Spotlight on employment law developments in the UK

John Bracken, Senior Associate at Baker & McKenzie LLP, considers the ever-changing employment law environment, highlighting recent and upcoming court decisions and legislative developments

2023 is shaping up to be a big year for employment law in the UK. We are (supposedly) going to be saying goodbye to a raft of EU law, the government has announced it is supporting a number of interesting and eclectic private members bills in place of its oft-promised Employment Bill, and on top of that there are some important cases to watch out for on topics from religion and belief discrimination through to holiday pay. We take a look at the highlights of what is to come, as well as debriefing on a couple of cases that ensured the year started with a bang.

Legislative changes to look out for

Out with the old…

Let's start with one of the most substantive legislative changes expected to be coming our way this year; that is the Retained EU Law (Revocation and Reform) Bill 2022-23. The Bill "sunsets" - which is simply a poetic way of saying that it "revokes" - all (i) EU-derived subordinate legislation and (ii) retained direct EU legislation with effect from 31 December 2023 (although there is a possibility this could be extended in some cases - see below).

What employment law is covered by the Bill?

Entire articles could be devoted to exactly what would fall within the ambit of these two categories of law, but at a high-level, this would theoretically cover all employment rights that have been derived from (i) EU directives and EU treaties - think laws relating to transfer of undertakings (TUPE), working time, part-time workers and so on; or from (ii) EU regulations or decisions - GDPR being the most notable example in this second category (but crucially, domestic primary legislation, such as the Data Protection Act 2018, would be excluded even if it implements EU legislation).

The Bill also provides for the end of the supremacy of EU law over domestic UK legislation, which had been retained during the transition period for any legislation passed prior to 31 December 2020.

In addition, the Bill gives further wide-ranging "reform" powers to Ministers, including the ability to restate, revoke and replace retained EU law, which is law that is excluded from the sunset provisions and therefore becomes "assimilated law" after 31 December 2023. These powers have come in for much scrutiny as the Bill makes its way through parliament, due to the broad drafting and the potential for a reduction in parliamentary oversight: for example, Ministers can make any 'alternative provision' they consider 'appropriate' in revoking or replacing retained law after the sunset.

What is the status of the Bill?

The Bill hit the House of Commons in autumn 2022 and, as at the date of writing this article, currently sits at the Committee Stage with the House of Lords. Given the volume of laws caught by the legislation, there remains significant scepticism that the government and civil servants will be in a position to have fully understood the impact of the sweeping revocation provisions, or will have had time to act upon the EU law it wishes to preserve, by the end of 2023. As such, there is a chance this particular can will get kicked further down the road, with the ability for Ministers to extend the sunset until June 2026 potentially to be utilised across the board.

From an employment law perspective, it remains something of a wait and see game. Employment lawyers and HR professionals can perhaps derive some direction from the UK's Trade and Cooperation Agreement with the EU, which commits the UK not to weaken or reduce employment rights that were in existence at the end of the transition period to the extent that it would affect trade or investment.

The House of Lords has also published a comprehensive list of legislation that it suggests excluding from the sunset clause, which

includes a raft of employment legislation such as TUPE, the Agency Workers Regulations, Working Time Regulations, Maternity and Parental Leave Regulations and many more.

As such, and despite the years of rhetoric to the contrary, perhaps the sun will not set on EU derived employment law after all.

…. in with the new

After a long period in which the UK government has promised several employment law changes contained in an Employment Bill without bringing forward such a bill, it has now announced that it is instead supporting certain private members' bills. Here are a few highlights of the private members bills that the government has announced it is taking forward, with these laws not expected to come into force until 2024 at the earliest.

The right to request flexible working

The government has announced that it is backing the Employment Relations (Flexible Working) Bill. If passed in its current form, the legislation would not remove the current 26 weeks' threshold required for employees to request flexible working arrangements, but would require employers to consult with employees before rejecting their flexible working request, and would increase the number of statutory requests an employee can make each year from one to two.

The provisions would also reduce the period within which the employer must decide on a flexible working request from three months to two months from receiving it, and would also drop the requirement that the employee explain in the request what effect the change would have on the employer, and how this might be dealt with.

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The right to request predictable working pattern

In February 2023 the government announced that it would support the Workers (Predictable Terms and Conditions) Bill. If passed as it is currently drafted, the Bill would allow workers and agency workers with more than six months' service to ask for a more predictable working pattern.

The employer must then consider the request within a set timeframe, and can reject it only for certain specified business reasons. Failure to follow the process properly, or rejecting the worker's request based on incorrect facts, would make the employer liable for a penalty of up to eight weeks' pay. A worker would be able to make a maximum of two statutory requests per year. Workers who make or seek to enforce a request for more predictable working conditions would be protected from detriment or dismissal for doing so.

Protection of employees from third-party harassment

The Worker Protection (Amendment of Equality Act 2010) Bill would require employers to take all reasonable steps to prevent harassment of an employee during the employment period by a third party (such as clients or customers). Unless the employer can demonstrate that it has taken all such action, the employer would be vicariously liable for any harassment that occurs.

If passed, there is no doubt that this Bill will need care in implementation, in particular in managing conflict over political ideas and belief - not least because of the ongoing "clash of rights" that is currently taking centre stage within the employment courts (see more below).

A snapshot of other private member's bills which the government has declared it is supporting

- *Unpaid carers leave* - the Carer's Leave Bill is now before the House of Lords. If passed in its current form, it would give all employees who provide informal unpaid care to dependent family members or friends with a long-term care need a right to take up to one week's unpaid leave each year, in increments of half or whole days. Employees taking carer's leave will have the same employment protections as other forms of family-related leave, including protection from dismissal or detriment for having taken or asked to take time off.
- *Extending redundancy protection for pregnant women and those returning from family lea*ve - a woman has the right during her maternity leave (as do other employees on shared parental leave) to be offered a suitable alternative vacancy if one exists, in preference to other colleagues. Under the Redundancy (Pregnancy and Family Leave) Bill, the protected period would be extended to the entire period of pregnancy and up to six months following the employee's return from maternity or shared parental leave.
- *Neonatal care leave* - the government is supporting the Neonatal Care (Leave and Pay) Bill, which would give employees, from day one of the employment, a new

right to neonatal leave, and a right to neonatal leave pay for employees with at least 26 weeks' continuous service at the date of the leave and who earn at least the lower earnings limit (currently £123 per week).

- *Allocation of tips* - the Employment (Allocation of Tips) Bill, would ensure that tips, gratuities, and other service charges paid by customers are allocated to workers in full, without deductions, by the end of the month following that in which the gratuity was paid. A new statutory Code of Practice would be developed to provide businesses and staff with advice on how tips should be distributed.

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Recent newsworthy court decisions

Since the start of 2023, there have already been a number of employment judgments with interesting ramifications.

No reasonable foreseeability in criminal proceedings

The Court of Appeal in *Benyatov v Credit Suisse (Securities) Europe Ltd [2023] EWCA Civ 140* has ruled against a claimant whose employment was terminated after he was convicted of a criminal offence in the course of performing his job. Having conducted its own investigation, the employer agreed that Benyatov's conduct had been compliant with international banking standards and supported Benyatov in his defence and appeals against the conviction.

However, Benyatov's eventual conviction in 2013 led to him losing his approved status with the UK Financial Conduct Authority. Benyatov was placed on garden leave but continued to be paid for nearly two years until his employment was terminated on the grounds of redundancy in June 2015.

Benyatov brought proceedings against the bank, claiming that he was owed a duty of care by his employer and it should have protected him from criminal conviction in performing his role. He further argued that there was an implied indemnity - either at law or in the employment contract - which should cover all losses which flowed from his work.

In dismissing Benyatov's appeal from the High Court, the Court of Appeal found that the criminal proceedings were not reasonably foreseeable, and that the employer could not therefore be liable for that risk or the losses which arose from it.

The Court of Appeal also rejected the indemnity claim. Whilst there was a consensus amongst the parties that an employment contract should provide some form of implied indemnity in relation to losses suffered in the course of an employee's role, it would be unfair to extend that indemnity to losses caused by the act of a third party, when the employer was not at fault.

First COVID-19 case reaches the Court of Appeal

In a helpful reiteration of the scope of the health and safety protections that apply to workers, the Court of Appeal in Rodgers v Leeds Laser Cutting [2022] EWCA Civ 1659 confirmed that the dismissal of an employee who refused to return to work due to COVID-19 concerns was not automatically unfair.

The claimant's situation did not fall within the scope of the protection set out in s.100 of the Employment Rights Act 1996 ("ERA"), which provides for protection from dismissal on health and safety grounds. The Claimant had argued that this protection applied not only where an employee reasonably believed that he or she was in serious and imminent danger at the workplace, but also where the perceived danger arose on the employee's journey to work - which was evidently a pertinent issue during COVID.

The Court of Appeal noted that "it is the policy of the statute that (employees) should be protected from dismissal if they absent themselves (from the workplace) in order to avoid… …danger". However, whilst the employee does not need to demonstrate actual danger, they must have been a reasonable belief in the existence of danger as well as in its seriousness and imminence. In this case, the belief that the workplace presented an imminent danger was not objectively reasonable.

Key cases on the horizon

The year also ahead promises to bring us some useful guidance by way of court decisions in a variety of employment law areas.

The clash of rights continues…

The last few years have seen a number of cases related to the protection of gender critical beliefs, with the 2021 Employment Appeals Tribunal (EAT) decision in *Maya Forstater v CGD Europe and Others: UKEAT/0105/20/JOJ* laying the foundations for what is certain to be a contentious and rapidly evolving issue in the near future. The principles of these cases apply equally to other areas when employers are considering how to handle the expression of conflicting beliefs and rights in the workplace.

The *Forstater* decision confirmed that gender critical beliefs are capable

of protection, but the EAT suggested that it is how such beliefs are manifested which is key, notably stating "this judgment does not mean that those with gender-critical beliefs can 'misgender' trans persons with impunity."

Attention in recent cases has therefore focussed on the manner in which beliefs of this nature are expressed. Of particular note are the cases of (i) *Higgs v Farmor's School [2022] EAT 102* which concerned an employee who was disciplined following social media posts which the employer argued could imply Higgs held transphobic and homophobic beliefs. This case is set for the EAT on 16 March 2023; and (ii) *Dr David Mackereth v The Department of Work and Pensions (1) Advanced Personnel Management Group (UK) Limited (2) [2022] EAT 99* in which the EAT upheld a decision that the dismissal of a Christian doctor who refused to address transgender patients by their chosen pronoun was not discriminatory. Mackereth is currently seeking permission to appeal to the Court of Appeal.

Also of note is the case of *Ms A Bailey v Stonewall Equality Ltd and others: 2202172/2020*. Bailey was successful in her discrimination and victimisation claims against her barrister's chambers founded on her gender critical beliefs but unsuccessful in her claim against Stonewall, whom, she argued, had induced her chambers to discriminate against her. An appeal to the EAT is now pending on when the line of unlawful inducement is crossed.

Employers need to be aware of the low threshold for a belief to fall within scope for protection under the Equality Act. Even beliefs that some people find offensive can be protected, as long as they do not destroy the rights of others. Employers still have the right to restrict the manifestation of a protected belief in the workplace where doing so is necessary, proportionate, and in pursuit of a legitimate aim - but a mere expression of belief should be permitted unless it is expressed in an objectionable way. Any rules put in place (for example, social media policies) should be clear, respectful, and apply to all employees, and beliefs, equally.

No let-up in the holiday pay saga

Whilst some may have relished the prospect of reform to holiday pay legislation and therefore will be dismayed at the House of Lord's suggestion that the Working Time Regulations be protected from revocation (see more above), the fact is that, for now at least, holiday pay continues to be a complex and developing area of law.

In addition to the recently announced government consultation on the calculation of holiday entitlement received by part-year and irregular hours workers, which was issued hot on the heels of the Supreme Court judgment in *Harpur Trust v Brazel [2022] UKSC 21 in 2022*, we also have to contend with the impending Supreme Court decision in *Chief Constable of the Northern Irish Police v Agnew [2019] NICA 32*.

The Northern Ireland Court of Appeal decided that that a gap of three months or more between underpayments did not necessarily prevent workers from pursuing claims for alleged shortfalls prior to that period. This conflicts with the position in England and Wales that a claim for holiday pay deductions must be brought within three months of the deduction, or of the last deduction in the case of a series of underpayments.

At present, this judgment is binding only in Northern Ireland but the appeal was heard in the Supreme Court in December 2022 with the final decision likely to go to the heart of an employer's liability for historical underpayments across the UK.

When does a grievance become a misconduct offence?

Finally, we await the Court of Appeal hearing in *Hope v. British Medical Association EA-2021-000187-JOJ*. In 2022, the EAT found that it was fair to dismiss an employee for bringing multiple "frivolous and vexatious" grievances and refusing to attend meetings to discuss those grievances, which caused the employment relationship to break down.

The EAT found that there was no requirement to determine whether there had been gross misconduct in a contractual sense, but rather a straightforward assessment of whether the employer had acted reasonably in the circumstances in treating the conduct as a sufficient reason to dismiss was required. Whilst fact-specific, for lawyers and HR professionals who commonly see grievances as an avoidance or delaying tactic in a disciplinary context, this decision could have important ramifications.

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