Employment law dispatches

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At a glance

Cases & news covering:

- Social media
- Non-compete injunctions
- Beliefs & dismissal
- Holiday pay

Welcome...

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

Meet the team below – our contact details can be found throughout the newsletter. As always, we're here if you and your business need our support.

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Flexible working bill receives royal assent

On 20 July, the Employment Relations (Flexible Working) Act 2023 received royal assent having passed through Parliament. The new act makes changes to some – but not all – of the rules regarding flexible working requests.

Employers should therefore be aware of the new legislation which, when it becomes law, will introduce the following changes:

- employees will be able to make **two flexible working requests** in any 12 month period (currently, it is limited to one)
- flexible working requests must be dealt with within **two months** of receipt of a request, if no extension is agreed (down from three months, if no extension is agreed)
- employers are not able to refuse a flexible working request until they have **'consulted' with the employee**
- employees will **no longer have to explain** the effect their flexible working request would have on the business, and how any such effect might be dealt with.

The new act is designed to encourage flexible working and will likely to come into force during the summer of 2024, so there is a bit of time to prepare. We also expect that ACAS will issue new guidance to reflect the changes and help guide employers on best practice.

As always, we will let you know when both come into effect.

Webinar: Autumn employment law update | 17 Oct. (9:30am)

Keep on top of the key changes in UK employment legislation that may impact your organisation by joining our experienced employment lawyers for this free webinar. Register your interest here.

Case law watch

Social media: Employees' expectations of privacy

In *Webb v London Underground*, Ms Webb was dismissed for posting offensive comments about the Black Lives Matter movement and George Floyd on her private Facebook page.

Her page listed London Underground as her employer, and she had many colleagues as Facebook friends. Her posts were circulated on Twitter and colleagues complained about her posts.

Ms Webb argued that her dismissal and the defendant's conduct breached her right to private life and correspondence under Article 8 of the European Convention on Human Rights (ECHR).

The tribunal concluded that it was reasonable for an employer to rely on private Facebook posts in disciplinaries, in light of Article 8 ECHR.

London Underground's social media policy explicitly warned that private posts could be circulated and any posts inconsistent with the policy could be subject to disciplinary action.

Ms Webb routinely interacted with people that were not her 'Facebook friends' online and welcomed her Facebook friends reposting her content. Therefore, the tribunal found she could have no reasonable expectation of privacy and Article 8 ECHR was not engaged.

What should you do?

The private nature of social media will be very dependent on the factual background. Whilst this case is not binding, it highlights the importance of having clear policies, setting out the expectation of privacy for employees and that such a policy may justify using 'private' communications when dealing with employees.

If you have any questions about social media and the impacts it could have on your business, please contact our team of employment law experts.

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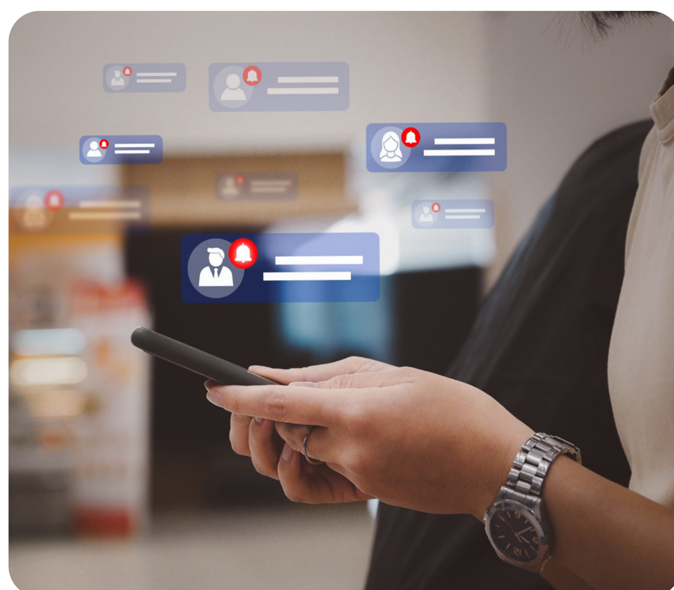

Post-termination restrictions: Don't delay!

In *Jump Trading International Ltd v Couture*, Mr Couture had a one-year notice period, during which time he could be placed on garden leave. Unusually, his restrictive covenants provided that the non-compete restriction period could commence at the end of any garden leave – or notice period – and could be between 0-12 months, at the choice of Jump Trading.

In March 2022, Mr Couture handed his notice in but did not inform Jump that he was planning to work for a competitor, Verition. Jump placed him on 12 months' garden leave and imposed a full 12-month non-compete period after his leave. In July, Mr Couture informed Jump of his intention to join Verition and Jump informed him that this would breach his restrictions.

Following some without prejudice correspondence, Mr Couture sent Jump an open letter in November 2022, confirming that he didn't believe the restrictions were enforceable. Jump replied in March 2023 asserting that they were, and subsequently applied for an interim injunction to prevent Mr Couture working for Verition.

The High Court refused the injunction, mainly due to the delay by the employer. Jump had been aware of Mr Couture's intentions since July 2022, and had not acted meaningfully until March 2023, without good reason. The court also criticised the uncertainty in the drafting of the non-compete clause.

What should you do?

High-quality drafting is essential when entering post-termination restrictions, and you should always seek legal advice on their enforceability.

If a dispute arises, employers should not delay in taking action. A court will be sympathetic to some without prejudice attempts to resolve matters, but unreasonable delays will impact any attempt for interim relief.

Don't hesitate to get in touch with our team if you require more guidance on non-compete clauses.

Dismissed for holding certain beliefs: Is this discrimination?

Two tribunal cases have provided further clarity in respect of gender-critical beliefs and employee rights.

In *Higgs v Farmor's School*, a teacher was dismissed for her Facebook posts criticising the nature of sex education in schools.

Mrs Higgs made it clear that she did not regret the posts but denied being homophobic or transphobic. The disciplinary investigation found that her posts showed she held "illegal and discriminatory views" and she was dismissed for gross misconduct.

Mrs Higgs brought a claim for direct discrimination and harassment in the tribunal on the ground of religion and belief.

On appeal, the Employment Appeal Tribunal (EAT) found that belief is not limited to merely holding a belief, but also the ability to express it. Therefore, if the dismissal was connected to the manifestation of a protected belief, this could be unlawful discrimination.

The case has been remitted to the Employment Tribunal for reconsideration.

In *Fahmy v Arts Council England*, Ms Fahmy brought a claim for victimisation and harassment due to her gender-critical beliefs.

During an internal Teams meeting, Ms Fahmy challenged the view that LGB Alliance was anti-transgender.

The next month, an employee circulated a petition to all staff which contained comments about "openly discriminatory transphobic staff" and described LGB Alliance as "a glorified hate group that… also happen to be neo-Nazis, homophobes and Islamaphobes [sic]."

The employee was suspended, but the petition remained up for over 24 hours. The tribunal found that the petition and comments amounted to harassment on the basis of Ms Fahmy's beliefs.

What should you do?

These two cases provide another reminder to employers that all beliefs – even if they are controversial – may be subject to protection under the Equality Act 2010.

Employers should proceed with caution when handling beliefs on either side of this debate. Contact our team of specialists if you require assistance navigating this potentially tricky area of law.

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Health & safety: The importance of making adjustments

In *Miles v DVSA*, Mr Miles was employed by DVSA as a driving examiner and suffered with chronic kidney disease.

During the pandemic, Mr Miles was classed as 'clinically vulnerable' and, so, his employer put in place measures minimising health and safety risks, allowing Mr Miles to return to work.

Mr Miles advised his employer that he felt there was still a serious risk to his health and safety and refused to return to work. He was placed on unpaid leave and later resigned, claiming – amongst other things – constructive dismissal and detrimental treatment. Specifically, he claimed that he suffered a detriment because he raised concerns about his reasonable belief that there was a risk to his health and safety, and because he refused to return to work due to those concerns.

The EAT found in favour of the DVSA, concluding that Mr Miles could not claim detriment/dismissal because he raised concerns about his belief that there was a risk, since the DVSA had a health and safety representative at his place of work. Claims of this nature can only be brought where there is no health and safety representative or safety committee at the workplace.

Further, Mr Miles' claim for detriment/dismissal for refusing to return to work because he believed there was a serious and imminent danger to his health and safety also failed because the employer had made adjustments to mitigate the risks. The EAT concluded that his belief was not 'reasonable' in the circumstances.

What should you do?

Having an appointed health and safety representative or committee in your workplace can act as an effective barrier to claims of detriment because of raising health and safety concerns. This case also demonstrates the importance of making reasonable adjustments.

Need more information on the topics covered in this article? Please don't hesitate to contact our expert team – we will be more than happy to help.

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Holiday pay on termination

Under Regulation 14(3) of the Working Time Regulations 1998 (WTR), the amount of holiday pay due on termination of employment is either what is set out in the WTR – this is dependent on the circumstances, but is a usual day's pay – or such other sum which is stated to be payable on termination of employment as set out in a 'relevant agreement'. In principle, this was generally understood to mean that, provided you had an agreement with the employee in writing, you could pay them any amount for holiday on termination, as long as it was 1p or more.

However in *Connor v Chief Constable of West Yorkshire Police*, the EAT ruled that this was not the case.

Mr Connor's contract of employment stated that holiday pay on termination of employment would be calculated based on 1/365th of his annual salary. This resulted in him receiving less than what he would have received under the WTR.

The tribunal held that the 1/365th calculation set out in his contract was a 'relevant agreement', and that the employer was entitled to pay him the lower amount in accordance with that agreement.

Mr Connor appealed the tribunal's decision and the EAT found in his favour, concluding that a 'relevant agreement' could not result in the employee receiving less holiday pay than they would be entitled to under the WTR calculation.

What should you do?

Check your contracts to ensure that employees will be paid for any accrued but unused holiday on termination of employment in accordance with the WTR. Any calculations or sums payable that are less than a usual day's pay (in accordance with the WTR) will be unlawful and open you up to potential claims.

To avoid problems further down the line, get in touch with our employment law specialists.

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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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