EVERSHEDS SUTHERLAND

In the spotlight

Employment litigation

Spring 2023

Welcome to our latest employment litigation newsletter

As various employment law proposals start to come to fruition after a quiet period for employment legislation, including plans for revised strike laws, additional leave for parents and more, employers will need to stay attuned to these various developments in the coming months and ensure they understand or get help with understanding the potential impacts.

Future litigation around the correct implementation of these changes will inevitably follow, as will disputes over adherence to rising statutory rates and appropriate calculations of the national minimum wage (see further below). As we reported last time also, the Retained EU Law (Revocation and Reform) Bill is currently progressing through Parliament and could lead to significant employment law changes from the end of this year. We await news of developments and the potential impact upon future employment rights of this Bill but also for employment litigation and legal interpretation by the courts.

A number of recent decisions handed down by the courts will affect employment litigation practice, going forwards, some involving technical determinations of how cases must be presented and supported but others concerning the scope and reliability of settlement terms, of which employers should be aware. Further clarification from the courts over the extent to which internal enquiries are protected by legal privilege should also give food for thought to employers undertaking grievance or disciplinary investigations (see our Recent Cases of Interest). Going into this quarter, however, employment litigation remains significantly affected by a stubbornly high backlog of employment tribunal claims.

Recent weeks have also seen progress by the courts and tribunals towards technological and digital advances, highlighted particularly by the publication of the Justice Committee's latest report into open justice, which reveals the roll out of various initiatives to facilitate remote access to information and court functions. For court users, online and remote access to information about hearings and to the system can have significant advantages but there can also be disadvantages.

Highlights

Podcast: Giving evidence from abroad

12 minutes to spare? Catch up with Naeema Choudry and Mark Pipkin as they explain how the recent changes to employees' working habits and locations can affect giving evidence for hearings.

Click here to listen >

Podcast: Employment litigation top tips - What to consider when a claim form lands

This podcast with Chloe Themistocleous and Sasha Lormant is the first in a series of quick-fire 'top tips' episodes, exploring the lifecycle of an employment tribunal claim and key aspects for employers. Look out for future episodes focusing on dealing with disclosure, identifying witnesses and preparing witnesses for giving evidence.

Click here to listen >

News

Some emerging trends

The year ahead may prove to be the first in some time to introduce significant changes to employment law which will not only affect employment practice but future litigation. However, in terms of case law trends in the last quarter, considerable focus has been upon procedural correctness. We consider below some of the important clarifications that the tribunals have provided for litigation practice in our Latest Guidance and Practice Developments section.

Legal changes on the horizon

As we look ahead into 2023, employers can expect further news on important legal changes which will impact both practice and future litigation. Most significant, given its potential to create considerable legal uncertainty ahead, is the Retained EU (Revocation and Reform) Bill, which aims to revoke certain EU-derived employment laws by 31 December 2023, unless otherwise preserved or extended to 2026, and to give courts new discretion to depart from retained EU case law. If enacted, the Bill will potentially affect issues such as maximum working hours and holiday entitlement, TUPE protection, family-related leave, flexible working and agency workers' protection. Clarification of the specific proposals and time frame are awaited so that employers can start to prepare, as necessary. See our previous Alert and watch out for further ES legal updates on this issue.

A further important development to prepare for is the recently announced draft Code of Practice on dismissal and re-engagement (so-called "fire and rehire"). Once in force later this year, the Code is designed to encourage good industrial practice in the context of negotiating or imposing changes to terms and conditions. It not only sets out steps that employers should take, including providing information, engaging in meaningful consultation and exploring alternatives but also makes clear that threats of dismissal must not be used as a negotiating tactic. There are direct implications for future litigation around this issue since the Code will raise awareness of appropriate practice but also heighten the risks for employers in applying fire and rehire to effect contractual change. Breach of the Code could also attract an uplift in unfair dismissal awards by as much as 25%. Employers will need to proceed with considerable caution and seek legal advice on the appropriate process to be followed if they are to limit claims but also potential reputational or industrial relations damage.

Updated Statutory Rates and National Minimum Wage rise

The Department for Work and Pensions' benefit and pension rates for 2023 to 2024 will, from April, set statutory maternity, paternity, adoption, shared parental and parental bereavement pay at £172.48 per week (a rise from 156.66) and statutory sick pay at £109.40 per week (a rise from £99.35).

Also in April, the National Living Wage will rise to £10.42 per hour for those aged over 23. The incremental rises in recent years, and which are set to continue, have seen many more employees included in the higher rate band but will also increase the risks of error and also of litigation in this area. See our Common NMW pitfalls guide.

Latest ET Claims Statistics

Tribunal Statistics for the period July to September 2022 have been published by the Ministry of Justice. While any reliable trend remains difficult to establish (due to a 2021 software change), since last quarter

the figures show that the number of single claims increased; multiple claims reduced but the backlog of claims had risen further, to 45,000 (from 43,000 last quarter). Processing claims more quickly remains a significant challenge for the ET system but also for employers, in terms of their awareness of claims and ability to prepare but also upon strategy.

Important updates on the scope of settlement

The possibility of settling claims which have not yet arisen is often contentious. The recent EAT decision in Bathgate v Technip UK Ltd appears to have once more called into question whether including wording which purports to do so in a settlement agreement meets the statutory requirements for such agreements to identify a "particular complaint", in this case finding that it did not. Although this case sits out of kilter with previous decisions and the issue is likely to be reviewed by an appeal court in due course, employers should be aware of potential limitations of settling future claims and the risk of challenge if they seek to do so. Legal advice on such issues is highly advisable.

In the context of disputes resolved by COT3 agreements negotiated through Acas, the recent case of *Arvunescu v Quick Release (Automotive) Ltd* has provided useful clarification that a claim alleging victimisation after the employment had ended was validly settled by a COT3 entered into on termination and which purported to compromise all claims arising out of, or in connection with, the employment. (see Recent cases on interest below).

Latest guidance and practice development

Addressing Judges

Since December 2022, the appropriate way to address employment judges and judges sitting in the EAT has changed. All should now be addressed in hearings as "Judge" rather than "Sir" or "Madam". Panel members should continue to be addressed as "Sir" or "Madam".

Procedural clarifications for appeals

A number of recent tribunal decisions have highlighted defects in appeal applications which should be noted. For example, a delay in providing the grounds of appeal until after the 42 period time limit had expired, resulted in an appeal application being ruled out of time in one case. A request for an extension of time was rejected in the circumstances (*Anghel v Middlesex University*). The EAT has also re-iterated the importance of including with any appeal application the original, signed tribunal decision and any written reasons. Supplying extracts of these documents does not meet appeal requirements (*Richardson v Extreme Roofing Limited*). An exception to this may apply where written reasons have been requested but not yet provided. In such a scenario the absence of written reasons should be made clear when lodging the appeal and the written reasons should be forwarded as soon as they are available (*Elhalabi v Avis Budget UK Ltd*).

Increased digitisation and digitalisation

The pace of change of the courts and tribunals embracing technology is particularly in evidence this quarter. The latest House of Commons report into open justice (referred to above) highlights areas of development, such as online access to hearing lists; remote observation of proceedings by request and a new platform for the publication of judgments. These steps are aimed at supporting accessibility to and transparency of our justice system. The Courts and tribunals judiciary webpage has also be substantially revamped to improve layout, navigation and functionality. in the employment tribunals section, for example, providing clearly identified sections to access tribunal rules, judgments and guidance. Public scrutiny of court function and fairness is at the core of open justice. As any parties to litigation will know, however, increased access and visibility can prove a double-edged sword on an individual level. When tribunal judgments started to be published online, for example, the desire for privacy and reputational protection became an additional consideration in the context of litigation strategy.

As a post script regarding digitalisation, the UK Supreme Court has added a note to its Practice Directions to confirm that paper copies of documents are no longer required unless expressly stated.

Consultation on the composition of tribunals

The Senior President of tribunals has launched a Consultation regarding his office's future responsibility for determining the makeup of employment tribunal and EAT panels. Whilst it is accepted that the aim of panel composition should be efficiency and consistency, with a likely reduction in size in many cases, views are sought on the extent to which Employment Judges do and should sit alone by default and how discretion should be exercised for hearing cases by a wider panel. The Consultation closes on 27 March 2023. Eversheds-Sutherland intends to submit a response on behalf of our clients so please feel able to send your thoughts on these issues to Gillianwatkins@evershedssutherland.com and we will be happy to incorporate them on an anonymous basis.

Recent cases of interest

The EAT held in University of Dundee v Chakraborty, that legal privilege does not apply retrospectively to protect an original report prepared by the employer in the context of an internal investigation but where legal advice has subsequently resulted in amendments. The original version of the report did not attract either litigation privilege or legal advice privilege and the EAT rejected the employer's contention that privilege should apply retrospectively in light of later legal advice which led to an amended version that was shared.

In *Arvunescu v Quick Release (Automotive) Ltd* the Court of Appeal has held that a COT3 settlement agreement which purported to settle claims arising both "out of" the employment but also "in connection with" the employment, was sufficiently broad to include a claim of alleged victimisation not in the minds of the parties at the time it was signed. The former employee sought to bring a fresh claim, alleging the employer had prevented him from securing alternative employment but the EAT decided any such act by the former employer was necessarily connected to the individual's previous employment and therefore settled by the earlier COT3

In *Marangakis v Iceland Foods Ltd*, in circumstances where an employee sought reinstatement in her internal appeal against dismissal but later changed her mind, whilst still pursuing the appeal, the EAT considered the effects upon the original dismissal decision. It determined that a decision by the employer to accede to reinstatement meant there could be no unfair dismissal since the original dismissal vanished once reinstatement was confirmed -just as would be the case if an appeal was successful, regardless of the employee's wishes. The position might be different if the appeal was withdrawn or not pursued to conclusion but there was no indication on the facts that the employee's change of heart signalled a withdrawal of her appeal

The EAT has considered in Hilaire v Luton Borough Council the scope of the employer's duty to make reasonable adjustments in the context of disability. When a disabled employee declined to reapply for a position and participate in an interview process as part of a redundancy and restructuring, the tribunal held the employer was not guilty of disability discrimination when in selecting the employee for redundancy. In this case the employee had chosen not to participate and was not prevented from doing so due to disability. As a result he was not disadvantaged by any provision, criterion or practice imposed by the employer and it would not have been a reasonable adjustment to offer him a new role without interview.

Appeal cases to note and to watch out for

Recent decisions of particular significance:

- ***Rodgers v Leeds Laser Cutting Ltd***: (CA) dismissal of an employee who declined to come into work, believing that COVID-19 presented circumstances of serious and imminent danger "all around" but not specifically in his workplace, was not automatically unfair.

Upcoming hearings/ awaited decisions:

- ***Chief Constable of the Police Service NI v Agnew***: (SC) whether a gap of 3 months or more breaks a "series" of unlawful deductions from wages in the context of holiday pay.
- ***Fentem v Outform EMEA Ltd***: (CA) whether the employer's unilateral exercise of a contractual right to pay in lieu of notice upon an employee's resignation constitutes a dismissal.

Eversheds Sutherland insights

As referred to in the preceding paragraphs, a look ahead at employment litigation suggests that reducing the employment tribunal backlog will continue to be an area of focus for the tribunal system but, in the meantime, remains a significant factor for parties and prospective parties. Progress with the development of employment law proposals will also bring about some important changes for practice and litigation in the coming months.

In terms of some of our own experiences and insights in the last quarter, we would highlight:

Costs awards

Recovering the costs of litigation is not a common occurrence for employers in the employment tribunal but can be achieved if the merits are strongly argued and set out clearly before the tribunal. We recently secured a substantial award of costs (circa £175,000 plus vat) against a litigant in person who the tribunal accepted had raised numerous but unmerited claims of discrimination and had sought to sensationalise their allegations via social media and through the press. The employment tribunal found the claimant to have been vexatious and cynical in pursuit of unfounded allegations against their employer, factors which we successfully argued gave rise to compelling reasons for a costs order in the employer's favour.

Multiple discrimination allegations

Employers will often feel overwhelmed by a high number of allegations of discriminatory conduct and fear that their chances of defeating all of them before an employment tribunal are reduced. However, a properly constructed and evidenced defence can address each claim and quickly establish credibility. We recently secured a successful outcome in the employment tribunal for a client facing a claim for unfair dismissal and disability discrimination, including 86 complaints of discrimination dating back to 2009.

For further information please contact:

Naeema Choudry
Partner

T: + 44 161 831 8283
M: + 44 777 558 7813
naeemachoudry@
eversheds-sutherland.com

Mark Pipkin
Partner

T: + 44 115 931 7569
M: + 782 793 6340
markpipkin@
eversheds-sutherland.com

eversheds-sutherland.com