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12 Days of Employment Law Developments

Everybody loves a list at this time of year. With the end of year fast approaching, everyone is working through their gift lists, to-do lists and grocery lists for their holiday celebrations. For the 12 Days of Christmas, we bring you this additional list of 12 employment law developments this year. There is no need to sing this one.

We wish you warmest wishes for a safe and happy holiday season.

ON THE FIRST DAY OF CHRISTMAS, THE EAT GAVE TO ME… A REMINDER TO REFRESH YOUR ANTI-HARASSMENT POLICY

In February this year, the Employment Appeal Tribunal (**EAT**) held that an employer's anti-harassment and diversity training was insufficient to meet the "reasonable steps" defence in a claim of racial harassment by one of its employees. The training delivered two and three years earlier had become "stale" and required refreshing.

Employers are vicariously liable for acts of harassment or discrimination committed by their employees unless they can show they took "all reasonable steps" to prevent the harassment or discrimination.

In considering the reasonableness of steps that have been taken, consideration will be had to the extent to which the steps were likely to prevent harassment. The EAT noted that brief and superficial training is unlikely to have a substantial effect in preventing harassment. It is also unlikely to have long-lasting consequences. Thorough and forcefully presented training is more likely to be effective and to last longer. The EAT drew an analogy between effective training and the COVID-19 vaccine – we are interested not only in how effective it is in preventing harassment but also how long the response will last.

In this case, the fact that the accused employee thought he was engaging in no more than "banter" and that others had heard racist comments be made but not reported them indicated that whatever training there had been was no longer effective.

ON THE SECOND DAY OF CHRISTMAS, THE SUPREME COURT GAVE TO ME… THE LEADING DECISION ON WORKER STATUS

In what is now the UK's leading judgment on worker status, the Supreme Court held that drivers engaged by Uber were "workers" rather than self-employed contractors. The key reason for this was the Court's conclusion that Uber had a high degree of control over the drivers, including by setting the fares and by imposing "penalties" if too many trips were declined. The drivers were found not to be free to develop individual relationships with customers and provided a standardised service.

Yet a few months later in June 2021, the Court of Appeal rejected an appeal that Deliveroo riders were workers, reminding us just how fact specific these cases are. The right of substitution is a key distinguishing feature that sets the Deliveroo judgment apart from the Uber judgment, despite the similarity in business models. The Deliveroo riders' contracts included an unlimited right of substitution. More importantly that right of substitution was genuine and actually used in practice.

ON THE THIRD DAY OF CHRISTMAS, HMRC GAVE TO ME … AN IR35 TAX REFORM

On 6 April 2021, we saw the delayed implementation of changes to the off-payroll working rules (**IR35**) which can apply if a contractor provides their services to a client through their own personal services company (**PSC**) or another type of intermediary. IR35 applies when the contractor would ordinarily be regarded as an employee if they were hired directly by the client rather than via an intermediary. In these circumstances, PAYE and NICs must be paid in respect of the fees received by the PSC for the services.

The changes shifted the responsibly for assessing whether IR35 applies to the end-user client (instead of the contractor), requiring all medium and large clients in the private sector to:

- assess the employment status (for tax purposes) of self-employed contractors who provide labour through PSCs; and
- where IR35 applies, deduct income tax and employee NICs from any payments made to the PSC and pay employer NICs.

The government promised a "soft landing" for the first year of the changes to give businesses time to adjust. HMRC has said that any mistakes made in the first 12 months will not be penalised, provided the company "took reasonable care to apply the off-payroll working rules correctly". Next year, we may well see an increase in scrutiny of "disguised employees".

Employers should ensure their contracts have been updated to reflect the new regime and should use the HMRC online assessment to ascertain if there is an obligation on the company to deduct income taxes in respect of any contractors engaged through an intermediary.

ON THE FOURTH DAY OF CHRISTMAS, THE #METOO MOVEMENT GAVE TO ME… A NEW DUTY FOR EMPLOYERS TO PROACTIVELY PREVENT SEXUAL HARASSMENT

In July, the government published its long-awaited response to its 2019 consultation on measures to combat sexual harassment in the workplace and strengthen existing legal protections. Most significantly, the government has committed to introducing a new proactive duty on employers to prevent sexual harassment in the workplace and to reintroduce protections from third-party harassment.

The government has said it anticipates that the new duty will require employers to take all reasonable steps to prevent harassment. Under this reformulation of existing laws, an employer would still be required to take reasonable

steps (as they are now, assuming they want to be able to defend any claims) but could potentially be liable for failing to take preventative action without the need for an incident to have occurred.

The government is also likely to extend the time limits for bringing claims under the Equality Act 2010 (**EqA**), but this is still being considered. No timelines have been indicated and it is likely to be some time before any changes come into effect. Read our August alert for further details of the proposals and next steps for employers.

ON THE FIFTH DAY OF CHRISTMAS, THE COURT OF APPEAL GAVE TO ME … CLARITY THAT A LACK OF APPEAL WILL NOT BE DETERMINATIVE OF A REDUNDANCY'S FAIRNESS

The ACAS statutory Code of Practice on Disciplinary and Grievance Procedures requires employers to offer a right of appeal for misconduct or poor performance dismissals. A failure to do so will render the dismissal unfair and potentially increase the level of compensation awarded. However, the Code does not expressly apply to redundancies or dismissals for some other substantial reason ("**SOSR**"), which has caused uncertainty as to whether employers need to offer an appeal in these circumstances.

A Court of Appeal decision in September confirmed that the absence of an appeal in an otherwise fair redundancy procedure does not, of itself, make the dismissal unfair. The absence of an appeal will be one of many factors to be considered in determining the overall fairness of a redundancy. However, no reasonable employer would refuse to consider an appeal in circumstances where an employee had a right of appeal, for example in an employment contract or policy.

In another key case this year, the EAT confirmed that, while an appeal will normally be part of a fair procedure for a SOSR dismissal, that will not invariably be so. In this case a founder and director's SOSR dismissal was held to be fair without a right of appeal where the Board had lost confidence in his ability to change his ways following a series of incidents. The EAT noted the founder's difficulty in accepting that the company was no longer his and an independent review had concluded he would "*sabotage any CEO coming into the business*". The EAT held this was not a case where the threat the founder posed to the company's future could be addressed in a retraining programme or where different managers might be able to work with him more effectively. If there is persuasive evidence that a further appeal meeting would be "truly pointless", a failure to offer an appeal may not render the dismissal unfair.

ON THE SIXTH DAY OF CHRISTMAS, THE UK GOVERNMENT GAVE TO ME… ONE WEEK'S UNPAID CARER'S LEAVE

In September 2021, the UK Government confirmed its intention to introduce a new statutory right for employees with unpaid caring responsibilities to take up to one week of unpaid leave per year (five working days). This will be a day one right available to employees who provide care for a dependant with a long-term care need. A 'long-term care need' will be defined as a long-term illness or injury, disability, or issues related to old age. There will be exemptions from the long-term requirement in the case of terminal illness. The week of leave could be taken as one block or as single individual or half days. For further details, please see our October Alert.

ON THE SEVENTH DAY OF CHRISTMAS, RISHI SUNAK GAVE TO ME … THE EXTENSION OF THE FURLOUGH SCHEME (AGAIN)

After several extensions, the Coronavirus Job Retention Scheme (a.k.a the furlough scheme and the gift that kept on giving) finally came to an end on 30 September 2021. The scheme is reported to have paid out a total of £70 billion over the course of 18 months, supporting 11.6 million jobs in total.

Now that the scheme has come to an end, HMRC's attention has shifted to reviewing claims to ensure their accuracy. The Treasury has estimated that fraud and error in the scheme could be as high as 10% (up to £7 billion). HMRC has set up a taskforce to review and investigate employers' claims, and require repayment in certain circumstances. HMRC has the right to audit claims for five years after the scheme ended. Employers should retain their claim documentation (including furlough agreements) and ensure these are collated and stored somewhere easily accessible.

Businesses who have claimed under the scheme must declare any amounts received on their company tax return and confirm they were entitled to this amount. Employers should take proactive steps to review and audit their claims. Given the short timeframe in which the scheme was introduced and the rapidly evolving (and at times inconsistent) guidance, it is unsurprising that errors and overpayments have occurred.

ON THE EIGHTH DAY OF CHRISTMAS, A FIRST INSTANCE EMPLOYMENT TRIBUNAL GAVE TO ME … PROTECTION FROM ASSOCIATIVE INDIRECT DISCRIMINATION

In this first instance Tribunal decision, the employer applied a policy which required employees of a certain grade to be office based. The claimant contended that she needed to work from home because she was the carer for her disabled mother and that she was selected for redundancy due to indirect associative disability discrimination (as a result of her homeworking).

Discrimination because of association with a person with a protected characteristic is only expressly prohibited by the UK's EqA in relation to direct discrimination and harassment. Indirect discrimination claims could previously only be brought by a claimant who themselves had the protected characteristic.

The Tribunal allowed the indirect disability discrimination claim and held that the EqA should be interpreted as also prohibiting associative indirect discrimination in order to comply with EU case law. In 2015, a European Court of Justice decision, *Chez Razpredelenie Bulgaria*, had established that the concept of associative discrimination could in principle be extended to indirect discrimination. Post-Brexit, UK courts still have to follow existing ECJ case law unless the Supreme Court or Court of Appeal have given a contrary ruling since 31 December 2020.

While this is only a first instance decision, the extension of associative discrimination is noteworthy. Many employers are in the process of designing new policies relating to home or hybrid working arrangements. When designing these policies, employers should consider the potential for disadvantage to individuals associated with someone with a protected characteristic and consider whether the policy is a proportionate means of achieving a legitimate aim.

ON THE NINTH DAY OF CHRISTMAS, THE UK GOVERNMENT GAVE TO ME… PLANS TO ENSURE THAT TIPS ARE PAID TO STAFF WITHOUT DEDUCTIONS

In September 2021, the government announced plans to introduce new legislation that will require employers to pass on 100% of tips to staff without deductions (save for tax purposes). A new statutory Code of Practice will be introduced setting out how tips should be distributed to ensure fairness and transparency. There will also be a new right for workers to request information relating to their tipping record, which employers will need to respond to within four weeks. Employees will be able to bring claims for any breaches in the Employment Tribunal, with employers liable for compensation in addition to fines. The plans are estimated to affect around two million hospitality workers.

ON THE TENTH DAY OF CHRISTMAS, THE EAT GAVE TO ME… A FINDING THAT MENOPAUSAL SYMPTOMS CAN BE A DISABILITY

In *Rooney v Leicester City Council*, the EAT held that an Employment Tribunal had incorrectly decided that a woman suffering with menopausal symptoms was not disabled. The council worker suffered from a wide range of

menopausal symptoms including migraines, hot flushes, insomnia, fatigue, confusion, difficulty concentrating and depression. These symptoms had caused her to spend long periods of time in bed due to fatigue, forget to attend various appointments and lose personal possessions.

This is not the first case where menopause has met the legal definition of disability. There is a growing number of tribunal claims in which employees are alleging menopause-related discrimination or harassment either on the basis of sex, age and/or disability discrimination. Symptoms will not always be so severe that they amount to a disability and therefore employers should be mindful of when the duty to make reasonable adjustments might arise.

We are seeing a growing momentum around the impact of menopause in the workplace. Many employers are proactively implementing practical support for staff affected by menopause, encouraging conversations about menopause as a workplace issue and training managers to have supportive conversations with their employees, as well as making them aware of the impact menopause can have on an employee's wellbeing, attendance and performance.

ON THE ELEVENTH DAY OF CHRISTMAS, THE SUPREME COURT GAVE TO ME … CONFIRMATION THAT TRADE UNIONS DO NOT HAVE A VETO OVER EMPLOYERS MAKING DIRECT OFFERS TO THEIR MEMBERS

The Supreme Court issued a test case in October on the interpretation of section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992. Section 145B prevents employers from making offers to staff who are members of a recognised union if acceptance of the offer would have the "prohibited result" of meaning their terms of employment will no longer be determined by collective bargaining.

In this case, the employer had reached an impasse in negotiations with a recognised union over annual pay and had written to its workforce directly to offer them a deal. The EAT had previously held that the prohibited result occurs where offers, if accepted, result in a term being agreed directly rather than through collective bargaining. In overturning this interpretation, the Supreme Court found this would effectively give trade unions a veto over any direct offer to any employee concerning any term of the contract and that only Parliament could properly make such a change.

The Supreme Court ruled that the effect of s.145 B is to prohibit employers making direct offers to their workforce before the collective bargaining process has been exhausted. Direct approaches can be made where the employer has a genuine belief that collective bargaining has been followed and exhausted.

ON THE TWELFTH DAY OF CHRISTMAS, THE PANDEMIC GAVE TO ME … HOMEWORKING FLEXIBILITY

The pandemic forced flexible working on many employers and employees, with many businesses adopting an increased flexible approach to balancing work and home life in the long-term. 85% of the clients who took our survey earlier this year had offered staff flexible working hours to respond to the challenges presented by the pandemic, particularly for working parents and carers. In addition to an increase in remote working, there is an increased focus on "flexi-time" and many of our clients have confirmed they will continue to have a hybrid model of home and office working in the future.

Public consultation has recently closed on proposals to "reshape" (but not overhaul) the statutory right to request a flexible working regime. These include reviewing the business reasons an employer can rely on for refusing a flexible working request and requiring the employer to consider alternative arrangements before refusing a specific request. Further details of the proposals are set out in our October Alert.

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