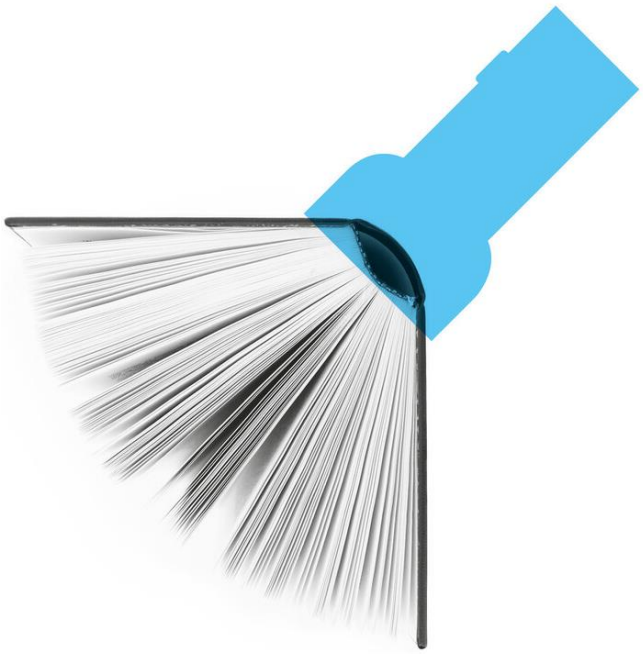
EVERSHEDS SUTHERLAND



In the spotlight

Employment litigation

Autumn 2022

Welcome to our latest employment litigation newsletter

The intervening weeks since our previous newsletter have proved particularly eventful, politically as well as judicially. Looking ahead, employment and employment litigation are influenced by the economic landscape so the types of claims coming through will be reflective of current challenges. From a legal perspective, the recent publication of the Retained EU Law (Revocation and Reform) Bill could lead to significant employment law changes next year and beyond.

Updated **Tribunal Statistics** for the second quarter of 2022 have been published by the MOJ (following the 2020/2021 absence) and continue to show a downward trend in claims from 2020 figures. The data also reveal that a substantial backlog of claims remains (despite the disposal of a significant number of class actions). At the end of June 2022, 487,000 cases were outstanding (43,000 single claims, and 443,000 multiple claims). The increase in claim disposals for multiple claims (class actions) is something we highlighted in our **Summer newsletter** and is the subject of a further Eversheds webinar this month (see Highlights below).

Evolving discrimination issues in the workplace have been particularly under the spotlight in the last quarter, with the courts providing important clarifications around the meaning and scope of protection of religious or philosophical beliefs and forms of age discrimination. Significant labour law issues have also arisen, including around contractual change and the principle of "fire and rehire".

Case law also continues to provide important insight into other areas of employment litigation, with holiday pay calculations back on the agenda and with recent clarifications over employee conduct and whistleblowing (see our "emerging themes and highlights" and "Recent cases of interest"). As usual, we also highlight below some of the latest topical and practical litigation issues and developments for employers.

Highlights

A recent webinar presented by Naeema Choudry, Mark Pipkin and Wie-Men Ho focused on the issue of class actions in the employment tribunal, which continue to occupy a considerable amount of tribunal time according to the latest ET statistics (see above). Following this successful event, a further webinar concerning class actions specifically in the context of equal pay was presented by Naeema Choudry, Sally Isaacs and Suzanne Caveney. Recordings of both webinars are accessible online:

- **"The Rise of Class Actions"**
- **"Equal pay and class actions"**

Future webinar and podcast topics from the team will include: Giving evidence from abroad, s145B claims, and the rise of the menopause as an issue employers are engaging with at work. We are also anticipating a podcast focussed on Social Media and Class Action.

As court and tribunal activity increases, 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.

News

Some emerging trends and themes

A number of recent cases have once more placed the meaning of "belief" under the spotlight in the context of the protected grounds of religion or philosophical belief under the Equality Act 2010 and the tests previously established in the case of *Grainger plc v Nicholson*. The case of *Forstater v CGD Europe* has clarified that, in principle, gender critical beliefs are protected so that someone voicing such an opinion should not be disadvantaged as a result. A belief in a political philosophy or doctrine (as opposed to supporting a political party) may also be protected (*Scottish Federation of Housing Associations v Jones*). Emerging questions in this context have included whether the employer's action is taken not because of the particular belief but because the employee manifested it in a way that is "objectively offensive" and whether the employer's response is objectively justified (*Higgs v Farmor's School*) and (*Mackereth v DWP*). Such issues are not only presenting difficult practical and reputation-management issues for employers but are raising interpretational issues for the courts. Continuing to monitor trends and risk areas in this evolving area will be important.

Age discrimination based on perceptions of age and personal characteristics often lies at the heart of such claims but can occur even where a difference in age is marginal. In the case of *Citibank NA v Kirk*, the EAT observed that this might arise, for example, where a cut-off age is applied to a benefit or where, due to levels of maturity, an age gap is more significant. Recent case law has also served as a reminder that there are exceptions to an employer's liability to maintain certain employee benefits beyond retirement age. In *Pelter v Buro Four Projects Services Ltd*, an employer did not directly discriminate by ceasing an employee's benefits under a PHI scheme when he reached the age of 65, relying upon the Equality Act 2010 exclusion from age discrimination of employer "insurance or a related financial service" benefits which end at age 65 or state pension age. Both scenarios highlight the need for employers to be aware of risk areas.

Employer liability regarding contractual commitments has also been highlighted recently in other contexts. A growing issue encountered by our labour law litigation specialists, particularly around pay negotiations and disputes, is the incidence of claims alleging that contractual changes progressed without collective agreement infringe labour law rights (section 145B Trade Union and Labour Relations (Consolidation) Act 1992). Questions over employer ability to change contractual terms also led to the significant and high-profile Court of Appeal decision in *USDAW v Tesco Stores Ltd*. In this case, involving "fire and rehire" proposals to remove a pay enhancement, the court rejected the use of injunctions to prevent such steps. (See our **Alert**).

Finally, a perennial theme that is once more back on the litigation agenda is holiday pay entitlement. The Supreme Court decision in *Harpur Trust v Brazel* has provided much-awaited clarification for term-time workers (see "Recent cases of interest") but, looking ahead, the Supreme Court will hear the case of *Chief Constable (NI) v Agnew* in December. This latter case could prove critical to employee eligibility for backdated holiday pay so is one to watch, along with the progress of the Retained EU Law (Revocation and Reform) Bill and any potential Government proposals for holiday pay reform.

Latest guidance and practice developments

Remote EAT hearings to stay

From 25 September 2022, **The Employment Appeal Tribunal (Amendment) Rules 2022** have made permanent the temporary measure for remote hearings in the EAT introduced during COVID-19. Rule 29(3) provides "Any oral hearing may be conducted, in whole or in part, by use of electronic communication (including by telephone) provided that the Appeal Tribunal considers that it would be just and equitable to do so and provided that the parties and members of the public attending the hearing are able to hear what the Appeal Tribunal hears and see any witness as seen by the Appeal Tribunal." (In contrast, the ability of employment tribunals to conduct proceedings remotely is provided generally through the pre-existing rules of procedure).

Use of a Single Claim form in Class Actions

We have previously highlighted a rise in class actions and the increased employment tribunal activity reflected in recent ET statistics (see also our Eversheds Sutherland webinars above). A question which arose recently in the case of *Clark v Sainsburys Supermarkets Ltd and Lloyds Pharmacy Ltd* was whether multiple Claimants had satisfied early conciliation requirements in order to commence proceedings, having shared the same Early Conciliation certificate number (EC number) on each multiple claim form. Overturning the tribunal decision, the EAT confirmed that, whilst it is preferable for tribunal administration for the EC numbers of all claimants to appear in a multiple claim form, this is not necessary and that inclusion of a single EC number for one of the claimants will suffice.

Witness statements (Scotland)

A Practice Direction and Presidential Guidance was published in Scotland in August on the use of witness statements in Scottish Employment Tribunal hearings which take place on or after 1 October 2022.

The general presumption remains that witness evidence will be given orally but the Practice Direction and Presidential Guidance set out the circumstances in which statements will be ordered for a case in the Scottish Employment Tribunals. As such, any applications for the use of witness statements should be made at the earliest opportunity. If the Tribunal grants an application for witness statements to be used, the Practice Direction requires that the witness statement should be in a particular format. For example, the witness statement to include information on how the witness statement was taken (e.g. face to face interview) and the format of the witness statement (e.g. document reference), should be in the witnesses own words, should make no comment on the evidence it is thought another party's witness will give and make no comment on the weakness of the other party's case. The witness statement should also be signed and dated by the witness with a confirmation and statement of truth indicated that the witness has not been asked or encouraged by anyone to include something in the statement that is not, to the best of the witnesses ability and recollection their own account. Should you need any assistance with Employment Tribunals in Scotland please contact us.

Period for lodging an appeal in the Employment Appeal Tribunal

The EAT has confirmed that, where an employment tribunal decision is corrected, in the normal course the 42 day period for lodging an appeal starts to run from the date of the original decision (and not from the date of the correction). It will only be in the unusual circumstances where a correction gives rise to a new decision, in substitution for and as a replacement of the original decision in its entirety, that the date for appeal will reset to the date of that replacement judgement. (***Hargreaves v Evolve Housing + Support***).

Searching for Court judgments

A reminder that the publication of future decisions from the UK Supreme Court, the Court of Appeal, the High Court and the Upper Tribunals has moved to a new website, **The National Archives Find Case Law** website.

Recent cases of interest

In *Harper Trust v Brazel*, the SC has confirmed that an employer was wrong to cap holiday pay at 12.07% of annualised hours for a zero hours contract worker working on a term-time only basis. Instead, her holiday pay should have been based upon her average earnings in the pre-holiday period (that period now being defined by regulations as 52 weeks). This decision dismissing the application of a 12.07% formula presents a change in practice for many education employers but is equally important to those who work varying hours during only certain weeks of the year but retain a continuing contract throughout the year.

Harpur Trust v Brazel (see our Alert)

In *Kong v Gulf International Bank (UK) Ltd.*, the CA has held that a whistleblower's dismissal was not automatically unfair where the decision-maker was able to show the dismissal was based on the employee's conduct (which involved personal criticism of a colleague's professional integrity) and not upon their protected disclosures. In practice, separating the two issues can be practically and legally difficult and should be approached with caution.

Kong v Gulf International Bank (UK) Limited

In *Amdocs Systems Group v Langton*, the CA held that an employer was liable to pay the level of income protection (PHI) payments set out in the contract of employment and that liability was not limited by the extent of any employer insurance cover underwriting such employee benefits. Here any limitations on PHI payment entitlement was not unambiguously communicated to the employee and could not be relied upon. Employers should ensure any restrictions on contract terms are clearly expressed and communicated but should also conduct regular reviews of such terms against insurance or other policy terms they wish to rely upon to support such benefits.

Amdocs Systems Group Ltd v Langton

The EAT has held in *MTN-1 Ltd v O'Daly* that it was appropriate to extend time for an employer to appeal a default judgment where communications about the claim were not seen by company and the CEO then delayed in lodging an appeal due to his ADHD and depression. The EAT accepted on the facts that the CEO had been unable to focus upon more than one issue at a time, due to his mental impairments, and that this contributed materially for the late appeal submission. The case is interesting in that the EAT found the evidence of the CEO's conditions to be persuasive, even though he could have delegated the case handling. What is also clear is that but for this evidence, the extension would not have been granted.

MTN-1 Ltd v O'Daly

Appeal cases to note and to watch out for

Recent decisions of particular significance:

- ***Steer v Stormsure Ltd***: (SC) permission to appeal the CA decision of last year (which held that the unavailability of interim relief during discrimination proceedings is not a breach of human rights) has been refused.
- ***Forstaterv CGD Europe***: (ET) an employee who had expressed the view online and on social media that biological sex is immutable and not to be conflated with gender identity was found to have been discriminated against and victimised on the grounds of her beliefs.
- ***USDAW v Tesco Stores***: (CA) the court overturned an injunction which had suspended an employer's proposal to dismiss and re-engaging staff in order to change their contractual terms.
- ***Brazel v Harper Trust***: (SC) upholding the CA finding, the correct holiday pay calculation for "part-year" permanent employees who do not work throughout the year, including term-time workers, is to ignore weeks not worked.
- ***Kong v Gulf International Bank (UK) Ltd***: (CA) the real reason for dismissal against a back drop of whistleblowing.

Upcoming hearings/awaited decisions:

- ***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.
- ***Chief Constable of the Police Service NI v Agnew***: (SC) whether a gap of three months or more breaks a "series" of unlawful deductions from wages in the context of holiday pay.

Eversheds Sutherland comment

As referred to in the preceding paragraphs, we anticipate that the coming months of employment litigation will be influenced to a degree by the economic climate, potentially leading to a rise in industrial action and pay disputes as well as contract enforcement. However, a change in government administration is proposing an extensive employment law review and potential for change. For the employment tribunal system, tackling the stubborn backlog of cases will continue to present considerable challenge.

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