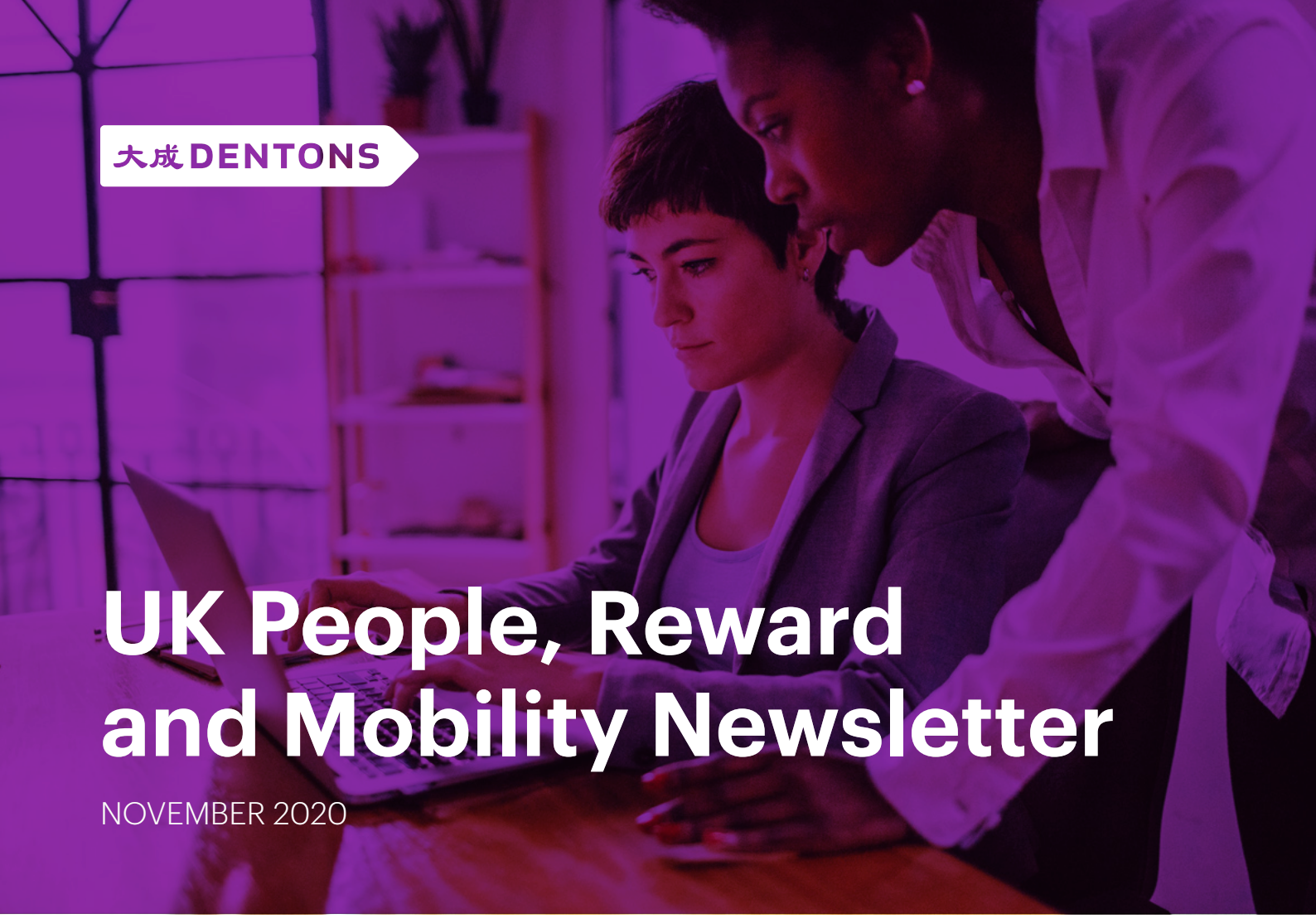

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UK People, Reward and Mobility Newsletter

NOVEMBER 2020

IN THIS ISSUE

In this issue we look at time limits in whistleblowing claims, transgender rights in the workplace, indirect age discrimination when filling internal job vacancies and what to expect from the Pensions Bill 2020.

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.

Time limits in whistleblowing claims

When does the time limit for whistleblowing claims start to run?

This was the question considered by the recent Employment Appeal Tribunal case of Ikejiaku v. The British Institute of Technology UKEAT/0243/19.

Facts

Mr Ikejiaku started working for the Respondent in February 2013. He is a qualified solicitor and barrister in Nigeria and was employed by the Respondent as a senior lecturer in business and law. He was given a new contract in February 2016, which purported to change his status from an employee to a self-employed contractor. The purpose behind the new contract was to resolve an ongoing dispute between Mr Ikejiaku and the Respondent relating to pay and payslips, and to provide clarity as to the arrangements between them.

Mr Ikejiaku made two protected disclosures to the Respondent. The first, in October 2015, was that he had contacted HMRC and been informed that the Respondent had not been paying tax and National Insurance contributions in respect of Mr Ikejiaku when it should have been. The second disclosure, in July 2017, was that he had been told to give a pass mark to some students who had been found to be copying from each other.

Mr Ikejiaku was dismissed the day after the second disclosure. Unsurprisingly, he brought a claim of automatic unfair dismissal relying on the July 2017 disclosure. He also brought a claim for detriment as a result of whistleblowing. He alleged that the reason he had been given the new contract in February 2016 was the first protected disclosure in October 2015.

The Employment Tribunal found that the October 2015 disclosure was a material and effective cause of the Respondent requiring Mr Ikejiaku to enter into the new contract. It also found that the change of status from employee to self-employed contractor was a detriment.

The Employment Tribunal found that, despite the February 2016 contract which stated that Mr Ikejiaku was a self-employed contractor, he had been an employee throughout his time with the Respondent.

The Employment Tribunal concluded that Mr Ikejiaku was automatically unfairly dismissed as a result of the July 2017 protected disclosure. However, it found that the detriment claim was out of time and should have been brought within three months of the Respondent requiring Mr Ikejiaku to enter into the new contract in February 2016. The Employment Tribunal also found that it was reasonably practicable for Mr Ikejiaku to have brought his claim in time and so declined to extend the time limit in this case.

Appeal

A worker must bring a claim of detriment due to whistleblowing within three months of the act or failure to act that is the subject of the complaint. However, where that act extends over a period of time, the claim must be brought within three months of the last day of that period.

Mr Ikejiaku appealed to the Employment Appeal Tribunal. He argued that the contract change in February 2016 was not a "one-off" event but an act extending over a period of time. He said that, because the contract continued to be in place until his dismissal in July 2017, the act complained of was effectively extending over a period of time.

The Employment Appeal Tribunal concluded that the imposition of the new contract on Mr Ikejiaku was a single event and not a continuing act. It highlighted the importance of distinguishing between an

ongoing detriment and an ongoing act. While it may be possible to say that the detriment of not being an employee was ongoing, the act that caused that detriment was not. Therefore, the time limit for bringing a claim began at the time that contract was imposed on Mr Ikejiaku.

Summary

It can often be difficult to distinguish between a one-off act, which has an ongoing detrimental result, and a continuing act, which extends over a period of time. However, it is important to do so because it will determine when time starts running for the purposes of bringing a claim.

Previous cases have shown that it is possible for decisions made in reference to a policy or procedure to amount to a continuing act. For example, one case found that where an employer operates a detrimental rule or practice, such as a failure to recognise service abroad for the purposes of a pension arrangement, that will constitute an act extending over a period of time.

This case is interesting in that it provides a useful contrast to some previous decisions regarding ongoing acts. Other similar examples of one-off acts which may have an ongoing detrimental effect include a refusal to upgrade an employee and banning construction workers from a building site.

EDITOR'S TOP PICKS OF THE NEWS THIS MONTH

- The Pensions Regulator on distressed employers for DB trustees
- Taking modern slavery seriously
- Good work for all in the coronavirus economy
- Gender pay gap falls to 7.4%
- Is an employer liable for an employee's practical joke that causes another person personal injury?
- Furlough extended to March 2021, leaving home during English lockdown and guidance for those previously shielding

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.

Transgender rights in the workplace

What rights do transgender people have in the workplace?

Transgender people are currently protected by two key pieces of legislation – The Equality Act 2010 (EA) and the Gender Recognition Act 2004 (GRA).

The EA prohibits discrimination in employment on the grounds of one of nine protected characteristics, of which gender reassignment is one. This protection applies to those proposing to undergo, undergoing, or who have undergone a process (or part thereof) to reassign their sex by changing physiological or other attributes of sex. This transition does not require any medical intervention to be protected under the EA. The EA gives transgender people protection against direct and indirect discrimination, victimisation and harassment on the grounds of their transgender status. These protections do not apply to non-binary individuals who do not identify as either a man or a woman (although in some cases it may be possible for those individuals to rely on discrimination by perception).

The GRA allows transsexual people to obtain a Gender Recognition Certificate (GRC) to legally change their gender, once they have lived as their acquired gender for two consecutive years and intend to continue living as their acquired gender for the rest of their lives. Whilst one can change the name and gender on one's passport and driving licence with relative ease, a GRC is required to change the gender on an individual's birth certificate. Transgender people who have not obtained a GRC will still be protected by the EA.

How is this landscape changing?

In July 2018, the Government Equalities Office (GEO) launched a consultation on proposed reforms to the GRA to make it easier for transgender people to obtain a GRC and thereby be legally recognised as their chosen gender. The consultation received more than 100,000 responses and sparked widespread debate. The GEO responded to the consultation on 22 September 2020, concluding that:

- the balance presently struck by the GRA was correct, with proper checks and balances, as well as support for those who wished to change their legal sex;
- the process that those applying for a GRC are required to go through should be improved to be "kinder and more straightforward", with the fee being reduced dramatically; and
- steps will be taken to address the state of healthcare for transgender people.

There are no plans at this time to change the legal framework to allow individuals to self-determine their own preferred gender, as is increasingly the position in other legal systems.

Practical guidance for employers

We have not yet reached a point where transgender staff enjoy any greater protection than staff who have other protected characteristics. Given the recent consultation on the GRA, it seems that any change in this regard may still be a long way off. Employers will want to promptly address any discrimination transgender individuals are facing. However, employers may also want to take positive steps make it clear to transgender employees that they have their support and respect, and can be themselves at work. This should start from the top but steps need to be taken to ensure that this ethos is fostered by all employees. As with any type of discrimination, this may be challenging, particularly in larger organisations.

The starting point for employers will be ensuring that the right policies and procedures are in place. Employers are liable for their behaviour towards transgender employees as well as any harassment, bullying and discriminatory behaviour directed at transgender employees by their staff. Employers should put in place anti-harassment, anti-bullying, equality and diversity policies, and train employees on these to create a culture that will prevent negative behaviour occurring. Some employers may wish to implement a separate transgender policy. Other points to implement are set out below.

- Transgender staff should be encouraged to speak openly and honestly with their line managers, which will allow staff to request, and employers to make, adjustments to the workplace.
- Allow transgender staff to use the facilities available to their identified gender. Guidance released by the GEO indicates that it will be best practice to work with the relevant individuals to determine the date on which they will commence using their preferred facilities and whether any communication about this will be made to other employees.
- Do not share an employee's gender status and transition history without their permission. This information is confidential. The permission of the transgender individual should ideally be gained in writing. If there is no permission, this information absolutely must not be disclosed. Disclosure without permission may be a criminal offence.
- Transgender employees should be allowed to take time off work where appropriate when going through a transition. These absences should not be treated less favourably than any absence for illness or injury – to do otherwise will constitute direct discrimination. That said, transgender people should not be treated as having an illness or injury. However, it should be recognised that they will need time to recover from any transition procedures. Legislation does not dictate a minimum or maximum amount of absence during transition. As such, requests should be accommodated in line with normal procedures.
- Gender reassignment discrimination may be lawful in circumstances where the requirement that an employee is not a transsexual person is an occupational requirement, the requirement is a proportionate means of achieving a legitimate aim and the employee does not meet the requirement. This does not give a green light to discrimination – it will only be relevant in a very limited number of sectors and employers should challenge themselves on whether it applies in their own circumstances. Advice should be sought before taking any action that might constitute discrimination.

Indirect age discrimination – why you should take care when recruiting from a talent pool

Indirect age discrimination

Indirect age discrimination occurs where an employer applies an apparently neutral provision, criterion or practice (PCP), but the PCP puts individuals in a particular age group at a disadvantage. Discrimination in relation to an employer's PCP can be justified if it can be shown that it is a proportionate means of achieving a legitimate aim. Employees who consider that they have been disadvantaged by a PCP because of their age can bring a claim under the Equality Act.

The facts of *Ryan v. South West Ambulance Services NHS Trust*

The claimant, who was in her mid-sixties, worked for the South West Ambulance Services NHS Trust as a Learning and Development Officer. This particular NHS Trust had devised a recruitment tool called the "Talent Pool", which involved establishing a pool of high-performing and talented employees. The Talent Pool was constructed to fill some of its vacancies, reducing the need to interview external candidates and allowing the Trust to fill roles quickly. There were two ways for an employee to enter the Talent Pool – either via an appraisal process or a process of self-nomination.

During 2017, two managerial roles became available within the Trust. The first role was filled immediately from the Talent Pool. Mrs Ryan was not in the Talent Pool and so she was not considered for this post. Mrs Ryan submitted a formal expression of interest in the second role, but she was told that she could only apply if the vacancy could not be filled from the Talent Pool. The second role was allocated to an individual in the Talent Pool.

Mrs Ryan brought a claim of indirect age discrimination. She argued that, by creating a Talent Pool for allocating employment positions, the Trust operated a PCP that indirectly discriminated because of the under-representation of employees in her age bracket (aged 55-70).

The Employment Tribunal (ET) dismissed Mrs Ryan's claim. It held that, as she had not actively tried to become part of the Talent Pool, there was no causal link between the disadvantage Mrs Ryan had suffered and the PCP in question. The ET also held that the PCP was a "proportionate means for achieving a

legitimate aim", specifically, a form of succession planning for positions necessary in an emergency response organisation.

The EAT's determination

Mrs Ryan successfully appealed the ET's decision. The EAT found that the ET was incorrect to say that Mrs Ryan was not put at a disadvantage by the PCP. There were statistics to show that there was a reduced likelihood, due to age, of employees aged 55 and above being in the pool, and this showed that there was a group disadvantage. Mrs Ryan was also *personally* disadvantaged because she was not considered for roles for which she would otherwise have been considered because the employer had looked to fill the vacancies from the pool. The Trust had argued that Mrs Ryan had not tried to access the pool by all routes available to her, but they failed to provide any evidence of this and so could not prove that the discriminatory effect of the rule was not at play in her particular case. The EAT therefore ruled that the application of the PCP resulted in disadvantage to the claimant, and not the claimant›s failure to apply to the Talent Pool. The EAT also rejected the Tribunal›s decision that the PCP could be justified in the circumstances.

Important takeaways

Pools are helpful, particularly if you are a large employer. However, the construction of any pool must be given considerable thought. Employers should consider whether the access route to a pool causes any particular problems for someone with a protected characteristic under the Equality Act (i.e. age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage and civil partnership, and pregnancy and maternity).

Employers should be aware of the possibility of group disadvantage, and not only any disadvantage suffered by an individual, in relation to these characteristics. The potential for both indirect and direct discrimination should also be kept in mind. A full audit of the different types of risk should be carried out before using any pool to make a recruitment/promotion decision.

Additionally, those presenting in the EAT, and indeed the ET, should be aware of the particular way of presenting group and individual disadvantage in discrimination cases. Both disadvantages should be articulated clearly and in the correct order. HHJ Tucker, the appeal judge in this case, stated that the group disadvantage should be identified first, followed by the corresponding individual disadvantage. She stated that failure to express these concepts properly was "likely to lead to many problems in the ensuing litigation".

Pension Schemes Bill 2020: More powers for the Pensions Regulator and increased scheme funding obligations

Scope of the Pension Schemes Bill

The Pension Schemes Bill (the Bill) was introduced into the House of Commons on 1 July 2020, and is now expected to proceed to the report stage and a third reading on 16 November.

Most notably under the Bill:

- Measures will come into force that will substantially strengthen the Pensions Regulator's powers. These include a new criminal offence for anyone engaging in conduct that detrimentally affects, in a material way, the likelihood of accrued scheme benefits being received. As a result, companies engaging in corporate transactions, a reorganisation or refinancing will face greater burdens in ensuring compliance; and
- Defined benefit schemes will be required to have a funding strategy in place for ensuring benefits can be provided over the long term and to have an investment strategy to support this objective.

Despite an anticipated delay, the Pensions Minister, Guy Opperman, has stated that he is confident that the Bill will be law by the end of the year. Overall, these new measures will mean greater protection for pension schemes, particularly in ensuring that they are better supported on a company sale, a reorganisation or financing, but will place greater obligations on companies sponsoring defined benefit schemes (and the trustee of those schemes) in ensuring compliance with the new requirements.

1. Strengthening the Pensions Regulator's powers

Contribution Notice: Two new tests will be introduced for imposing a Contribution Notice (i.e. a notice requiring a person, such as another group company or a company director, to make a payment of a specified sum into a defined benefit scheme if the Pensions Regulator considers it reasonable to do so):

- the "**employer insolvency test**" – this will be met if, in relation to an act or omission, the Pensions Regulator is of the opinion that the scheme was in deficit on a "buy-out basis" and, if a "Section 75 debt" had fallen due,[1] the act or failure to act in question "would have materially reduced the amount of the [Section 75] debt likely to be recovered by the scheme
- the "**employer resource test**" – this will be met if, in relation to an act or omission, the Pensions Regulator is of the opinion that the act/omission "reduced the value of the resources of the employer" and the reduction was material relative to the amount of the estimated Section 75 debt in relation to the scheme.

A statutory defence is available under either test. The new tests could potentially catch the following corporate activity:

- payment of a dividend;
- sale of a business;
- granting security to a lender; and
- intra-group transfers.

Much will depend on how the Pensions Regulator applies the "material reduction" tests in either case.

1 An employer participating in a defined benefit occupational pension scheme may owe an employer debt to the scheme's trustees under Section 75 or Section 75A of the Pensions Act 1995 if the scheme is underfunded on a buy-out basis. This Section 75 debt is unsecured and contingent until triggered. The debt is triggered on the winding-up of the relevant scheme, the insolvency of an employer, or when a participating employer in a multi-employer scheme withdraws while the scheme is ongoing.

IN THE PRESS

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

- People Management – **Victoria Albon** and **Kate Coppack** analyse the role and rights of health and safety representatives

It is hoped that the Pensions Regulator will issue guidance on the exercise of its new powers in due course.

Criminal offences/financial penalties: The Pensions Regulator's powers will be bolstered with three new criminal offences available to it and a civil sanctions regime, including the power to issue penalties of up to £1 million. Those that risk members' accrued scheme benefits, or avoid a Section 75 debt, could face up to seven years in prison and/or an unlimited fine.

Information and interviewing powers: The Pensions Regulator will also now be able to summon certain persons for an interview and will have greater powers to inspect premises when considering grounds for issuing a Contribution Notice.

2. New funding scheme requirements

The Bill introduces a new requirement for defined benefit schemes to have a "funding and investment strategy" to ensure benefits can be provided over the longer term. Trustees will be required to produce a funding and investment strategy to support this long-term objective, specifying which investments the trustees intend to hold, and the intended funding levels.

Scheme trustees will need to report on its implementation to the Pensions Regulator in a new "statement of strategy". The Pensions Regulator will have powers requiring trustees to revise their funding and investment strategy.

The obligations on scheme trustees are likely to increase as a result of these requirements (as the scheme's funding and investment strategy have to be agreed with the employer, and trustees must consult with the employer on the written statement of the strategy).

3. Collective Defined Contribution schemes

The Bill also provides a framework for the operation and regulation of collective defined contribution (CDC) pension schemes. Under the existing UK workplace pensions framework, employers offer either:

- Defined Benefit (DB) schemes, which provide pension benefits based on salary and length of service; or
- Defined Contribution (DC) schemes, where individuals build up a pot of money to provide an income at retirement.

Unlike DB schemes, which promise a specific income, DC incomes depend on factors such as the amount paid in, investment returns and decisions made at retirement. These two models place all the risks and associated costs – economic, financial and longevity – with either the sponsoring employer (for DB schemes) or the individual member (for DC schemes).

The government believes that creating a third option called Collective Money Purchase Schemes (CMPS) – where risks would be entirely with the members but shared between them collectively – could be beneficial to sponsoring businesses and individuals in certain cases. Ultimately, under a CMPS both the employer and employee would contribute to a collective fund from which the employee would then draw an income at retirement.

4. Pensions dashboards

In line with its far-reaching approach and building on previous discussions, the Bill also provides for a pioneering new dashboard system offering an online service that allows people to view all their pension information in a single place.

The aim is to aid people's retirement planning by allowing them to view their information on a consolidated platform and, as a result, the proposal has generally been welcomed by the pensions industry. The idea is to provide consumers with simple, impartial and trustworthy information. However, it is still unclear exactly when schemes will be required to provide information to the new dashboard provider(s) and how onerous the requirements will be. There may be significant cost implications for schemes in meeting these new requirements.

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