

In the spotlight

Employment litigation

Autumn 2021



Welcome to our latest employment litigation newsletter

Employment tribunal claims related to the COVID-19 pandemic are starting to filter through the system, initially it seems related to decisions over accessing the Government Furlough scheme which ended on 30 September 2021. It will be some time before a clearer picture emerges but a first instance decision in the case of *Mhindurwa v Lovingangels Care Limited* found that the employer had unfairly dismissed an employee when it terminated the employment for redundancy instead of electing to place the employee on furlough. In contrast, in the case of *Handley v Tatenhill Aviation Limited*, the ET found dismissal for redundancy during a period of furlough to be fair. Employers can expect further developments from litigation in this area as their employment decisions but also their interpretation of the Job Retention (Furlough) Scheme, are scrutinised. Retaining records of decisions and decision-making processes will be particularly important.

Similarly, claims regarding employee health and safety issues will follow, for example, where employees allege a return to the workplace poses a health risk. A recent example of this arose in the case of *Accattatis v Fortuna Group (London) Ltd*, in which an employee's request to be placed on furlough to avoid travelling to work by public transport was declined and their unfair dismissal complaint rejected by the tribunal. Difficult decisions by government and employers over COVID-19 vaccination and certification will also need to be handled delicately, if litigation is to be avoided. Judicial Review proceedings are already understood to be underway to challenge the Government's legal requirement that care home workers are vaccinated.

As usual, we also highlight below some of the latest topical and practical litigation issues for employers and case law developments.

Highlights

The future of Employment Litigation roundtable event, October 2021

The latest in our Eversheds-Sutherland series of "Talking Points" virtual round table events addressed key issues and differences to be aware of when defending employment claims in different parts of the United Kingdom, Ireland and the Channel Islands. We brought together some of our most experienced employment litigators: Naeema Choudry, Dawn Dickson, Lisa Bryson and Joanne Hyde, who were joined by guest speaker Richard Sheldon of Appleby Solicitors. Read our [outline of the issues discussed](#) and if you were unable to attend but would like further information, please get in touch with any of the contacts listed.

As court and tribunal activity increases post-pandemic, you may find our [Employment Litigation brochure](#) and our [Strategic Litigation flyer](#) useful in terms of the key litigation areas they identify and relevant tips/ considerations. Also, see our [COVID-19 Litigation Risks Report](#).

News

New rights and more robust enforcement on the way

Recent weeks have seen developments by the Government of various employment rights initiatives, developments which are likely to lead to legal change in the coming months. In particular, the Government has launched a Consultation regarding a proposed right to request flexible working - [read our briefing](#). Responses to Consultations have also paved the way for the introduction of carers' leave as a day one statutory employment right and for all employers to pass on tips to workers without any deductions. These changes will come into effect as soon as Parliamentary time allows.

However, a vital component of the Government's proposals to reform workers' rights in the UK has been enhanced enforcement. A recently published Response to Consultation has confirmed that, as and when Parliamentary time allows, a new Single Enforcement Body will be launched and will also deliver a significantly expanded remit. Although it is likely to be some months yet before the new body is operational, employers should prepare for greater scrutiny of their operations. Significantly also, a key focus of the new body will be upon raising awareness which, over time, is also likely to increase litigation and reputational risk through the "naming and shaming" regime. We anticipate that initial activity by a new Single Enforcement Body will be focused upon:

- shortfalls in national minimum wage
- shortfalls in holiday pay and statutory sick pay
- transparency in supply chain abuses
- modern slavery statement reporting
- agency workers and regulating umbrella companies

Holiday pay, in particular, is likely to be a significant and contentious issue and to affect a variety of employers - many of whom will not yet have appreciated that they have an issue. [Read our briefing.](#)

Latest guidance and practice developments

- **Mask wearing in the tribunal**

The President of Employment Tribunals in England and Wales has confirmed that the wearing of face coverings will continue to be "strongly encouraged" during in-person hearings for the foreseeable future, notwithstanding relaxations elsewhere in public services. Masks should therefore be worn by all tribunal users except for the Employment Judge, panel members or by those addressing the tribunal who are exempted.

- **Greater flexibility over case management is on the cards**

As the Judicial Review and Courts Bill makes its way through Parliament in the coming weeks, it is increasingly likely that responsibility for the Employment Tribunal and its Rules will transfer from the Government's Department for Business, Energy & Industrial Strategy to the Lord Chancellor's Department. In practice, the change could prove significant as it should facilitate quicker and more effective responses to tribunal practice, including in applying new powers to delegate judicial functions to legal case officers and to determine the composition of the tribunals and EAT, both of which could aid in processing the backlog in claims.

- **Slight changes to practice and procedure**

Amendment Regulations mean that from 6 October 2021 a tribunal may list a preliminary hearing at its own initiative at any time (in addition to doing so upon application by one of the parties) and, from 1 December 2021, claimants will be permitted to identify more than one prospective respondent on an early conciliation form.

Latest ET claims statistics

The latest available [ET claims statistics](#) published by the MOJ for January to March, 2021 (statistics for April to June being delayed due to the pandemic), continued to show a rising backlog of claims as the tribunal has struggled to dispose of claims sufficiently quickly to reverse this trend. 44,000 claims were reported as outstanding in this period. Although the number of single claims received reduced by 13% on 2020 figures, multiple claims increased by 14%. Until a fuller picture of the impact of the pandemic on claims and on claim disposals is available from future figures, it seems unlikely that these latest statistics reveal any reliable pattern. What continues to be apparent nonetheless is that significant challenges and delays remain, with the mean period of disposal for single claims being 43 weeks, which is 5 weeks longer than in January to March 2020. Positive impact from a recruitment drive for employment judges earlier this year may be in evidence once the Q2 figures are available but, as we highlighted in the last edition, employers should adopt a strategic approach and prepare case responses and witness statements early so that vital evidence is not lost.

Recent cases of interest

In *Royal Mail Group Ltd v Efofi*, the SC has confirmed that a two-stage approach should be applied to the burden of proof in discrimination claims.

The claimant sought to argue that the Equality Act 2010 had changed established practice. However, the SC rejected this suggestion and has confirmed that claimants still need to prove facts that support their allegations of discrimination before the burden shifts to the employer.

In *K and ors v Tesco Stores Ltd*, the ECJ has confirmed that, under EU law, predominantly female store workers are able to use male distribution centre workers as pay comparators. This will now open the way to analysis of the nature of the work and equal pay principles in the case, as well as any justification arguments on the part of Tesco.

Similar litigation has been brought against other supermarkets. Equal pay determinations through the courts remain several years off but, in a wider context, all employers would be advised to appraise their pay structures to identify disparities and reasons. [Read our briefing.](#)

We highlighted the case of *Steer v Stormsure Ltd* last time and the potential for the CA to extend interim relief to discrimination cases. The CA has now held that interim relief is not available in discrimination cases and, furthermore, that this is not in breach of the European Convention on Human Rights (namely, articles 14 and 8). In light of the importance of the decision and scrutiny of the legal principles involved, it seems highly likely that this case will be appealed and addressed by the SC in due course.

In *Scipharm Sarl v Moorfields Eye Hospital NHS Foundation Trust [2021]*, the High Court found that references within a witness statement to discussions between an employee and the company's solicitor gave rise to a duty by the company to disclose relevant attendance notes from those discussions (pursuant to rule 31.14 of the Civil Procedure Rules, which deals with rights of evidence inspection). The decision is important as the Court found implied reference to and reliance upon the documents was sufficient to require disclosure in this case. [Read our briefing.](#)

Appeal cases to note and to watch out for

Recent appeal decisions of particular significance:

- **Efofi (see above):** (SC) the burden of proof in discrimination cases
- **Chief Constable of Police Service NI v Agnew:** (SC) this case has now settled, meaning the CA decision continues to apply in England, Wales and Scotland i.e. a 3 month break period acts as a cut off to backdated holiday pay claims

Upcoming hearings/ awaited decisions:

- **Dunkley & Ors v Kostal UK:** (SC) whether a direct pay offer to a unionised workforce was an "unlawful inducement"
- **Brazel v Harper Trust:** (SC) will clarify the correct holiday pay calculation for "part-year" permanent employees who do not work throughout the year, including term-time workers
- **Chell v Tarmac Cement and Lime Ltd:** (CA) the extent to which an employer may be liable for injury resulting from a practical in the workplace
- **Smith v Pimlico Plumbers Ltd:** (CA) whether holiday can be carried over indefinitely when the worker has taken unpaid annual leave

Eversheds Sutherland comment

- Our lawyers are increasingly seeing litigation arising from the Job Retention Scheme, including unlawful deductions claims based on the calculation of furlough pay, as well as claims based upon employees being dismissed rather than furloughed. Administering claims to the scheme can be complex and should be undertaken with care but a fundamental factor in decision-making must

also be equality and fairness, to rule out alleged discrimination but also preserve morale and reputation.

- Post-pandemic there is notable volatility in the employment market. Appropriate drafting and enforcement on contractual restrictions can prove a lifeline to some businesses. Read our [Guide to protecting your business relationships and confidential information](#).
- We have also witnessed a rise in takeovers and mergers in recent months. Collating case-specific evidence is critical where challenges ensue and one of our lawyers recently raised interesting arguments in the ET to successfully defend a claim that a transferee employer's use of technology and the Cloud to deliver the IT services constituted a fundamental change in the activities that were being undertaken.

For further information, please contact:



[Naeema Choudry](#)
Partner
[Email](#) | +44 161 831 8283



[Mark Pipkin](#)
Partner
[Email](#) | +44 115 931 7569

Useful Links

- [Eversheds Sutherland Website](#)
- [Events and training](#)
- [Where we are](#)
- [Practices we provide](#)
- [Industries we cater for](#)
- [Briefings and articles](#)
- [Find a contact](#)
- [Careers with Eversheds Sutherland](#)

Forward

Twitter

LinkedIn

Contact us

My preferences

Unsubscribe

Data Protection

Any personal information collected as part of our Marketing process will be used by Eversheds Sutherland (International) LLP in accordance with applicable data protection legislation and our [Privacy Notice](#). We use your personal data to send you the types of communications you have requested and manage your preferences in relation to them, arrange the events you sign up to attend, meet our legal obligations, and improve and monitor the performance of our digital platforms and marketing. The information may be shared by Eversheds Sutherland (International) LLP with other members of the Eversheds Sutherland group (some of which may be outside the EEA). If you would like to exercise any of your rights in relation to your personal data, please contact dataprotectionoffice@eversheds-sutherland.com.

Please note this link is for your personal use only and should not be forwarded. If you have a colleague who would like to register, please use this link: [Register to receive regular updates](#). You can also [unsubscribe](#) from our marketing communications or [update your preferences](#) at any time.

©Eversheds Sutherland 2021. All rights reserved.

[Unsubscribe](#) | [Preferences](#) | [eversheds-sutherland](#)