Employment law dispatches

Willans LLP | solicitors

October | 2023

At a glance

Cases & news covering:

- Dismissals
- Reasonable adjustments
- Share incentive plans
- Fines for illegal working

Welcome...

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

New employment legislation has been a rare thing over the last decade, but in September we saw a second piece of legislation receive royal assent in as many months.

The Workers (Predictable Terms and Conditions) Act 2023 is not expected to come into force until September next year but, when it does, it will have some big implications for businesses that engage workers on an unpredictable basis – for example, where their hours and days of work are variable, agency workers or fixed term contracts of less than 12 months. Fixed term workers can also ask for a longer term, or to remove provisions from the contract relating to the fixed term.

The act introduces a new statutory right for workers to request predictable working patterns after they have been employed continuously for 26 weeks. Workers can make two applications in any 12-month period and requests must be decided on within a month. Also, employers will only be able to refuse a request on specific grounds.

September 2024 is a long way off, but if you engage workers on an unpredictable basis, agency workers or short/fixed term workers, you should start thinking about how you will deal with this legislation.

Helpfully, ACAS will be providing some guidance about how to deal with such requests, which we will let you know about as and when.

In the meantime, enjoy our case law update. Our contact details can be found throughout the newsletter. As always, we're here if you and your business need our support.

Matthew Clayton
Partner & head of employment law & business immigration

Jenny Hawrot
Partner

Hayley Ainsworth
Associate, solicitor

Klára Grmelová
Solicitor

Webinar: Autumn employment law update | Now available to watch on catch-up

In October, our expert team hosted a webinar covering the latest updates in employment law that may impact your organisation going forward.

Useful for directors and senior executives with responsibility for HR and risk management issues, as well as business owners, HR professionals and in-house legal advisors, you can tune in to watch a recording of the webinar on our website here.

Case law watch

Reasonable adjustments & knowledge of disability

In the case of *AECOM Limited v Mallon*, Mr Mallon applied for a job with AECOM.

The recruitment process involved an online application only, and Mr Mallon asked AECOM for a telephone interview to supplement the application as a reasonable adjustment to accommodate his disability. He did not advise AECOM of the details of his disability, he just confirmed that he had difficulties with the online application.

AECOM refused his request for a telephone interview and Mr Mallon brought a claim for failure to make reasonable adjustments.

Mr Mallon was successful in his claim. Both the employment tribunal (ET) and the Employment Appeal Tribunal (EAT) found that AECOM had constructive knowledge of Mr Mallon's disability, so were under a duty to make reasonable adjustments. It was acknowledged that AECOM did not know the details of his disability, however they could have made reasonable enquiries as to the nature of it. They failed to do this.

What should you do?

This case demonstrates that even constructive knowledge of a disability will trigger an employer's duty to make reasonable adjustments. It's crucial that – where there is an indication that a person is disabled – employers should make detailed enquiries before making any decisions about them.

It is also an important reminder that employers have an obligation not to discriminate against job applicants, as well as employees.

If you have any questions, please contact our team of employment law experts. ■

jenny.hawrot@willans.co.uk
linkedin.com/in/jennyhawrot/

Mutually agreed termination: Can it amount to an unfair dismissal?

Mr Riley was employed by Direct Line as a home claims advisor. He had autism spectrum disorder, anxiety and depression, which amounted to a disability under the Equality Act.

Between 2014 and 2017, Mr Riley was absent from work due to his disabilities on a long-term basis. A phased return was attempted but failed and a medical report produced by UNUM (the employer's private medical insurer) said he would never be able to return to work.

Direct Line and UNUM told Mr Riley that he would receive salary payments from UNUM if his employment ended. After taking time to consider his options and fully understand the proposal, Mr Riley agreed that his employment would end and he would receive the UNUM payments. The next day, Direct Line wrote to him terminating his employment.

Mr Riley brought a claim for unfair dismissal. The ET found that he had not been dismissed because the termination was mutually agreed by both parties. The Employment Appeal Tribunal upheld the decision, finding that the termination was mutually consensual, and he was not tricked or coerced into agreeing that his employment would end.

What should you do?

This case highlights the importance of keeping detailed notes of all conversations when mutual termination is discussed and agreed. Communication is key and employees should be made fully aware of arrangements and be given time to consider any mutual termination proposals. ■

klara.grmelova@willans.co.uk
linkedin.com/in/klaragrmelova/

When do the imposition of new terms of employment amount to a dismissal?

In *Jackson v University Hospitals of North Midlands NHS Trust* (the trust), the Employment Appeal Tribunal (EAT) held that the employment tribunal (ET) had failed to apply the correct test when determining whether the imposition of new terms and conditions of employment amounted to a dismissal (known as 'Hogg dismissal').

Ms Jackson, the claimant, was employed by the trust as a band six nurse under the NHS pay and grading system known as 'Agenda for Change' (AfC), which was incorporated into her employment contract. Under AfC, the claimant was entitled to an enhanced redundancy payment. However, this payment would be forfeited if she left her employment 'before expiry of notice'.

In 2018, the trust decided to reduce the number of band six roles and the claimant was among those affected. She was offered the opportunity to apply for a remaining band six position but was unsuccessful.

Consequently, the trust informed her that she would be moved to a band five role and presented her with new terms and conditions. The claimant refused this, claiming that she should have been made redundant instead.

In response, the trust accepted her position and served notice of termination. The claimant disagreed with the termination date and resigned, claiming constructive dismissal. The trust informed her that by leaving before the expiry of her notice, she forfeited her entitlement to the enhanced redundancy payment.

The claimant brought a claim arguing she was unfairly dismissed and that she was owed a redundancy payment. The ET upheld her unfair dismissal claim and her claim for a statutory redundancy payment, but rejected the claim for contractual redundancy pay finding that the imposition of the new terms did not amount to a dismissal. The claimant appealed.

The EAT held that the ET failed to conduct a thorough comparison between the band five and six positions to determine if the new terms were sufficiently different to amount to a dismissal. As a result, it remitted the point back to the ET for a proper factual analysis.

What should you do?

This case serves as a reminder that unilaterally imposing new terms and conditions of employment carries various risks and, in certain circumstances, can amount to the dismissal.

The decision by the EAT underscores that the greater the difference between the terms of employment before and after the change, the higher the likelihood that a tribunal may determine a dismissal has occurred. ■

matthew.clayton@willans.co.uk
linkedin.com/in/claytonmatthew/

Business immigration webinar: Right to work checks | Tuesday 21 November (9:30-11am)

Join our *Legal 500*-rated business immigration team for the latest webinar covering right to work checks. Looking into what your organisation should be taking into consideration, this webinar – followed by a Q&A session – will be useful for directors and senior executives with responsibility for HR and risk management issues, as well as business owners, HR professionals and in-house legal advisors.

To register your interest, please visit our website by clicking here.

TUPE & share incentive plans

As in *Ponticelli Limited v Gallagher*, Mr Gallagher's employment was transferred under the Transfer of Undertaking (Protection of Employment) Regulations (TUPE) to Ponticelli.

Before the transfer, Mr Gallagher participated in a share incentive plan (SIP) which allowed him to acquire shares in the company. It was a voluntary plan and was not detailed in his employment contract.

After the transfer of his employment, Ponticelli wrote to Mr Gallagher refusing to continue the SIP or provide an equivalent scheme and sent him a compensatory payment of £1,855.

Mr Gallagher argued he was entitled to participate in the SIP as a result of the TUPE transfer and brought a claim against Ponticelli.

The employment tribunal (ET) found in favour of Mr Gallagher. It held that the share scheme was a benefit exclusively for employees, and therefore formed part of Mr Gallagher's overall financial 'package'.

Since we looked at this case in February's issue of ***Dispatches***, the Court of Session has upheld the ET's decision, stating that, despite the SIP not being specified within his employment contract, it was "in connection with that contract," therefore Ponticelli was ordered to provide a substantially equivalent benefit to Mr Gallagher.

What should you do?

This case highlights the importance of full due diligence when acquiring a business.

Fundamentally, as an employer it is important that you do not overlook the significance of SIPs that are linked to employment, and that you provide an equivalent where an exact continuation is not possible.

If you require assistance on any of the topics above, please do not hesitate to contact our team. ■

jenny.hawrot@willans.co.uk
linkedin.com/in/jennyhawrot/

Employee whose termination date was postponed due to his health issues held not to be unfairly dismissed

In *Garcha-Singh v British Airways Plc*, the Employment Appeal Tribunal (EAT) considered whether it was unfair to dismiss an employee and consequently postpone the termination date on several occasions due to the employee's health issues.

The claimant was employed by the respondent as a member of the cabin crew. The relevant period of his absence began in August 2016, and he was issued a notice of termination of employment a year later. The respondent initially set the termination date for 5 January 2018. However, they stated that such a date was 'not set in stone' and that the claimant was promised support in the interim.

The initial termination date was postponed on several occasions, mostly to try and allow the claimant to return to work. During such time, the claimant was signed off sick and raised a grievance about the extension of his termination date.

Although the claimant claimed that he was fit to return to work in December 2018, he was unwilling to put forward any medical evidence of his fitness or to undergo an assessment. Consequently, the respondent decided not to extend the termination date further, and the claimant was dismissed on 21 December 2018.

The claimant then brought an unfair dismissal claim, arguing that the extension of time was in breach of Respondent's Absence Management Policy, which was part of his contract of employment.

Both the ET and the EAT found in favour of the respondent. The EAT further stated that the relevant policy was not breached and that the extensions were in favour of the claimant. The EAT found the respondent's actions to be within a range of reasonable responses in the circumstances and dismissed the appeal.

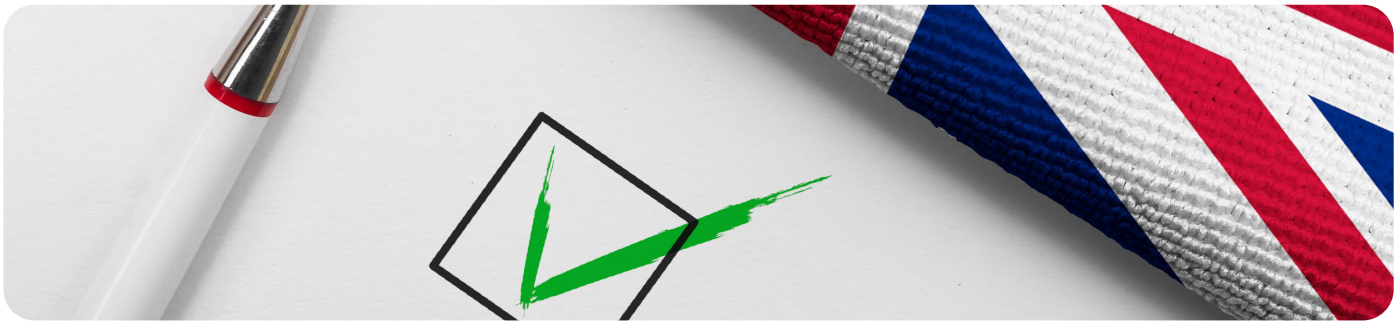
What should you do?

The dismissal of an employee on long-term sick leave comes with various difficulties. Employers facing such a decision need to weigh their steps very carefully to avoid the risk of unfair dismissal and disability discrimination claims.

While in this case the EAT highlighted that any such extension was to the claimant's advantage and was intended to support him in returning to work, uncertainty around a termination date could cause anxiety for an employee, and undermine any later argument that notice had been duly served. ■

Business immigration

Fines for illegal working to increase substantially in 2024



The Home Office has announced plans to more than triple fines for employers who are employing illegal workers.

The civil penalty for the first violation of the relevant legislation will increase to £45,000 per illegal worker, from £15,000. Repeated violations may result in fines as high as £60,000 per migrant worker, compared to the current £20,000 fine.

This increase in fines is a part of the government's effort to reduce the number of illegal migrants entering the UK. The Home Office hopes that the higher fines will help identify and reduce the number of illegal migrants in the UK, ensuring that only those eligible can work, receive benefits and access public services in future.

Employers caught employing illegal migrants are already published by the Home Office in its quarterly report, which could cause significant reputational damage. Furthermore, the Home Office has announced its intention to strengthen actions against licensed businesses that employ illegal workers. Details about the specific actions the government will take have not been disclosed yet, but consultations on this matter are expected later this year.

The changes are scheduled to be introduced in early 2024, but no dates have been confirmed yet. Stay tuned to our updates for more information on this issue.

Compliance is a key tool to prevent your business from suffering any financial or reputational damage caused by employing illegal workers. Join our *Legal 500*-rated business immigration team for a refresher session on the right to work on **21 November**. The link to register can be found here. ■

hayley.ainsworth@willans.co.uk
linkedin.com/in/hayleyainsworth/

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.

Employment law

Matthew Clayton
matthew.clayton@willans.co.uk

Jenny Hawrot
jenny.hawrot@willans.co.uk

Charities & not-for-profit

Alasdair Garbutt
alasdair.garbutt@willans.co.uk

Litigation & dispute resolution

Paul Gordon
paul.gordon@willans.co.uk

Nick Southwell
nick.southwell@willans.co.uk

Corporate & commercial

Chris Wills
chris.wills@willans.co.uk

Rishi Ladwa
rishi.ladwa@willans.co.uk

Real estate & construction

Alasdair Garbutt
alasdair.garbutt@willans.co.uk

Nigel Whittaker
nigel.whittaker@willans.co.uk

Divorce & family law

Sharon Giles
sharon.giles@willans.co.uk

Jonathan Eager
jonathan.eager@willans.co.uk

Wills, trusts & probate

Simon Cook
simon.cook@willans.co.uk

Rachel Sugden
rachel.sugden@willans.co.uk

Tom O'Riordan
tom.oriordan@willans.co.uk

Agriculture & estates

Adam Hale
adam.hale@willans.co.uk

Residential property

Suzanne O'Riordan
suzanne.oriordan@willans.co.uk

Simon Hodges
simon.hodges@willans.co.uk

Willans LLP solicitors

34 Imperial Square,
Cheltenham
Gloucestershire GL50 1QZ
+44 (0)1242 514000

law@willans.co.uk

www.willans.co.uk

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on Facebook, Twitter &
LinkedIn