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**Insights**

# UK HR TWO MINUTE MONTHLY: RELIGIOUS DISCRIMINATION; TUPE; IR35

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SUMMARY

Our first update of 2020 outlines key UK employment law developments over the last month. It includes cases on the definition of 'employee' under TUPE, the impact of a job evaluation survey in relation to equal pay, direct maternity discrimination, dress codes and religious discrimination, loss of privilege, and a recent tax tribunal decision on the application of IR35. We also outline other points of note, including the publication of the ICO's new draft guidance on Subject Access Requests.


## DISMISSAL VIOLATED EMPLOYEE'S FREEDOM OF EXPRESSION UNDER ARTICLE 10 ECHR

The European Court of Human Rights has held that an employee's right to freedom of expression under Article 10 ECHR was violated after he was dismissed for posting on a personal knowledge-sharing website.

The employee described himself in his website blogs as an expert in HR management who worked at a large bank, but did not mention his employer by name.

The employee argued that the termination of his employment breached his right to freedom of expression and appealed to the ECHR. The Court addressed four main questions when considering whether the right to freedom of expression had been infringed:

1. Nature of the speech - the Government argued that as the blog was only addressed to HR professionals (rather than to the public generally) Article 10 was not engaged. However, the ECHR noted that free speech does not only protect comments that demonstrably contribute to a debate on a public matter.

2. Motives of the author - in this case, the motive was simply to share knowledge, not to damage the bank's reputation.

3. Damage caused by the speech - the employer made no attempt to show how the posts had adversely affected its interests.

4. Severity of sanction – the employee had suffered a severe penalty as he was dismissed, with no lesser options considered

The Hungarian court had failed to carry out the requisite balancing exercise between the employee's freedom of expression and the employer's desire to protect its business interests.

WHY THIS MATTERS

The case serves as a reminder for employers of the importance of a social media policy which clearly sets out the requirements employees are expected to comply with. The scope of any such policy should take into account an employee's right of free speech.

Herbai v Hungary

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## TUPE APPLIES TO 'WORKERS' AS WELL AS EMPLOYEES

An Employment Tribunal has held that that 'workers' falling within the definition of section 230(3)(b) of the Employment Rights Act 1996, as well as employees, are protected under TUPE. TUPE defines an employee as "any individual who works for another person whether under a contract of service or apprenticeship *or otherwise* but does not include anyone who provides services under a contract for services."

In reaching its decision, the Tribunal looked at the underlying European Acquired Rights Directive (ARD), and noted that the purpose of the ARD is to preserve rights under national employment law. The Employment Judge concluded that the words "or otherwise" were intended to reflect a broader group of working relationships than traditional employment, and should include both employees and workers.

WHY THIS MATTERS

Whilst the judgment is not binding, it may lead to more workers claiming TUPE protection if the business or service they work for is sold or outsourced. Importantly however, workers cannot claim unfair dismissal protection, even in connection with a TUPE transfer, as unfair dismissal remains available only to employees.

Dewhurst v Revisecatch Ltd t/a Ecourier

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## EQUAL PAY FINDINGS SHOULD NOT EXTEND PAST THE DATE OF THE JOB EVALUATION SURVEY

The EAT has held that it wasn't open to an Employment Tribunal to extend its findings of unlawful pay disparity back into the period prior to a job evaluation study (JES) being carried out.

A dispute arose after a JES determined that an employee was not being paid the same as her comparators. The Employment Tribunal decided that the employee was entitled to equal pay with her comparators from a point in time up to a year before the JES as it felt able to assume that there had been direct discrimination in the period prior to the JES.

The Court of Appeal held that, as a JES does not have retrospective effect, the ET was not able to extend their findings back. In the absence of any evidence that there was any issue in pay prior to this point, it was only following the JES that it became clear that the employer's original justification for lower pay no longer existed. As such, the Court of Appeal held that the 'material factor defence' continued to apply until a new decision such as a pay review exercise could be identified, at which point any pay differential would need to be defended again.

WHY THIS MATTERS

This is an important decision which confirms that once a material factor defence to pay disparity is established, this will continue until a further decision (or omission) in relation to pay is made.

Co-operative Group Limited and another v Walker

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## LACK OF MUTUALITY OF OBLIGATION MEANT ARRANGEMENT FELL OUTSIDE IR35

A First-tier tax Tribunal has allowed an intermediary's appeal against HMRC's determination that IR35 applied to its arrangements. In this case, an IT consultant provided his services through his personal services company (PSC) via two agencies. Prior to setting up his PSC he had worked as an employee for one of the clients. Whilst the work carried out via the PSC was in many ways similar to that previously carried out as an employee, the Tribunal found that the lack of mutuality of obligation pointed to self-employment, noting that there was no obligation to provide the consultant with a specific amount of work or for the consultant to achieve a specific outcome, and IT projects could be cancelled at will. Whilst the mutuality of obligation point was held to be determinative, the Tribunal also considered other factors, namely that whilst the consultant's right to substitution was restricted, he had significant control over his work and could work for other clients. He was not 'part and parcel' of the client's business and had his own professional indemnity insurance and business premises.

WHY THIS MATTERS

Employment status for tax purposes is under increased scrutiny given the proposed extension of the off-payroll working rules to the private sector from April 2020. Under the draft legislation

extending these rules, responsibility for determining the tax status of such engagements shifts to the client.

RALC Consulting Ltd v HMRC

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## INTERIM INJUNCTION TO PREVENT STRIKE ACTION UPHELD BY COURT OF APPEAL

The Court of Appeal has upheld an injunction to prevent strike action on the basis that the union had interfered with the ballot.

The Communication Workers Union sent postal ballots to employees of Royal Mail, seeking support for strike action. The Union encouraged workers to intercept delivery of the ballots, open them at work and vote yes immediately.

Royal Mail argued that the ballot was unlawful and breached section 230 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). That section requires every person voting to be allowed to vote "without interference from, or constraint imposed by, the union or any of its members, officials or employees" and states that each person must "have a voting paper sent to him by post at his home address" to enable secrecy and to reduce the possibility of external interference.

The High Court granted an interim injunction on the basis that the Union had undermined the purpose of the legislation. The Court of Appeal agreed, finding that the intention of the section was for voters to receive their ballot papers at home. The Union had subverted this by encouraging employees to intercept ballot papers at work, which amounted to interference. In addition, the Union had failed to ensure that ballot papers were sent to workers' home addresses as required.

WHY THIS MATTERS

Given the unique ability of postal workers to intercept their own mail, there may be limited situations in other businesses where these circumstances would apply. However the judgment provides helpful guidance on the circumstances which may amount to interference, rendering a ballot unlawful.

Royal Mail Group Limited v Communication Workers Union

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## NO COMPARATOR REQUIRED FOR CLAIM OF DIRECT DISCRIMINATION DURING MATERNITY LEAVE

The EAT has held that the London Allowance, unlike other allowances provided for under the Police Regulations 2003, should be paid to female police officers during maternity leave as the Police

Regulations do not explicitly state otherwise.

In reaching its decision, the EAT confirmed that the employee, who claimed direct sex discrimination relating to non-payment of her London Allowance in full during her maternity leave, did not have to prove the police would have treated a male officer more favourably. A claimant who has been treated unfavourably on the ground of pregnancy or maternity has been the victim of sex discrimination and does not need to, and indeed cannot, prove that a man would have been treated differently.

Once it had been shown that the less favourable treatment was because the claimant was on maternity leave, a comparator was not required.

WHY THIS MATTERS

The case is a reminder of the special protected nature of the maternity leave period and the rights afforded to employees during this period.

The Commissioner of the City of London Police v Geldart

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## "NO BEARDS" POLICY INDIRECTLY DISCRIMINATED AGAINST SIKH WORKER

An Employment Tribunal has considered an indirect religious discrimination claim relating to a "no beards" policy. The claim was brought by a practicing Sikh.

The claimant adhered to the Sikh requirement of Kesh (the requirement that body hair not be cut). He sought work with an agency that had a "no beards" policy, which was concerned with appearance, and had been implemented in response to client demands.

The Tribunal held that the "no beards" policy was a provision, criterion or practice (PCP) for the purposes of the Equality Act 2010 which placed Sikhs generally at a disadvantage because of the requirement of Kesh. The Tribunal accepted that it was a legitimate aim for the agency to seek to comply with client requirements, but held that the "no beards" policy was not a proportionate means of achieving this aim. Not all of the agency's clients had a "no beards" policy and the agency had not even attempted to ask the clients whether they would make an exception for the claimant. It was disproportionate for the agency to refuse to put the claimant onto its books because the issue could have been dealt with on a case by case basis.

WHY THIS MATTERS

The case reiterates the importance of considering not just an employer's aim in implementing a PCP, but also the steps taken to achieve it. The decision is in line with earlier case law which indicates that Tribunals are likely to look more closely at steps taken to achieve aims relating to appearance and uniform, than where there is a genuine health and safety objective for the employer's actions.

## ROUNDUP OF OTHER DEVELOPMENTS

The Information Commissioner's Office has published detailed draft subject access guidance for consultation. The guidance explains in detail the rights of individuals to access their personal data, and the corresponding obligations on employers. The consultation runs until 12 February 2020.

The Solicitors Regulation Authority (SRA) has updated its warning notice on the use of NDAs to take account of its new Standards and Regulations regime introduced in November 2019. Whilst the SRA's expectations in its updated warning notice are not materially changed, employers are advised to keep track generally of legislative and regulatory developments regarding NDAs, as this is an evolving area.

### RELATED PRACTICE AREAS

- Employment & Labor

## MEET THE TEAM

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