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Client Alert

Global Human Capital and Compliance

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April Employment Law Round-Up: Platform Workers, Non-Competes and Beyond

Although many employment changes in the UK are largely on ice until after the election later this year, April has seen a number of employment law developments – largely from the courts. We highlight some recent decisions, on protection for striking workers, reasonable adjustments for disabled employees, an unhelpful decision on claims for holiday pay, and a more helpful decision limiting whistleblowing claims.

We also flag some developments outside of the UK, including the final version of the Platform Workers Directive and the FTC's near-total ban on employee non-compete agreements in the US.

EU AGREES ON THE LONG-PROMISED PLATFORM WORKERS DIRECTIVE

After more than two years of intense negotiation and debate, EU Member States finally reached agreement last week on the Platform Workers Directive (**PWD**). The final version of the PWD is a significantly watered down version of what was originally proposed in December 2021. The initial draft would have introduced a legal presumption that gig workers had employment status when at least two of five criteria were satisfied. The proposal for an EU-wide test for determining employment status has been scrapped after Member States failed to reach agreement on the criteria.

The final PWD still creates a presumption of employment status in certain circumstances but now leaves it to each individual Member State to decide on what basis this will happen. They will do this by setting their own national rules which will assume employment when "*facts indicating control and direction according to national law, collective agreements or practice*" are found, with "*consideration to case-law of the Court of Justice"*. This means that Member States are essentially free to set out their own framework for this presumption and can look to their existing

national tests as to what constitutes 'control' and 'direction'. Once a presumption is established, the burden is then on the employer/ platform to prove that there is no relevant control or direction under local law.

While this is a far cry from harmonising the legal status of platform workers across the EU, it will at least require Member States to lay down their criteria for the determination of employment status and introduce a presumption of employment as a starting point. The PWD also lays down the first EU rules on the use of artificial intelligence in the workplace and grants platform workers the right to receive adequate information about categories of decisions made or supported by automated systems. The processing of certain types of personal data, such as biometric data or data concerning the worker's emotional or psychological state, will be prohibited under the PWD.

Once in force, Member States will have two years to implement the PWD into their national legislation. As a result of Brexit, the UK will not have to adopt the PWD, but it will have significant implications for platforms based in the UK with workers located in the EU and the UK government may well take the PWD into account if and when it circles back to its own Good Work Plan.

SUPREME COURT RULES THAT UK TRADE UNION LAW BREACHES WORKERS' HUMAN RIGHTS

On 17 April 2024, the Supreme Court ruled that section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 (**TULRCA**) breaches workers' rights by failing to protect them against *sanctions short of dismissal* when taking part in lawful strike action during working hours.[i] The case was brought by UNISON on behalf of a social care worker who was suspended by her employer after she became involved in strikes over pay cuts for sleep-in shifts, and lost some additional paid allowances and was not allowed to participate in the strike action.

The Supreme Court found that UK legislation failed to give employees any protection against sanctions short of dismissal, other than where outside of working hours or where an employer has agreed to their trade union activities. In doing so, it made a declaration that section 146 is incompatible with Article 11 of the European Convention of Human Rights, which protects freedom of assembly and association with trade unions. If employees can only take strike action by exposing themselves to detrimental treatment, the right to take lawful strike action "dissolves".

Following the declaration of incompatibility, Parliament will consider whether to change the law to ensure compliance with Article 11. However, until the law is changed, section 146 of TULRCA will continue to have force and effect, meaning than other than the threat of reputational damage there are no protections for striking employees or workers against sanctions short of dismissal.

The decision comes at a key period for workers' rights following a surge in industrial action in the public sector. Any change is likely to take place after the upcoming election given Labour has committed to reform trade union laws, if elected.

EAT FINDS THAT A TRIAL PERIOD IN AN ALTERNATIVE ROLE CAN BE A REASONABLE ADJUSTMENT

The EAT has upheld a ruling that an employer failed to make reasonable adjustments when dismissing a disabled employee instead of offering them a trial period for an alternative role.

The case concerned an employee who was diagnosed with multiple sclerosis. Various adjustments to working arrangements were made however the employer eventually decided there was no viable way that he could continue in his physically demanding role. The employee applied for a service administrator role within the company but was unsuccessful following maths and verbal assessments and due to not having relevant skills and experience. The

employee was dismissed on the grounds that there were no further adjustments that could be made which would enable him to remain in his original role and that there were no suitable alternative roles.

The EAT upheld the Tribunal's decision that a four-week trial period was a reasonable adjustment for the employer to make as there was a 50% chance that he would have succeeded in the role. Factors that were relevant to this being a reasonable adjustment included the role being a more junior support role to the field role that the employee had been doing and that his field role had included a number of administrative functions (such as report writing and stock check) that would have been relevant experience. Further, he could have been trained on Excel and, although he had performed poorly on the tests, his field role was already expected to require those skills. A trial period could have remedied the employer's concerns about his performance in the interview process.

On a related note, the Department for Work and Pensions has just issued new guidance aimed at helping managers to better support disabled people in the workplace. It covers areas such as employers' legal responsibilities, reasonable adjustments, managing sickness absence and how to discuss performance and progression.

EAT RULES THAT A WHISTLEBLOWING CLAIM CANNOT SUCCEED IF THE DECISION-MAKER IS NOT AWARE OF THE SUBSTANCE OF THE DISCLOSURE

The EAT has held that the decision-maker in a whistleblowing claim must know "at least something" about the substance of the employee's complaints or concerns for the employer to be found liable for automatically unfair dismissal.[ii]

In this case, the employee had raised alleged protected disclosures about the CEO to two members of HR. The employee claimed that HR told the CEO of these protected disclosures, who later made the decision to dismiss him.

The EAT found that the concerns had not been communicated to the CEO in sufficient detail nor any mention of the dismissed employee as the source of the concerns. The CEO had simply been told that "lots of complaints" about her management style had come out of a workshop with junior staff.

This decision provides comfort that the decision-maker in a whistleblowing case must have some knowledge of the substance of the disclosure to be liable for automatically unfair dismissal (for which uncapped compensation can be awarded), a point which, surprisingly, has not been previously considered. The EAT did however note that where the decision-maker is deliberately kept in ignorance of the substance or content of the disclosure and a 'bogus dismissal' is then invented, the Employment Tribunal would still be permitted to 'see through' that contrivance (in accordance with the Supreme Court's decision in *Royal Mail Group Ltd v Jhuti).*

LATEST DECISION ON HOLIDAY PAY – EAT CONSIDERS LINKING A SERIES OF HISTORIC UNDERPAYMENTS

As we previously reported, last year the Supreme Court confirmed that employers can no longer rely on a three month gap in holidays to prevent earlier claims for underpaid holiday. A 'series' of historic underpayments of holidays can be linked together where there is a sufficient similarity of subject matter, for example a "common fault or unifying vice".[iii]

In a case concerning British Airways cabin crew, the EAT found that failing to include one or more kinds of allowances in holiday pay satisfied the 'sufficiently similar' test set out by the Supreme Court. The different kinds of allowances are not approached separately. The EAT commented that when considering whether there is a sufficient connection between deductions, the Tribunal should take into account the statutory purpose of protecting vulnerable workers and look at the overall factual matrix. This means that Tribunals have some discretion as to whether they allow claimants more time to bring pay claims, where they relate to different types of payments or allowances.

IN OTHER NEWS THIS MONTH …

- From 6 April 2024, employees are now entitled to one week of unpaid leave every 12 months to provide or arrange care for a dependant with a long-term care need. ACAS has issued new guidance to coincide with the new statutory right to carer's leave.
- Extended redundancy protection for pregnant employees and new parents also took effect from 6 April.
- Changes to the right to request flexible working also took effect on 6 April. ACAS has now published the revised Code of Practice on requests for flexible working that will apply going forward.
- On 23 April 2024, the US Federal Trade Commission issued a near-total ban on employee non-compete agreements, with a narrow exception for existing agreements with senior executives. Please see our full Client Alert on the topic here, and let us know if you would like to join our client briefing on **Thursday, May 2 from 12:00-1:00 p.m. ET.** The UK government last year threatened to go in the same direction, limiting non-competes to three months and with no senior executive exception. But there is no date or confirmed plan to progress this intention and the changes may not take place given the general election later this year.

[i] *Secretary of State for Business and Trade v Mercer* [2024] UKSC 12.
[ii] *Nicol v World Travel and Tourism Council* [2024] EAT 42.
[iii] *British Airways Ltd v De Mello & Ors* [2024] EAT 53.