



Employment law update

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Agenda

- Employment Law Reform
- Wages Hours and Holidays
- Disciplinary procedures
- Dismissal
- Trade unions
- Equal Pay
- Direct and indirect discrimination
- Sexual orientation and religious belief
- Defining disability
- Discrimination 'arising'
- The duty to make reasonable adjustments



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Busy in April 2020?

- IR35 extended to private sector
- Written statement of terms for all workers from day one
- Swedish derogation abolished
- Parental Bereavement Leave
- Holiday reference period increases to 52 weeks
- Reduced threshold (from 10% to 2%) for employee request for Information and Consultation arrangements



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To be confirmed...

- New rules on tips and gratuities
- Increased time to break continuity
- Right to request stable contractual hours
- Cap on public sector exit payments
- Ethnic pay gap monitoring
- Redundancy protection for new parents
- Reform of non-disclosure agreements

But...



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What happens next?

- BREXIT! – will we match EU developments in employment law?
 - Parental leave
 - Predictable working hours
- New PM? What would Boris do?
- General Election – what would a Labour Government mean for employment law?



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Stefanko and others v Maritime Hotel Ltd

- Written statement of terms to be given within two months of employment starting
- That continues to apply even if the employee leaves before the two months are up
- Currently does not apply to employment that continues for less than a month
- From April 2020 will be a day one right for all employees and workers



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Govdata Ltd v Denton

- Penalty only applies where employer still in breach at time of employee's claim
- Employer here failed to provide written statement in time – but did so before claim was lodged
- Tribunal wrong to increase compensation



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Pimlico Plumbers Ltd v Smith

- Self-employed plumber claims disability discrimination
- Employer says: no mutuality, right to send substitute and plumber in business on his own account
- Tribunal finds 'armies of lawyers' could not disguise underlying reality
- Supreme Court agrees – use of plumbers mate and right to send another 'Pimlico' Plumber not inconsistent with obligation of personal service



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Uber BV v Aslam

- Uber drivers held to be 'workers'
- Tribunal entitled to find that the written contract did not reflect the reality of the bargain
- Drivers were integrated into the Uber business of providing transportation services
- ET also entitled to find that drivers were working while waiting to allocated a job
- While 'logged on' drivers were encouraged to accept jobs and penalised if they refused too many
- Will be heard by Supreme Court in the Autumn



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IWGB v Deliveroo

- Application to CAC for union recognition on behalf of Deliveroo riders
- Deliveroo introduced a substitution clause giving absolute right to send substitute of rider's choice
- CAC accepts it was not a sham – even though it made no business sense
- Forced to conclude riders weren't workers and rejected claim for recognition



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Brazel v The Harpur Trust

- Term time only casual music teacher
- Had his holiday pay capped at 12.07% of his annual hours
- But normal WTR calculation leads to higher proportion than that
- EAT say no justification for capping his holiday – part-time workers can be treated more favourably



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Compensatory rest

- Lots of exceptions to rest-break entitlements (shift workers, mobile workers etc) – but all entitled 'where possible' to 'equivalent period of compensatory rest'
- **Crawford v Network Rail**: employee was relief cover signaller working 8 hour shifts in (mainly) single person signal box. Maximum of six trains per hour
- Could have lots of short breaks – but no one break of 20 minutes or more
- EAT holds that compensatory rest must be a single 20 minute period
- Court of Appeal overrules – compensatory rest does not need to be uninterrupted. Depends on circumstances



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Royal Mencap Society v Tomlinson Blake

- Does a sleepover shift count as working time?
- Court of Appeal accepts that issue is whether a sleeping worker can also be working
- Holds that he or she is not – thinks it is obvious
- In line with Government policy at the time and recommendations of Low Pay Commission
- Permission to appeal to Supreme Court granted



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London Borough of Lambeth v Agoreyo

- Primary school teacher suspended for alleged 'inappropriate force' with two disruptive children
- Resigns same day – claims breach of contract
- High Court upholds claim – employer's reason for suspension was unclear, and no exploration of alternatives
- Court of Appeal overrules – High Court should not have interfered with county court findings
- County court entitled to find there was 'reasonable and proper cause' for suspension
- High Court wrong to apply a test of whether suspension was 'necessary'



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Talon Engineering Ltd v Smith

- Employee accused of gross misconduct (disparaging colleagues to a supplier)
- Union rep can't make scheduled hearing date – gives alternative 2 weeks later
- Employer refuses to postpone – hearing goes ahead in employees' absence
- EAT upholds unfair dismissal finding – irrelevant that employer complied with statutory right to be accompanied
- Employee 'could not be faulted' for refusing to attend hearing



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Asda Stores Ltd v Raymond

- Driver dismissed for urinating in shared delivery yard
- Held to be unfair and discrimination 'arising' from disability
- Employer had claimed breach of health and safety rules – but failed to identify them
- Had not considered explanation (sudden urge linked to diabetes) but just assumed that the basic fact was enough



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Hargreaves v Manchester Grammar School

- Teacher accused of grabbing pupil and putting his fingers 'to his throat'
- Investigation ignores three witnesses who saw nothing untoward
- Not unfair to fail to disclose their evidence
- Employer entitled to conclude that just because they saw nothing did not mean that nothing had happened



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Patel v Folkestone Nursing Home Ltd

- Employee dismissed for being asleep on duty and falsifying patient records
- Is reinstated on appeal
- But appeal only deals with sleeping – does not mention falsifying records
- Employee refuses to return unless that is resolved
- Court of Appeal finds no express dismissal because appeal cancels it automatically
- But was a constructive dismissal – employer's failure breached trust and confidence



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When notice is given

- Contractual issue – does employee have to read dismissal letter for notice to be validly given?
- Yes says Supreme Court in **Newcastle Upon Tyne Hospitals NHS Foundation Trust v Haywood**
- Notice sent to employee's home while she was on holiday did not start to run until she had a reasonable opportunity to read it
- As a result, the notice did not expire until after her 50-th birthday (£££!)



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East Kent Hospitals University NHS Foundation Trust v Levy

- Employee offered a job in different department
- Sends note to manager giving 'One Month's Notice'
- New job offer withdrawn
- Employer insists that employee has resigned and does not allow her to withdraw notice
- EAT holds that in context 'One Month's Notice' did not show an intention to resign
- Employer knew it was an internal transfer and had not treated it as a resignation until she tried to withdraw it



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Afzal v East London Pizza Ltd

- Employer believes that employee does not have right to work in UK and dismisses him
- Does that without a disciplinary procedure – not right of appeal
- Held: Dismissal unfair. If appeal was held employer would have discovered that employee did have the right to live and work in UK after all



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Safeguarding and disclosure

- Supreme Court upholds dismissal of headteacher for failing to disclose friend's convictions: **Reilly v Sandwell Metropolitan Borough Council**
- Failure was in breach of contractual duty to assist governing body in discharging its functions
- Court dodges issue of whether that involved breach of privacy



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Hawkes v Ausin Group (UK) Ltd

- Army reservist signs up for 7 week training exercise
- Employer says they can't keep job open
- Held: fair SOSR dismissal
- Not unfair to decide to dismiss without hearing first – clear that employee was committed to go on the training



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Mbubaegbu v Homerton University Hospital

- Dysfunctional NHS Team leads to investigation
- Highlights a series of concerns about employee's performance
- Tribunal finds dismissal was fair even if there was no gross misconduct
- EAT upholds – but finds ET had to rule on whether there was gross misconduct to decide 'wrongful dismissal' claim



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Cameron v East Coast Mainline Company Ltd

- Employee dismissed for breach of health and safety procedures
- Tribunal dismisses both unfair and wrongful dismissal claims – employer had acted reasonably
- EAT sends back wrongful dismissal case – ET had to make findings on whether employee was actually guilty



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Payments in Lieu of Notice

- PILON can be damages for wrongful dismissal or a sum due under the contract
- Hitherto it was paid net and part of £30,000 tax free allowance as compensation for loss of office
- New rules now mean that no payment in lieu of notice can be part of that £30K NICs also payable
- Means there is less scope for employee windfall in PILON settlement



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Morris v Metrolink Ltd

- Employee dismissed for using wrongly obtained material in representing employees in grievance
- EAT finds that was not a dismissal for trade union activities but for misconduct
- Court of Appeal overturns. The conduct was bound up with the union activities and could not properly be separated.



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Gender Pay Gap Reporting

- Second tranche of figures almost due
- Mean and median gender pay gaps, mean and median bonus gaps, male and female proportions of each pay quartile
- Who goes up, who goes down?
- Will there be an ethnic pay gap reporting requirement?



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Reading Borough Council v James

- Equal pay claims based on comparators doing work of equal value
- Both comparators were no longer employed on equal work by the time of the claim
- That did not matter and did not affect back pay says EAT
- Once the equality clause applies, it continues in effect even if the comparator leaves



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South West Yorkshire Partnership NHS Foundation Trust v Jackson

- Number of claims arising from redundancy and restructuring
- One employee had important letter about redeployment sent to work address while she was on maternity leave
- ET finds maternity discrimination
- EAT sends back – failure to look at the ‘reason why’ the unfavourable treatment occurred



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Lee v Ashers Baking Company Ltd



- No discrimination when bakers refuse to bake cake with slogan 'support gay marriage'
- All customers treated the same – it was the message not the person the bakers objected to
- Discrimination by association means association with other individuals, not concepts



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Gan Menachem Hendon Ltd v De Groen

- Teacher in ultra orthodox Jewish nursery dismissed for refusing to deny living with her boyfriend
- EAT holds this was not religious discrimination – based on employer's belief not hers
- Was sex discrimination – conversation with manager laden with sex-based assumptions and language



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Oxford Bus Company v Harvey

- Bus driver is a Seventh Day Adventist – needs to avoid Friday evening / Saturday working
- Required to work 5 day out of 7 rota – including Fridays and Saturdays – claims indirect discrimination
- Tribunal finds no justification – employer could have accommodated his need
- EAT allow appeal – issue was not the treatment of the individual, but the justification for the rule
- Employer was concerned that an exceptions would lead to further requests and undermine rota
- Sent back to Tribunal to consider justification afresh.



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Royal Mail Group Ltd v Efofi

- Employee rejected in internal recruitment multiple times
- Alleges discrimination – employer does not call evidence relating to individual decisions
- EAT says Tribunal should have taken account of that and placed burden on employer to prove absence of discrimination
- Court of Appeal overturns. Claimant must establish a 'prima facie' case raising inference of discrimination before the absence of explanation is considered



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X v Y Ltd

- Employee with ongoing performance issues and outstanding grievances
- Employer's lawyer writes email suggesting that restructuring gives opportunity to dismiss employee for redundancy – avoiding future discrimination claims
- Issue is whether legal advice is admissible – the 'iniquity principle'
- EAT holds that it is – advising employer on how to cloak a dismissal as redundancy when the real reason is different



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The Lord Chancellor v McCloud; Sargeant and others v London Fire and Emergency Planning Authority

- Two cases concerning similar transitional provisions in move to less generous pension scheme
- Aimed to protect those nearest retirement rather than those at much earlier stage of career
- Court of Appeal hold that both transitional provisions were unjustified age discrimination
- state was entitled to some leeway in deciding which social policy objectives it should pursue and how – but not if based on vague generalisations not backed up by evidence.
- No evidence that older judges needed pension protection more than younger judges.
- Not good enough to assert that it 'felt right' to protect older firefighters and no proper evidence had been presented explaining why older firefighters were in need of greater protection.



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Saad v Southampton University Hospitals Trust

- Victimisation has no defence of justification
- But an employee is not protected if allegations are false and in bad faith
- Employee raised allegation of discrimination from 4 years ago to delay performance management process
- ET said that was not in good faith and he did not reasonably believe the allegation was true
- EAT say not enough – to defeat claim employer must show the allegation was actually false



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Evans v Xactly Corporation Ltd

- Employee complains of being called ‘fat ginger pikey’
- Claims race and disability harassment
- Tribunal says ‘fat’ was not related to his type 1 diabetes
- ‘Pikey’ was potentially racial harassment
- But, in context, it was not unwanted and offensive as employee freely joined in with derogatory and abusive ‘banter’



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Nissa v Waverly Education Foundation Ltd

- Employee developed pain that was subsequently diagnosed as fibromyalgia
- ET says not disabled while still employed – not expected to last a year or more (even though, with hindsight, it did)
- EAT: Tribunal placed too much emphasis on medical diagnosis, also needed to look at surrounding circumstances
- Sent back to fresh Tribunal



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Williams v The Trustees of Swansea University Pension and Assurance Scheme

- Disabled employee forced to take early retirement
- Enhanced pension based on salary at time of retirement
- Disability had forced him to work part-time – pension would have been higher if disability had been sudden
- Court of Appeal says no 'unfavourable' treatment
- Actually treated favourably, even if some disabled employees would have done better still
- Upheld by Supreme Court – but no clarity on what 'unfavourable' means



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Dunn v Secretary of State for Justice

- Employee develops depression and heart condition
- Application for ill-health retirement hampered by delays and Bureaucracy
- Takes more than a year to process – exacerbates illness
- Tribunal finds this was direct and disability-related discrimination
- EAT says no.
- What was the reason for the treatment? – not disability
- Was it because of 'something' arising from disability? – No.



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City of York Council v Grosset

- Teacher dismissed for showing horror film to vulnerable teenagers
- Tribunal finds that was related to disability – cystic fibrosis leading to fatigue, stress and lapse in judgment
- Court of Appeal upholds finding of discrimination
- No justification because of employer's lack of support
- But Tribunal entitled to find that dismissal was fair – no contradiction, different standard of reasonableness



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Ishola v Transport for London

- Employee raises grievance about colleague, objects to the way it is handled, goes off sick
- OH says unlikely to return until grievance is dealt with to his satisfaction
- Employer dismisses after one year – when sick pay has expired
- No failure to make reasonable adjustment – employer entitled to conclude employee would only return if grievance was upheld



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iForce v Wood

- Worker given final written warning for refusing to work near the warehouse door
- Claims disability discrimination – believed that working near the door was colder and damper and would worsen her arthritis
- Employer shows that temperature at warehouse door is not any lower
- EAT holds this means that her unfavourable treatment was not 'because of something arising in consequence of her disability'



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