

Insights

UK HR TWO-MINUTE MONTHLY: AUGUST 2022

PART-TIME HOLIDAY PAY, WHISTLEBLOWING, GENDER CRITICAL/TRANS DISCRIMINATION
AND NEWS ROUNDUP

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SUMMARY

Our August update includes new case law on the calculation of holiday pay for part-time workers, a tricky case on whistleblowing, two cases on the balance between gender critical views and trans discrimination, a news roundup on strike-breaking/agency workers, employment status and proposals for a new data protection regime in the UK.

PAID HOLIDAY FOR PART-TIME WORKERS IS NOT PRO-RATED

In September 2002 the claimant began working as a part-time music teacher at Bedford Girls School, a school managed and run by the Harpur Trust (the Trust). The claimant was employed on a permanent contract but was only required to work during school terms. She was paid for the hours she taught during term-time, and her hours varied from week-to-week depending on how many pupils needed lessons.

The claimant's contract entitled her to 5.6 weeks' annual leave. She was required to take her leave in three tranches, during the winter, spring and summer school holidays respectively. Her holiday pay for those periods of leave was calculated according to her average weekly pay in the 12 weeks preceding each school holiday, also known as the "calendar week" method under Regulation 16 of Working Time Regulations 1998 (WTR).

In September 2011, in line with ACAS guidance at the time, the school changed the way it calculated the claimant's holiday pay. It stopped using the calendar week method. The school now (a) calculated the hours she had worked at the end of each term, (b) multiplied this figure by 12.07% and (c) paid her hourly rate for that number of hours – this is also known as the "percentage" method. ACAS guidance at the time stated that this was the easiest way to calculate a worker's holiday pay entitlement, accumulating as hours are worked. The 12.07% figure

represents the proportion that 5.6 weeks holiday equates to in relation to the working year, the working year being 46.4 weeks (as it is 52 weeks minus 5.6 weeks of annual leave).

The claimant brought a claim at the employment tribunal (ET) for unlawful deductions from her pay by way of underpayment of her entitlement to holiday pay. She complained specifically that the percentage method resulted in her receiving less paid holiday than she had previously received under the calendar week method. The Trust argued that the percentage method more accurately reflected her leave entitlement as it was based on her accrued leave according to the hours she actually worked.

The ET found in favour of the Trust. The Trust successfully argued that the claimant's pay should be pro-rated given she worked fewer than the standard 46.4 weeks in the working year. As a part-time teacher, she worked far less than this, at 32 weeks per year. The ET held that the claimant's holiday should be capped at 12.07%, as full-time workers would otherwise find themselves treated less favourably than part-time workers.

The core of the argument was that if the claimant's pay were calculated using the calendar week method (as she believed it should) she would be entitled, pro rata, to more holiday pay than a full-time employee with 5.6 weeks paid leave.

The claimant appealed and the EAT found in her favour. The EAT held that the claimant's pay should have been calculated using the calendar week method, not the percentage method. It stated that the wording of the WTR was plain – a worker on a year-long permanent contract is entitled to 5.6 weeks' holiday. The Trust appealed to the Court of Appeal.

The Court of Appeal upheld the EAT's decision stating that "the WTR do not provide for the kind of pro-rating for which the [school] argues and which underlies the application of the 12.07% formula in the case of a part-year worker. The exercise required by Regulation 16 and the incorporated provisions of the 1996 Act [basically the calendar week method] is straightforward and should be followed".

The Trust appealed again.

The Supreme Court unanimously dismissed the Trust's appeal, essentially agreeing with the EAT and Court of Appeal. It held that the calendar week method correctly implements the WTR. The core point that the result of using the calendar week method is that a part-time worker might receive slightly more holiday pay than a full-time worker was held to be immaterial and did not breach any provisions of the WTR. The Supreme Court concluded that a part-time worker's leave under a permanent contract should not be pro-rated to that of a full-time worker and the calendar week method must be used to calculate holiday pay.

WHY THIS MATTERS

This case, which is complex in terms of competing methods of calculation, acts as a reminder to employers that part-time workers are entitled to 5.6 weeks of holiday per year. Their holiday pay must be calculated according to their average pay over the year, namely the calendar week method, rather than being pro-rated to reflect the hours actually worked.

Harpur Trust v Brazel

WHISTLEBLOWERS MAY LOSE STATUTORY EMPLOYMENT PROTECTION IF DISCLOSURES MADE IN THE COURSE OF MISCONDUCT

Can an employee be dismissed fairly for conduct connected with making protected disclosures/whistleblowing?

Yes, if the reasons for dismissal are separate from the protected disclosure, rather than so closely connected with it that a distinction cannot fairly and sensibly be drawn said the ET, EAT and now the Court of Appeal.

The claimant worked at a bank as Head of Financial Audit. She made what were accepted as protected disclosures in relation to a legal template document, which in her view was not sufficient to cover certain financial risks. The template was the responsibility of the Head of Legal, Ms Harding, who became upset when the claimant, in meetings and in emails, cast doubt on the effectiveness of the template. The claimant also questioned Ms Harding's legal awareness and, as argued by Ms Harding, her professional integrity.

The claimant, known as very able but having a reputation as "pernickety" and "inflexible", emailed her concerns to Ms Harding and, in the most controversial of those emails dated 23 October 2018, blind copied her boss, the Group Chief Auditor, Mr Mohammed. Although Mr Mohammed seemed to accept the content of the disclosure(s), this took a back seat to his main concern, which was that the email was illustrative of what he considered to be unacceptable conduct on the part of the claimant – in particular her questioning of Ms Harding's legal awareness.

In the meantime, Ms Harding had reported matters to the Head of Human Resources, Ms Yates. Ms Harding was apparently at "the end of her tether" with the claimant, saying she could not work with her. The bank's CEO, Ms Garrett-Cox, had also become involved (by Ms Harding). The general consensus at the bank was that the working relationship between the claimant and Ms Harding had broken down because of the claimant's conduct.

In November 2018 Ms Garret-Cox and Ms Yates met with Mr Mohammed and they came to a joint decision. As a result, in December 2018 the claimant was dismissed because of her conduct. Ms Harding played no part in the decision.

The claimant brought several claims against the bank, including automatic unfair dismissal for whistleblowing under section 103A of the Employment Rights Act 1996 (ERA) and for detriments under section 47B of the ERA.

The core issue was whether the reason (or principal reason) for the dismissal was the protected disclosure, or whether the claimant's conduct towards Ms Harding was sufficiently separate that a distinction could be drawn.

The tribunal, looking at the facts carefully, held that the issues were separable. It looked at what precisely led Mr Mohammed, Ms Yates and Ms Garrett-Cox to dismiss the claimant. The tribunal held that, as a question of fact, it was not the making of protected disclosures, rather it was the claimant's conduct towards Ms Harding, which reflected a history of poor people skills. The tribunal took into account Mr Mohammed's response to receiving the blind copy of the claimant's 23 October email, namely that her conduct was unacceptable and he could "no longer defend her". The claimant was responsible for a breakdown of the relationship with the bank's Head of Legal - that was the principal issue in the minds of the dismissing officers, not the protected disclosures. The EAT agreed, as did the Court of Appeal. The Court of Appeal in particular was very clear that the issue of "separability" between misconduct and protected disclosures was always a question of fact. There is no formula or criteria to follow and it requires in each case a careful analysis of exactly what was on the minds of those dismissing the employee.

Some of the claimant's claims for detriments, to which a different legal test applies, were upheld as being related to whistleblowing. However these were out of time. The detriments also related to the conduct of Ms Harding, and she played no part in the decision to dismiss.

Protect, the charity set up to protect whistleblowers intervened in this case at the Court of Appeal stage and, following on from the decision released a public statement that referred to the case as:

"...a worrying decision by the courts that means an employer can dismiss a whistleblower for the manner in which they raise concerns, rather than the whistleblowing, even if those concerns were raised in a reasonable way."

Protect's concern was/is that the protection a worker receives as a whistleblower might depend on the way in which the workers blows the whistle.

However, the Court of Appeal was very clear that (a) the two issues, protected disclosures and conduct, are separable and that (b) each case which features the issue of separability will be considered entirely on its facts. The law of unfair dismissal is clear in that, whatever the circumstances, the determinative factor is what was on the mind(s) of the dismissing officers at the point of making the decision to dismiss. There seems little doubt that, when the decision to dismiss was taken in December 2018, any issue of protected disclosures was overshadowed by concerns about conduct, and that the claimant's conduct was the principal reason for her dismissal, which satisfies the statutory test for section 103A of the Employment Rights Act 1996.

WHY THIS MATTERS

Although the decision is favourable to employers, the Court of Appeal emphasised that each case depends entirely on its facts. Employers should take care to ensure that their decision-making is for clear reasons, particularly where a protected disclosure has caused offence or upset (as may often be the case). It will also be important to conduct a full and fair procedure (which was not followed in this case - the dismissal was found to be procedurally unfair).

Kong-v-Gulf International Bank (UK) Limited/Protect (as Intervener)

CONSULTANT WAS DISCRIMINATED AGAINST BECAUSE OF HER GENDER-CRITICAL BELIEFS

The claimant, Maya Forstater, was a consultant researcher. Her consultancy contract was not renewed when she sent tweets reflecting and making clear her gender critical views that trans women were not women and could not change their biological sex.

At a preliminary hearing last year, which ended up at the EAT, it was held that whilst gender critical views may be *"profoundly offensive and even distressing to many others"* they are nonetheless beliefs that are and must be tolerated in a pluralist society. The gender critical views held by the claimant were held to be a philosophical belief protected under the Equality Act 2010 (EqA) and the case was sent back to the ET to assess whether the claimant had been the victim of direct discrimination or victimisation.

Last month the ET held that the claimant had been discriminated against. It was because of her gender critical beliefs that her consultancy contract and visiting fellowship were not renewed. The ET stated that *"absent an explanation from the respondents, the facts are such that the tribunal could properly conclude that the tweets were a substantial part of the reason why [the claimant] was not offered employment; and the respondent's evidence, far from proving the contrary, supports the finding that they were"*.

The ET also noted that it would be a mistake to treat the claimant's tweets as inherently unreasonable and inappropriate. It noted that whilst beliefs may well be profoundly offensive, or even distressing to many others, they are still beliefs that must be tolerated in a pluralist society.

WHY THIS MATTERS

This judgment demonstrates that whilst some beliefs may be seen as *"offensive and abhorrent to some"*, this does not preclude such a belief from protection under the EqA. Therefore, it will be for employers to balance the rights of individuals to hold and express their beliefs on sensitive topics, against the need to protect individuals (such as trans individuals) against acts of discrimination and harassment in the workplace. The next case is perhaps an illustration of that.

CHRISTIAN DOCTOR WAS NOT DISCRIMINATED AGAINST BECAUSE OF HIS GENDER-CRITICAL BELIEFS

This case is similar to the *Forstater* case above, although based on religious rather than philosophical belief, and with a different outcome.

The claimant initially brought a claim against the Department of Work and Pensions (DWP) in respect of discrimination and harassment based on his gender critical beliefs, including a lack of belief in transgenderism. The claimant had applied to work as a health and disabilities assessor, a role which involved assessing eligibility for disability benefits. The claimant informed the DWP that, due to his religious beliefs, he was not prepared to use non-gendered, or preferred pronouns (if they differed from the original biological sex of the individual) to address trans individuals. As a result of this refusal, the DWP reached the decision that he would not be permitted to carry out the role applied for.

At first instance the ET found the claimant's religious beliefs (and the lack of belief in transgenderism) was protected under the EqA. However, the ET held that the right to manifest a religious (or philosophical) belief is subject to the rights and freedoms of others, as stated in *Forstater* last year. As a result, it found that the manner in which the claimant expressed his beliefs constituted unlawful discrimination and/or harassment against trans individuals. In particular, the DWP's policy of addressing transgender people by their preferred/non-gendered pronouns would be applied equally across the board to all other employees, regardless of their religious or other belief. As a result, the claimant had not been treated any less favourably than (for example) any other non-religious employee who refused to use preferred/non-gendered pronouns. The ET rejected the claims of discrimination because of religious belief.

The claimant appealed. The EAT upheld the ET decision in that the belief, or lack of belief, in transgenderism was protected under the EqA, but the ET's decision on the issue of its manifestation in the workplace (the refusal to use preferred/non-gendered pronouns) was upheld. So the claimant's religious belief was protected, but he was not discriminated against.

The claimant has already indicated that he will appeal the EAT's decision.

WHY THIS MATTERS

This case, along with *Forstater*, illustrates the balancing act employers need to undertake when dealing with protected beliefs and characteristics under the EqA. When the EAT made the finding in *Forstater* that gender critical beliefs were protected under the EqA, it made it very clear that this did not reduce or compromise the protection trans individuals have under the EqA. It is also worth noting that Forstater herself did not refuse to use non-gendered or preferred pronouns but in this

case the claimant did precisely that, putting himself at odds with the DWP's established policy and outside the EqA.

We expect further developments in this area and the potential in this case of an appeal to the Court of Appeal, although that will surely be on the issue of the claimant's expression of his gender critical beliefs, not the beliefs themselves which are already protected.

Mackereth –v- DWP and another

NEWS ROUNDUP

LEGISLATION NOW IN FORCE INCREASING MAXIMUM AWARDS AGAINST UNIONS AND ALLOWING AGENCY WORKERS TO REPLACE STRIKING WORKERS

The government has acted quickly in response to recent strike action by the RMT and, with effect from 21 July 2022, new legislation has been introduced (a) to increase the maximum awards that can be made against trade unions for unlawful industrial action and (b) to allow employers to use agency workers during strikes.

With regard to (a), the limits on maximum damages which may be made against a trade union for taking unlawful industrial action are now increased as follows:

- For trade unions with less than 5,000 members, the maximum fine is £40,000 (previously £10,000);
- For trade unions with between 5,000 and 24,999 members, the maximum fine is £200,000 (previously £50,000);
- For trade unions with 25,000 to 99,999 members, the maximum fine is £500,000 (previously £125,000); and
- For trade unions with 100,000 members or more, the maximum fine is £1,000,000 (previously £250,000).

With regard to (b), which essentially allows agency workers to be used as “strike-breakers”, the new legislation revokes Regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003, which prevented employment businesses from supplying temporary workers to replace workers on strike or taking official industrial action. Under the new legislation, employers can engage temporary workers during industrial action. Unison has indicated that it will seek judicial review of the Regulations.

The ability to use agency workers may have a particular impact on the effectiveness of strikes, although it remains to be seen how effective this will be in practice.

LAW ON EMPLOYMENT STATUS - GOVERNMENT RESPONSE TO 2018 CONSULTATION AND NEW RECOMMENDATIONS

The government has published its response to the 2018 consultation on employment status. The government asked for views on whether legislative changes relating to defining employment and worker status would achieve greater clarity and certainty, and whether the tax and employment tests for status should be aligned.

162 formal responses from a variety of organisations, including trade bodies, trade unions, businesses, and some individuals, were considered. The vast majority of respondents agreed there are issues with current legal tests but there was little if any consensus on what action the government should take. The respondents agreed (unsurprisingly) that it would be complex to implement legislative reforms.

On alignment between tests for determining employment and tax status, most respondents were in favour but again there was no consensus on how this could be achieved. The government has concluded that it is not the right time to implement any kind of legislative alignment.

Although the government has decided not to make any changes, it has published new guidance intended to improve clarity on employment status. The non-statutory guidance includes an explanation of the differences between employees, workers and self-employed individuals and discusses the key factors in determining employment status.

Despite the guidance however the legal position remains the same, and the sheer number and complexity of recent decisions on employment status, including tax based “IR35” cases brought by HMRC, illustrate the extent to which employment status continues to be a source of uncertainty. The decision not to take any action obviously means nothing has changed.

DATA PROTECTION AND DIGITAL INFORMATION BILL

On 18 July, the Data Protection and Digital Information Bill was introduced into Parliament. This proposes an overhaul of the data protection regime. It is a post-Brexit measure intended to simplify the UK GDPR and Data Protection Act 2018. The intention is to reduce the administrative burden on organisations, while still maintaining high data protection standards.

There are numerous proposed changes, which include reforming the ICO and clarification of the rules on international transfers and cross-border flows of personal data. There are also proposed changes to the rules on Data Subject Access Requests which, again very broadly, will operate in favour of employers.

We will report separately on the Bill as a whole.

This article was co-written with Trainee Solicitor Gin Kynigos

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