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Client Alert

Global Human Capital and Compliance

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Clashing beliefs on social media- landmark case gives employers guidance and other updates

This month's update covers the latest on the Employment Rights Bill and proposals for new leaves. We also explain significant new case law including a key decision providing guidance on balancing competing protected beliefs and freedom of speech on social media and what employers need to show to defend a forced retirement.

EMPLOYMENT RIGHTS BILL: TWISTS AND TURNS AHEAD

The Employment Rights Bill is changing shape as it moves towards becoming law. The following changes were recently proposed:

- The Bill would now extend the time limits within which individuals can make a claim to the Employment Tribunal from three to six months for almost all types of claim.
- Small businesses may be exempted from some of the new rules.
- There is ongoing discussion about the impact of removing the two-year unfair dismissal qualifying period - specifically whether this could deter businesses hiring new staff. This is the 'headline' change in the Bill.

The government ran four separate public consultations at the end of last year on aspects of the Bill. We already know that there will be changes resulting from these to the statutory sick pay rules – details to follow. The other consultations are yet to report back.

We expect further consultations to take place in the near future in relation to other hotly debated matters arising out of the Bill.

CLASH OF BELIEFS - SOCIAL MEDIA DISMISSAL UNLAWFUL

The Court of Appeal has ruled that the dismissal of a teacher for sharing posts on her private Facebook page criticising the teaching of 'gender fluidity' was discriminatory based on religion or belief.

The teacher had reshared a petition against children being "brainwashed" by a government policy on sex education in schools which "promoted" same-sex relationships and gender-fluidity. She had also reshared messages criticising "far-left zealots" for their "devious scheme to supplant traditional gender roles" and "cramming their perverted vision of gender fluidity down the throats of unsuspecting school children". A parent had complained to the school that these posts were "homophobic and prejudiced".

The Court held that the school was entitled to object to the offensive language in the posts but that dismissal was disproportionate – meaning the school was liable for discrimination.

The Court drew distinctions between:

- Dismissing an employee because they have *expressed a protected belief*. This will be unlawful direct discrimination; and
- Dismissing an employee because of *the way in which* a protected belief was expressed. This will not constitute unlawful direct discrimination provided the employer can objectively justify its decision – which is not a given.

Under discrimination principles the employer needs to show it had a legitimate aim it was seeking to protect and that it acted proportionately. These cases are finely balanced - the first court in this case had found in favour of the employer - and often lead to appeals. The following principles from this judgment can help guide employers:

- Where and how were the 'objectionable' views expressed? In this case, the teacher had not evidenced discriminatory attitudes at work, the posts were not made to incite hatred, and the language was generally not her own but was reshared (save for the "brainwashing" comment). The views were on the employee's private Facebook account. These all counted against termination as a valid response.
- What was the impact on the employer? Here, the posts contained nothing which suggested any connection with the school. The posts had no proven negative reputational impact on the school despite one parent complaining. The risk of potential future reputational damage was not enough to justify termination.
- The employee's motivation is important - cases involving religion or belief need special care. Where an employee is not expressing their beliefs an employer will not need the same balancing exercise to disprove discrimination. Instead of discrimination the main risk will be unfair dismissal – for which an employer needs to show that it acted reasonably.

This decision shows the risks involved in handling these cases, especially in a polarised environment.

Higgs v Farmor's School [2025] EWCA Civ 109

DISABILITY INSURANCE COVER: DOES THE EMPLOYER OR THE INSURER FOOT THE BILL?

Disability insurance (sometimes known as 'income protection' or 'permanent health insurance/PHI' in the UK) is a valuable benefit that pays a percentage of earnings where an employee goes onto long term sick leave. Given the value of the benefit and the fact that employees who receive it may never return to work, litigation is common – and costly.

In a recent case, the Employment Appeal Tribunal had to consider whether the employer was liable to pay benefits where the insurer refused to pay out. The court scrutinised the wording of the employment documentation. It found

that the employee's contract incorporated separate statements which gave a firm commitment to paying staff a proportion of their salary. It did not make payout conditional on the insurer approving the claim, or state that the employer was not liable if the insurer declined to provide cover. The case highlights the need to be clear as to which separate policies and statements form part of the employment contract, and which are discretionary, and whether benefits are guaranteed or are subject to the insurer's determination.

Although the employee did not properly raise the point, the contract wording is also key to whether an employer can terminate for reason of incapacity where it would result in an employee losing disability benefits. Very clear language is needed in the contract to be able to potentially terminate for this reason - although the same principles do not apply to termination for other reasons such as misconduct and role elimination.

McMahon v AXA ICAS Ltd [2025] EAT 8

WOMEN'S RIGHTS MILESTONE: NEW LEAVE FOR MISCARRIAGE AND DOMESTIC ABUSE

Separately to the Employment Rights Bill, proposals for enhanced rights for miscarriage leave and leave for victims of domestic abuse have been introduced. Although neither proposal is guaranteed to become law, these leaves would reflect the direction of travel in other countries in Europe.

Miscarriage leave: statutory bereavement leave is proposed for women who suffer miscarriage, ectopic pregnancy, molar pregnancy, IVF embryo transfer loss and terminations for medical reasons. Proposals would ensure women are able to access the support they need during the leave period. Currently statutory parental bereavement leave only applies to those suffering pregnancy loss after 24 weeks.

Domestic abuse leave: two weeks paid "safe leave" is proposed for victims of domestic abuse. In a speech in parliament introducing the Bill, it was noted that the financial impact on victims of domestic abuse in costs of fleeing an abuser and building a new life average £50,000. The impact on attendance at work of fleeing domestic abuse, for example taking sick leave or time off to attend court proceedings, only exacerbates that financial impact. These steps would align the position in the rest of the UK with Northern Ireland, where victims of domestic abuse receive 10 days of paid leave each year.

TIME TO 'RETIRE' YOUR RETIREMENT POLICIES? COMPULSORY RETIREMENT WAS UNJUSTIFIED AGE DISCRIMINATION

A law firm partner has succeeded in a claim of age discrimination when compulsorily retired at age 63. Most employers removed retirement ages when the Equality Act came into force in 2010, other than in narrow sectors and roles with demonstrable health and safety considerations. But some professional service partnerships have tried to keep compulsory retirement, relying on 'objective justification' such as the need to create a pathway for younger staff to be promoted.

In a recent case the employer brought in a policy that after the age of 60, partners needed to show 'exceptional performance' to be kept on and would only be extended for fixed terms, The Court found that the refusal to extend him for a second time, aged 63, was unlawful age discrimination. The performance and conduct issues that were part of the refusal to extend should have been managed through the usual processes. The grounds the firm relied on to justify retirement – avoiding the need for performance management (and resulting workplace conflict) and succession planning/inter-generational fairness – were potentially valid. But in this case, there was no evidence that they in fact applied either at the point the policy was set or that they had that effect in practice. Assumptions around declining performance or demotivating effect on junior/younger staff were not enough and showed a discriminatory mindset.

This case is a reminder that identifying potentially legitimate grounds is not enough to avoid age discrimination – there needs to be a documented process at the time the process is set, scrutiny as to whether the facts support those justifications, and ongoing review to show that in practice, the policy was achieving its goals. It also makes clear that there is no 'safe' age at which retirement can be imposed – but that a lower age such as 60 or 63 will be harder to justify.

Scott v Walker Morris LLP ET/1806503/2023
