Employment Law Update 15 November 2023

CHANGING LIVES FOR THE BETTER STANDING UP *for you*

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Overview

- Legislative changes – key for trade unions is The Strikes (Minimum Service Levels) Act 2023

- Case Law -

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Legislation 2023

- Strikes (Minimum Service Levels) Act 2023 (Strikes Act) - Royal Assent 20 July 2023

- The Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022 - quashed with effect from 10 August 2023

- Retained EU Law (Revocation and Reform) Act - Royal Assent 29 June 2023

- Amendments to Rehabilitation of Offenders Act 1974 – effective since 28 October 2023 provide that certain offences will become spent sooner

- A number of Acts enabling the government to introduce legislation in relation to tips, flexible working, carers leave etc.

The Strikes (Minimum Service Levels) Act 2023 (Strikes Act 2023)

- Enables the Secretary of State to make regulations which would set the levels at which services must be maintained (minimum service levels) during a strike in the following sectors:
- Health, Fire and Rescue, Education, Transport, Border Security and Nuclear decommissioning and the management of radioactive waste and spent fuel
- Regulations will specify the minimum service levels which apply to the particular public service
- Consultations have taken place on minimum service levels in fire and rescue, ambulance and passenger rail. Further consultations on introducing minimum service levels for urgent emergency and time critical hospital based services was launched on 19 September.
- On 20 October 2023, the government announced plans to introduce minimum service levels in schools and colleges
- On 6 November the government announced it would publish its response to the consultations on rail, ambulance, and border security staff and at the same time lay MSLs regulations before Parliament in these sectors

The Strikes (Minimum Service Levels) Act 2023 (Strikes Act 2023)

- Where the MSL regs apply an employer may give a “work notice” to a trade union in relation to any strike which the union gives notice of relating to the service

- A “work notice” is a notice in writing of the levels of service under the minimum service regulations that are to apply in relation to the strike

- The “work notice" must identify those workers that are required to work and specify the work they are required to do to ensure the MSL is met ,

- The work notice not identify more workers than are “reasonably necessary” to provide the MSLs and when deciding whether or not to identify someone in a work notice the employer must not have regard to :

  - trade union membership;

  - whether or not the person has taken part in trade union activities or made use of trade union services; or

  - whether or not the person has had a matter raised, or has agreed to have a matter raised, by the trade union

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The Strikes (Minimum Service Levels) Act 2023 (Strikes Act 2023)

- Before giving (or varying) a ‘work notice’, the employer must consult the union about the number of workers to be identified, and the work to be specified,. The employer must have regard to any views expressed by the union.

- A ‘work notice’ must be given to the union up to 7days before IA commences and can be varied up to the 4th day before the IA (or any later day if agreed with the union).

- A TU is at risk of being sued if it fails to take “reasonable steps” to ensure that its members identified in the “work notice” comply with it.

- Employees identified in the work notice who does not comply with the “work notice” and are dismissed for taking part in the strike will not automatically unfair dismissal

Code of Practice on the reasonable steps trade unions should take

- The Code of Practice (CoP) although not legally binding will have to be taken into account by a court:
- The recommended "reasonable steps" set out in the Code are:

Step 1	As soon as practicable after receiving a work notice, unions should begin identifying any members who are subject to the work notice
Step 2	Encourage individual members to comply with a work notice – the union should issue a "compliance notice" to each member identified in the "work notice"
Step 3	Send general communications to the wider membership – this should set out similar information to that contained in the "compliance notice" to members in Step 2
Step 4	Instruct picket supervisors or other official or member to use "reasonable endeavours" to ensure pickets avoid trying to persuade member identified in the work notice not to cross the picket line so far as is reasonably practicable
Step 5	The union should not undermine the reasonable steps it has taken

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The Conduct of Employment Agencies and Employment Businesses (Amendment) Regs 2022

- These regulations which came into force on 22 July 2022 repealed Regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 and in doing so it meant that it was no longer unlawful for an employer to engage agency workers to replace workers on strike
- 13 trade unions brought a successful judicial review in the High Court on the ground that the Secretary of State had failed to comply with his statutory duty to consult before making the amendment regulations
- In its judgment on 13 July 2023 the Court was highly critical of the Secretary of States failure to consult stating;

  "It is also indicative of Mr Kwarteng's lack of interest in evidence or views about the impact and desirability of the proposal to revoke regulation 7 that the decision was to proceed at exceptional speed, despite the concerns of Mr Stevens [Deputy Director for Employment Rights and Enforcement in Labour Markets] about the effect on Parliamentary scrutiny, and without any further consultation at all"

- The effect of the judgement is that from 10 August 2023 regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 is back in force and employment business cannot use temporary agency workers to cover workers taking part in strike action

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Amendments to the Rehabilitation of Offenders Act 2023

- S. 193 of the Police, Crime, Sentencing and Courts Act 2022 (“the Act”), amends the Rehabilitation of Offenders Act 1974 w.e.f 28 October 2023

- Reduces the periods of time after which certain offences become spent meaning they no longer need to be disclosed to an employer

- Custodial sentences of four years or less, and of more than four years for some less serious crimes, will become ‘spent’ after a period of rehabilitation of up to seven years after the sentence has been served, provided that no further offence is committed in that period

Retained EU Law (Revocation and Reform) Act

- It gives the government power to reform all EU based law such as the Working Time Regulations 1998 and TUPE 2006 Regulations

- It will end the supremacy of EU law on 31 December 2023 which means that it will be easier for courts and tribunals to depart from existing EU-derived domestic case law such as the judgements on the right to holiday pay and equal pay.

- It includes a Schedule of Retained EU law (around 600 pieces of legislation) that will be repealed at the end of 2023 unless it is saved or preserved by regulations – this does not include any major employment law. The deadline for amending the Schedule is 31 October 2023.

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New Legislation

New Law	Summary of rights
Employment (Allocation of Tips) Act 2023 (Commencement No. 1 Regulations)	Passed into law on 31 July 2023 to ensure tips are allocated to workers. Code of Practice due end 2023
Employment Relations (Flexible Working) Act	Passed into law on 20 July 2023 in force in July 2024
The Neonatal Care (Leave and Pay) Act	Passed into law on 24 May expected 2025
Carer's Leave Act	Passed into law on 24 May expected sometime in 2024
Protection from Redundancy (Pregnancy and Family Leave) Act	In force 24 July 2023 expected sometime in 2024
Worker Protection (Amendment Equality Act 2010) Act	Passed into law on 26 October 2023 in force in 1 year
Workers (Predictable Terms and Conditions) Act 2023	Passed into law on 23 September 2023 in force in 1 year

Case Law

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Key Cases - Employee status

- ***Plastic Omnium Automotive Ltd v Hortion [2023] EAT 85*** – a person who provided their services to another party through a personal service company was not a worker

- ***United Taxis Ltd v Connolly [2023] EAT 93*** – a taxi driver who provided driving services for a licensed taxi operator through one of its shareholders could not be both a worker of the taxi operator and an employee of the shareholder.

Key Cases – Redundancy

- ***Lovingangels Care v Mhindurwa [2023] EAT 65*** – a care assistant was unfairly dismissed for redundancy when the employer failed to consider putting her on furlough as an alternative - employers must fully explore alternatives before dismissing for redundancy

- ***Mogane v Bradford Teaching Hospitals NHS Foundation Trust [2023] IRLR 44*** – the selection and dismissal of a fixed term employee for redundancy was unfair where the employer failed to consult her prior to making the decision on the selection criteria – employers must consult before applying selection criteria which will create a pool of one

- ***R (Palmer) V Northern Derbyshire Magistrates Court*** - the Supreme Court has overturned a finding by the Divisional Court and in so doing finds that an insolvency administrator does not commit a criminal offence if they fail to notify the Secretary of State where 20 or more employees are proposed to be dismissed as redundant under the collective redundancy provisions.in S. 188 of the Trade Union and Labour Relations (Consolidation Act) (TULR(C)A

Key Cases – Dismissal

- ***Meaker v Cyxtera Technology UK Ltd [2023] EAT 17*** – an employee was held to have been dismissed when he received a letter marked "without prejudice" dated 7 February even though he did not sign the terms of settlement enclosed with the letter and not on 14 February when he received payment. Where an employee is dismissed in breach of contract the date of dismissal is the date on which the dismissal was communicated.

- ***Hewston v OFSTED [2023] IRLR 878*** – the dismissal of an OFSTED inspector for physical contact with a child during a school visit was unfair in circumstances where the employee was not forewarned that a single incident of the kind carried out (and which was not a safeguarding issue) could constitute gross misconduct

- ***Omar v Epping Forest District Citizens Advice [2023] EAT 132*** – an employee was held not to have resigned when they did to in the heat of the moment during an altercation with their manager.

Key Cases – Holiday Pay

- ***Chief Constable of the Police Service of Northern Ireland and anor v Agnew and ors*** – the Supreme Court has held that claims for unpaid holiday pay under the Working Time Regulations were part of a series and the series is not necessarily broken by a gap of 3 months or more.
- ***Connor v Chief Constable of the South Yorkshire Police [2023] EAT 42-*** payment for accrued but untaken holiday under a relevant agreement cannot be less than the holiday pay a worker would have received for holiday taken during employment.

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Key Cases – Disability Discrimination

- ***McQueen v General Optical Council [2023] EAT36*** - an employee who was disciplined was not treated unfavourably for a reason arising from his disability – the tribunal was entitled to find that the behaviours for which he was disciplined were not caused by his disabilities

- ***AECOM Ltd v Mallon [2023] EAT 104*** – an employer was under a duty to make a reasonable adjustment when it required an applicant with dyspraxia to complete a job application on-line

- ***Boesi v Asda Stores Ltd [2023] IRLR 625 EAT*** – a disabled employee who was dismissed following sickness absence and argued the employer had not done enough to find alternative work was not directly discriminated against because of disability.

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Key Cases – Direct and indirect discrimination

- ***Kohli v Department for International Trade [2023] EAT 82*** – where a tribunal finds that the true reasons for an alleged discriminator's actions are not discriminatory, there is no further obligation to make a separate finding as to whether there is subconscious discrimination unless there is evidence on which an inference of subconscious discrimination could be based such as stereotypical assumptions. Unreasonable conduct on its own is not enough.
- ***Glover v Lacoste [2023] EAT 4*** – an employers decision at a flexible working appeal to require a woman to work on a fully flexible basis amounted to a provision, criterion or practice for the purposes of an indirect discrimination claim even though she did not return to work on that basis
- ***Rollet v British Airways*** - a change in the shift pattern which made it more difficult for employees based on mainland Europe to commute to the UK was held to amount to indirect associative discrimination

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Key Cases - Harassment

- ***Greasley-Adams v Royal Mail Group Ltd [2023] IRLR 723*** - the EAT holds held that an employee cannot have a perception that the effect of unwanted conduct violated their dignity if they were unaware of it at the time.

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Key Cases - Religion or belief discrimination

- ***Higgs v Farmor's School [2023] EAT 89*** – The EAT holds that an employment tribunal made an error of law when it rejected a school assistant's claim for direct discrimination claim because of the protected lack of belief in gender fluidity, when she was dismissed for posts she made on social media criticising the nature of sex education in schools and, in particular, the teaching of 'gender fluidity'.

Key Cases – judgments awaited

- ***Mercer v Alternative Future Group Ltd and anor*** – permission to appeal has been granted against the Court of Appeals decision which held that the right not to be subject to a detriment for the sole or main purpose of preventing, deterring, or penalising a worker for taking in part in the activities of a trade union, does not apply to a worker who participates in industrial action. The Supreme Court hearing is listed for 12 and 13 December 2023

- ***Union of Shop, Distributive and Allied Workers and ors v Tesco Stores Ltd*** –an appeal against the Court of Appeal's decision that the employer could terminate a pay enhancement set out in a collective agreement and which had been incorporated into the contract of employment even though it was expressed to be permanent . The case is to be heard by the Supreme Court on 24 and 25 January 2024

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Key Cases – judgments awaited

- ***The Royal Parks Ltd v Boohene*** – the Court of Appeal is to hear an appeal against the EAT's finding that while the claimants were contract workers under the Equality Act 2010 they were not indirectly discriminated against in relation to pay when compared with directly employed workers - to be heard on 20 and 21 February 2024

- ***Bathgate v Technip*** **–** the Court of Appeal is to hear an appeal against the finding of the EAT which held that the provisions of the Equality Act 2010 on settlement agreements (s.147) do not allow for the settlement of a future unknown claim at the time the agreement was concluded – to be heard on 22 November 2023

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Other future developments

Two new ACAS Code of Practice are awaited:

- Draft ACAS Code on Dismissal and Re-engagement consultation ended on 18 April 2023
- Draft ACAS Code of Practice on handling request for predictable work patterns consultation ends 17.1.2024

- The Low Pay Commission's recommendations on increasing the NMW from April 2024 is due this month
- The Draft National Minimum Wage (Amendment) (no.2) Regulations 2023 will remove the family worker exemption and if approved by both Houses of Parliament will come into force on 1 April 2024
- The governments response to the following proposals for reforms to working time rules, holiday pay and TUPE :
    - Removal of the requirement on employers to keep a record of working hours
    - Create a single annual leave entitlement of 5.6 weeks and a single rate of holiday pay
    - Introducing rolled up holiday pay
    - Extending the right for employers to consult directly with employees of any size when less than 10 employees are proposed to be transferred where there are o elected reps already in place

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Any questions?

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