a statement of opinion. It also found that Ms Bailey was discriminated against when Garden Court published its tweet about the investigation and found her tweets were likely to breach the core duties of barristers. Ms Bailey’s discrimination and victimisation claims were upheld and she was awarded damages.

What should you do?

This case highlights an increasingly debated topic. Although this is a first instance decision, and therefore not technically binding, it follows in the footsteps of the Forstater case (as below) confirming that gender-critical views could amount to a protected characteristic, even if they do have the potential to offend others.

As such, it is important for employers to be aware of the protection that the Equality Act affords to those with firm beliefs on either side of this debate.

If you need help with this or perhaps another matter, contact us and our team of employment experts will guide you through any issues or queries you may have. ■

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Worker discriminated against because of her gender critical views

In *Forstater v CGD Europe and others ('CGD')*, the Employment tribunal found that Ms Forstater had been discriminated against because of her gender critical views.

This case first attracted significant international publicity back in 2019, stirring a debate on gender critical views and their protection under equality legislation.

Ms Forstater was engaged on a consultancy basis as a 'visiting fellow' for CGD. She holds the belief that biological sex is 'real, important, immutable' and should not be 'conflated with gender identity' and therefore, in her view, a person can identify and be referred to as another sex and change their sex for legal purposes, but this does not change their actual biological sex.

She repeatedly expressed such views on social platforms. In 2018, a number of CGD's employees complained about her tweets. Some found them to be 'transphobic' and 'representing a reputational harm to CGD'. Following this, CGD decided not to extend Ms Forstater's fellowship and did not to offer her a contract of employment that was discussed at the time.

Ms Forstater brought a claim against CGD for direct discrimination stating that their decision not to extend her fellowship or offer her employment was due to her gender critical views. In 2019, the Employment Appeal Tribunal ('EAT') concluded that gender critical views could be a protected 'belief' under the Equality Act 2010.

The case was then referred back to the Employment tribunal to determine whether CGD had discriminated against Ms Forstater because of her gender critical beliefs. In its decision, the tribunal stated that 'beliefs may well be profoundly offensive and even distressing to many others, but they are beliefs that are and must be tolerated in a pluralist society'.

The Employment tribunal found in favour of Ms Forstater stating that CGD had discriminated against her on the grounds of her protected gender critical beliefs, in that the reason CGD did not extend her fellowship or offer her employment was due to those beliefs.

What should you do?

Although this is only a first instance decision, and is therefore not binding, there are certain points to highlight.

Not all manifestations of gender critical views will be classed as a protected belief, particularly if it's just 'a mere statement'. Equally, not all expressions of gender critical views, which go beyond a mere statement, will be acceptable. Employers need to always consider whether the nature of the expression of a belief 'crossed a line' and amounts to an objectionable or inappropriate manifestation of one's belief and therefore not protected.

It is crucial to remember that every case will be considered on its own merits and employers should always take into account what was said or expressed, in what way, and what were the circumstances, before taking an action against an employee.

If there is a case at your business that you're unsure about, our team of employment lawyers will be able to help. Get in touch.

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