# UK Employment Law Round-up

**March 2018** | Issue 22

## In this issue:

In this issue we look at some of the key employment law developments that have been taking place over the past month. In our case law review we take a look at 'deemed disabilities' under the Equality Act following a recent EAT judgment. We also look at what happens if an employer does not know an employee is pregnant when deciding to dismiss but finds out before the dismissal takes effect. The impact of the new taxation of termination payments coming into force from 6 April 2018 and the sponsor licence reporting process to be mindful of when involved in mergers and acquisitions are also covered.

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## A busy month for discrimination law

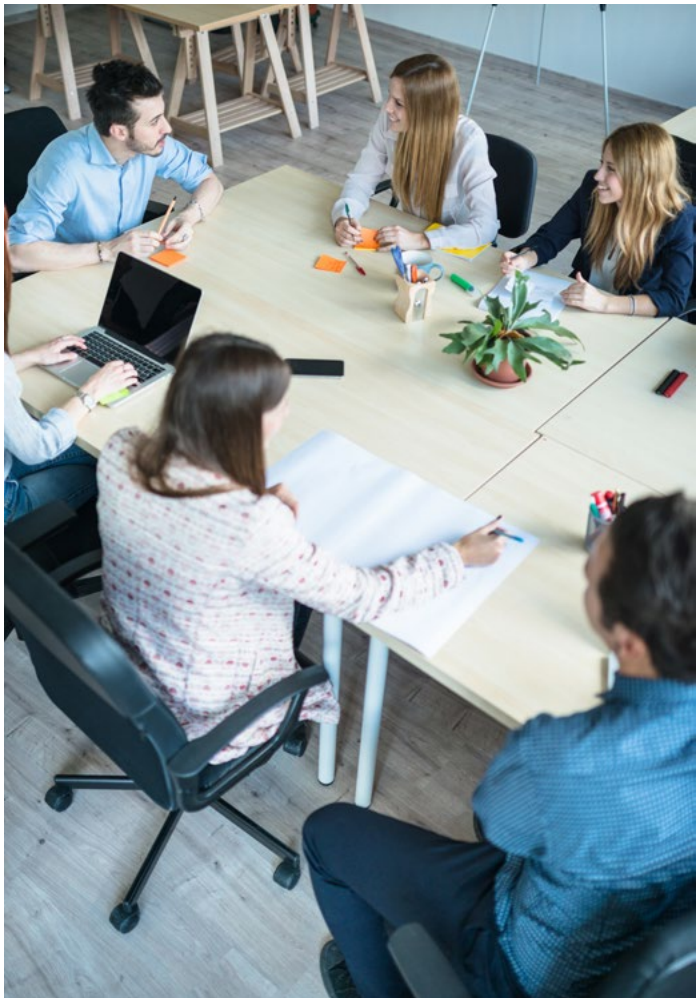
It's been a busy few weeks for judgments; we round up the most recent discrimination cases below.

### When is cancer a disability?

Certain conditions – including cancer – are specifically deemed to be disabilities for the purpose of protection under the Equality Act 2010 (EqA). In such cases, claimants are released from the usual requirement to demonstrate an impairment with a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

The claimant in *Lofty v. Hamis* suffered from a "lentigo maligna", which her consultant described as a "pre-cancerous lesion which could result" in skin cancer. She had successful treatment to remove the malignant cells before they had spread. The employment tribunal decided that the successful treatment meant that the claimant did not have cancer. On appeal, the Employment Appeal Tribunal (EAT) overturned that decision, holding that:

- The relevant point of determination is the point of diagnosis (and not after treatment).



## In the Press

In addition to this month's news, please do look at publications we have contributed to:

- Scottish Grocer – Laura Morrison considers the risks employers take if they use periods of unpaid work such as trial periods
- Scotsman – Mark Hamilton and Claire McKee explore why employment law must keep up with workplace changes
- Personnel Today – Jessica Pattinson gives insight into how to be GDPR compliant when it comes to immigration when it comes to immigration data as the GDPR deadline looms: Are your immigration data processes compliant?

We would love to hear from you if you have an idea for a topic you would like us to cover in future editions of our round-up, or if you have any comments on this edition. Please provide your comments here.

- The evidence before the tribunal was that the claimant had "in situ" or "stage 0" melanoma i.e. cancerous cells in the top layer of her skin.
- "Pre-cancer" was on the evidence to be viewed as medical shorthand for a particular stage in the development of cancer. It did not mean that there was no cancer for the purposes of the EqA.
- The law does not distinguish between invasive and other forms of cancer, and "there is no justification for … a tribunal to disregard cancerous conditions because they have not reached a particular stage".

The EAT therefore substituted a finding that the claimant had a deemed disability – cancer – under the EqA. This makes it important that employers do not rely on medical shorthand. Pre-cancer is still cancer for the EqA.

### What happens if an employer does not know an employee is pregnant when deciding to dismiss her but finds out before the dismissal takes effect?

The employer in *Really Easy Car Credit v. Thompson* decided to dismiss the claimant during her probationary period because of her "emotional volatility" and work ethic. It took this decision on 3 August 2016 but did not immediately inform the claimant. The next day, the claimant notified her employer that she was pregnant. On 5 August 2016, she was given a dismissal letter dated 3 August 2016. The claimant alleged that the dismissal letter had been falsely backdated and that the decision to dismiss her had been taken after the employer knew about her pregnancy and for that reason.

The employment tribunal rejected the claimant's factual account and held that the decision to dismiss had been taken on 3 August 2016. However, it went on to decide that, once the employer learned of the pregnancy, it should have been obvious that her behaviour and conduct was pregnancy related. On that basis, the employer had failed to establish that the dismissal was not related in any way to the claimant's pregnancy.

The EAT disagreed, holding that:

- To be liable for a pregnancy related dismissal, the employer had to know, or believe, that the claimant was pregnant when it took the decision to dismiss.
- Based on the tribunal's findings of fact, the employer could not have known about the claimant's pregnancy when it took the decision to dismiss on 3 August 2016.
- The first instance employment tribunal appeared to have found the employer liable by omission – for failing to take positive steps to revisit its decision having learnt of the pregnancy. That was wrong and no such obligation exists in law.

Nonetheless, the case was sent back to the employment tribunal to consider the reason for the dismissal, whether it was because of the claimant's pregnancy, and whether that was the reason or the primary reason as at 5 August 2016 (no findings of fact had been made in this regard by the tribunal).

As always, be very careful in such situations. Even if the employer is not aware of the pregnancy, it may be difficult to prove that.

### Was forfeiture of LTIP awards unlawful age discrimination?

In *Air Products v. Cockram* the claimant resigned at the age of 50. This meant that he forfeited his right to an unvested award under the rules of his employer's long-term incentive plan (LTIP).

The LTIP rules did however contain an exception to the general principle of forfeiture on termination. This exception allowed employees who left employment on or after a customary retirement age – which was fixed at age 55 – to retain their awards.

On that basis, had the claimant been 55 (and not 50) at the time of resignation he would have retained his award. He brought a claim alleging that this rule amounted to unlawful direct age discrimination. Unlike all other forms of direct discrimination, direct age discrimination claims can be defended on the basis that the discrimination in question is, broadly, a proportionate means of achieving a legitimate aim.

The Court of Appeal (CA) reinstated the decision of the employment tribunal – reversing the decision of the EAT – holding that (among other things):

- The employment tribunal had been entitled to find that the employer's aim of consistency between those defined benefit pension members (such as the claimant) who could draw their pension at 50 and defined contribution members who could not draw their pension at 50 was "a legitimate social policy aspect of intergenerational fairness".
- In addition, the CA agreed that on the evidence available the tribunal had been entitled to find that the LTIP rule was a proportionate means of achieving that aim.

The claim for age discrimination did not therefore succeed. Detailed evidence to support the claim and its impact was produced in this case. Without it the decision is likely to have been different.

# Mergers and acquisitions: post-completion immigration actions

Where an organisation has a Tier 2 Sponsor Licence to employ non-EEA workers they have a responsibility to report to the Home Office when certain events occur. Examples include where the organisation moves premises, changes its name, or there is a merger, takeover, de-merger or, more generally, any transaction where there is a change of ownership.

Even though we are approaching the 10-year anniversary of the introduction of Tier 2, there continues to be a lot of confusion and misunderstanding regarding the sponsor licence reporting process, especially in relation to transactions. With strict deadlines for reporting (20 days from the date the event occurs) it is critical to understand the events that need to be reported, and any additional actions you must complete.

Preparation in advance of a transaction is key – if you only start assessing the necessary actions once a transaction has completed it is usually too late and there is a risk that the deadline will be missed. This could jeopardise the immigration status of any sponsored employees and your ability to sponsor employees in the future.

The questions you need to ask to determine necessary actions are:

1. What type of transaction is taking place – is it a merger, acquisition, demerger, share sale?
2. What entities are involved and do they currently have a Tier 2 sponsor licence?
3. Will there be a change in the direct ownership of the sponsor licence entity, or will the change in ownership be higher up the chain?
4. Will TUPE apply?
5. Who are the Tier 2 visa holders impacted by the transaction?
6. Will there be secondary changes now or in the future that need to be reported, for example will there be a change to the name or location of the organisation?

Depending on the responses to these questions the necessary actions in relation to the organisation could be as simple as a short report to the Home Office, or as complex as needing to apply for a new Tier 2 sponsor licence. In respect of each employee with a Tier 2 visa, again it may be as simple as a short report to the Home Office or as complex as each employee needing to apply for a new visa (which they may not be eligible for).

In addition, a new right to work check needs to be completed for any employee who TUPE transfers into your organisation.

Given the complexities in identifying the necessary actions, the strict timeframes with which to comply, and the negative impact of making an error, it is critical to think about immigration early on in the corporate deal.

A final point to consider is that, if the transaction includes operations outside the UK, similar immigration compliance actions may be required in each location, adding to the overall complexity and risk position.

# Termination payments post 5 April 2018: a new landscape

New tax rules coming into force on 6 April 2018 will mean that income tax and national insurance contributions (NICs) must be paid on all payments in lieu of notice (PILONs) on termination of employment.

## Current rules

Currently the first £30,000 of any PILON enjoys tax-free status provided the employer does not have an express contractual right to make such a payment and has not created an implied right by, for example, a consistent practice of making PILON payments to departing employees. This is because it is treated as damages for breach of contract.

In a few situations, where there is an express contractual right, it has historically been possible to argue that the exemptions still applied. Such arguments have always been difficult as the employer has to breach its own contract.

## The new rules

In an attempt to simplify matters, the changes brought in from 6 April 2018 will mean that all PILONs will be taxed as earnings, regardless of whether they are contractual or not. Tax cannot be avoided by failing to pay in lieu.

Under the new rules, employers are required to work out an employee's "post-employment notice pay" (PENP). Essentially this represents the amount of basic pay the employee will not receive because their employment was terminated without full notice being provided. This PENP is taxable as earnings and therefore subject to income tax and NICs even if described as compensation.

The balance of any termination payment in excess of the PENP can still benefit from being tax free, up to the £30,000 threshold.

## Key dates

While the legislation itself suggests that the new rules will apply to all payments made after 5 April 2018, recent guidance from HMRC states that this change in tax status will apply only if both:

- the termination payment is made after 5 April 2018; and
- the employment terminated after 5 April 2018.

Therefore the new rules will not apply if the employment terminates before 6 April 2018, even if payment is made on or after 6 April 2018.

## Other changes

Other tax changes being brought in from 6 April 2018 include:

- Foreign service relief is to be scrapped.
- The tax exemption for payments for injury and disability will no longer apply to injury to feelings (whether on or before termination), save in circumstances where the injury amounts to a psychiatric injury or another recognised medical condition.

## How will this affect employers?

The first point to make is that the new rules are expected to increase the sums paid in settling termination claims, with the majority of this extra cost most likely to be met by employers. Employers should implement a review of their post-termination settlement negotiation processes and any template agreements they may use. As has always been the case, HMRC has statutory powers to recover any tax and NICs, plus penalties and interest from employers who incorrectly decide a PILON payment is not taxable.

If you are in any doubt as to how the new rule changes will affect you or your business, please contact a member of our team.

## Expansion of the meaning of "working time"

For many employers, the concept of "working time" can be difficult to pin down. In particular, the question as to whether time spent "on call" can count as working time has been the subject of various European case law decisions over the last decade.

Working time is defined in the Working Time Directive (WTD) as any period during which a worker is carrying out his duties and is at his employer's disposal.

Historically, when considering this issue the courts have tended to focus on the worker's location during periods of time spent on call. However, in the recent Belgian case of *Ville de Nivelles v. Matzak*, the ECJ appears to be moving away from that line of thinking.

### Summary

In this case the court was asked to consider whether time spent by Mr Matzak, a retired firefighter, on stand-by at home during evenings and weekends was "working time" under the WTD. The activities that he was able to carry out while on stand-by were severely restricted, due to the fact that he had to be able to report for work within eight minutes if needed, and he said that this left him unable to enjoy time with his family or to spend time pursuing his own interests. As a result, Mr Matzak argued that he should be paid for time spent on stand-by.

His case was ultimately referred to the European Court of Justice (ECJ) to determine whether the provisions of the WTD prevented home-based on-call time from being regarded as working time where the constraints on the worker restricted his ability to undertake other activities.

The ECJ ruled in Mr Matzak's favour, confirming that any on-call time that a worker spends near his workplace, with the duty to respond to calls from his employer within eight minutes, must be regarded as working time.

The court's decision echoed the earlier opinion given by the Advocate General on this case. Interestingly, the Advocate General emphasised that in each particular case regard should be had to the quality of the time that the worker may enjoy when on "stand-by" duty, rather than on any specific restrictions placed on the worker's on-call time by the employer. This is a departure from previous case law, which has tended to focus on the worker's location during periods of time on stand-by and whether such location has been determined by the employer.

### What does this mean for employers?

This case is important for employers with workers who are required to be on call. Employers should review the restrictions that they place on such workers, as it could be that time spent on call may now be found to be working time in light of this decision. If it is, those workers may well be entitled to the national minimum wage for the hours they are on call.

To reduce this risk, employers should also carefully consider whether they need to place significant restrictions upon employees' activities when they are on call, ensuring that such restrictions are no more than necessary to fit with operational requirements.

## Editor's top pick of the news this month

- Employers "named and shamed" for failure to pay the National Minimum Wage – http://www.ukemploymenthub.com/employers-named-and-shamed-for-failure-to-pay-the-national-minimum-wage
- Is your Privacy Notice GDPR compliant? – http://www.ukemploymenthub.com/is-your-privacy-notice-gdpr-compliant
- Brexit work permit crisis set to be the new normal – http://www.ukemploymenthub.com/brexit-work-permit-crisis-set-to-be-the-new-normal
- Historic increase in Tribunal claims since fees abolished – http://www.ukemploymenthub.com/historic-increase-in-tribunal-claims-since-fees-abolished
- Shared Parental Leave for self-employed contractors – http://www.ukemploymenthub.com/shared-parental-leave-for-self-employed-contractors

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