HR Hub – Legal Update

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COVID-19

No Jab, No Job?

This topic is becoming increasingly more prevalent as restrictions ease and the UK's vaccination programme rolls out. We have started to see some employers come out to say that vaccination will be a requirement for employment with them – such as Pimlico Plumbers and Care UK.

However, there is currently no legal requirement to have the vaccine. The Public Health (Control of Disease Act) 1984, gives the Government power to control and prevent the spread of the virus however, regulations cannot require a person to undertake medical treatment – including having the vaccine.

Under the Health and Safety at Work Act 1974 and the Management of Health and Safety at Work Regulations, employers must so far as is reasonably practicable:

- Safeguard the health and safety
- Control the risk of harm
- In relation to people their work may foreseeably affect
- Including their employees and persons other than employees

The 1974 Act also requires all employees to:

- Take reasonable care for the health and safety of themselves and other persons who may be affected by their acts or omissions at work and
- Co-operate with their employers so far as is necessary to enable the employer to comply with their health and safety duties.

HSC guidance is that vaccination status has no impact on the Covid secure guidelines employers must follow (ie. Social distancing, masks, hygiene etc.) Workplaces need to be Covid secure, following a Covid secure assessment. It is also unknown how effective the

vaccine is in reducing transmission and how effective it will be against new variants. Therefore, employers should remember that having a vaccination is not a substitute for having a Covid secure workplace.

- Can Job offers be conditional on proof of vaccinations?
  There are risks with this as individuals may have reasons for not having the vaccination which could lead to allegations of discrimination. For example, disability discrimination if they have not had the vaccine due to a health issue or discrimination on the grounds of religion or belief (see below). There are also data protection considerations that need to be kept in mind when asking, storing and retaining this sensitive data on your system.

- Can you prevent an existing employee coming to work unless they are vaccinated?
  It will be difficult to justify refusing entry to the workplace to employees, especially as guidance still currently states that you must just follow Covid secure guidelines. There may be constructive dismissal or discrimination claims that arise if employees are excluded.

- Can you dismiss someone who does not want the vaccine?
  We know that failure to follow reasonable instructions can lead to a dismissal, but in relation to a refusal to have the vaccine, it will depend on the job, who the employee needs to be in contact with at work, if their duty can be done a different way (such as working from home), and if other mitigating factors are in place.

  If an employer cannot utilise an employee because customers or clients refuse to work with someone who is not vaccinated, or where the safety of vulnerable clients would be put at risk, it may be possible to establish a fair SOSR dismissal. However, there are certainly going to be risks with taking this kind of action.

  You will likely have seen in the media that the legislation is to be amended to make vaccines mandatory in care homes with effect from October. It will be interesting to see how this unfolds and whether the change is then extended to the wider healthcare sector and beyond.

- Can someone say refusal to get the vaccination is an Anti-Vax belief?
  Under the Equality Act employees are protected from suffering a detriment from having a belief – but the belief has to be protected as a religious or philosophical belief. At the moment, it is unlikely that anti-vaxxing will fall under a religious belief.

  For a philosophical belief to be protected under the Act:

  1. It must be genuinely held;
  2. It must be a belief and not an opinion or viewpoint based on the present state of information available;
  3. It must be a belief as to a weighty and substantial aspect of human life and behaviour;
  4. It must attain a certain level of cogency, seriousness, cohesion and importance; and
  5. It must be worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental right of others.

So is an Anti-Vax worthy of respect in a democratic society? It appears from case law that we need to ask if this belief hurts others:

• Yes; not having the vaccine may not lead to herd immunity and may result in death if the anti-vaxxer accidentally infects someone;

• No; it isn't inherently possible to hurt someone by not having the jab

It is still a relatively grey area, but there is some scope to consider that anti-vaxxers have some seriousness about it (i.e. within the alternative medicine community), so it may be possible that it will be considered a philosophical belief. We are sure case law will emerge on this issue as time unfolds.

Long Covid

Acas has recently published guidance on long Covid for employers and employees.

Briefly, long Covid are symptoms of Covid that can last weeks or months after the infection. Symptoms of long Covid can include extreme tiredness, problems with memory and concentration, insomnia, dizziness, pins and needles, depression and anxiety. Long Covid can prevent some from being able to return to work, and some symptoms of long Covid can come and go.

Acas recommends that employers should:

- Agree how and when to make contact during any absence;
- Make sure their work is covered and shared out appropriately while they're off;
- Talk about ways to support them as they return to work where and when possible.

Acas then recommends that the employer should then talk with the employee about any support they may need, and that they could discuss:

- Getting an occupational health assessment;
- Making changes to the workplace or to how the employee works ('reasonable adjustments'), such as different working hours;
- A phased return to work;
- What they want to tell others at work about their illness.

The recommendations are nothing particularly new and what employers should already be doing in relation to employees with other health issues.

Acas has considered whether long Covid would constitute a disability under the Equality Act but unfortunately, doesn't really reach a conclusion on this given that it is a relatively new illness and the longer term impact is unknown. The guidance recommends that employers 'focus on reasonable adjustments rather than trying to work out if an employee's condition is a disability.'

Holidays and Isolation

With very few countries on the green list and a risk that the rules can always change, it is likely that if employees go abroad on holiday, they will have to quarantine for a period on their return.

You may find that employees don't think to take this into account when booking time off work as they are working from home and feel they can continue to work during the quarantine period. However, it may not always be that simple. For example, if the employee has children, they may not be able to attend nursery / school and the employee could end up with childcare responsibilities during the quarantine period which may impact on their ability to work effectively. Also, with a return to the office likely in the near future, it is worth considering whether you are ok with employees only being able to work remotely for that quarantine period. Having a consistent approach and communicating this before holidays start being booked should help avoid difficulties.

Return to the Office – Issues to Consider

With Covid restrictions proposed to be removed from 19 July 2021, many employers are planning a return to the office in the near future.

There are a number of considerations relating to such a return.

Health and Safety

It is not yet known what measures will be required or recommended by the government in terms of making the workplace Covid secure. It is possible that some of the current provisions such as masks and social distancing will be around for a while. Employers will need to ensure they are aware of the rules and able to implement these as people start to return. In addition, employers are likely to want to carry out their own risk assessment and implement safety measures deemed to be appropriate for the particular workplace and workforce.

If social distancing remains, many employers may conclude that having everyone back in the office is not possible. A hot desk system or staggered shifts may be appropriate to avoid too many people being in one place at the same time.

Employee concerns

You may have a number of employees who indicate they do not wish to return to the office. This may be because they are concerned about safety, have developed (or already had) anxiety and feel uncomfortable being in the office / leaving the house or perhaps because they prefer the flexibility in terms of lifestyle that home working allows.

You do not have to just allow people to continue to work remotely but will need to deal with individual concerns as they arise.

Risks to be aware of are when forcing a return to the office are:

- Allegations of health and safety issues
- Discrimination claims if perhaps an employee has health issues which makes them vulnerable or is pregnant and therefore not able to have the vaccine;
- Constructive dismissal claims if people decide they are not willing to return to the office and resign.
- Multiple flexible working requests which could be time consuming to deal with

Flexible Working Requests

Many people have become accustomed and enjoyed the flexibility of working from home. Therefore, organisations should be prepared to potentially see an increase in flexible working applications they receive from their staff who want to work from home permanently or seek a hybrid agreement.

Any employee with at least 26 weeks' continuous employment can make a request for flexible working under the statutory scheme for any reason. An employer then has three months to consider that request and can only refuse the request for one (or more) of the eight reasons set out in legislation. Although Covid has not changed the law, the context is now considerably different. If you have staff that have been working from home, it will be much more difficult to refuse requests to make homeworking permanent unless there is tangible evidence that you can point to of things going wrong or a decline in their performance – which cannot be explained by short term pressures (eg. home schooling children). You can always agree to a trial period in the first instance if you are unsure as to whether the arrangement is going to work out in the long term, however the employee needs to fully understand how you will assess whether the arrangement is satisfactory and that you can ask them to return to work if things do not go well.

The good news is that only one request can be made by the employee in any 12-month period. However, you must be sure to deal with any requests including the appeals process. If you do not adhere to the flexible working timetable, a tribunal can order you to pay up to eight weeks' pay compensation. Therefore, organisations should ensure that they have the correct measures in place to deal with a potentially high volume of requests when they return to the office.

Hybrid Working

Hybrid seems to be the new buzz word at the moment.

Many employers are considering introducing a hybrid arrangement where staff come in the office for some of the time but spend the rest working remotely. Although there is no obligation to offer hybrid working, a lot of individuals are likely to expect some level of flexibility having had such a long period working from home. Getting people back into the office full time is likely to be challenging and there is a risk that staff could leave to join organisations with more flexible working arrangements.

There are no rules around what hybrid needs to look like, but key factors to consider when thinking about the arrangements you want to implement and how to set this out in a policy are:

- How much time is needed in the office?

- Will this be fixed days or up to the employee?
- Will employees be able to make their own decisions about arrangements or do they need to agree with colleagues / a manager?
- Are there particular roles / duties / situations which would require time in the office?
- How do you ensure junior staff receive appropriate supervision? For example, do you want a requirement that they have to be in the same day as a senior member?
- If you are having a fixed number of days, how will you deal with this for part time staff?
- Do you want teams to be in on the same day?
- Is there a danger of differential treatment if for example some people choose to be in the office more than others and are therefore more visible.
- Are you introducing a permanent change or do you want to keep it under review?
- What are you doing about equipment? Will you want employees to bring in equipment they have been using at home?
- Data Protection – with staff coming in and out, there is a greater risk of data being lost or seen by others.

Immigration

The close of the Brexit transition period at the end of 2020 ushered in the most significant changes to the UK immigration system in over decade with a new set of rules coming into force from 1 January 2021.

The abolition of free movement of labour between the EEA and the UK as a result of Brexit means that EEA citizens are subject to the same new rules as other migrants. However, there were some transitional arrangements in place which allowed EEA citizens already in the UK the right to continue living and working and to apply to secure those rights going forward. Those arrangements come to an end on 30 June 2021.

EEA Nationals

Settled Status

EEA citizens already in the UK at 31 December 2020 have the right to apply for settled status under the EU Settlement Scheme. The last day for an application under the scheme is 30 June 2021.

If an EEA national has been in the UK with at least five years of continuous residency by 31 December 2020 they will be granted full settled status, if less than five years they will be granted pre settled status which will be valid for up to five years, at which point they will be able to apply for full settled status.

If the individual is granted pre settled status they must be aware that there are limits to the amount of time that can be spent outside of the UK without the five years of continuous residency being jeopardised – generally speaking, this is six months in every 12 month period.

Your Existing EEA Staff

Although individuals are required to make an application for settled status in order to protect their right to live and work in the UK, there is no obligation on you as the employer to check that they have done this. Provided you carried out the appropriate checks when you recruited them, you will continue to be protected in relation to any civil penalty if it turns out they have not applied and therefore do not have the right to work.

If it somehow comes to your attention that an existing employee has not applied, the Home Office has recently produced guidance which confirms that you will not immediately need to dismiss. Instead you should take the following steps:

- Inform the employee that they need to make a late application for settled status and that they should do so within 28 days;
- Get a copy of the certification of application from the employee once they have applied;
- Verify the application using the employer checking service.

If you follow these steps and keep the evidence, you will have the statutory defence for 6 months. If the employee does not make the application within 28 days, you will need to take steps to dismiss as they will not have the right to work.

Although 30 June was meant to be an absolute end date for applications, the Home Office guidance suggests that a fair amount of late applications will be granted. There are examples of what would be reasonable grounds and they are fairly wide. The list is also said to not be exhaustive so there is always discretion to approve late applications for other reasons.

New EEA Staff

As with all new recruits you will need to carry out the right to work checks for EEA nationals.

From 1 July a passport will no longer be sufficient evidence and will not provide you with the statutory excuse. Instead you need to establish whether the individual has the right to work by using the online check through the government's right to work service. https://www.gov.uk/view-right-to-work

The individual will need to access the system first (https://www.gov.uk/prove-right-to-work) and then provide you with a share code so you can review their status.

Workers who do not have settled status or some other right to work (such as a spouse visa, student visa or dependant visa) will need to be sponsored under the skilled worker system if you want to employ them.

The Skilled Worker Route

- This is the system that used to be known as Tier 2. This system requires employers wishing to take advantage of it to hold a sponsorship licence from the Home Office.

- The Sponsorship Licence application process is a reasonably logical, if quite weighty procedure. Ultimately it requires proof that the employer is a genuine business, it has roles which fulfil the points based requirements of the Skilled Worker Route and either there is a current need for recruitment in these areas, or there is likely to be in the near future.

- Once the employer has gone through the application procedure and successfully obtained a licence, they can then sponsor a migrant worker by issuing them with a Certificate of Sponsorship (a reference number) – this can be issued to a prospective employee who is abroad and wanting to come to the UK for the purpose of the particular role, or one who already resides in the UK under a different visa system and wishes to switch to the Skilled Worker Route.

- Once a Certificate of Sponsorship has been allocated, the employee will be able to apply for the Skilled Worker Visa by demonstrating that they qualify under the new points based system. The employee will need to demonstrate that they score the requisite number of points (70) to qualify for a visa based on their job offer, the qualification level of the job (A Level or above) their salary and their English Language ability.

- As a sponsor you will have a number of duties which you must comply with to maintain the right to have a licence. These duties include various record keeping and reporting obligations.

- An application for sponsorship may lead to a compliance visit from the Home Office. Before submitting the application it is therefore useful to check you are comfortable you will be able to demonstrate compliance with general obligations such as the right to work checks as well as having systems in place to be able to comply with the additional duties.

Covid Amendments

The right to work check process was temporarily amended to allow documents to be scanned and checked remotely instead of having to see original documents. This amendment has been extended to 31 August 2021.

Recent Case Law

Price v Powys County Council

Facts: The claimant took Shared Parental Leave as soon as his wife's compulsory maternity leave had ended. Under the Council's policy, he only got pay equal to statutory maternity pay, whereas the Council paid full pay to employees on Adoption Leave. The claimant alleged direct discrimination when he compared himself to a female colleague on Adoption Leave.

Decision: The tribunal dismissed the claim as the comparator was wrong and listed the following five differences between employees on Shared Parental Leave and on Adoption Leave:

1. Adoption Leave is in part compulsory, whereas shared parental leave is entirely optional;
2. Adoption Leave can begin before placement, whereas shared parental leave cannot;
3. Adoption Leave is an immediate entitlement on placement, whereas shared parental leave is not;
4. Shared parental leave can only be taken with the partner's agreement to give up adoption leave; and
5. Shared parental leave has to be taken within fifty-two weeks of placement and within the period and could be 'dipped in and out'.

The Employment Appeal Tribunal dismissed the appeal, and held that Adoption Leave is materially different to Shared Parental Leave as its purpose goes beyond providing childcare. The requirement in s23 of the Equality Act 2010 - that there must be no material difference in the circumstances between the Claimant and his comparator - was not met, so the claim failed. The EAT applied the decision in another case, Capita Customer Management Ltd v Ali, where it was decided here that the position of a woman on maternity leave, who is paid a higher rate of pay, is materially different from a man receiving statutory pay on Shared Parental Leave.

Takeaways: The Court held that correct comparator for a man on Shared Parental Leave who is in receipt of statutory pay, is in fact a woman taking Shared Parental Leave. When the man is compared to a woman on Shared Parental Leave, who also would receive statutory pay, then the male claimant would suffer no detriment.

Therefore, when considering sex discrimination claims, Shared Parental Leave is viewed as a materially different entitlement to Maternity Leave and Adoption Leave.

Mr D Barrow v Kellog Brown & Root

Facts: Mr Barrow was a senior employee at Kellog Brown & Root 'KBR' for 36 years. In January 2017, Mr Barrow was promoted from level 70 to 75 in the company-wide structure without an increase in pay. He discovered sometime later, that on the company's system, he was actually at level 80, yet had not been given notice of the change of level or received a pay rise. Management tried to explain that because they could not yet promote him to Vice President, level 80 (which was a "previously dormant and unused" level) provided an alternative promotion option.
In September 2017, Mr Barrow received steroid cream for an increasingly worrying skin condition. By November 2017, the condition had not settled and Mr Barrow was prescribed a more aggressive, oral steroid treatment, which subsequently built up in his system and started to make him hyperactive and energetic and cause him difficulty when trying to sit quietly and concentrate.

At the same time as he received the steroid treatment, Mr Barrow prompted discrepancies in his seniority level on the system, and said that he felt abused at being promoted, to look more "senior" than another colleague, without a pay increase. He sent his manager a three

page email outlining his complaints, which in response his manager forwarded to other members of KBR and suggested Mr Barrow was "building a case for some sort of tribunal/constructive dismissal". The next day, Mr Barrow informed his manager that he had been taking steroids and that these were having an adverse impact on his behaviour, and that he was going to take a day off. His manager agreed and encouraged a longer time away from the office as he too was concerned for his wellbeing.

Occupational health cleared him fit to return to work on 16 November. Mr Barrow attended a review meeting which was rushed and failed to sufficiently discuss his objectives, which he explained in a follow up email to his manager. He was then dismissed on 5 December 2017 and escorted from the building.

On 23 January 2018, Mr Barrow's solicitors informed the company that he had been diagnosed with a form of lymphoma and as he was due to start chemotherapy, he was unable to attend meetings on certain days and the treatment could cause him to cancel meetings at short notice. Mr Barrow submitted a formal grievance on 20 April 2018 and he was eventually formally dismissed (again) by the senior vice president on 30 May 2018, because of a breakdown of trust and confidence.

Decision: The judge concluded that the investigation process was a "sham" and that other members of KBR were controlling matters "behind the scenes", and that the investigation was "dressed up" as it was already decided that Mr Barrows should leave the company. The judge further held that the senior vice president did not believe that there was a breakdown in trust and confidence and agreed with witness testimony that the company created a "ruse" to dismiss Mr Barrow, who was a victim of unfair dismissal, disability-related harassment and unfavourable treatment for something arising in consequence of disability. Mr Barrows was awarded more than £2.5 million.

Takeaways: An award of this magnitude sends a clear signal of its contempt for the actions of the employer and should stand as a cautionary tale for all employers when it comes to dismissing a sick or disabled employee.

Dewhurst and Others v Revisecatch Limited t/a Ecourier and City Sprint (UK) Limited

Facts: The claimants were cycle couriers, who provided services to City Sprint in respect of City Sprint's contract with HCA Healthcare – however City Sprint lost the contract to Ecourier. The Claimants here brought claims under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), for a failure to inform and consult about the transfer. TUPE provides that employees will move to the new employer, with many of their rights and liabilities intact, and with special protection against changes being made to their employment terms or from being dismissed, as a result of the transfer. As you may or may not know, TUPE seeks to protect the rights of employees in a business transfer or service provision change situation, however TUPE uses a wider definition of 'employee' compared to many other pieces of legislation. A preliminary hearing was listed to determine whether the definition of "employee" under TUPE is wide enough to apply "limb b" workers – which includes couriers. Section 230(3)(b) ERA sets out the definition for "limb b" workers: "whereby the individual undertakes to do or perform personally any work or services for another party to the contact whose status is not by virtue of the

contract that of a client or customer of any profession or business undertaking carried on by the individual".

Decision: Surprisingly the tribunal held that TUPE does apply to "limb b" workers. The ET held that Regulation 2(1) TUPE which defined "employee" under TUPE, should be interpreted in line with the purpose of the EU's Acquired Rights Directive (ARD), to include a worker (as defined in s230 of the ERA). The ET found that the purpose of the ARD was not limited to a specific class of individuals but instead "to preserve" on a transfer "the different types and levels of employment rights and protections" which a Member State may afford "whatever they may be".

Takeaways: Any business planning to undertake TUPE transfer process needs to give serious thought as to who should be informed and consulted in the TUPE process in order to minimise the risk of liability on their business. The remedy for a claim for failure to inform and consult is up to 13 weeks' pay per affected employee.

While genuine independent contractors remain out of scope, potential litigation around employment status remains a concern. This decision emphasises the importance for all parties of ensuring adequate indemnity protection is in place.

Sidhu v Exertis

Facts: Mr Sidhu joined Exertis in 2012, and in 2015 sought a new role within the company. The new team he became a part of housed a culture of crude sexual innuendos, racial bullying and expressed explicit sexual references which were considered entertaining and a form of banter by the team. The Tribunal found that in order to fit into the culture "it was necessary to enter into jokes and discussions of that nature". Unfortunately, the team targeted Mr Sidhu and repeatedly made discriminatory remarks and acts towards him. Examples include the team referring to Mr Sidhu's surname as "siduko" and calling him an "Arab shoe bomber"; searching his home on google and likening the area to Aleppo; hiding his work equipment; standing to applaud him when he arrived late to work to humiliate him; and a colleague even refusing to hand over two of the accounts he was employed to manage. When Mr Sidhu reported the bullying to his manager, the tribunal found it was clear that his line manager's primary focus was whether his team were meeting their sales targets, was not interested in Mr Sidhu's concerns and failed to deal with them appropriately.

Mr Sidhu eventually resigned from the company on 24 May 2017 due to the acts of treatment he suffered.

Decision: The tribunal found that in the absence of an explanation by the respondents, Mr Sidhu's treatment was "because of or related to race". The tribunal found that the conduct alleged by Mr Sidhu amounted to race discrimination, which had "the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading or humiliating or offensive environment for him". The tribunal described the treatment as "a campaign of bullying". The tribunal found that Mr Sidhu eventually resigned because of a "combination of everything that happened to him", and that the acts of discrimination had a "significant influence" on his decision to resign, meaning that his constructive dismissal also amounted to an act of discrimination. All the other claims of race discrimination were considered as harassment as defined in the Equality Act.

In order to succeed in a claim for constructive dismissal, an employee must show that they have not acted in a way that suggests they have accepted the breach – this is called affirming the contract. Exertis argued that Mr Sidhu affirmed the contract by remaining an employee from 8 February 2017 (the day before he went on sick leave) to 24 May 2017. The tribunal however noted that during that time Mr Sidhu was off sick, and could not find that he did anything to affirm the contract. In any event, the tribunal found that Mr Sidhu received his grievance outcome on 18 May 2017, which the tribunal found was deficient in itself, and that Mr Sidhu was entitled to rely upon that outcome as being the "last straw". The tribunal also found that Mr Sidhu was subjected to detriment on the ground that he made protected disclosures, and that Exertis were also in breach of contract as they had failed to pay Mr Sidhu his notice pay.

The claims also succeeded against three individually named harassers within the meaning of s26 of the Equality Act, meaning that they are personally liable as well as Exertis. A remedy hearing is due to take place later this year and Mr Sidhu is claiming over £6 million. He claims he will never be able to work again.

Takeaways: Mr Sidhu's lawyer remarked how the situation was "**'Lord of the Flies'** level of group condemnation". Exertis tried to argue that they were not vicariously liable for the acts of their employees and that they had taken "all reasonable steps to prevent its employees from doing the acts alleged or anything of that description". Any act of discrimination or harassment carried out in the course of employment will make the employer vicariously liable (unless the employer can show they took all reasonable steps to prevent the discrimination/harassment occurring). However, the tribunal was not shown records to indicate that any equality or diversity training had taken place prior to the allegations. Therefore, Exertis had not taken all reasonable steps to prevent the conduct.

"Banter" in the workplace is a constant headache for employers. It also is important to understand that simply because a victim may also have participated in banter previously, this does not preclude them bringing a claim. This case serves as a stark reminder that it is imperative for employers to provide appropriate harassment training regularly to its employees to discourage inappropriate behaviour in the workplace.

Forstater v CGD Europe

Background: Maya Forstater asserted her gender critical beliefs in debates on social media. Some trans people found her comments to be offensive and transphobic. Following complaints by colleagues, her employer investigated and subsequently her contract was not renewed. Ms Forstater complained that she had been discriminated against because of her gender-critical beliefs which she stated were a protected philosophical belief under section 10 of the Equality Act and that she had been dismissed as a result if her philosophical beliefs.

Decision: The test for philosophical belief are as follows:

- the belief must be genuinely held
- it must be a belief, not an opinion or viewpoint based on the present state of information available

- it must be a belief as to a weighty and substantial aspect of human life and behaviour
- it must attain a certain level of cogency, seriousness, cohesion and importance, and
- it must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.

The ET found that Ms Forstater's gender-critical beliefs satisfied the first four tests, however they did not pass the final element – that the belief "must be worthy of respect in a democratic society". As a result, Ms Forstater's claim failed.

The EAT however overturned the ET's decision and clarified that the threshold for whether a belief is "worthy of respect in a democratic society" is very low. The test is meant to exclude only the most extreme beliefs such as Nazism or totalitarianism which supports "hatred and violence in the gravest forms". They found that a belief can be worthy of respect even if it is profoundly offensive, shocking or even disturbing to others because "they are beliefs that are and must be tolerated in a pluralist society".

In this case, it was held that Ms Forstater's gender-critical beliefs were commonly held in society and did not seek to destroy the rights of trans persons. Whilst offensive to some and having the potential to lead to harassment of trans persons, such beliefs nevertheless were found to fall within Article 9(1) of the ECHR (the right to freedom of thought, conscience and religion) and therefore also amount to a philosophical belief warranting protection under the Equality Act.

Takeaways The EAT's decision focused solely on the technical legal question of whether Ms Forstater's beliefs could be protected under the Equality Act, not if her behaviour on social media was right or wrong. The case will now return to the ET to determine whether she was dismissed as a result of her philosophical beliefs and whether that dismissal was discriminatory.

Other Employment Considerations

Menopause in the workplace

According to ACAS, around two million women over the age of 50 have difficulties at work as a result of their menopausal symptoms.

While there is no specific duty in relation to the menopause, employers have a general duty to protect the health and wellbeing of their staff, and women experiencing the symptoms of the menopause should be treated fairly at work.

Employers who don't take steps to provide support could find they are faced with claims for sex, age or disability discrimination. With compensation for discrimination claims being uncapped, it is particularly important that employers take steps to avoid the risks.

In addition to the risk of a claim, there is also a risk to employers in terms of reduced productivity, high levels of absence and the loss of good members of staff who decide they do not feel supported.

A menopause policy can help to educate your staff about the menopause and provide them with a framework to handle conversations about the menopause. It also demonstrates a culture and commitment to supporting women experiencing symptoms of the menopause in the workplace. A policy alone however is not enough. You need to ensure staff are trained on the policy and that support is actually offered in practice.

Increase to Vento bands for 6 April 2021

Compensation for discrimination, whistleblowing detriment and trade union membership claims can cover non-financial losses suffered by the claimant, which will often include an injury to feeling award.

The Vento bands are increased annually each April, in line with inflation and there are three bands for an Employment Tribunal to consider; the lower band, the middle band and the top band.

1. The lower band is relevant for less serious cases, such as where the prohibited act was an isolated or one-off occurrence: From 6 April 2021, lower band claims are £900-£9,100 (up from £900-9,000);
2. The middle band is relevant for more serious cases, which do not merit an award in the highest band: From 6 April 2021 middle band claims are £9,100 - £27,400 (up from £9,000-£27,000);
3. The top band is only used for the most serious cases, such as where there has been a lengthy campaign of discrimination on the ground of sex or race: From 6 April 2021 top band claims are £27,400 - £45,600 (up from £27,000-£45,000).

Post-Employment Notice Pay (PENP)

From 6 April 2021 there has been a change to the standard formula for calculating post-employment notice pay. The government has sought to avoid unfair outcomes if an employee's pay period is defined in months but the contractual notice period is expressed in weeks.

The standard formula used the number of days in the pay period ('P') as one of the inputs and this can vary between 28 and 31 days, depending on when in the year employment terminates. This has the unintended consequence of having different outcomes depending on which calendar month employment is terminated. The new change results in a more consistent calculation. Instead of using the number of days in the pay period, the average number of days in a month is to be used, which is 30.42 days.

Action point: Employers should review PENP calculations and settlement agreements which have a termination date on or after 6 April 2021 to ensure that income tax and National Insurance Contributions are correctly accounted for.

Increase in statutory limits from 6 April 2021

National Minimum Wage

On 1 April 2021, the national living wage increased to **£8.91 per hour** (up from £8.72). In addition, the age threshold for the national living wage was amended so that it applies

to 23 and 24 years old workers, whereas before it was only available to those aged 25 and over.

Other national minimum wage rates also increased on 1 April 2021, with hourly rates rising to

- £8.36 for workers age 21 and 22, to
- £6.56 for workers aged 18 to 20 and to
- £4.62 for workers aged 16 and 17.

Statutory Redundancy

From 6 April 2021 the cap on a week's pay is **£544** (up from £538).

Statutory Family Related Pay and Statutory Sick Pay

The weekly rate of statutory maternity, paternity, adoption, shared parental and parental bereavement pay increased to **£151.97** (up from £151.20) from 4 April 2021.

The weekly rate of statutory sick pay increased to **£96.35** (up from £95.85) as of 6 April 2021.