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UK People, Reward and Mobility Newsletter

NOVEMBER 2019

IN THIS ISSUE

In this issue we look at some of the key employment law developments that have taken place over the past month. In particular, we examine: the Good Work Plan changes coming into force in April 2020; the new EU Whistleblowing Directive; whether an employer is liable for harassment of its employees by third parties; and a recent case concerning the tricky points that can arise in the context of redundancy trial periods.

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The EU Justice and Home Affairs Council formally adopts new Whistleblowing Directive

The EU Justice and Home Affairs Council has formally adopted a Directive of the EU Parliament, which aims to harmonise the protections available for EU whistleblowers who report breaches of EU law.

The Directive comes after the European Commission carried out a consultation to collect information, views and experiences on the benefits and drawbacks of whistleblower protection.

The results of the consultation

The Commission sought views on the following questions:

- What is considered important for effective whistleblower protection?
- Are problems arising both at national and EU level the result of gaps and weaknesses in existing whistleblower protection, and is there a divergence of protection across the EU?
- Is there a need for minimum standards of protection?

The consultation took place between 3 March and 29 May 2017 and the results revealed some startling statistics:

- 85% of respondents believed that workers very rarely or rarely report concerns about threat or harm to the public interest;
- only a few member states have legislation protecting whistleblowers in place, resulting in fragmented and inadequate protections across the EU;
- the most common factors selected by respondents as to why whistleblowers were not reporting concerns were a fear of legal consequences (80% of individual respondents and 70% of organisations); a fear of financial consequences (78% of individual respondents and 63% of organisations); and a fear of getting a bad reputation (45% of individual respondents and 38% of organisations); and

- 96% of individual respondents and 84% of organisations were supportive of the Commission's proposal to establish legally binding minimum standards on whistleblowing protection in EU law.

How will the new EU Directive impact the current position in the UK?

The UK was one of the countries that the Commission identified as already providing comprehensive protection and much of the content of the Directive is already contained in UK domestic law.

Brief summary of the law in the UK

In the UK, the whistleblowing protections can be found in sections 43A to 43L of the Employment Rights Act 1996 (as inserted by the Public Interest Disclosure Act 1998).

The legal framework essentially creates two levels of protection for whistleblowers:

- firstly, there is protection against dismissal. If the reason, or principal reason, for the dismissal of an employee is that they have made a qualifying "protected disclosure", the dismissal will be automatically unfair – even if the employee does not have two years' service; and

- secondly, there is protection against detriments. If a worker is subjected to any detriment on the ground that they made a protected disclosure they have the right to seek compensation from a tribunal.

Demonstrating that the employee has made a qualifying disclosure is the first step in establishing protection under the whistleblowing legislation.

A qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making it, is made in the public interest and tends to show one or more of the types of wrongdoing or failure listed in section 43B(1)(a) to (f) which are:

a. that a criminal offence has been committed, is being committed or is likely to be committed;

b. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which s/he is subject;

c. that a miscarriage of justice has occurred, is occurring or is likely to occur;

d. that the health or safety of any individual has been, is being or is likely to be endangered;

e. that the environment has been, is being or is likely to be damaged; or

f. that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

A worker does not have to prove that the facts or allegations they are disclosing are true, or that they are capable in law of falling within one of the categories of wrongdoing listed.

So long as the worker subjectively believes that the relevant failure has occurred or is likely to occur and their belief is, in the tribunal's view, objectively reasonable, it does not matter if the belief later turns out to be wrong.

Finally, in order to qualify for protection under UK law, the disclosure must also be made in the right way.

The UK legislation very much encourages internal disclosure to the employer as the primary method of whistleblowing with wider, external disclosure only being allowed when more stringent conditions are met.

The EU Directive largely reflects these key principles. However, there are a couple of key differences between the provisions of the UK legislation, which gives protection to those making disclosures relating to breaches of UK law, and the Directive, which relates to breaches of EU law.

What are the key differences between UK law and the EU Directive?

Under the Directive, organisations with 50 or more employees will be required to establish internal reporting channels and respond to reported concerns within three months (or six months in complex cases).

Secondly, whistleblowers will also have the right to make an external disclosure to a competent national authority or, in limited cases, a public disclosure.

Member states will have two years, from the date the Directive enters into force, to adopt the Directive into national law.

What about Brexit?

It is not yet clear whether the Directive will be formally implemented in the UK, or whether domestic legislation may be amended to incorporate these same rights in any event to ensure that the UK keeps pace with European worker rights. The timing of Brexit, any transition period and the political situation overall are all likely to have a significant bearing on this.

Conclusion

Whistleblowing is becoming more and more of a hot topic. Over recent months, it has featured regularly in the press, with high-profile cases such as *Gilham v. Ministry of Justice* reaching the Supreme Court.

Employers would be well advised to implement a whistleblowing policy if one is not already in place. They should also consider providing training to managers so they better understand the protections afforded to staff who raise legitimate concerns during their employment. Dentons can assist with the provision of such training.

The Good Work Plan – exciting times ahead

The government published its Good Work Plan back in December 2018 in response to Matthew Taylor's review of employment practices. The Good Work Plan's stated aims are to provide clarity, ensure fair and decent work and facilitate enforcement. Employers need to be aware of and prepared for various changes to the employment and appointment of their staff that will come into effect on 6 April 2020.

6 April 2020 changes

- **Applicability of Section 1 Statement** – Employers are currently only legally required to provide a written statement of the main terms of employment to their employees (Section 1 Statement). From 6 April 2020, employers will also have to provide Section 1 Statements to their workers.
- **Day 1 right** – Section 1 Statements will need to be provided on or before the worker's/employee's first day of work. There will no longer be a two-month grace period.

Employers will be pleased to note that there will be no need to issue new contracts to existing staff if their terms do not change. Existing staff will, however, have the right to request new Section 1 Statements at any time, including up to three months after the end of their appointment/employment, and employers will have one month to comply. If employers change any term which is required to be listed in the Section 1 Statements, they will need to notify their staff accordingly.

- **Additional information to be included** – additional information will also need to be included within the Section 1 Statements, such as:
    - details of any probationary period, including its duration and any conditions that apply (such as a shorter notice period) during the probation;
    - details of all paid leave, including details of pay for any form of family leave;
    - training entitlements and details of compulsory training, including whether the employer will pay for it;
    - details of all benefits provided. This appears to include both contractual and non-contractual benefits, so it will be important to differentiate between them; and
    - terms relating to any work the worker will be required to complete outside the UK for periods of more than one month.

Not all of these changes to Section 1 Statements will be an issue for employers, many of whom will already have much of the required information in their contracts. Care will, however, be needed to ensure that an appropriate level of detail is included within

the Section 1 Statement itself, as there will be less scope to rely on ancillary documents such as policies in a handbook.

In addition to Section 1 Statements, there are a number of other changes coming on 6 April, including:

- **Reference period increase** – the reference period for calculating average weekly pay will increase from 12 to 52 weeks. This is intended to prevent staff being disadvantaged if they take holiday during quieter times.
- **Swedish derogation removal** – it will no longer be possible to rely on the Swedish derogation provision when using agency workers. Agencies whose contracts with their workers contain such provisions will need to be provided with a written statement confirming that, with effect from 6 April 2020, these will no longer apply. The Swedish derogation provisions had previously provided an exemption from the right to parity of terms with direct recruits after 12 weeks where agency workers were issued with a permanent contract and paid between assignments.

Comment

Employers will be well advised to get up to speed with these changes. The changes to Section 1 Statements should be relatively easy to implement if the necessary information is organised now. However, the reference period increase will impact more complex issues, such as the calculation of holiday pay, and may require changes to payroll systems.

Is an employer liable for harassment of its employees by third parties?

The extent to which an employer is responsible in law for the harassment of its employees by third parties has changed several times over the years. As originally enacted, the Equality Act 2010 made employers liable for failing to protect employees against harassment by third parties in some situations. The requirements were that the harassment was related to a protected characteristic and that the employee had been harassed at least twice before. This was the so-called "three strikes rule" and it was quite controversial. However, the fact that the rule was then repealed entirely in October 2013 was perhaps even more controversial.

Since then there has been no legislation specifically making employers responsible for failing to protect employees against such harassment. In the recent case of *Bessong v Pennine Care NHS Foundation Trust* (the Trust), the Employment Appeal Tribunal (EAT) rejected a claim arising from third party harassment and confirmed that UK equality legislation does not now impose liability on an employer for failing to protect an employee from such harassment.

Facts of the case

Mr Bessong is a black African who worked as a mental health nurse. He was assaulted both physically and verbally by a patient on racial grounds. The Trust made a report to the police, but

did not mention that the assault was linked to his race. Mr Bessong brought claims against the Trust for direct discrimination, harassment and indirect discrimination. In the Employment Tribunal (ET) his indirect discrimination claim, relating to the reporting of the assault, was successful, but his claim of harassment was dismissed. That claim was rejected because the ET concluded that the Trust's failure to protect Mr Bessong from racist harassment was not itself related to race. While the assault was clearly racially motivated, the Trust's actions were not.

Mr Bessong also argued that the Trust's failure to report the incident properly was a further example of unwanted conduct that amounted to harassment under section 26(1) of the Equality Act. He was unsuccessful with this argument for the same reason. The ET held that, while the failure to report the assault as an incident of racism was unwanted conduct, it was not "related to" race as required by section 26.

Mr Bessong appealed against the rejection of his harassment claims on various grounds, including that section 26 should be construed in accordance with the EU Race Directive 2000/43/EC. In particular, he argued that Article 2(3) of this Directive should be interpreted as requiring member states to make employers responsible for third party harassment, even if their failure to do so was unrelated to race – i.e. it would be sufficient that the racist conduct by the third party took place.

Counsel for Mr Bessong sought to support his argument on the Race Directive with reference to a number of other international laws, including the Charter of Fundamental Rights of the European Union, and a new Convention and Recommendation to end violence and harassment in the world of work, which was passed by the UN in June this year, but has not yet been ratified by the UK.

EAT decision

The EAT rejected these arguments.

It concluded that there is nothing in the Directive to suggest that an act (or failure to act) that is not itself related to race should be deemed to be discriminatory and prohibited. It pointed out that if Mr Bessong's interpretation were correct, it would amount to imposing strict liability. Employers would be liable for acts of third party harassment "irrespective of any motivational element relating to race on [the employer's] part."

The EAT went on to say that in any event it was bound by the 2018 decision of the Court of Appeal in *Unite the Union v Nailard*. In that case, the court found that an employer would only be liable for harassment under section 26 if it can be shown that the relevant protected characteristic was "the ground" for the employer's failure to protect an employee from third party harassment. That is a very difficult test to satisfy as the focus is on the employer's grounds for not protecting the employee from the harassment and not the circumstances of the harassment by the third party.

Conclusion

In short, employers will only be liable under the Equality Act for harassment by a third party if their failure to protect the employee was itself related to a protected characteristic.

Despite this clear statement on third party harassment, it is still important to remember that allowing an unsafe or threatening working environment to continue may give rise to other claims, such as constructive dismissal. In addition, the government's recent consultation on sexual harassment, which concluded on 2 October 2019, included a proposal to reinstate liability for third party harassment.

As for now, the UK law is clear in the way that employees have no direct right to make a claim against their employer for third party harassment.

IN THE PRESS

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

- People Management – Rhona Azir looks at what's new in immigration law including recent changes to EU settled status and the shortage occupations list
- Scottish Grocer – Aggie Salt considers industrial action and the right to join a union
- Scottish Grocer – Claire McKee outlines the rules around work flexibility, as well as some of the potential benefits

EAT confirms that employers must give notice of dismissal to trigger a statutory trial period

For such an apparently simple idea, statutory trial periods are notoriously tricky. Often employers and employees agree some sort of trial period of their own and usually there is no problem. However, if a dispute arises, any deviation from the statutory rules can make a big difference. In this article, we consider the recent Employment Appeal Tribunal (EAT) decision in *East London NHS Foundation Trust v O'Connor*. In this case, the EAT confirmed that telling an employee his role was being "deleted" did not in itself amount to a redundancy dismissal and, therefore, a statutory trial period was not triggered at that time. The decision was based on the complex legislation on statutory trial periods, which we explore in further detail below.

Legal background

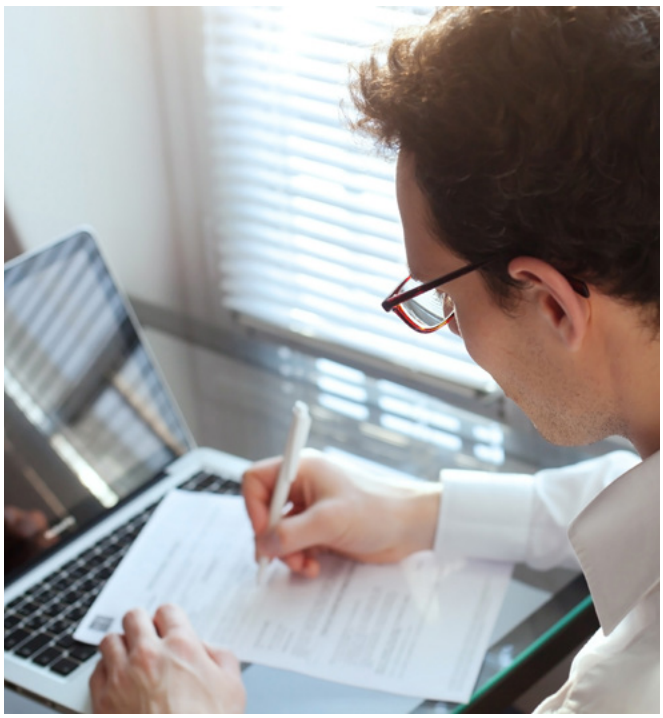
Suitable alternative employment

Under section 138 of the Employment Rights Act 1996 (ERA), an employee will be entitled to an automatic four-week statutory trial period in an alternative position if:

- they have been dismissed or given notice of dismissal by reason of redundancy;
- they accept an offer for that alternative employment before their current contract ends;
- the new contract begins either immediately after the end of the previous contract or within four calendar weeks of the end of the old contract; and
- the terms of the new contract differ from the original contract.

If an employee unreasonably rejects an offer of suitable alternative employment (or unreasonably resigns or gives notice during a trial period for a suitable alternative), they will lose their right to a statutory redundancy payment. As such, employers may want to ensure that they fall within the statutory trial period scheme where a suitable role is being offered.

Assessing whether or not an employee is entitled to a statutory redundancy payment in this context requires consideration of both suitability and the reasonableness of the refusal:



- **Suitability**: This requires an objective assessment of the job offered and the employee in question, to determine whether the job is a suitable alternative for that particular employee. When assessing this, the tribunal will have regard to all the terms of the alternative role (for example, status, place of work, tasks to be performed, pay, benefits, overtime, bonuses, hours/working time arrangements, responsibility, location, flexibility etc.) and how they compare with the terms of the redundant role.
- **Reasonableness of refusal**: This will depend, broadly, on the circumstances of the offer and the reasons the particular employee has for rejecting it (including factors relating to personal circumstances, such as health and personal/family commitments). The question is whether, taking all these factors into account, the particular employee in question was being reasonable in turning down the offer. It does not matter whether a hypothetical "reasonable employee" would have accepted.

The employer has the burden of showing both that: (i) the alternative employment offered was suitable; and (ii) the employee's refusal was unreasonable. This is relevant primarily to the question of whether or not a refusal means that the employee loses their right to a statutory redundancy payment. In practice, tribunals tend to be hesitant to uphold an outcome which would deprive an employee of their redundancy payment. As such, the bar for demonstrating both suitability and unreasonable refusal is fairly high.

Trial period

It does not matter whether or not an alternative role offered is "suitable" (as defined above) or not for the purpose of triggering the statutory rules on trial periods. If alternative employment is offered on different terms, then the statutory four-week trial period is triggered. The test is whether "*the capacity and place in which the employee is employed, and the other terms and conditions of his employment, differ (wholly or in part)*". It is worth noting that, for the purpose of this test:

- all differences count unless they are truly trivial or insignificant;
- each term is considered individually, and contracts are not considered on the basis of overall effect; and
- the fact that the new terms may be more favourable is not relevant.

For practical purposes, almost any change at all will trigger the right to a trial period. It is rare for an alternative role to be offered with no changes at all (if there are no changes, the original role is unlikely to be redundant in the first place). Therefore, in the vast majority of cases, a trial period is triggered.

Strictly speaking, the statutory trial period takes effect automatically whether or not it is referred to in the offer letter or contractual terms. Nonetheless, it is good practice to expressly refer to the trial period in the new offer letter and, given the EAT's recent judgment, the benefit of doing so is even more evident. This also allows the employer to confirm that it too can terminate during the trial period. Refusing to agree a trial period can render a redundancy dismissal unfair.

Facts

Mr O'Connor was employed as a psychosocial intervention worker by the East London NHS Foundation Trust (the Trust). Following a restructuring exercise in March 2017, Mr O'Connor was told that his role was at risk of redundancy and was later informed that his role would be deleted with effect from 3 July 2017. Formal notice of dismissal was not given at this stage, although the Trust indicated that formal notice would likely be issued in due course.

Subsequently Mr O'Connor was offered a trial period in the alternative role of care coordinator, commencing on 3 July 2017. The "trial period" was

extended until 9 August 2017 to accommodate Mr O'Connor's pre-booked annual leave. At this time, the Trust was unaware that it could not legally extend a statutory trial period. At the end of the trial period, the Trust offered Mr O'Connor the care coordinator role on a permanent basis. However, there was a dispute as to whether the role was in fact suitable alternative employment. If it were, Mr O'Connor would not be entitled to a redundancy payment (see guidance on the meaning of suitable alternative employment above).

Mr O'Connor went off sick and raised a grievance alleging that the care coordinator role was not a suitable alternative role. The Trust agreed to extend the trial period further while the grievance process was ongoing. The grievance was subsequently rejected in November 2017 and the Trust offered Mr O'Connor the care coordinator role again, which he declined.

The Trust terminated Mr O'Connor's employment in December 2017. It declined to make a redundancy payment, asserting that the statutory trial period had ended on 9 August 2017. The Trust's view was that the care coordinator role was suitable alternative employment which had been unreasonably refused by Mr O'Connor and, therefore, he was not entitled to a redundancy payment.

ET decision

Mr O'Connor brought a claim in the Employment Tribunal (ET) for statutory redundancy pay. At a preliminary hearing, the ET determined that the trial period was not a statutory trial period for the purposes of the ERA, and that Mr O'Connor had not been dismissed prior to being offered the care coordinator role on 3 July 2017. On this basis, Mr O'Connor would, therefore, be entitled to statutory redundancy pay following his dismissal in December 2017. The Trust appealed this decision.

EAT decision

The EAT upheld the ET's finding that formal notice of dismissal was not given on or before 3 July 2017, and that the trial of the alternative role that began on that date was not a statutory trial period. The judge commented that there is no rule of law that notification of deletion of a post is sufficient to amount to notice of dismissal in itself. The EAT, therefore, upheld the finding that Mr O'Connor was dismissed in December 2017. Accordingly, the case was remitted to the ET to address the remaining issues that needed to be resolved in order to determine whether Mr O'Connor was entitled to a statutory redundancy payment.

Comment

This case confirms that a statutory trial period in redundancy situations does not arise unless an employer gives specific notice of termination of an employee's current role. Indeed, it can only start after that termination has happened.

Given that the Trust was clear in that Mr O'Connor's role was to be deleted with effect from 3 July 2017, the conclusion that this did not trigger a statutory trial period may come as some surprise. However, the EAT's decision turns on the content of the relevant communications with Mr O'Connor. Specifically, the Trust wrote to Mr O'Connor in June 2017 stating that it was likely that formal notice of dismissal would be issued at a later stage. However, such notice was not in fact given until December 2017. The Trust also wrote to Mr O'Connor in August 2017 suggesting that the terms under the offer for the new role of care coordinator constituted an amendment to his existing contract, thus supporting the contention that there had not been a dismissal.

The extension of the trial period to accommodate pre-booked annual leave and to deal with the ongoing grievance may also have contributed to the EAT's decision that there was no statutory trial period on the facts.

It is common practice for employers to propose alternative roles during a redundancy consultation process before issuing a formal notice of dismissal and to allow a "trial" in that position before terminating. In such circumstances, the EAT's ruling is a reminder that employers cannot rely on a statutory trial period. We would suggest that employers mitigate this risk by explicitly terminating the existing contract before starting any trial period in a suitable alternative role to avoid any uncertainty. The trial period should then not be extended without recognising that this takes the trial outside the statutory regime and is likely to impact on any right to redundancy pay.

EDITOR'S TOP PICKS OF THE NEWS THIS MONTH

- Covert CCTV monitoring possible without violating an employee's Article 8 privacy rights
- Discrimination and harassment cases – further progress on restricting a cover up
- Government proposes enhanced protections for employees and workers facing workplace discrimination
- Philosophical belief case on right to copyright fails
- ACAS publishes "Menopause at work" guidance

Find out more about our team, read our blog and keep up with the latest developments in UK employment law and best practice at our UK People Reward and Mobility Hub – www.ukemploymenthub.com

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