EVERSHEDS SUTHERLAND

In the spotlight

Employment litigation

Summer 2022

Welcome to our latest employment litigation newsletter

The post-Covid period is setting a next phase in employment tribunal operation with a new tribunal "roadmap" for conducting proceedings having been published. The roadmap confirms that extensive digital and remote interaction will remain, going forwards, but with a more targeted approach. The tribunal system is also continuing to make advances with its digital capacity through the HMCTS Reform Programme, which is developing software to facilitate electronic case management and the eventual removal of paper from employment tribunals.

Despite these ambitious electronic developments and aspirations, a software change last year has meant that Government statistics of employment tribunal claim numbers and type since 2021 have not been accessible in the interim and it is only recently that publication of these data has resumed. The **latest statistics** to be published by the Ministry of Justice relate to the period January to March 2022 and indicate that claim numbers declined in that period (multiple claims significantly so) and have returned to pre-pandemic levels. In isolation and following what has been a tumultuous period in both collating the data and for litigation, it is difficult to compare these statistics meaningfully with those pre March 2021. However, reducing the significant backlog in cases clearly remains an ongoing challenge and the latest figures suggest case receipts continued to exceed disposals during the period, with 42,000 outstanding single cases. From an Eversheds Sutherland perspective, our own recent experience also reflects the latest tribunal data and the significant rise in the number of class actions being dealt with by tribunals in recent months. Looking further ahead, we would anticipate that several recent rate rises may lead to more challenges over employment status and pay and consequential litigation, for example over compliance with the national minimum wage, which rose to £9.50 per hour for many adults from April.

Case law also continues to provide important insight into areas of litigation, with pandemic-related decisions continuing to evolve, personal social media profiles becoming more relevant and with recent clarifications over disclosure and openness in tribunal proceedings, the latter of which we touch on further in our "emerging trends and themes" and "recent cases of interest", below.

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

Highlights

Our recent webinar presented by Naeema Choudry, Mark Pipkin and Wie-Men Ho, regarding "**the Rise of Class Actions**", addresses issues such as some of the reasons for the rise in these types of claims but also important tactical considerations for employers. **View the recording** and see also trends, below.

Following our webinar, above, we will be presenting a further webinar on 27 September 2022 from 16:30 - 17:30, focusing on "Equal pay and class actions". An invitation will be circulated shortly but please feel free to **register here** in advance.

Look out for future podcast topics later in the year, including giving evidence from abroad and s145B claims. A future podcast will also consider the rise of the menopause as an issue employers are engaging with at work. Further details will follow in our next newsletter.

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.

News

Some emerging trends and themes

The latest employment tribunal statistics (see above) and recent Eversheds Sutherland experience suggest a notable increase in group claims, also known as class actions. This is borne out also by Acas data and is a significant development for employers in terms of how they respond to volume claims but also in turnaround time for doing so. For further insight into this issue, listen to our recent **webinar recording: The rise of class actions**.

Transparency and openness to evidence in the employment tribunal is always an important aspect of litigation but has once more been under the spotlight in recent cases. The decisions serve as a reminder for parties to litigation that, when it comes to requests for witness anonymity or the privacy of certain evidence, it cannot be taken for granted that a tribunal will allow this, even where the parties agree to it. In the case of *Frewer v Google UK Ltd*., for example, the employment appeal tribunal reiterated that there may be a public interest in naming individuals or entities involved in employment litigation. Furthermore, in the case of Guar*dian News and Media Ltd v Rozanov*, it was held that that tribunal documents, including skeleton arguments and witness statements, should be disclosed to a journalist in the interests of open justice. In some cases, knowledge that anonymity or secrecy cannot be guaranteed may well influence the tactics of litigation or even a party's decision whether to proceed. As a related topic, online profiles and comments have also been at the forefront of some recent cases, such as *Forstater v CGD Europe*, where discrimination was found to have occurred on the grounds of gender beliefs and, in *Higgs v Farmor's School*, where an appeal hearing was postponed when a tribunal lay member was recused over online comments regarding gender identity issues.

The latest research data regarding the impact of the menopause at work, published by the Fawcett Society, suggests 8 in 10 affected employees receive no support from their employer. Pressure upon employers to respond has been growing in the last few years, through various campaigns and from various quarters, but what is also apparent is that rising awareness of this issue is being reflected in employment tribunal claims and application of the law. Data from HM Courts and Tribunals Service identifies that the menopause was cited in three times as many cases in 2020 as 2018 and showed a further significant rise in 2021. Recent examples include the case of *A v Bonmarche*, in which a manager's hostile response to an employee going through the menopause was found to have amounted to unlawful harassment on grounds of age and sex and the case of

Rooney v Leicester City Council (see our **Spring newsletter**), where focus was upon the employee's menopause symptoms as a potential disability. As the menopause continues to grow as a topic of workplace discussion, employers may well wish to grasp the nettle and act now to support struggling employees but to also avoid costly litigation. There have even been calls upon Government to make menopause a protected characteristic under the Equality Act 2010, although these are currently resisted. We will be considering these and other issues for employers in our autumn podcast on the menopause. Look out for further detail in our next newsletter.

Pandemic-related judgements continue to emerge, albeit there is still some way to go before settled precedents are likely to be set. In the case of *Rodgers v Leeds Laser Cuttings*, the employment appeal tribunal has upheld an ET decision that the dismissal of an employee who refused to return to work due to fears over COVID-19 was not automatically unfair. The employee believed that COVID-19 presented circumstances of serious and imminent danger "all around" but did not raise or identify any specific issue within the workplace. It was found that he could reasonably have averted danger by abiding by the guidance applicable at that time.

Latest guidance and practice developments

Latest compensation rates

From 6 April, **the Employment Rights (Increase of Limits) Order 2022** raised the statutory rate limits in the employment tribunal, increasing the limit on a week's pay to £571 (from £544) and maximum compensatory award for unfair dismissal to £93,878 (from £89,493). This coincided with **updated Guidance** on tribunal awards for injury to feelings and psychiatric injury, published by the Presidents of the Employment Tribunals in England & Wales and Scotland (commonly referred to "the Vento bands"), which have increased as follows:

- £990 to £9,900 for the lower band – less serious cases
- £9,900 to £29,600 for the middle band
- £29,600 to £49,300 for the upper band – the most serious cases
- £49,300 and above for the most exceptional cases

Recent Presidential Guidance

The Presidents of the Employment Tribunals in England and Wales and in Scotland have published a number of useful guidance documents which will steer tribunal practice in the coming months:

- **A new Road Map for tribunal hearings**
  Statistics revealed by the National Employment Tribunal Users group at the start of the year indicated that the highest incidence of in-person hearings, regionally, was just 20-25% but was as low as 5% in some areas. Face-to-face interaction is now returning more widely but a new Presidential "**roadmap**" for employment tribunal proceedings in 2022/23, reflects a long term legacy of the pandemic. From 1 April 2022, the default position for preliminary hearings, wage claims and straightforward unfair dismissal cases will be that these will continue to be conducted by telephone or video, subject to tribunal discretion. The forum for final hearings will vary but in-person hearings are more likely to be reserved for more complex cases, such as discrimination or whistleblowing claims.
- **New Guidance in the Employment Tribunal for witnesses abroad**
  New **Guidance** has been issued on taking oral evidence by video or telephone from persons located abroad, reflecting the decision of the Immigration Tribunal last year in the case of ***Agbabiaka***. The Guidance confirms that the foreign state in which a person is located

should be contacted for permission for the giving of such evidence and parties should notify the ET office to initiate this process. Permission is not required for written evidence or submissions.

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 *London Fire Commissioner v Hurle*, the EAT has urged parties to be prepared to make a costs application at the end of the appeal hearing rather than waiting until afterwards. It observed that dealing with a case justly in accordance with the overriding objective should include consideration of the limited resources of the EAT. Where a party argues that the appeal is misconceived and then seeks to pursue a costs order on that basis, EAT resources can be saved if the party makes an application for costs at the time and avoids a later process/hearing on this issue.

London Fire Commissioner v Hurle [2022]

In *Dafiaghor-Olomu v Community Integrated Care*, the EAT considered the requirement for the statutory cap on compensation to be applied, "after 'taking into account' any payment made by the employer to the employee". It held that, when an award was substantially increased on appeal after the employer had paid the original sum awarded, the correct approach nonetheless was to deduct the amount already paid to the claimant from the increased award and to then apply the statutory cap on compensation. This was so even though the result in practice was that the employer gained no credit for the sum already paid (the new award, here, exceeding the amount already paid and the maximum statutory award, combined).

Dafiaghor- Olomu v Community Integrated Care [2022]

The importance of context in cases alleging discriminatory harassment was illustrated in *Ali v Heathrow Express Operating Co Ltd*. During a simulated security exercise, the employer used a bag designed to look like a terrorist device, with the words in Arabic, "Allahu Akbar", attached. An employment tribunal found that this was not an act of racial discrimination or harassment against the claimant as he should reasonably have appreciated the scenario was not directed at him or his religion but was chosen to illustrate a potentially suspicious object and security threat.

Ali v Heathrow Express Operating Co Ltd

The EAT has issued a reminder in the case of *Frewer v Google UK Limited* that protecting anonymity at a party's request cannot be guaranteed. The tribunal's decision whether to allow anonymity required a weighing up of the individual's rights to a fair hearing and to freedom of expression against issues of commercial confidentiality. Here, the EAT refused to hide the identity of the company's clients, whom the claimant alleged had received competitive advantage. The EAT concluded that, open justice supported disclosure of the names as a matter of public interest, the latter of which includes public access to information through press reporting.

Frewer v Google UK Limited [2022]

Appeal cases to note and to watch out for

Recent decisions of particular significance:

- **Rodgers v Leeds Laser Cutting Ltd:** (EAT) 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.
- **Forstater v 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-engage 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.

Upcoming hearings/ awaited decisions:

- **Kong v Gulf International Bank (UK) Ltd:** (CA) the real reason for dismissal against a back drop of whistleblowing
- **Dunkley & Ors v Kostal UK:** (SC) whether a direct pay offer to a unionised workforce was an "unlawful inducement"
- **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 are seeing an increase in class actions, particularly in relation to equal pay, collective redundancy/restructuring processes and worker status. Having a clear and accessible communications strategy for identifying common employment concerns and grievances can greatly reduce the risks of litigation. However, where class actions do arise, a well thought-out, co-ordinated approach will be needed and, ideally, should be in place in advance. For further insight into this issue, listen to our recent webinar recording: The Rise of Class Actions and look out for our forthcoming webinar on equal pay and class actions.

Also, 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.

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