UK Employment Law Round-up

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In this issue, we look at whether Britain's decision to leave the European Union is actually likely to have a significant impact on UK employment law. In our case law review, we will also consider the extent to which without prejudice privilege attaches to protected conversations.

There is also some useful guidance from recent case law about the types of dismissal to which the ACAS Code of Practice on Disciplinary and Grievance Procedures applies. We give comment on the current position in relation to Employment Tribunal fees, and the implication of the equal pay claims brought against ASDA in the Employment Tribunal.

In this issue...

Please contact us if you would like to discuss any subject covered in this issue.

Brexit: will it really matter?

You'd be forgiven for hoping that you'd open this month's newsletter and see no mention of Brexit. But this is something that's not going away, and given how important it will be to the future of the UK, it would be remiss of us not to mention it in our first newsletter since the big decision was made.

When it comes to employment law, the question on everyone's lips is: will it really matter?

As was often repeated by the Remain campaign in the build-up to the referendum, much of UK employment law does indeed derive from the European Union (EU).

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The list includes: protection against discrimination; family friendly rights; protection of employment on the transfer of an undertaking (TUPE); collective consultation obligations; rights for agency workers; limits on working time and the right to paid holiday. On first glance, the implications of Brexit on UK employment law do look a little scary.

However, the fact is that in most of these areas (except for working time, collective consultation and rights for agency workers), UK employment protections either pre-dated or have 'gold-plated' EU law. For example, there was also protection in the UK against discrimination on the grounds of race, sex and disability before the EU Equal Treatment Directive. Women in the UK returning from maternity leave were entitled to come back to the same job before EU legislation weighed in. In the UK, mothers are entitled to take up to 52 weeks' maternity leave (if they take both ordinary and additional leave) – the EU minimum requirement is for just 14 weeks. The EU Working Time Directive requires member states to pass legislation entitling workers to a minimum of 20 days' paid annual leave – in the UK, we have at least 28 days. A further example is found in TUPE – the concept of a service provision change (which relates to outsourcing arrangements) isn't found anywhere in the EU Acquired Rights Directive – it's a UK invention.

If we look again at those family friendly rights, the concept of shared parental leave is a UK legislative creation. The government has announced plans to extend the right to this kind of leave to grandparents. Whatever the uptake of shared parental leave (which is believed to be low) and, should it be implemented, shared grandparental leave (which will surely be lower), it is clear that the UK is trying to offer rights to support working families, not take rights away from them. Leaving the EU is unlikely to change this.

Where we are most likely to see changes is in how the Courts interpret employment legislation. Depending on the terms of the exit from the EU the UK is able to negotiate, the decisions of the European Court of Justice (ECJ) may no longer be binding on the UK. This means that in future it would, for example, be open to the UK Courts to determine whether holiday pay is limited to basic pay or should include commission payments and (for employees with normal working hours) overtime. We could, therefore, see the nuances of UK employment law develop in quite a different way from the ECJ case law.

There is of course a risk that a future government might want to substantially dilute UK employment rights, and Brexit will make this more of a possibility. However, as

the result of the referendum has shown, we live in a democracy (for better or for worse). With that in mind, no government would dilute employment rights substantially (if at all) if they wanted to stay in government.

So, when it comes to employment law, will Brexit matter? Probably not that much. Although the true answer remains that, for now (and probably for quite some time to come), we just don't know.

For a more in-depth analysis of the likely implications of Brexit (from an employment and immigration point of view) **please see here.**

Protected conversations and admissibility as evidence

It is commonplace for employers to enter into settlement negotiations with their employees prior to termination of their employment. Where there is a genuine dispute at the heart of the negotiations, it is well established that these discussions will usually be covered by without prejudice privilege. If settlement can't be reached, whilst the detail of the negotiations will be inadmissible in a Court or Tribunal, the fact of the negotiations themselves will be disclosable (if the parties so wish).

Since 29 July 2013, it has been possible for an employer and an employee to have a 'protected conversation' about ending the employment relationship in cases where there is no existing dispute between them. The protected conversation should not then be referred to in relation to any subsequent unfair dismissal claim – although the extent to which this is the case has, before now, been unclear. This is a useful tool for employers who might want to exit an employee with whom there is no existing dispute.

We now have some guidance on the extent to which protected conversations (and the documents relating to them) are admissible as evidence. In *Faithorn Farrell Timms LLP v Bailey* (UKEAT/0025/16), the Employment Appeal Tribunal (EAT) held that, in relation to protected conversations, the fact of the negotiations is inadmissible as well as the content. Further, the EAT held that internal communications (for example, between managers and HR) relating to protected conversations, are also inadmissible. This statutory 'privilege', said the EAT, cannot be waived. This goes further than without prejudice privilege. That's a good start for employers who want to be able to have these protected conversations without them being later used against them in relation to an unfair dismissal claim (which may arise if settlement can't be reached).

This poses two problems for employers. The first is that, where an employer is taking an employee through a disciplinary or grievance procedure, they might delay the procedure to have a protected conversation and engage in settlement negotiations. If the parties are not able to make reference to the fact of the protected conversation (as well as the content), then an employer will be unable to explain any such delay in the process to a Tribunal when defending a claim for unfair dismissal. To deal with this, employers should consider whether they need to continue the open process alongside the protected conversation so that there is no unexplained delay.

The second problem is that the shield provided by protected conversations only applies to unfair dismissal claims. Where an employee brings a claim for discrimination, both the fact and detail of the protected conversation are admissible as evidence (unless there is a dispute, in which case without prejudice privilege is likely to apply).

It is easy to imagine that, where a protected conversation takes place, an employee who previously has had no dispute with their employer goes on (rightly or wrongly) to form the impression that it is because of their sex/race/age/disability or otherwise that their employer has sought to push them out. Where that is the case, it is likely that a dispute would arise. Once there is a dispute, any settlement negotiations would be covered by without prejudice privilege. However, the protected conversations that took place before the dispute arose would not be covered by without prejudice privilege – and in relation to the discrimination claim would potentially be admissible.

A situation might therefore commonly arise where a Tribunal is required to consider the fact and detail of a protected conversation in relation to a discrimination claim, but has to proceed on the basis that it knows absolutely nothing about it for the purposes of an unfair dismissal claim. Whether or not a Tribunal is really able to do that when the relevant information is so clearly within its knowledge is a difficult matter (for it). Employers who are having protected conversations (where there is no existing dispute) should be mindful of the fact that although at the time there is no reason why those conversations would be admissible, they may still well come before a Tribunal if things don't turn out as planned.

Recent case law on the scope of the ACAS Code

The scope of the ACAS Code of Practice on Disciplinary and Grievance Procedures (the Code) has been narrowed following two recent claims concerning ill health and some other substantial reason (SOSR) dismissals. If the Code applies, a Tribunal can impose a financial penalty on anyone who unreasonably fails to comply with it. Specifically, a Tribunal can impose an uplift or reduction of up to 25 per cent in any award it gives. It is accepted that the Code covers disciplinary situations, which includes conduct and poor performance. The question in the two recent cases was whether the Code specifically applied to ill health and SOSR dismissals.

Holmes v Qinetiq Ltd (UKEAT/0206/15)

Mr Holmes was dismissed for reasons of ill-health following several extensive periods of absence. Qinetiq did not receive the most current occupational health report before making this dismissal. Mr Holmes argued the dismissal was unfair and the Tribunal should award him with an uplift in his compensation because of Qinetiq's failure to adhere to the Code. Both the Tribunal and the EAT rejected Mr Holmes's position. They held that the Code does not apply to dismissals for genuine ill health, as capability procedures relating to an inability to do the job, due to sickness absence, do not come within the scope of the Code. The EAT clarified that the Code only applies to capability situations where there is some degree of culpability on the part of the employee.

Phoenix House Ltd v Stockman and another (UKEAT/0264/15)

Ms Stockman was dismissed by Phoenix House for a breakdown in the working relationship following a grievance and disciplinary procedure. Ms Stockman's unfair dismissal claim was upheld by the Tribunal, which considered that the Code applied and granted Ms Stockman a 25 per cent uplift in the compensation awarded. The EAT agreed the dismissal was procedurally and substantively unfair, however it did not consider the Code applied to an irretrievable breakdown in the working relationship. The EAT accepted that discrete features of the Code are capable of being applied in SOSR circumstances, for example recommendations for the procedure employers should follow in disciplinary and grievance matters. However, it ultimately held that imposing a sanction for failure to comply with the Code in other situations, such as in these circumstances, would go beyond Parliament's intention.

Our view is that it is always good practice to follow the Code in circumstances where an employee may be dismissed. However, where employers want to follow an expedited procedure, it is useful to have further guidance as to when the Code is likely to apply.

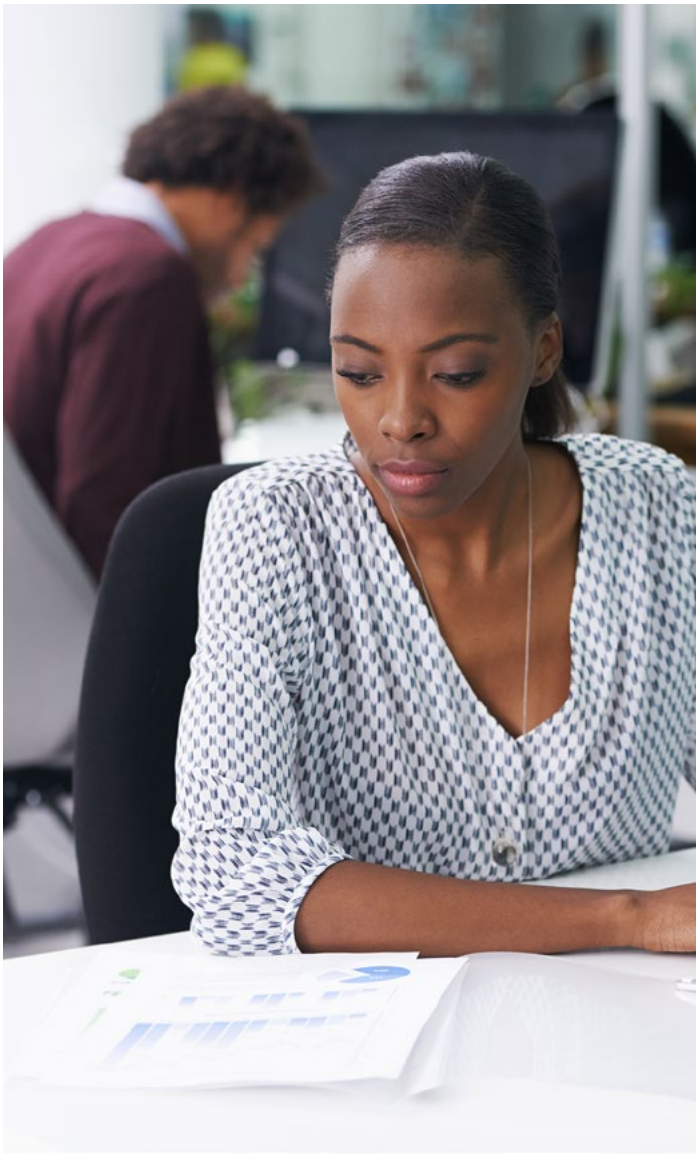
ASDA equal pay claims

On Monday 20 June 2016, a seven-day hearing began in the largest private sector equal pay claim ever brought. It is estimated that the claim, if successful, could cost ASDA over 100 million pounds. It could also have wide-ranging implications for other employers, particularly those in the retail sector.

It is understood that the number of claimants now attached to the claim is approximately 7,000. The key point in this case is the issue of job evaluation. Any female employee is entitled to enjoy contractual terms that are as favourable as those of a male comparator, if they are employed in jobs of equal value.

The Employment Tribunal has been asked to determine whether the supermarket's in-store staff jobs, which are mainly held by female workers, are of equal value, and are therefore comparable, to higher-paid jobs in the company's male-dominated distribution centres.

If the Tribunal does in fact find that the roles constitute work of equal value, workers could be entitled to six years' back pay for the difference in earnings. It is not yet clear when we can expect a decision, but it is likely that this case has a long way to go and we anticipate that, whatever the Employment Tribunal's decision, the future may hold a number of appeals to the higher courts.



House of Commons Justice Committee review of Tribunal fees

It has now been three years since the introduction of Employment Tribunal fees (ET Fees). There is an ongoing challenge to ET Fees by the union Unison, which is taking its judicial review case to the Supreme Court. The publication of the government's post-implementation review of the ET Fees, which was due by the end of 2015, is still awaited. We suspect that this will be very low on the government's current agenda, and that we can expect to continue to wait for some time for this (if in fact it ever appears).

There has been some formal review of ET Fees in the meantime. On 20 June 2016, the Justice Committee published a report titled "Courts and Tribunals fees" (the Report) to assess the impact of Tribunal fees (as well as changes to the Court fees regime) on access to justice.

The Report identifies that the impact of ET Fees has had a dramatic effect, with a 70 per cent decrease in the number of claims being issued since their introduction. It considers that, in light of this, the introduction of ET Fees has "had a significant adverse effect on access to justice for meritorious claims".

The Report is critical of the government's failure to publish its review. It also criticises the government's position that the drop in Employment Tribunal claims has been due to the introduction of ACAS Early Conciliation

(which came in at around the same time) as "even on the most favourable construction, superficial".

The Report concludes that a contribution by claimants to funding their claim through the Tribunal (and Court) system is not a problem in principle, but suggests that the level of fees should generally be lower and should also be more proportionate to the complexity of the case presented. The Report also suggests an increase in the financial threshold for fee remission and special consideration for women alleging maternity or pregnancy discrimination.

It is clear that the introduction of ET Fees has had a significant impact on the numbers of Employment Tribunal claims being brought. The number of frivolous claims that we have seen since the introduction of fees has all but disappeared. This is obviously welcome news for employers. However, it simply must be the case that there are some meritorious claims which are not brought because of the fee regime. It is clear that whilst ET Fees do serve a useful and valid purpose, they also limit access to justice. Clearly a finer balancing exercise needs to take place, and changes may need to be made to the fee regime along the lines that the Report suggests. It will be interesting to see what comment the Supreme Court makes (the hearing is due to take place on 7 and 8 December 2016). However, unless it is given a pressing reason to do so, it looks unlikely at the moment that the government will make any change to the fees regime for some time.

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