Employment law dispatches

Willans LLP | solicitors

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Welcome...

...to the latest issue of **Dispatches**, bringing you recent case news and updates from the world of employment law and business immigration.

Recently, the government has been busy considering the Retained EU Law (Revocation and Reform) Bill's impending deadline of 31 December 2023. Under the first draft of this bill, all EU law would be automatically repealed at the end of the year, unless expressly retained.

The ultimate plan was to replace it with new and improved – although probably very similar – UK law. It appears that the government has now realised the enormity of this task and has made a screeching U-turn that most F1 drivers would be proud of.

On 10 May, the government released a written statement confirming that, now, all EU law will remain binding after 31 December 2023, unless it is expressly repealed. On 11 May, they published a list of laws they intend to repeal, which – if you're struggling to sleep at night – you can find here.

You will be pleased to know that only three (very obscure) employment law regulations are being repealed, so there will be no major changes come 1 January, and anarchy will not prevail.

As we all breathe a sigh of relief, please enjoy our latest roundup of recent employment case law which – we hope – will be less effective at helping you drop off to sleep.

As always, please contact us if you and your business need our support. We'd be happy to help.

At a glance

Cases & news covering:

- discrimination
- furlough claims
- non-compete clauses
- and more...

Matthew Clayton
Partner & head of employment law & business immigration

Jenny Hawrot
Partner

Hayley Ainsworth
Associate, solicitor

Klára Grmelová
Solicitor

Promotions in the employment law & business immigration team

This month, we're pleased to announce that three members of our employment law & business immigration team have been promoted.

Hayley Ainsworth joined the firm in June 2021 and has now been promoted to the role of an associate, solicitor. Klára Grmelová – with a background in Czech and European law – has also qualified as a solicitor following the completion of her English law exams.

Former secretary Achante Anson has also moved to the role of a paralegal – so you'll be seeing more from her as she continues to assist the team in the future.

Congratulations to all!

Webinar: Business immigration for employers

Join us for our free webinar on **15 June** where we will be discussing the key points to consider when employing non-UK workers.

Click here for more details and to book your place now!

Royal assent for new employment protections for parents & carers

On 24 May 2023, three government-backed private members' bills received royal assent.

The Carer's Leave Act 2023:

This will create a new statutory entitlement to one week of unpaid leave per year, for employees caring for a dependant with a long-term care need.

The Neonatal Care (Leave and Pay) Act 2023:

This will allow eligible employee parents up to 12 weeks of paid leave if their new-born baby is admitted to neonatal care. This is in addition to existing leave entitlements like maternity or paternity leave.

The Protection from Redundancy (Pregnancy and Family Leave) Act 2023:

This will extend existing enhanced redundancy protections (currently for employees who are on maternity, adoption or shared parental leave) to also cover pregnancy and a period of time after a new parent has returned to work.

The government has issued a press release stating that secondary legislation implementing these measures will be laid down in "due course." ■

Positive action in the workplace: New government guidance

The Equality Act 2010 enables employers to take 'positive action' to help those with protected characteristics (such as race, sex, sexual orientation, etc.) who suffer a disadvantage, have particular needs or are disproportionately under-represented in the workforce with a view to level the playing field.

However, the uncertain boundaries around such positive action and fear of discrimination claims discouraged many from going down this route.

The government has now issued new guidance intending to tackle these obstacles and encourage more employers to implement these provisions. You can find the full text of the guidance here. ■

Seminar: Organisational resilience is key to success

Join us, Randall & Payne LLP and HR People Support Ltd in Cheltenham on 22 June as we provide insight on how to prepare your business to be best equipped to cope with times of change.

Perfect for directors, senior executives and HR managers/advisors, click here for more details and to book your place now!

Discrimination against religious beliefs

In the case of *Randall v Trent College Ltd. and others*, Mr Randall was the chaplain at a school. In 2016, he delivered two sermons opposing same-sex marriage, sex outside of marriage and communicated his 'gender critical' views.

The school received complaints from pupils, parents and staff who were upset by the underlying messaging. The school asked Mr Randall to stop delivering sermons of that nature, which he did and no formal action was taken.

In 2018, the school introduced 'educate & celebrate' – an Ofsted and Department for Education programme – with the aim of tackling homophobic, biphobic and transphobic bullying, and ingrained attitudes in schools. Mr Randall disagreed with this, finding it to be contrary to Christian teachings and going beyond a neutral stance of inclusivity.

In 2019, Mr Randall delivered two sermons with the same underlying message as those he delivered three years prior. This was done without any discussion with the school and again resulted in complaints. This time the school commenced a disciplinary process with Mr Randall, leading to his dismissal for gross misconduct. He appealed, and his dismissal was overturned and replaced with a final written warning.

A year later, the school undertook a restructure and Mr Randall was dismissed by a reason of redundancy. Mr Randall argued that the real reasons for his dismissal were his religious beliefs and the sermons he gave and, so, issued a claim for religious discrimination and harassment.

The tribunal found against the claimant stating that:

- the redundancy was genuine – the school provided sufficient evidence of this
- the school did not harass Mr Randall or discriminate against him.

The tribunal found that that it was not Mr Randall's belief that led to the disciplinary procedure, but rather it was the objectionable way in which he manifested his beliefs.

According to tribunal, it was because of the time, the place, to whom he expressed his beliefs and how he did so that was objectionable and caused the disciplinary action, not the beliefs themselves.

What can employers do?

Although this is a first instance decision – and therefore not binding – there are certain points employers should take from it. It's clear that employees do not have carte blanch to express their beliefs in an objectionable way and it highlights the importance of providing underlying evidence for decisions made. It also adds to the developing case law and commentary on 'gender critical beliefs' in the workplace. ■

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Proposed change to non-compete clauses

Earlier this month, the government announced its intention to introduce new legislation to limit non-compete post termination restrictions to three months.

The proposed change should bring more flexibility, allowing workers to join a competitor or start their own competitive business three months after termination of employment.

The proposed legislation would not prevent employers from restricting their employee's activities during any (paid) notice period or garden leave, nor would it affect the use of non-solicitation clauses. However, it remains unclear when – and indeed if – such legislation will be put forward, so watch this space. ■

New guidance on reasonable adjustments for mental health

In April, Acas published new guidance on dealing with mental health issues at work. The guidance focuses on how employers can support their employees recovering from – or managing – a mental health condition by introducing reasonable adjustments.

The guidance is available in full here. ■

Furlough pay: A reassuring case for employers

In *Mones v Lisa Franklin Limited*, the claimant, Ms Mones, was employed by the respondent as a part-time receptionist. Ms Mones was furloughed during the pandemic and the respondent sent her a letter outlining the terms of her furlough (the 'furlough letter'), setting out a formula on which her furlough pay would be calculated.

The formula detailed in the furlough letter was different to the formula specified by the government's Coronavirus Job Retention Scheme (CJRS) and resulted in Ms Mones receiving a lower payment than she would have under the CJRS.

The claimant brought a claim for an unlawful deduction from wages.

The Employment Appeal Tribunal (EAT) sided with the respondent, finding that the CJRS specified the obligations between employers and HMRC only, and that the CJRS hadn't created a statutory or contractual obligation owed by employers to employees who were furloughed.

There was an express contractual agreement between the employer and the employee in the form of the furlough letter and CJRS did not impose any higher obligation.

What should you do?

This information would have been useful three years ago when employers were grappling with the newly-introduced CJRS, and for many it may have come too late. However, for those employers who are facing claims of this nature, it's reassuring and helpful. It's worth noting that the EAT stated that – in the absence of any express agreement about furlough pay terms – the CJRS would likely prevail, so caution should be taken when seeking to rely on this ruling. ■

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What can employers do when faced with a loss of earnings claim?

The claimant, Mr Edward, was employed by Tavistock and Portman NHS Foundation Trust (the 'trust') but was terminated due to poor performance.

Mr Edward brought a claim for victimisation claiming that the reasons for putting him on a performance plan were discriminatory. He was then unemployed for over two and a half years. During this period, he applied for one job within the NHS but was unsuccessful. He did not apply for any other roles with the NHS as he believed it was pointless. He applied for many jobs in the private sector but was also unsuccessful.

Mr Edward was successful in his claim and when analysing his loss of earnings, the tribunal found that he had failed to mitigate his loss sufficiently. It concluded that if he had continued to apply for work in the NHS, he would have found a suitable alternative role sooner, so his compensatory award was reduced by 50%.

Mr Edward appealed this decision to reduce his compensation. His appeal was upheld by the EAT who highlighted that the burden of proof of lack of mitigation is always on the respondent. The tribunal should ask, on the balance of probabilities, when a suitable alternative role would have been found and the rate of pay. Any reduction should have been applied after that point. Additionally, the EAT held the trust needed to show that Mr Edward acted unreasonably in failing to mitigate his loss (i.e. by not applying for further jobs in the NHS). The tribunal did not address this, therefore the EAT remitted the matter back to the tribunal to be reconsidered.

What should you do?

When faced with a claim for loss of earnings, it is important that employers look for and keep records of vacancies that a claimant could apply for after termination of employment in the open job market and in your own organisation. This will help prove that a claimant has not adequately mitigated their loss and encourage a tribunal to reduce any loss of earnings awarded. ■

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Restrictive covenants: Working for a competitor

Dr Boydell was employed by NZP as the head of commercial for speciality products, specialising in a very niche area in the pharmaceutical industry. His employment contract contained a 12 month non-compete clause which prevented working for any company that competed with NZP or any other company in the group.

Dr Boydell later resigned to work for a competitor and so, consequently, NZP sought injunctive relief to enforce the non-compete clause.

The Court of Appeal upheld the earlier High Court decision finding that, whilst some of the clause was "fantastical" (namely reference to group companies which go beyond the niche work Dr Boydell undertook) in that it was too wide to be enforced, other elements of the clause (i.e. those restricting him from working for the niche competitors of NZP only) were clearly contemplated by the parties, and therefore enforceable.

The Court of Appeal removed the 'fantastical' reference to the group companies from the clause and granted the injunction in relation to competition with NZP only.

What should you do?

Despite this decision, employers should not see this as the floodgates being open to act freely when drafting a non-compete clause. These clauses should still be drafted with precision to ensure that they protect what needs protecting. Drafting a 'catch all' restriction without specifying particular areas that really need to be protected will not afford any protection. Indeed, as noted above, the government is looking to put a limit of three months on non-compete clauses in the near future.

Ultimately, well drafted and obviously-enforceable restrictions will also avoid the need for legal proceedings and the associated costs and disruption. ■

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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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