HR Hub - Employment Update

Section 1 – Legislation / Code of Practice

Dismissal and Re-engagement

The Code of Practice on Dismissal and Re-engagement (fire and rehire) came into force on Thursday 18 July 2024. The Code seeks to ensure that employers behave fairly and reasonably when trying to change employees' contractual terms.

There are many reasons why an employer may wish to change the terms of the employment contract, but where the change is unfavourable, e.g. a detrimental change to pay or benefits, the employee may not give their consent to the proposed change. If negotiation and consultation cannot resolve the issue, the employer may as a last resort terminate the existing contract and offer a new contract on the new terms. This practice known as 'fire and rehire' has led to widespread controversy in recent years, to the point that the Conservative government had promised a new statutory code to deal with it. An order was made during the final period of the Conservative government bringing the Code into force.

The key elements of the Code are set out below:

1. **Consultation Requirement:** Employers are required to consult with employees and explore alternative options before considering dismissal and re-engagement. This consultation should be as long as reasonably possible, but there is no specified minimum time period. Employers are encouraged to contact Acas (Advisory, Conciliation and Arbitration Service) at an early stage, before raising the prospect of 'fire and rehire' with the workforce.
2. **Last Resort:** The code emphasises that dismissal and re-engagement should only be used as a last resort. Employers should not threaten dismissal if it is not actually envisaged and must not use threats of dismissal to coerce employees into signing new terms and conditions. Employers should re-examine proposed changes if they are not agreed upon and consider feedback from employees and/or their representatives.

3. **Tribunal Consideration:** Employment tribunals must take the code into account in relevant cases, such as unfair dismissal claims. If an employer unreasonably fails to follow the code, tribunals can increase compensation by up to 25%. Conversely, if an employee unreasonably fails to comply, the tribunal can reduce any award by up to 25%.
4. **No Stand-Alone Claim:** There is no stand-alone claim for breach of the code's provisions. However, the code must be considered in tribunal proceedings where it is relevant. This means that while the code itself does not create a new cause of action, it influences the outcome of existing claims.
5. **Government Support:** The new Labour government has committed to bringing forward new legislation to strengthen the code and put an end to 'fire and rehire' practices.
6. **Protective Awards:** Claims for a protective award for failure to inform and consult in respect of collective redundancies will not be subject to the compensation adjustment, since the relevant amending legislation was not brought into force before the general election.
7. **Employer Obligations:** Employers are advised to commit to reviewing the changes at a future set time and reconsider whether they are still needed. If more than one change is being implemented, employers might also consider introducing them on a phased basis.

Sexual Harassment

Research shows that a significant percentage of women and men have experienced unwanted sexual harassment in the workplace. There is a lack of awareness at senior levels about the extent of the problem. A new duty to prevent sexual harassment in the workplace is due to come into force from 26 October 2024 under the Worker Protection (Amendment of Equality Act 2010) Act 2023.

Employers will have a new duty to take proactive and '**reasonable steps'** to prevent sexual harassment of their employees in the workplace. Employers facing an allegation of sexual harassment will need to demonstrate the targeted measures they have implemented to comply with this positive duty to protect employees from sexual harassment. Unlike the 'all reasonable steps' defence, the new duty is limited to preventing sexual harassment only so does not apply to other types of discrimination or harassment.

Helpfully, on 9 July 2024, the Equality and Human Rights Commission (EHRC) commenced a short consultation on its updated guidance on how to comply with the duty. The consultation has closed, and we can expect the final version to be published in September 2024.

There is some guidance from the EHRC giving examples of what steps can be taken but reasonableness will vary from employer to employer and will depend on factors such as the employer's size, the sector in which it operates and its available resources. The guidance does make it clear that no employer will be exempt from the duty and there are no minimum standards an employer must meet.

Steps to consider:

1. Carry out a risk assessment.

In much the same way as an employer would assess other workplace risks, employers are encourage to consider the risks of sexual harassment occurring in the course of employment, what steps need to be taken to reduce those risks and prevent the sexual harassment of their workers, which of those steps are reasonable and then implement those steps.

2. Foster an inclusive culture.

   Prevention is key, fostering an environment of respect and inclusion within the workplace, with a clear zero tolerance approach to harassment is crucial to combatting the risk of unacceptable conduct. Examples of things companies can do include:

   - Visible senior level commitment to creating a respectful workplace culture
   - Ensure that existing policies are effective, easy to access and regularly reviewed.
   - Run regular training for staff on what constitutes harassment and emphasise the zero-tolerance approach so there can be no excuses or misunderstandings
   - Consider your approach to third parties, who might the employees come into contact with, clients, suppliers, customers and where might these interactions take place

3. Effective complaints handling process.

   To create the culture mentioned, all complaints of harassment must be taken seriously and handled and investigated appropriately. It is important for staff to understand how to raise complaints and that they can trust their complaint will be listened to and dealt with.

4. Monitor and evaluate processes and the progress.

   To demonstrate adherence to the new duty, employers should monitor and review the policies and procedures put in place on a regular basis to establish effectiveness.

Under the new Act if an employee succeeds with a claim for sexual harassment, the Employment Tribunal must consider whether the employer breached its duty to take reasonable steps to prevent the harassment and whether there is a basis to award up to a 25% uplift on any award of compensation. The EHRC also has power to taken enforcement action directly.

The originally draft of the Worker Protection Act was going to amend s.40 EqA 2010 to re-introduce employer liability for the sexual harassment of employee by third parties. That provision was removed, however, the EHRC code says:

> "*3.27. The preventative duty includes prevention of sexual harassment by third parties. Therefore, if an employer does not take reasonable steps to prevent sexual harassment of their workers by third parties, the preventative duty will be breached.*"

This statement does not reflect the law as it currently stands.

It seems that:

1. the EHRC may have the power to take enforcement action against an employer who doesn't take reasonable steps to prevent third party harassment, although currently and on the basis of the proposed changes on 26 October 2024, an employee cannot bring a claim themselves in the employment tribunal.
2. The Government's plan for employment law reform has said that it will '*require employers to create and maintain workplaces and working conditions which are free from harassment, including by third parties*' so this may change. On 26 August 2024 the TUC published "Report: Bullying, harassment and discrimination of LGBT+ workers" in which it recommended that the government should re-introduce s.40 EqA 2010, extending protection against third party harassment. It would be a reasonable assumption to expect the government to deal definitively with this issue in the coming months.

Section 2 – Case Law Update

Mrs S Bradley v The Royal Mint Ltd 1601525/2022 – ET decision - Discrimination

Background: Ms Bradley had worked for the Royal Mint since Jan 2009, was promoted until she became the Director of HR directly reporting to the CEO. She had suffered from depression and anxiety since 2013 and received a diagnosis of ADHD in 2022. In 2019 and 2021 Mrs Bradley attempted to end her employment but each time the CEO refused to accept her resignation as it was clear she was making these decisions whilst unwell.

Mrs Bradley was open about her ADHD diagnosis and discussed it with colleagues. Medication was prescribed but at this time she stopped taking antidepressants without medical guidance. At this time she had a clash with the executive team and became upset. The CEO discussed the issues with her and things calmed down and Mrs Bradley seemed 'normal'. Four weeks later she resigned, the CEO mindful of previous resignations, asked if she was okay. They discussed the reasons for her resignation which included money, taking more lucrative interim roles in London, the fact her husband was shortly due to retire and she felt her job had become stale and repetitive. Three weeks after resigning Mrs Bradley tried to rescind her resignation explaining to the CEO that she had not been herself at the time, the CEO refused her request.

Decision: Mrs Bradley made various claims in the Employment Tribunal, most of which were either withdrawn or dismissed. The only claim to that succeeded was her complaint for discrimination arising from disability (s.15 EqA 2010).

The Tribunal accepted that the employer had a legitimate aim in refusing the recission which was described as maintaining operational integrity and expediency and maintaining the stability within the small number of senior executives in the business. The Tribunal went on to set out that based on medical evidence it thought that Mrs Bradley resigned due to her mental health and ADHD. The employer failed to take any medical advice at the time, instead preferring to rely on the CEOs observations. Whilst the Tribunal didn't go so far as to suggest the outcome would have been different had the Royal Mint sought medical advice as to Mrs Bradley mental capacity for making such a decision, the point was that they had not taken these steps at all despite being sufficiently aware of her disability.

Comments: Whilst this Employment Tribunal decision is not binding on other tribunals and is very fact sensitive, it does remind employers of the need to be vigilant and to understand when employees might be deemed disabled and protected, and that they should defer to medical professionals for support and advice in place of relying on their own assessment.

British Airways Plc v Rollett & Ots EAT – Indirect discrimination by association

It was easy to miss, but on 1 January 2024, the previous government introduced a new section to the Equality Act 2010. S.19A was added putting the European decision in CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (CHEZ) on a statutory footing. This means that from 1 January 2024, claimants who do not have the protected characteristic of the disadvantaged group but share the same particular disadvantage, can bring indirect discrimination claims.

Section 19A states that:

> A person (A) discriminates against another (B) if—
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> (a)A applies to B a provision, criterion or practice,
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> (b)A also applies, or would apply, the provision, criterion or practice to—
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> (i)persons who share a relevant protected characteristic, and
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> (ii)persons who do not share that relevant protected characteristic,
>
> (c)B does not share that relevant protected characteristic,
>
> (d)the provision, criterion or practice puts, or would put, persons with the relevant protected characteristic at a particular disadvantage when compared with persons who do not share the relevant protected characteristic,
>
> (e)the provision, criterion or practice puts, or would put, B at substantively the same disadvantage as persons who do share the relevant protected characteristic, and
>
> (f)A cannot show that the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

The position before this legislation change was not completely clear, until on 15 August 2024, in *British Airways plc v Rollett & Others* the Employment Appeal Tribunal gave judgment that section 19 EqA 2010 should be read as compatible with the decision in CHEZ.

This was a claim by Heathrow-based cabin crew of British Airways (BA). The cabin crew argued that scheduling changes by BA were indirect discrimination. For example, they argued that the changes:

- put those (predominantly non-British nationals) who lived abroad, and commuted to Heathrow from abroad, at a particular disadvantage compared to those who commuted from within the UK, and so there was indirect race discrimination. This claim was made not only by non-British nationals, but also

for example by a British national who lived in France and complained of being put at the same disadvantage as non-British nationals commuting to the UK from abroad;

- put those (predominantly women) with caring responsibilities at a particular disadvantage compared with those who did not have caring responsibilities, so that there was indirect sex discrimination. As well as women, this was claimed by one or more men with caring responsibilities. They complained they were put at the same disadvantage as women with caring responsibilities.

Decision: The Employment Appeal Tribunal said that even claimants who did not have the protected characteristic being disadvantaged could still claim indirect discrimination under s.19 EqA, if they were put at the same disadvantage. This was despite the fact that the wording of s.19 said the claimant must have the protected characteristic.

The EU court in CHEZ had said that indirect discrimination can extend to claimants who do not have the same protected characteristic as the disadvantaged group. Courts are required the courts to interpret British legislation to comply with EU law, even departing from the wording of the legislation, if (broadly) the re-interpretation was not against the grain of the British legislation.

Comments: We are now clear that both for claims occurring before and after 1 January 2024, indirect discrimination by association is permitted.

Taylors Service Ltd (dissolved) and another v The Commissioners for HM Revenue and Customs [2024] EAT 102 – National minimum wage for travelling

Background: The employer provided a minibus to transport workers to their assignments. HMRC decided that the travel time should be remunerated at the NMW and issued Notices of Underpayment. TSL and TPS challenged this decision, but the employment tribunal dismissed their claims, holding that the travel time was "time work" as defined in the NMW Regulations 2015.

Time work is defined as work, other than salaried hours work, for which a worker is entitled to be paid under their contract. This includes hourly paid work, work paid according to output in a period of time, and work paid by the hour if the worker fails to reach the output level set by their contract.

Travel time is treated as time work if the worker is travelling for the purposes of time work, except when travelling between their home and their normal place of work or an assignment.

Definition of travelling in the NMW Regulations 2015 - travelling includes hours when the worker is in the course of a journey by a mode of transport, waiting at a place of departure, or waiting at the end of a journey to carry out duties or receive training.

Ordinary commuting costs are excluded from the definition of the worker's remuneration. This includes travel between the employee's home and a permanent workplace.

The EAT considered case law on sleep-in shifts and the NMW. In the case of *Royal Mencap Society v Tomlinson-Blake*, the Supreme Court held that care workers expected to sleep at or near their workplace were not entitled

to the NMW for their entire sleep-in shifts. They were only entitled to the NMW for hours during which they were awake for the purposes of working.

Decision: The EAT concluded that "just" travelling is not to be treated as work unless there is work to be done while travelling. The tribunal should have concluded that the workers were not engaged in "time work" while travelling.

Comment: The EAT noted that the potential injustice in this case could only be rectified through legislation. The meaning of the Regulations was sufficiently clear following the Royal Mencap decision.

Valimulla v. Al-Khair Foundation – considered the employer's obligation to consult employees over the selection pool in a redundancy exercise.

Background: Mr Valimulla was employed by the Al-Khair Foundation in the role of a liaison officer, of which there were three others carrying out the same/similar roles in other geographical locations. Work for liaison officers decreased during the pandemic. Yet, Mr Valimulla was the only individual placed at risk of redundancy in a pool of one. The other liaison officers were not placed at risk. Three consultation meetings were held, and after the third, Mr Valimulla was dismissed by reason of redundancy.

Mr Valimulla brought a claim of unfair dismissal, advancing the argument that the redundancy process was unfair, specifically raising concerns about being selected from a pool of one. At first instance, the employment tribunal (ET) held that he had been fairly dismissed for redundancy as his role was 'unique'. Consequently, Mr Valimulla appealed on the grounds that the ET had made insufficient findings of fact relevant to the fairness of the Al-Khair Foundation's approach to pooling for the purposes of selection for redundancy and that the material issue, namely that Mr Valimulla's complaint that he was not consulted with in relation to being placed in a pool of one, was not adequately addressed. The appeal was allowed and provided the EAT with an opportunity to examine the fairness and legality of such a selection process.

The Appeal: The EAT found that the Al-Khair Foundation had not consulted with Mr Valimulla about the selection pool and that the ET had failed to consider whether a pool of one was a reasonable approach in this particular case. Consequently, the EAT found that Mr Valimulla had been unfairly dismissed on procedural grounds because of a failure to adequately consult about pooling. Despite consultation meetings being held, the consultations did not discuss why Mr Valimulla was placed in a pool of one that did not include the other liaison officers.

Comment: This case reiterates the importance of ensuring that there is a fair basis upon which individuals are selected for redundancy, as an employer must be able to demonstrate that they have genuinely applied their mind to the question of pooling. There was no evidence that the employer had considered pooling the employee with other employees in the same role in different geographical locations. In addition, this case underpins the importance of the consultation process and the fact that discussions should be meaningful and genuine. In this situation, consultation took place after the decision had been made to place Mr Valimulla in a pool of one. Therefore, the EAT questioned how the consultation meetings could have been "meaningful" given that the key issue of the pool was not addressed.

When it comes to selection of the pool, the starting point is to consider which particular kind of work is ceasing or diminishing and which employees perform that kind of work, which should include consideration of, as this case has shown, employees who are doing similar work at different locations. It is important to look beyond the terms and conditions of an employee's contract and look at the reality of the situation and what the employee does on a day-to-day basis in making decisions regarding the pool.

Section 3 – The Kings Speech / Labour reforms

The King's Speech delivered on 17 July 2024, outlined the Labour Government's legislative agenda for the new Parliamentary session, with a strong focus on employment law reforms. The speech emphasised the government's commitment to making work pay, banning exploitative practices, and enhancing employment rights.

Here is a summary of the key employment-related proposals:

- The cornerstone of the employment law reforms is the **Employment Rights Bill**, which is expected to be introduced within the first 100 days of the new government. This bill aims to address several critical issues in the workplace and ensure fair treatment for all workers. One of the primary measures is the **ban on exploitative zero-hour contracts.** The bill will ensure that workers have a right to a contract that reflects the number of hours they regularly work. Additionally, it mandates that all workers receive reasonable notice of any changes in shifts and proportionate compensation for any shifts that are cancelled or curtailed.
- Another significant aspect of the Employment Rights Bill is the **end of the practice of 'fire and rehire'.** The government plans to reform the law to provide effective remedies for workers and replace the previous government's statutory Code of Practice (mentioned above). This move aims to protect workers from being unfairly dismissed and re-engaged on less favourable terms.
- The bill also seeks to make **parental leave, sick pay, and protection from unfair dismissal a 'day one' right.** This means that workers will be entitled to these benefits from the first day of their employment, subject to probationary periods to assess new hires. Furthermore, the government plans to strengthen statutory sick pay by removing the lower earnings limit and the three-day waiting period.
- **Flexible working** is another key focus of the Employment Rights Bill. The government intends to make flexible working the default from day one for all workers. Employers will be required to accommodate flexible working arrangements as far as is reasonable. This measure aims to improve work-life balance and support workers in managing their personal and professional responsibilities.
- The bill also includes provisions to **strengthen protections for new mothers**. It will be made unlawful to dismiss a woman who has had a baby for six months after her return to work, except in specific circumstances. This measure aims to provide greater job security for new mothers and support their transition back to the workplace.
- To ensure the effective enforcement of workplace rights, the government plans to establish a new **Single Enforcement Body**, also known as the Fair Work Agency. This agency will be responsible for overseeing and enforcing employment rights, ensuring that workers are treated fairly and that employers comply with the law.

- The Employment Rights Bill also proposes the establishment of a **Fair Pay Agreement in the adult social care sector**. Following a review, the government will assess how and to what extent such agreements could benefit other sectors. This measure aims to ensure fair pay and conditions for workers in the social care sector and potentially other industries.
- In addition to the Employment Rights Bill, the government plans to introduce the **Equality (Race and Disability) Bill**. This bill will enshrine in law the full right to equal pay for ethnic minorities and disabled people, making it easier for them to bring pay discrimination claims. It will also introduce mandatory ethnicity and disability pay reporting for employers with 250 or more employees to help close the pay gaps.
- The King's Speech also highlighted the government's intention to **update trade union legislation**. This includes removing unnecessary restrictions on trade union activity, ensuring that industrial relations are based on good faith negotiation and bargaining, and simplifying the process of statutory recognition. The government also plans to introduce a regulated route to ensure workers and union members have a reasonable right to access a union within workplaces.

On 12 August 2024, the Government has stated that it is committed to delivering the plan in full. Watch this space…

The new Labour government has dropped legislation that gives workers the right to request a more predictable working pattern to allow them to pursue a stronger contractual right to the hours they usually work. The Department for Business and Trade (DBT) said it has 'no plans' to bring the legislation, the Workers (Predictable Terms and Conditions) Act 2023, into force in the autumn as expected. A spokesperson for the DBT said it will instead introduce 'a new right to a contract that reflects the number of hours regularly worked, as part of our significant and ambitious agenda to ensure workplace rights are fit for a modern economy'. 'We do not want to confuse employers and workers with two different models', the spokesperson said about the decision not to enact the law, which gained Royal Assent in September 2023.

The 'number of hours regularly worked' will be based on a 12-week reference period. But it is not clear whether this is a fixed or rolling period, whether there is a qualifying period to have access to the right or when it will be implemented. The government did not answer questions about the details of its plan or whether it will be put to a public consultation. Lawyers said the complexities involved in establishing such a right mean it is unlikely to be included in the Employment Rights Bill, which is expected in October 2024.

Speakers

Lauren Harkin, Partner
Lauren.Harkin@rwkgoodman.com
01793 847720

Kate Benefer, Partner
Kate.benefer@rwkgoodman.com
01865 268639