



Employment Law Update 2021 – what to watch out for

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Outline

- Covid and vaccination impact and how employers are managing risks
- How health and safety considerations impact employment law case management
- Interim relief applications at the employment tribunal
- Case law update



COVID and Vaccination Impact and How Employers Are Managing Risks

Employers are responsible for ensuring the health and safety of their employees so far as reasonably practicable (HSWA ss.2 and 3)

The vaccination is not mandatory so employees are not breaking any laws by refusing the vaccination

- In certain sectors, it might be reasonable for an employer to request that all staff be vaccinated
- Consideration should be given to alternatives where employees do not want the vaccine



How Are Employers Managing Risks (cont.)

Discrimination issues

- The vaccine may not be suitable for all
- Any requirement for the vaccine would need to include exceptions

Contractual requirement for vaccinations

- A contractual requirement would amount to a change in the terms and conditions requiring employee agreement

Employers could introduce a Covid-19 policy requiring that all employees who can be immunised be immunised.

How health and safety considerations impact employment law case management

- **Health and Safety at Work etc. Act 1974**
 - places general duty on employers to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all of their employees
 - Written health and safety policy if more than 5 employees
- **Implied term that employers will take reasonable steps to protect employees' health and safety at work**
- **Protection of whistleblowers important when looking at health and safety of staff since the spread of Covid-19 including those returning to work following the ease of lockdown**

How health and safety considerations impact employment law case management cont'd

■ **Challenges for employers during Covid-19**

- ensure workers are able to communicate any concerns they may have on the workplace and their employer's obligations
- if they do not feel listened to, they can raise them formally through a 'speak up' channel or other whistleblowing mechanism in place

■ **Whistleblowing claims**

- Ensure communication channels are open and there is an active two-way dialogue with workers
- Important for employers to deal with any concerns properly and investigate where appropriate

How health and safety considerations impact employment law case management cont'd

■ Whistleblowing claims:

- to gain legal protection as a whistleblower, worker must show they have made a qualifying disclosure –
- One of those protected disclosures is that the health or safety of any individual has been, is being or is likely to be endangered
- The legislation dictates to whom a qualifying disclosure can be made to be protected

The dismissal of an employee will be unfair if the reason is that they have made a protected disclosure

- Do not need 2 years continuous service
- No limit on compensation



Interim Relief Applications at the Employment Tribunal

The Law

- Interim relief is rarely sought and even more rarely granted
- Available in limited cases of (alleged) automatically unfair dismissal
 - Section 128 Employment Rights Act 1996
 - Paragraph 161(2) Schedule 1A of Trade Union and Labour Relations (Consolidation) Act 1992
 - Trade union membership or activity
 - Whistleblowing
 - Activities as H&S representative; working time representative; pension trustee; or elected representative for collective redundancy or TUPE

Interim Relief Cont'd

- Burden of proof on employee
- Claimant must satisfy the Tribunal that they are **likely** to succeed at trial in showing that the dismissal was for the reason relied on
- Claimant must show that they have more than a reasonable prospect of success and has *a pretty good chance* of succeeding *Taplin v C Shippam Ltd 1978 ICR 1068, EAT*
- Likely means “*pretty good chance*” – “*looks like a winner*”
- The burden of proof is **greater** than at a full hearing

What Is Interim Relief?

- If test is met Respondent will be asked if it will re-instate or re-engage (on no less favourable terms)
- If accepted, this may enhance chance of final remedy being reinstatement or re-engagement
- If Respondent refuses, a continuation order is made
 - Claimant entitled to receive salary and benefits until full hearing
 - Continuity of employment preserved
 - Taxation – taxed as compensation payment, not emolument of employment (earnings)

Practical Issues

- Claimant must make application before the end of the 7th day following the effective date of termination s.161(2) TULR(C)A & s.128(2) ERA
- Claimant can make application during notice period
- Claimant must submit ET1 at the same time as application for interim relief
- Application will be heard at a preliminary hearing (EJ sitting alone)
- Minimum of 7 days' notice of preliminary hearing
- Claim is still a “normal” claim
- No obligation to use ACAS Early Conciliation for interim relief claims

Practical Issues

- ET3 will need to be drafted and filed and ET will set “normal” date for that
- In reality need a pretty final draft of ET3 for the interim relief hearing
- Full disclosure
- Witness evidence
- Tribunal not likely to take oral evidence, all statements will be read, but will need to have witnesses on standby to attend
- Be ready to deal with general directions at end of interim relief hearing, whatever the outcome

Increased Use of Interim Relief?

- Commentary suggests an increased number of applications
- Impact of current delays in cases getting to full hearing
- Impact of increased number of collective redundancy processes
- Also consider consequences of succeeding on continuity of service

Case Law Update

Varnish v British Cycling Federation (EAT)

- Determining employee status
- C was cyclist in Olympic Training Programme
- Terminated for performance reasons
- ET: not an employee or a worker;
 - No mutuality of obligation
 - C not personally performing work
- EAT: Upheld ET decision



Tan v Copthorne Hotels (ET)

- C brought variety of claims inc. unfair dismissal
- C recorded conversations
- C's claims failed, R sought costs
- C ordered to pay R c. £400k
- Largest cost order made in ET



Taylor v Jaguar Land Rover Ltd (ET)

- Definition of 'gender reassignment' under EqA 2010
- C was gender fluid/non-binary
- Claim for harassment, direct discrimination and victimisation
- ET: gender fluid/non-binary fell within definition of 'gender reassignment'
- £180k compensation and other remedies

Hot Topics in Employment Law (cont.)

Employees travelling abroad

- We are receiving more and more questions about this as employees adapt to remote working.
- Relevant considerations include:
 - Local employment law rights;
 - Confidentiality and data protection;
 - Immigration and tax; and
 - Practical arrangements.

Any questions?

