HR Hub – Legal Update

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Covid – recent developments

- **Hybrid working**

On 13 July 2021, Acas published new guidance on hybrid working to help employers consider whether it could be an option for their workplace and how to fairly introduce it. Acas has also published the results of a survey showing that over half of employers expect an increase in employee requests for flexible working. The advice includes tips for employers on how to:

- Consult with staff on the practical considerations regarding introducing hybrid working.
- Support and manage staff who are hybrid working and ensure all hybrid workers are treated fairly.
- Create a hybrid working policy.
- Handle hybrid working requests from staff.

It advises employers to consider whether technology could assist hybrid working, and issues such as health and safety, data privacy, cybersecurity, onboarding new joiners, and how teams will communicate remotely.

- **Covid – Practical Questions**

Where an employee refuses to attend work due to fears about COVID-19, what can the employer do and what should the employee be paid?

If the employee can work from home, this may well resolve the issue. If not, the employer would need to consider the current public health advice, the specific reason that the employee is concerned about attending work and whether it would be discriminatory to refuse home working, take disciplinary action, or withhold pay in light of the employee's refusal.

If there is no discrimination angle, and the public health advice is such that the employee could reasonably be asked to continue to attend work then it is possible that the employee could be investigated for misconduct in terms of their refusal to follow a reasonable management instruction, and their unauthorised absence. If the absence is unauthorised then the employee would likely not be entitled to pay as they are not willing to attend work.

However, the context of the refusal to attend work would need to be closely considered before disciplinary action were taken. Certain dismissals related to the raising of health and safety concerns amount to automatically unfair dismissals which do not require qualifying service and action short of dismissal on these grounds could amount to a detriment which is unlawful under section 44 of the ERA 1996.

Can employers pay home workers less than those who return to the office?

A survey conducted by CIPHR has revealed that of the 150 business leaders and organisations asked, more than two-thirds (68%) currently paying location allowances are considering cutting pay for staff who opt to work from home, despite 53% reporting savings made through home working. 86% had already suspended, temporarily reduced, or removed payments such as the London Living Wage and other location premiums.

There are a number of factors that would have to be considered before implementing any change to pay. For existing employees any change could be a breach of contract or unlawful deduction from wages if employees do not agree. In addition, employers should consider why people are opting to work from home as there is a risk those with health issues or childcare responsibilities chose to work from home and this could therefore lead to arguments of discrimination.

Covid Tribunal cases

It is too soon for any cases to have reached the higher appeal Tribunals so any decisions so far are not binding on future Tribunals. However, it is still interesting to see how Covid related matters are being interpreted by the Tribunals.

Jimenez v Firmdale Hotels Plc ET/2203194/2020

An employment tribunal has allowed an employee's victimisation claim that his employer subjected him to a detriment contrary to section 27 of the Equality Act 2010 (EqA 2010) by not furloughing him under the Coronavirus Job Retention Scheme (CJRS) to proceed, as amended.

Mr Jimenez had previously brought various claims against his employer, Firmdale Hotels Plc (Firmdale). It was not disputed that presentation of the earlier claims was a protected

act within the meaning of section 27 EqA 2010. It was also not disputed that Mr Jimenez was excluded from the group of employees furloughed by Firmdale under the CJRS, whether in late March 2020 or subsequently. His exclusion was because he was on long-term sick leave and not in receipt of Statutory Sick Pay, meaning that Firmdale considered him "ineligible" under the CJRS. It subsequently considered it too late to furlough him because he had not been furloughed before June 2020.

Without purporting to make a judicial determination of the point, the employment judge at the preliminary hearing considered that Firmdale was mistaken in its understanding of the CJRS and could have furloughed Mr Jimenez. In addition, despite his requests, it had not explained to him in sufficient detail why it considered him ineligible for furlough. Firmdale submitted that other employees on long-term sick leave were treated in the same way as Mr Jimenez. The judge noted that if this was correct and there was no other indication of differential treatment, it would be compelling evidence that Mr Jimenez had not been subjected to a material detriment because of the protected act. However, with sufficient evidence to shift the burden of proof to Firmdale, his claim could proceed given that he had also attempted to present it in time. The judge advised Mr Jimenez to consider any comparator documents disclosed by Firmdale, as they were likely to inform his decision on whether to pursue his claim to a final hearing or apply to amend it to a discrimination arising from disability claim.

The case is yet to be decided on its facts and Mr Jimenez may not be successful. However, it is an interesting reminder that employers need to be particularly careful when dealing with employees who have raised previous concerns. It is also a good reminder of the importance of consistency of treatment and evidencing the reason for decisions. If the employer can evidence that the reason for the decision was nothing to do with the protected act and that the Claimant was treated in the same way as others, the claim is unlikely to succeed.

Gibson v Lothian Leisure ET/4105009/2020

An employment tribunal held that an employee had been unfairly dismissed under section 100(1)(e) of the Employment Rights Act 1996 for raising health and safety issues about lack of PPE or other workplace COVID-secure measures, out of concern for his clinically vulnerable father.

The claimant, Mr Gibson, worked as a chef in a restaurant owned by Lothian Leisure. The restaurant closed temporarily in March 2020 due to the first COVID-19 lockdown, and Mr Gibson was furloughed. Before re-opening the restaurant, the employer asked Mr Gibson to come into work. Mr Gibson was concerned about catching COVID-19 at work and passing it onto his father, who was clinically vulnerable. When Mr Gibson raised concerns about the lack of PPE or other COVID-secure workplace precautions, the employer's response was robustly negative, and he was told to "shut up and get on with it".

With no prior discussion, the employer dismissed Mr Gibson summarily by text message on 30 May 2020. It did not pay him any notice pay or accrued holiday pay. The message said that Lothian Leisure was changing the format of the business and would be running it with a smaller team after the lockdown.

An employment tribunal held that Mr Gibson had been unfairly dismissed under section 100(1)(e) of the Employment Rights Act 1996 (ERA 1996) because he had taken steps to protect his father in what he reasonably believed to be circumstances of serious and imminent danger. Alternatively, since the wording of the employer's text message suggested a possible redundancy situation, Mr Gibson had been unfairly selected for redundancy under section 105(3) because he had taken those steps. The circumstances of danger were the growing prevalence of COVID-19 and the potential significant harm to Mr Gibson's father if he contracted the virus. Mr Gibson reasonably believed that this was a serious and imminent danger, leading him to raise concerns regarding the lack of PPE. Until Mr Gibson had raised those concerns, he had been a successful and valued member of staff.

With a return to the office taking place for many employers, concerns about health and safety are likely to be raised. Before taking action against employees who do not feel comfortable coming into the workplace, consideration needs to be given to whether the employee reasonably believes there is a serious and imminent risk. Steps should then be taken to try to remove or minimise that risk where possible so as to increase the chance of the employee attending and to reduce the risk of a claim.

Accattatis v Fortuna Group (London) Ltd 3307587/2020

An employment tribunal has held that it was not automatically unfair under section 100(1)(e) of the ERA 1996 for an employer to dismiss an employee who had expressed concerns about commuting and working in the office during lockdown and had repeatedly asked to be furloughed.

Mr Accattatis worked for Fortuna Group (London) Ltd, a company which sells and distributes PPE. During March and April 2020, Mr Accattatis repeatedly asked to work from home or be placed on furlough, explaining that he was uncomfortable using public transport and working in the office. Fortuna told Mr Accattatis that his job could not be done from home, and that furlough was not possible because the business was so busy, but that he could instead take holiday or unpaid leave. Mr Accattatis declined and asked three more times to be furloughed. After the final request on 21 April 2020, he was dismissed by email the same day.

Mr Accattatis did not have sufficient service to claim ordinary unfair dismissal. He instead alleged he had been automatically unfairly dismissed under section 100(1)(e) of the ERA 1996 for having taken steps to protect himself from danger.

The tribunal observed that the government had announced on 14 February 2020 that COVID-19 posed a serious and imminent threat to public health. This, together with Mr Accattatis' emails expressing concern about commuting and attending the office, showed he reasonably believed there were circumstances of serious and imminent danger. However, it was a requirement under section 100(1)(e) for Mr Accattitis to have taken appropriate steps to protect himself from danger or to have communicated the circumstances of danger to Fortuna. Fortuna had reasonably concluded that Mr Accattatis' job could not be done from home and that he did not qualify for furlough but had instead suggested taking holiday or unpaid leave. Mr Accattatis' response was not only that he wanted to stay at home (which was agreed), but also to demand that he be allowed to

work from home (on full pay) or be furloughed (on 80% of pay). These demands were not appropriate steps to protect himself from danger, so his claim failed.

Although not binding, this case is a reminder that the pandemic may not on its own justify a refusal to attend work under section 100(1)(e) if employers have reasonably tried to accommodate employees' concerns and reduce transmission risk.

Status

IR35

The Department for Work and Pensions (DWP) has faced a £87.9 million tax bill for the incorrect determination of the IR35 status of its contractors, despite using HMRC's Check Employment Status for Tax (CEST) tool.

For the public sector, responsibility for making the relevant status determinations was transferred from contractors to end hirers in 2017, to combat non-compliance. With the same rules now in force for the private sector, after a one-year delay due to the COVID-19 pandemic, businesses should perhaps exercise caution when using the CEST tool alone to inform decisions on the status of contractors.

Labour Party and worker status

On 26 July 2021, the Labour Party announced plans to create a single status of "worker" to replace the existing categories of "worker" and "employee" used for employment law purposes. The genuinely self-employed would retain their self-employed status.

The status would be accompanied by rights and protections for all workers from the first day of employment (day one rights), including rights to Statutory Sick Pay (SSP), the National Minimum Wage (NMW), holiday pay, paid parental leave, and protection against unfair dismissal. The plan is part of Labour's objective to end insecure employment.

The Labour Party subsequently also announced that it would make flexible working "a force for good" for all workers, with a default right to flexible working from day one of employment and a legal responsibility on employers to accommodate flexible working unless it can be shown that it is not workable. The right to flexible working would include flexible hours, compressed hours, staggered hours, annualised hours, and flexibility around school runs and other family and caring responsibilities, including childcare during school holidays.

Case Law Update

- **Moore v Phoenix Product Development Limited**

<u>Does refusing an appeal make a dismissal unfair?</u>

The Claimant, the inventor of a water efficient toilet, stepped down as CEO of the Respondent. He initially stayed on as a director and employee but was subsequently

dismissed due to an irretrievable breakdown in relationships. He was not offered a right of appeal.

The tribunal rejected his claim of unfair dismissal. Having concluded that Claimant had sent aggressive emails and been confrontational, the Tribunal concluded the breakdown was entirely the fault of the Claimant and that an appeal would have been pointless. The Claimant appealed.

The EAT upheld the decision. An appeal will normally be part of a fair procedure, but not invariably so. The relevant circumstances should be taken into account. It was a small organisation, relations had broken down, the Claimant held a senior position and was unrepentant. The tribunal was right to find an appeal would have been futile and that was one of the relevant circumstances to be taken into account.

This decision is helpful but the safest approach in most cases is still going to be to offer the right of appeal as this can potentially repair any unfairness in the original process, allows another opportunity to set out why the dismissal is the right decision and means that there is no breach of the ACAS code.

- **Fallahi v TWI**

Does a Tribunal need to look into the fairness of an existing final written warning when looking at the fairness of a capability dismissal?

The Claimant had been dismissed on the back of a final written warning after failing to meet targets in his project management role. The tribunal held that the Claimant's dismissal was fair and declined to go behind the final written warning.

The EAT noted the limited scope for going behind a final written warning when considering fairness. The tribunal was required to judge the reasonableness of the dismissal in all the circumstances, not simply whether the final warning was reasonable or appropriate, although that warning was a relevant factor, it was only one. Here the employer had been dealing with the continuum of the employee's performance over a long period, part of which led to a final written warning. The tribunal was entitled to find that the warning was within the range of reasonable responses.

- **Opalkova v Acquire Care Ltd**

When considering an application for costs on the basis that a claim or response had no reasonable prospect of success, the Tribunal should consider each statutory cause of action separately not look at the claim as a whole.

The ET1 alleged six causes of action. One was conceded before trial, two succeeded at trial and three were dismissed. The Claimant appealed the tribunal's refusal to make a Preparation Time Order in her favour.

EAT confirmed that 'claim', in the context of an application for a costs or time order, means each separate cause of action, not the whole of the proceedings brought in the claim form. When determining whether the threshold had been crossed, each should be considered separately.

There are three key questions:

1. Did the claim or response have no reasonable prospects when submitted? Did it reach a stage where it had no reasonable prospect? This is an objective test.
2. At the relevant stage, did the paying party know that?
3. If not, should the paying party have known?

Where employers are defending claims they should consider whether there are elements of the claim which would be better settled / admitted rather than necessarily defending everything. The fact that the employer has reasonable grounds for defending some or even most of a claim won't prevent a costs order being made in relation to another element which was weak.

- **Follows v Nationwide Building Society ET/2201937/18 (14 March 2021)**

Indirect Associative Discrimination

An employment tribunal has upheld a claim of indirect associative discrimination on the grounds of disability, applying the judgment of the ECJ in Chez Razpredelenie Bulgaria AD C-83/14 that the concept of associative discrimination could in principle be extended to indirect discrimination.

Mrs Follows was the principal carer for her disabled mother. She was employed as a Senior Lending Manager (SLM) by Nationwide on a homeworker contract. Nationwide decided that SLMs could no longer work at home on a full-time basis due to the need to provide effective on-site supervision. As Mrs Follows could not comply, she was subsequently dismissed, allegedly by reason of redundancy.

The tribunal accepted that carers for disabled people were less likely to be able to be office-based than non-carers and, as such, the claimant was put at a substantial disadvantage because of her association with her mother's disability. Nationwide was fully aware of Mrs Follows' mother's disability and the disadvantage that she would suffer by the application of its requirement. Reasonable steps had not been taken to avoid the disadvantage.

The need to provide effective on-site supervision was in itself discriminatory and so could not be a legitimate aim. Even if it was legitimate, dismissing Mrs Follows was not a proportionate means of achieving that aim, which could have been achieved through hybrid working. The tribunal was not satisfied that the requirement corresponded to a real need and nor was it based on actual evidence or rational judgment, instead being based on Nationwide's subjective view.

This decision appears to extend the protection available to employees who have association with others who have protected characteristics. The decision is only a first instance Tribunal decision so not currently binding but other Tribunals could also decide to apply the same interpretation. Employers should be careful to consider the impact of rules, policies or decisions on individuals who may have caring responsibilities.

- **Amdocs Systems Group Ltd v Langton**

The EAT has held that clauses in the employee's contract regarding benefits payable under the PHI policy, which were not in the employer's insurance cover, were contractual and as such the employee was entitled to them. This particularly included a 5% escalator for each year after the first year that the benefits were paid out.

The claimant's offer letter included a summary of benefits, which included the PHI policy and benefits payable under it, as well as the 5% escalator, and that the policy kicked in after continuous absence of 13 weeks. When the employee went on long-term sick, the benefit kicked in. However, following the claimant's transfer of employment to another company, he realised the escalator had not been paid. Upon querying this, he was informed that the escalator had been removed from the company's insurance cover some years earlier, before he had commenced receiving benefits.

The claimant brought a claim for unlawful deduction from wages on the basis that the escalator was referenced in his summary of benefits and as such was a contractual entitlement regardless of the fact that the escalator had been removed from the insurance policy. The tribunal upheld his claim on the basis that, even though the insurance policy no longer provided for the escalator, the summary of benefits in the claimant's offer letter and contract of employment did. As such, they were contractual entitlements and the claimant was entitled to be reimbursed for them. The EAT upheld the tribunal decision.

This case is a useful reminder not to set out specifics of benefits which may be reliant on third parties. Any insurance backed benefits should ideally just refer to the scheme, not specify details in a contract.

- **First Choice Selection Services Ltd**

The Information Commissioner's Office (ICO) has issued First Choice Selection Services Ltd with an enforcement notice for failure to comply with a data subject access request under Article 15 of the EU GDPR and UK GDPR during employment tribunal proceedings.

In response to the request, First Choice informed the data subject that it would only release information when instructed to do so by the tribunal and the data subject made a complaint to the ICO. After failing to respond to the ICO on a number of occasions, First Choice subsequently stated to the ICO that it had been instructed by the tribunal not to release any information at that stage but failed to provide evidence of this. However, the tribunal confirmed to the data subject that it had no jurisdiction to deal with matters relating to data protection requests.

The ICO found that First Choice had wilfully sought to mislead the ICO and, as well as failure to comply with the subject access request, it was in breach of the accountability principle (Article 5(2), EU GDPR and UK GDPR).

The notice requires First Choice to properly respond to the subject access request and to make changes to its internal systems, procedures and policies to ensure it identifies and responds to any future requests.

This serves as a reminder to employers that disclosure as part of an employment tribunal claim is a different regime to disclosure of personal data under a subject access request

and employers should have appropriate processes in place to recognise and respond to such requests.

Fire and Rehire

Where employers wish to make changes to the terms and conditions of employees' contracts, they have various options. Ideally, the employer will be able to reach agreement with employees over the changes, either by consulting individually with employees or with appropriate representatives. However, where agreement is not forthcoming, the employer can either unilaterally impose the change or terminate the employees' existing contracts and offer re-employment on new terms (the latter practice has recently been commonly referred to as "fire and rehire").

Making changes without agreement, either unilaterally or by firing and rehiring, is not without risk for the employer and could give rise to various claims including wrongful dismissal, breach of contract, constructive dismissal and unfair dismissal.

On 8 June 2021, Acas published its report on fire and rehire practices. Participants in the report were employer bodies, trade unions, professional advisory bodies (including lawyers, accountants, HR and payroll), academics and senior advisers from Acas.

Key findings of the report are as follows:

- Acas explains that the use of fire and rehire is not new. Although it has become a focus of attention during COVID-19, the practice predates the pandemic by many years and is widespread across a range of industries and sectors. Some participants felt that the practice appears to have been used more widely as a negotiating tactic during the pandemic, although others suggested that wider use may be linked to the genuine and significant business challenges posed by COVID-19. All participants acknowledged that use of fire and rehire may increase as the CJRS and other support measures are wound down.

- All participants emphasised the scale of the business challenges posed by the pandemic. Not all employers have resorted to fire and rehire, and there have been many examples of employers collaborating with their workforce to find suitable adaptations. However, concerns were expressed that some employers were using the crisis as a smokescreen to diminish terms and conditions, with fire and rehire being seen as a tactic to undermine workplace dialogue

- There were similarly mixed views on whether fire and rehire was reasonable outside the context of the pandemic. Some participants regarded it as always unreasonable, while others believed that it could be reasonable sometimes (for example, as a last resort or if driven by genuine business need).

- Participants in the report expressed a range of views about the strengths of, and gaps in, the current legal framework. Some employer advisory bodies felt that the balance of protection between employers and employees was "about right". However, a group of participants shared the view that fire and rehire is an attractive option for an employer determined to see through changes without agreement, since it can be less

costly than making redundancies and quicker than consultation. Trade union participants expressed the view that fire and rehire is a low-risk option for well-advised employers, and participants from the legal profession agreed with this to a certain extent; commenting that, although the process is certainly not without risk, it is a "well-trodden path" to successfully changing terms and conditions if handled with care.

- There was no consensus between participants over whether measures were needed to address fire and rehire, or what interventions may be most appropriate. Some participants felt that the use of the practice should be prohibited or strongly disincentivised by law. Others felt that the practice should be permitted when it is a genuine and unavoidable last resort, but that more could be done to disincentivise its unreasonable use in other circumstances, including as a negotiation tactic. Particular concern was expressed about employers using the practice to break continuity of employment, especially for employees with less than two years' service who have no unfair dismissal rights.

Since Acas was not asked by BEIS to make recommendations about what reforms should be made to fire and rehire practices, the report merely records ideas for reform that were suggested by participants for consideration by the government.

Suggestions by participants for legislative reform included:

- Enhancing the unfair dismissal regime.
- Requiring employment tribunals to scrutinise business rationale for changes to terms and conditions in relevant cases.
- Protecting continuity of employment in fire and rehire scenarios.
- Strengthening employers' consultation obligations in relation to proposed dismissals.

Suggestions for non-legislative reform included:

- Improving guidance on relevant legal obligations and good practice.
- Using fire and rehire data to inform decisions on public procurement.
- Naming and shaming of employers by publishing fire and rehire data.

In response to the ACAS report, the government has confirmed that it does not accept fire and rehire as a negotiation tactic, and that employers must exhaust every avenue towards reaching agreement where it is necessary to change employees' terms and conditions. However, it also repeated the concerns expressed in the Acas report that there was a risk that any reform in this area could result in unintended adverse consequences, including that more businesses may fail and more people would lose their jobs.

On this basis, the government has said it will not introduce "heavy-handed legislation" to prevent fire and rehire. Instead, the government has asked Acas to produce better, more comprehensive, clearer guidance to help employers explore all options before considering fire and rehire, and to encourage good employment practice.

Potential Future changes

- **Menopause**

The menopause and workplace inquiry committee may recommend changes to Equality Act 2010 to provide better protection against menopause discrimination

The chair of the Women and Equalities Committee, Caroline Nokes, leading the inquiry into menopause discrimination in the workplace, has declined to rule out the possibility of recommending a change to the Equality Act 2010 to strengthen protection for menopausal women who suffer discrimination at work. According to the chair, some responses to the inquiry have indicated that menopausal women do not feel that they have adequate legal protection due to the lack of clarity in the legislation, leading many to bring claims for disability discrimination. The Committee may seek to change the EqA 2010 to recognise menopause as a protected characteristic, if the outcome of the inquiry shows that the current legislation is not working.

- **Consultation on Sexual Harassment in the Workplace**

The government has published its consultation response on sexual harassment in the workplace.

The consultation was undertaken in response to recent public disclosures by a number of (mainly) women of their experiences of workplace sexual harassment. These indicate that there is still a real, worrying problem that the law is failing to address.

The response includes a proposal to introduce a new positive duty upon employers to take 'all reasonable steps' to prevent workplace sexual harassment. The new duty would be enforceable by both the EHRC and by individual employees with employers potentially liable if they do not take reasonable steps to prevent harassment in accordance with a statutory code of practice.

The response also makes proposals to reform sexual harassment law in other areas:

- the introduction of workplace protections against third party harassment;
- confirmation that more transient roles including volunteers and interns have legal protection;
- the extension of the time limit to bring employment tribunal discrimination claims from three months to six months.

- **Consultation on making flexible working a "day one" right for employees**

The government has published a consultation document proposing various reforms to the current right for employees to request flexible working, taking into account changes in working practices brought about during the COVID-19 pandemic. The consultation document, Making flexible working the default, was published on 23 September 2021.

The consultation notes that the COVID-19 pandemic has required many of us to change how we work, and has shifted the way we think about flexible working. As well as homeworking, the pandemic has led to a greater recognition of the need for flexibility to balance work with other commitments, for example childcare or looking after family members who are unwell.

The government has considered whether to introduce a right for employees to work flexibly, removing the ability of an employer to turn down a request. However, in the light of the broad range of individual needs and the wide variety of business models, this is not regarded as achievable. The basic system, involving a conversation between employer and employee about how to balance work requirements and individual needs, will remain.

However, the government is keen to encourage genuine two-sided flexibility. This could be achieved by a rebalancing of the current framework so that it better supports a wider discussion of what may be possible, rather than the current focus of what is not possible.

The consultation sets out five proposals for reshaping the existing framework:

- Making the right to request flexible working a "day one" right.
- Making changes, if necessary, to the eight business reasons for refusing a request to work flexibly.
- Requiring the employer to suggest alternatives to the arrangement suggested by the employee.
- Changing the administrative process underpinning the right to request flexible working.
- Raising awareness of the existing right of employees to request a temporary flexible working arrangement.

The consultation also considers whether the three-month deadline for responding to requests remains the right approach.

The consultation closes on 1 December 2021.