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Insights

UK HR TWO MINUTE MONTHLY: DECEMBER 2023

ARE TRANSGENDER INDIVIDUALS "WOMEN" UNDER THE EQUALITY ACT 2010, BRINGING NEW WHISTLEBLOWING CLAIMS ALREADY DISMISSED AND SETTLED UNDER A COT3, THE NECESSITY OF EARLY REDUNDANCY CONSULTATION, AND A GENERAL NEWS ROUNDUP.

Dec 20, 2023

SUMMARY

Our December update includes a Scottish Court of Session case which holds that "women" as defined in the Equality Act 2010 includes transgender individuals with a gender recognition certificate, a case asking whether new whistleblowing claims can be brought when they were allegedly dismissed by the tribunal as well as being settled under a COT3 Agreement, and an important case on the importance of timing in redundancy consultations. We also feature a news update on new legislation coming into force in April 2024, and new draft guidance from the ICO aimed at recruitment/recruiters.

"WOMAN" UNDER THE EQUALITY ACT 2010 INCLUDES TRANSGENDER INDIVIDUALS WITH A GENDER RECOGNITION CERTIFICATE

The Gender Representation of Public Boards (Scotland) Act 2018 (the Act), a piece of Scottish legislation that sought to achieve 50% female representation of non-executive members on public boards, gave a definition of "woman" which was challenged by a gender-critical feminist campaign group, For Women Scotland Limited ("FWS").

The definition given in the Act included transgender women who shared the protected characteristic of gender reassignment under section 7 of the Equality Act 2010 ("EqA").

FWS argued that, by including transgender women, this definition represented two separate protected characteristics under the EqA, namely "sex" under section 11 EqA, which FWS argued meant biological sex, and "gender reassignment" under section 7 of EqA, which refers to individuals who are proposing to undergo, are undergoing, or have undergone a process (or part of a process) for the purpose of reassigning their sex. FWS's argument was that transgender women should not

be included in the Act or protected under the umbrella of sex discrimination under section 11 in both cases because they are not biological women. They would be protected as transgender individuals under section 7 EqA, but not biological women under section 11 EqA.

FWS succeeded in its first challenge. Scotland's Inner House of the Court of Session held that the proposed definition of woman in the Act was trying to expand/change the existing EqA definition, which is a matter reserved for Parliament in Westminster.

Subsequently, the Scottish government revised its guidance and issued a new definition of a woman, as follows:

> "*…'woman' in the Act has the meaning under section 11 and section 212(1) of the Equality Act 2010. In addition, in terms of section 9(1) of the Gender Recognition Act 2004, where a full gender recognition certificate has been issued to a person that their acquired gender is female, the person's sex is that of a woman.*"

FWS was still dissatisfied and argued that possession of a gender recognition certificate (GRC) did not affect an individual's sex within the meaning of the EqA. Sex under the EqA refers only to one's biological sex, not an acquired gender.

However, FWS were unsuccessful in their second challenge. In rejecting FWS' arguments, the Court considered the relevant provisions of the Gender Recognition Act 2004 ("GRA"). Section 9 GRA states that where a GRC is issued to a person, their gender becomes their acquired gender **for all purposes**, subject to any provisions made by the GRA or any other enactments. The Court found that, absent any express provision disapplying the EqA's definition of "woman" from transgender women, transgender women in possession of a GRC were women for the purposes of the EqA. The Court also stated that the GRA uses the terms "gender" and "sex" interchangeably, therefore any references to sex are not confined to biological sex.

WHY THIS MATTERS

This case clarifies that possession of a GRC will almost always be determinative of one's sex for the purposes of the EqA. That is to say that "women" for the purposes of the EqA are those who (a) are biologically female and (b) those who have acquired female gender by way of a GRC.

The sex of a transgender person without a GRC, however, remains the sex they were born into, although they may still have the protected characteristic of gender reassignment under section 7 EqA.

Whilst decisions of the Scottish Court of Session are not binding on the Tribunal or the EAT in England and Wales, their judgments can still be considered and are often persuasive. Earlier this year, the Equality and Human Rights Commission recommended that the UK government clarify

that the definition of “sex” in the EqA relates to biological sex. It will be interesting to see whether this change becomes law, which will undoubtedly impact cases such as this.

For Women Scotland Limited v The Scottish Ministers

CAN AN EMPLOYEE BRING WHISTLEBLOWING CLAIMS AFTER COT3 PROVIDING FOR WITHDRAWAL/DISMISSAL?

The claimant worked as a doctor and remains employed at the same hospital.

In 2017 the claimant brough several whistleblowing detriment claims based on nine protected disclosures made between 2011-2016. The claims were settled, and the parties entered into an ACAS COT3. As part of the COT3, the detriment claims were withdrawn and dismissed by the tribunal under Rule 52 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules).

However, after the claimant returned to work, she alleged that she suffered further detriments and brought two further detriment claims in 2021, based on the same 2011-2016 protected disclosures.

The issue was whether the claimant could bring further claims after her case had been settled. Did the new detriment claims fall outside the scope of Rule 52 and the COT3?

The respondent applied to strike out the claims. Its primary argument was that the new detriment claims were an abuse of process – first, her claims had been withdrawn/dismissed in 2017 under Rule 52 and, secondly, the COT3 settled any future claims that were based on protected disclosures already dealt with.

At the tribunal the respondent was successful. The tribunal accepted that the new detriment claims brought by the claimant were inextricably linked to the original protected disclosures, which had been dismissed in 2017 under Rule 52. Further, because the protected disclosures had been the subject of a judgment by the tribunal in 2017, the claimant was “estopped” from bringing any claims which relied on them. She could not bring claims based on disclosures which had already been judged and dismissed and which had been settled under a COT3. The tribunal said the COT3 had acted as a final break in respect of the claimant’s whistleblowing claims, or at least those based on the 2011-2016 protected disclosures.

The claimant appealed to the EAT, who looked at the Rule 52 dismissal and the COT3 separately:

Rule 52

The EAT said the wording of Rule 52 in respect of dismissal is very specific and refers only to claims and complaints, as the following extract from Rule 52 illustrates (our emphases):

> "*Where a **claim**……has been withdrawn under Rule 51, the tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further **claim** against the respondent raising the same, or substantially the same, **complaint***"

The EAT held that the 2011-2016 protected disclosures did not qualify as claims/complaints under Rule 52. The tribunal cannot dismiss a protected disclosure on withdrawal because it is not a claim/complaint. A detriment resulting from a protected disclosure is a claim, but the protected disclosure itself is not. As this was the case, the tribunal's point about issue estoppel was rejected as there was no issue to estopp under Rule 52. The claimant was not re-opening a claim/complaint that had already been decided, namely the original detriments. The claim was for new and different 2021 detriments. The EAT held, dealing with the section of Rule 52 in brackets (see above), that the 2021 detriments were substantively different from the old, dismissed detriments, so fell within the exception – they were not the same, or substantially the same as the old detriments.

The COT3

This raised the difficult issue of settlement documents, such as COT3s and settlement agreements, preventing individuals from bringing future claims where (a) the facts creating those claims came into being after the agreement, and (b) which the individual did not know about at the time of the agreement. The claimant's 2021 detriment claims fell into this category. The respondent spent a great deal of time attacking this idea using the law relating to settlement agreements and future claims, essentially looking at how specific the wording needed to be to exclude future complaints.

The EAT made two points:

- COT3s are governed by different statutory provisions and different rules than settlement agreements and there is no authority that, to exclude future complaints such as the claimant's, a COT3 has to have any specific wording. In fact, previous case law indicates that quite generic wording can exclude future complaints;

- However, even with that in mind, the COT3 in this case did have specific wording. The claimant had agreed in the COT3 not to reactivate/relitigate "*the issues/complaints in the Proceedings*", meaning the original 2017 tribunal proceedings. The key word here was "issues". The EAT had held that Rule 52 only covered claims/complaints, but the COT3, at least in this case, extended to **issues**, which is broader than claims/complaints. One of the "issues" in the claimant's original claims, settled by the COT3, was whether her 2011-2016 disclosures were protected, and she was relying on the same disclosures and same issue, for the 2021 detriment claims. The protected disclosures were not complaints or claims, so fell outside Rule 52, but they were issues in the original proceedings, and were caught by the wording of the COT3, which included "issues". The claimant could not bring future claims that reactivated/relitigated "issues" that had formed part of the earlier, settled, proceedings. By

bringing new detriment claims that relied on the 2011-2016 protected disclosures, the claimant was in breach of the COT3, under which she had agreed not to revisit those issues.

The EAT concluded that Rule 52 did not prevent the claimant from bringing her new detriment claims but the COT3 did.

WHY THIS MATTERS

This case is very fact-specific and will only apply in cases where employment is continuing.

Although the case touches on the difficult issue of future claims being compromised, it was the specific wording of the COT3 that prevented the claimant from bringing her new claims. The judgment did not cover whether the same wording (relating to "issues" as opposed to "claims") would have worked in a settlement agreement.

However, in general the judgment did say that, when it comes to compromising future claims, COT3s require less specific wording than settlement agreements, simply because of the different statutory provisions governing the two types of agreement. Both are equally capable of compromising future claims, but (a) settlement agreements need to be carefully and specifically worded to do so and (b) settlement agreements are *possibly* more restrictive because they can only compromise future claims/complaints, as opposed to COT3s which, in this specific case, compromised "issues", which included previous protected disclosures. It was accepted that the making of future protected disclosures, whatever the circumstances, could never be prevented by any agreement, as a matter of law/statute (and as a matter of SRA warning notices).

Ajaz -v- Homerton University NHS Foundation Trust

LACK OF EARLY REDUNDANCY CONSULTATION AT "FORMATIVE STAGE" MAKES DISMISSAL UNFAIR

The respondent is a UK subsidiary of a US company which also operates subsidiaries in other countries. The claimant was one of 16 people in the UK employed by the respondent to recruit employees for a single client company. At the end of May 2020, the respondent decided to reduce the recruitment workforce.

At the beginning of June 2020, the claimant's manager was asked to assess and score her team members by reference to 17 entirely subjective criteria that had been provided by the respondent's US parent company. The claimant came last in the scoring, and it was decided he would be dismissed.

In June 2020, the claimant was called to a meeting. He was told that the purpose of the meeting was to inform him of the situation and the need for redundancies. He was told he could ask

questions and could suggest alternative approaches. He was invited to two further meetings in July 2020 and then given a dismissal letter. Throughout these meetings, the claimant was unaware of the scores he had achieved and was not given the scores of other employees.

The claimant appealed against his dismissal. He complained he had not been given sufficient information, in particular about his scores, to challenge the scoring. An appeal meeting was held in August 2020 and, although the claimant was provided with his scores at the appeal meeting, he was not shown the scores of his colleagues. The appeal was unsuccessful, and he brought a claim for unfair dismissal.

The tribunal dismissed the claim. It found the claimant had not demonstrated that his score should have resulted in a higher ranking. It also rejected his criticisms of both the pool chosen by the respondent and the selection criteria. The claimant appealed, arguing that the respondent had failed to consult properly and that the tribunal had not considered the consultation issue adequately or at all.

The EAT noted the principle that employers must act within the band of reasonableness/reasonable responses in redundancy situations when they follow good practice. A key element of this was consultation, and key to consultation is timing.

The EAT held that it is for the tribunal to conclude whether the decision to dismiss for redundancy is reasonable within the meaning of section 98(4) of the ERA 1996. It went on to identify a number of guiding principles that a tribunal should consider, and in particular focused on the timing of consultation:

- An employer will normally warn and consult either the employees affected or their representative(s);
- Very importantly, fair consultation occurs when proposals are **at a formative stage** and where employees have adequate information and time in which to respond and possibly influence the decision, along with a conscientious consideration of the responses by the employer;
- Whether consultation is collective or individual, its purpose is to avoid dismissal or reduce/ameliorate its impact;
- A redundancy process must be viewed as a whole, so an appeal may correct an earlier failing, making the process reasonable as a whole;
- Whether consultation is adequate is a question of fact and degree, and a dismissal is not necessarily unfair where there is a lack of consultation in one particular respect;
- Any particular aspect of consultation, such as the provision of scores, is not essential to a fair process; and

- Conversely, the use of a scoring system does not automatically make a process fair, and the relevance or otherwise of individual scores will relate to the specific complaints raised in the case.

The overall view was that the absence of consultation at an early stage, when employees can still discuss the possibility of avoiding redundancies by proposing a different approach and at a time when they have the potential to influence the employer's decision, is indicative of an unfair process.

The EAT considered that an appeal can fill gaps in earlier stages of the process but could not repair the fundamental issue of consultation being too late, as was the case here.

The EAT found that consultation took place later than the formative stage and the tribunal erred in concluding that consultation was reasonable where there was no explanation on the facts as to why it took place at such a late stage. The EAT allowed the claimant's appeal, substituted a finding of unfair dismissal and remitting the case to the same tribunal to deal with remedy.

WHY THIS MATTERS

This decision highlights that meaningful consultation in a redundancy situation, whether that involves individual and/or collective redundancies, should take place at an early formative stage where an employee (or representative) is given adequate information, the employer has time to respond, and where genuine consideration is given to the response. It demonstrates the need for what it terms "general workforce consultation", giving all employees the opportunity possibly to influence the employer's decision at a formative stage of the process. The EAT gave an example of a voluntary pay cut to eliminate/decrease the need for redundancies. Consultation in this case had been too late for that.

The EAT also noted that although an appeal can potentially correct a specific part of a consultation process, in this case a failure to provide the employee with their own score against selection criteria, it cannot repair a failure to consult at a formative stage. If an employer becomes aware of such a failure, it would be faced with the need to restart its redundancy process in order to address the need to consult at the proper early stage.

Joseph De Bank Haycocks v ADP RPO UK Ltd

NEWS ROUNDUP

NEW EMPLOYMENT LEGISLATION

This month has seen several statutory instruments laid before parliament this month featuring legislation due to come into force on 6 April 2024. This includes:

Flexible working

The Flexible Working (Amendment) Regulations 2023 remove the requirement that an employee must have 26 weeks' service to be able to make a request for flexible working, and so make the right to request flexible working a "Day One" right. The regulations come into force on 6 April 2024 and will apply to requests made on or after that date. These regulations were previously covered in the Employment Relations (Flexible Working) Bill that received Royal Assent on 20 July, but it is only now clear that this will become a Day One right;

Extended redundancy protections – pregnancy and family leave

The draft Maternity Leave, Adoption Leave and Shared Parental Leave (Amendment) Regulations 2024 are expected to come into force from 6 April 2024. If the draft regulations are passed in their current form, they will mark a significant extension of time to the current rights to be offered suitable alternative vacancies in redundancy situations for employees on maternity/adoption/shared parental leave. As a brief summary, the new regulations will apply as follows, and each scenario relates to when an employee must be given first refusal of suitable alternative employment in a redundancy situation:

- In the case of pregnancy, from the date the employee tells their employer about their pregnancy. If the employee is entitled to statutory maternity leave, the protected period of pregnancy will end on the day statutory maternity leave starts. If the pregnancy ends and they are not entitled to statutory maternity leave, the protected period ends two weeks after the end of pregnancy;
- In the case of maternity, 18 months from the first day of the estimated week of childbirth. The protected period can be changed to cover 18 months from the exact date of birth if the employee gives the employer notice of this date prior to the end of maternity leave
- In the case of adoption, 18 months from placement for adoption; an
- In the case of shared parental leave, 18 months from birth or placement for adoption (or the date they enter Great Britain if adopted from overseas), provided that the parent has taken a period of at least 6 consecutive weeks of SPL and has not taken maternity or adoption leave.

Carer's Leave

This will introduce a new right to a week's unpaid leave for carers. A "week" will almost always be five working days. The right will apply to employees who have a dependant with a long-term care need. The leave can be taken flexibly, in a block of one week or in individual days or half day. Employers cannot decline carer's leave but can postpone it where it would be unduly disruptive. Employers must give notice of postponement as soon as is reasonably practicable and following consultation with the employee. They must then confirm a new date on which they can take the leave within a month of the original request. This new right is in addition to the existing right to take

time off to arrange emergency care for dependants, but employees can use the new carer's leave entitlement to arrange care, as well as provide care themselves.

ICO OPENS CONSULTATION ON DRAFT RECRUITMENT AND EMPLOYEE RECORDS GUIDANCE

The ICO has published two new sets of draft guidance for employers and recruiters setting out how to comply with data protection obligations relating to retention of employee data and staff recruitment procedures. Both sets of guidance are open for public consultation until 5 March 2024.

These are the latest additions to the ICO's employment information resource on employment practices and data protection and comprise very broadly:

- Keeping employment records - this includes selecting an appropriate lawful basis for retention and working with employee consent; and
- Recruitment and selection - this is aimed at employers and organisations which carry out recruitment on behalf of employers, such as recruitment agencies, headhunters etc. It explains how to process candidates' data fairly and lawfully, ensure records are kept accurately and up to date, security and data sharing requirements, and compliance with employee's rights as data subjects.

The ICO will be releasing checklists and other additional practical tools to accompany this latest guidance and help further support best data protection practice among employers and other recruiters.

This article was written with Trainee Solicitor Rhea Ava Patel

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