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Insights

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COVID-19 DISMISSALS, EARLY CONCILIATION AND IR35, PLUS NEWS ON HYBRID WORKING, FIRE/REHIRE AND THE MENOPAUSE

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SUMMARY

Our June update looks at case law developments relating to health and safety dismissals for remaining away from/expressing concerns about Covid-19 in the workplace, the consequences of not complying with the strict requirements of ACAS Early Conciliation when lodging Tribunal claims and the tests for employment status under IR35, along with news updates on hybrid working, fire/rehire polices and the menopause.

COVID-19 – MANAGING ANXIOUS OFFICE RETURNERS

The EAT has upheld an Employment Tribunal's decision that an employee was not automatically unfairly dismissed following his refusal to attend work during the first Covid-19 lockdown, despite his feeling anxious about the risks of Covid-19 and having vulnerable children at home.

An employee normally needs two years' qualifying service before being able to bring a claim for unfair dismissal. There are exceptions to this rule, including where an employee has a 'reasonable belief' that their workplace poses a serious and imminent threat in terms of health and safety (section 100(1)(d) of the Employment Rights Act 1996 (ERA)). Where this section applies, an employee is entitled not only to leave their workplace but can also refuse to return until the alleged threat to health and safety has been resolved. Importantly, if an employee is dismissed in these circumstances, it is automatically unfair, with no qualifying service required and no cap on compensation.

The claimant started working in the employer's warehouse in June 2019. As part of his role, the claimant worked with approximately five other people in an area described as being 'half the size of a football pitch'. Prior to the UK going into its first lockdown on 23 March 2020, one of the claimant's colleagues displayed Covid-19 symptoms and was sent home to self-isolate. Despite many employers going into 'lockdown mode' at the time, the employer's warehouse was permitted

to remain open as the employees working in the warehouse were on the government's list of essential workers. The employer put in place several safety measures aimed at preventing the spread of Covid-19, including the staggering of work patterns, compulsory social distancing and ensuring the regular cleaning of workstations.

On 25 March 2020, very shortly after the lockdown came into force, the claimant contacted his manager to inform him that he intended to remain off work until the lockdown had eased. He said he did not want to risk infecting his children with Covid-19 – one of whom suffered with sickle cell anaemia. The manager acknowledged his message but no further communication took place between the claimant and the employer until 24 April 2020, when the claimant discovered he had been dismissed for reasons which were at the time unclear. As a result, he brought a claim for automatic unfair dismissal under s100(1)(d) on the basis that he was dismissed because he had a 'reasonable belief' that the warehouse posed a serious and imminent threat to his family's health and safety.

The Tribunal considered whether the claimant had a 'reasonable belief' with regard to his concerns about his workplace. The Tribunal acknowledged the claimant's overall concerns about the pandemic – specifically acknowledging his concerns in relation to his vulnerable children. However, the Tribunal also considered that the claimant had failed specifically to explain why his workplace was unsafe and how the safety measures put in place by the employer were insufficient to address his concerns. The Tribunal considered his concerns 'vague' and at times contradictory. As a result, the claim failed. However, the Tribunal commented that there were issues with the manner in which the claimant had been dismissed to the extent that, if the claimant had had two years' service, he would might have succeeded in a claim for 'ordinary' unfair dismissal.

The claimant appealed against the decision. The EAT dismissed the appeal.

The EAT found that the claimant did not have a 'reasonable' belief that his workplace posed a serious and imminent threat to health and safety. Even if it did, the claimant should have taken reasonable steps to avoid such threat, including by adhering to the safety steps put in place by the employer, such as social distancing measures, sanitising and wearing a mask. These were all possible and enabled/encouraged by his employer.

WHY THIS MATTERS

This is an interesting appeal case for employers bearing in mind the numbers of dismissals which took place during the pandemic. The main issue with the claimant's case was that he was unable to identify specifically why he felt his workplace was unsafe, especially as he had acknowledged the employer had implemented various safety measures. It was not sufficient just to allege there was a threat to health and safety – the specifics of the threat and the fact of any safety measures taken by the employer also had to be considered before the threshold was reached.

Employers need to be aware of the risk of health and safety claims, including cases of employees who may have flagged Covid-19-related anxieties relating to returning to the workplace. In this case, the employer took sufficient steps to safeguard employees and the employee was unable to identify with sufficient or any precision what the risks were and what his 'reasonable belief' was actually based on. This may not always be the case and, as mentioned above, claims under section 100(1)(d) require no qualifying service, have unlimited compensation and (although rarely used) are eligible for interim relief.

Rodgers –v- Leeds Laser Cutting Limited

ACAS EARLY CONCILIATION (EC) – FAILURE TO SUBMIT AN ACAS EARLY CONCILIATION CERTIFICATE WITH A CLAIM FORM HAS SEVERE CONSEQUENCES

The EAT decided that an Employment Tribunal did not have jurisdiction to hear sex and race discrimination claims because (and only because) a claimant had not obtained an ACAS Early Conciliation (EC) certificate before submitting her claims.

The employee was dismissed, leading her to bring race and sex discrimination claims at the Tribunal. She brought the claims well within the statutory time limit, lodging them on the same day as her dismissal. On her claim form (ET1) she ticked the relevant box to indicate that she did not have an ACAS EC certificate number. The claimant was then made aware by ACAS (after her claims had been submitted) that she would need both an EC certificate and a certificate number to satisfy the requirements of section 18A of the Employment Tribunals Act 1996, which sets out the requirement to contact ACAS before issuing certain Employment Tribunal proceedings.

The EC certificate was issued to the claimant a few days later and she emailed that certificate to the Tribunal on 27 August 2019, just four days after her dismissal and the lodging of her ET1. The claimant only emailed the EC certificate on 27 August, not the EC certificate and the ET1.

Initially, the claimant's claim was accepted by the Tribunal and the employer responded by submitting a response form. However, during a preliminary hearing the employment judge noticed that the EC certificate had been issued after the ET1 form had been submitted. He concluded that this invalidated the claims, which were then dismissed due to a lack of Tribunal jurisdiction.

The employee appealed against the decision by arguing that (a) the lodging of both the EC certificate and the ET1 within four days of each other (although not at the same time) satisfied s18A and (b) that she had in fact "re-presented" her claim by emailing the Tribunal on 27 August attaching her EC certificate.

The EAT dismissed the employee's appeal and upheld the original Tribunal decision that it did not have jurisdiction to hear her sex and race discrimination claims. The EAT acknowledged that this

might be (very) harsh on the claimant, who was not legally represented, but they had no discretion under s18A and had to apply the Tribunal rules of procedure to the letter. The rules are strict and simple. **As the ET1 had been submitted prior to the EC certificate being issued, the Tribunal had no jurisdiction to hear the claims**. The email enclosing the EC certificate sent on 27 August was not considered to be a re-presentation of the claim, just a late EC certificate. This was indeed harsh on the claimant. The Tribunal had all the documents it needed, they were all presented within the statutory time limit - but the Tribunal had no jurisdiction to hear the claims because the documents were not presented in the correct order.

WHY DOES THIS MATTER

This case illustrates that, as statutory bodies, Tribunals are entirely bound by their own rules, whatever the outcome. The claimant may have had entirely valid legal claims for sex and race discrimination but she was precluded from bringing them because she did not comply with procedural requirements that were essentially administrative, not substantive. This case acts as a timely reminder of the importance of checking that procedural requirements have been met by both sides throughout all stages of employment litigation – and, specifically when a claim form is first submitted by a claimant.

Pryce –v- Baxterstorey Limited

IR35 AND *AUTOCLENZ* – LOOKING BEYOND CONTRACTUAL WORDING

The rules relating to IR35 arrangements were recently reviewed for the first time at the Court of Appeal. Only one aspect of the relevant case will be considered here.

The radio presenter Kaye Adams (KA) provided her services to BBC Scotland (BBC) through an intermediary personal services company (PSC). HMRC, using IR35 legislation, challenged the working arrangements and argued that, if the PSC were removed, the relationship between KA and the BBC would be one of employment, not one of an independent contractor.

The case was complex and made its way through the tax tribunals. At the First-Tier Tax tribunal (FTT) the contractual documentation between the PSC and the BBC was considered. The documentation was not helpful to the PSC or to KA. It contained clauses that gave the BBC a high degree of control over KA's activities and stated that the BBC had a 'first call' on KA, having control over her other engagements to ensure that she fulfilled her contractual obligations to the BBC. There were other contractual provisions that were similarly unhelpful in arguing that KA was an independent contractor and not an employee.

To try and mitigate the damage of the contract at both the FTT and the Court of Appeal, the PSC/KA argued that the case of *Autoclenz –v- Belcher [2011] UKSC* (Autoclenz) applied.

Autoclenz was a case in which a car valeting company carefully worded its contracts and inserted certain clauses (which were not used in practice) so that valeters would not be categorised as 'workers' or 'employees'. However, the contract wording did not reflect the reality of the relationship between Autoclenz and the individuals. The Supreme Court therefore went behind the contractual wording and considered what the true relationship between the parties was, based mostly on how the parties actually conducted themselves in practice. Importantly, the Court took into account (i) the fact that the individuals concerned were potentially being deprived of important statutory rights by wording that did not reflect the reality of the parties' relationship, and (ii) their inequality of bargaining power.

The PSC/KA ran the same argument. They argued that the BBC contract did not reflect the reality of the relationship. In practice KA had autonomy over her other engagements and the BBC had no right of 'first call'. It was argued that the Court, as in *Autoclenz*, should look beyond the contract and focus on the underlying relationship, which was indicative of self-employed status. In simple terms, the Court should create a hypothetical contract, the one the parties *intended* to enter into, rather than the one they actually entered into.

The Court of Appeal said no. It held that the *Autoclenz* approach, which involves the radical step of looking behind the wording of a contract to assess the true intended contractual/legal relationship between the parties, only applied in situations where individuals were being deprived of statutory rights and where the bargaining power between the parties was uneven. It was also noted that, in *Autoclenz*, the Court was not being asked to create a hypothetical contract, only to interpret it in a manner that conferred statutory rights. KA's case did not involve statutory protections and there was no inequality of bargaining power.

WHY THIS MATTERS

This case illustrates the boundaries of the *Autoclenz* judgment. Broadly, the courts will only look behind the words of a contract under *Autoclenz* where statutory rights are at stake and the bargaining power between the parties is unequal. The court will not rewrite a contract just because the parties got it wrong, because it does not reflect the true relationship, or because one of the parties did not read it. Essentially, the *Autoclenz* approach is intended to protect individuals who might be deprived of statutory rights by the insertion of clauses into contracts that are fundamentally inaccurate, do not reflect the reality of the relationship and which are inserted (at least in part) for the very purpose of avoiding statutory protection.

The approach will not apply to IR35 cases, except in the unlikely event of statutory rights being at stake.

HMRC –v- Atholl House Productions Limited [2022] EWCA Civ 501

ROUND UP OF OTHER DEVELOPMENTS

HYBRID WORKING

Two recent surveys on hybrid working, one UK-wide by the Office for National Statistics (ONS) and one London-based by King's College, seem to provide clear evidence that, certainly for the next year or so, hybrid working will be the dominant working pattern across the UK, particularly in London.

75% of Londoners do not see themselves returning to the office five days a week and 60% are still working on a hybrid basis, over four months after all Covid-19 restrictions were lifted. There are differences in hybrid working patterns depending on demographics and income. Higher earners in the 30-49 age bracket find hybrid working the most attractive, with younger people and people in older age groups being more prepared to return full-time to the office. However, broadly speaking, around 80% of employees want to be hybrid workers, with fully remote home-working and full-time office working being equally unpopular.

FIRE AND REHIRE POLICIES

The government has recently announced that a new Statutory Code of Practice will be published on the use of "fire and rehire" practices to bring about changes to employees' terms and conditions.

A draft of the Statutory Code of Practice on dismissal and re-engagement will be published and representations, including from trade unions, will be considered in accordance with section 204 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). The scope of the code and remedies for breaches of it will be in accordance with TULRCA. Under section 207 of TULRCA, tribunals and courts will be required to take the code into account when considering relevant cases. Under section 207A, they will have the power to apply an uplift of up to 25% of an employee's compensation where the code applies and the employer has unreasonably failed to follow it. It was confirmed that legislation to lay the code will be introduced "when parliamentary time allows".

Currently, non-statutory advice published by Acas in November 2021 suggests that employers should fully consult their workforces and make every effort to reach agreement on any contract changes, noting that fire and rehire is an extreme step that can damage staff morale, trust, productivity and working relations.

MENOPAUSE DEVELOPMENTS

Research commissioned by menopause specialists, Health & Her, has found that 10% of women leave the workforce due to menopause related issues and that one in four consider leaving. 370,000 women between the ages of 50 and 64 have left or considered leaving work because of their symptoms. The menopause reportedly costs UK businesses 14 million working days each year, the equivalent of £1.88 billion in lost productivity.

The co-founder of Health & Her has urged businesses to create environments that encourage menopausal women generally and help to target their specific needs and requirements. This adds to

other recent calls for employers to do more to actively speak about the menopause in the workplace and make adjustments to help employees experiencing menopause symptoms to remain in the workforce and continue to advance their careers.

However, we are still some way from specific legislation on menopause issues, and until that changes, any employment related legal proceedings based on the menopause would likely be brought under the protected characteristics of age, sex and disability (or any combination of them) under the Equality Act 2010. A number of large employers in the UK have already voluntarily introduced menopause policies.

RELATED PRACTICE AREAS

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