EMPLOYMENT NEWS HEADLINES OCT-DEC 2022 ISSUE 38

WHAT'S IN THE EMPLOYMENT LAW PIPELINE FOR 2023

At the time of issuing the last Maxlaw Global Employment News Issue 37 in the Autumn quarter, Liz Truss was Prime Minister and government policies and plans were all askew. With some stability restored, below are a few areas of potential change in the employment space that employers should be aware of:

- *European Union (EU) retained law* – this provides that any laws that are directly from the EU or EU derived will expire at the end of 2023 unless expressly retained by the UK Government. This would cover many familiar laws in the UK such as the Transfer of Undertakings Regulations also referred to as TUPE, Working Time Regulations, Fixed-term, Part-time and Agency Workers' regulations amongst others. The Government will need to decide soon what goes and what stays.

- *Carers' leave and neo-natal leave* – these bills would mean the introduction of additional leave for employees who are carers' for a family member such as spouse, parent etc., and for employees with a child receiving neonatal care. The rules on eligibility, duration, when it can be taken and whether its paid or unpaid varies and is still open to further debate. Currently it is proposed that it will be one week of unpaid leave for carers leave a year and 12 weeks of paid leave for neonatal care leave post birth.

- *Enhanced maternity protection* – this bill is intended to extend the redundancy protections already in place for a woman on maternity leave but will cover the pregnancy period before maternity leave and the post maternity period likely to be 6 months after the return to work.

- *Harassment protection duties* – the workers' protection bill is intended to increase employer duties firstly, not only to ensure that employees are protected from any harassment by third parties while working such as clients or customers but also, secondly, to take reasonable steps to prevent sexual harassment in the workplace. A failure to actively take reasonable steps could result in an uplift of 25% to any compensation awarded if found failing in that duty.

- *Fire and Re-hire Code* – in light of many employers, notably PO Ferries, British Gas and Tesco, using this practice to unilaterally force through changes to terms of employment, the Government announced in 2022 the proposed publication of a draft statutory code of practice for employers considering the termination and reengagement route. This is expected sometime this year. Again, a failure to follow the new code could result in an uplift of 25% to any compensation awarded in claims that may arise.

- *Minimum service levels during strike action* – readers will be well aware of the never-ending strike action across various public services in the UK over the recent year, in particular, train services. The Transport Strikes bill is intended to ensure that minimum service levels can be maintained during periods of strike action by unions. Currently there is a judicial review underway on the use of agency workers by employers in such situations. It will be interesting to hear the findings of that review in light of this bill.

- *Flexible working* – the right to request flexible working already exists for employees with 26 weeks continuous service. The proposed revision to this right is to introduce this as a day one right as well as the ability to make two flexible working requests in a 12-month period rather than one as is the case currently. It also proposes a full and transparent consultation requirement from the employer with the employee before a refusal to permit the request. Many employers may well already be doing this informally.

THE USE OF 'WITHOUT PREJUDICE' CONVERSATIONS – GARROD V RIVERSTONE MANAGEMENT LIMITED (EAT)

The case of *Garrod v Riverstone Management Limited* is interesting on the facts as it provides some clear pointers for employers as to when it is appropriate to use an "off the record" conversation which is legally valid as a "without prejudice" discussion and therefore not admissible in court.

A "without prejudice" discussion is usually instigated by the employer rather than the employee where a dispute between the parties has arisen and there is reasonable contemplation of litigation if the said dispute cannot be resolved outside of the courts. It is therefore important for the "without prejudice" discussion to be a genuine attempt to resolve the dispute.

Mrs Garrod was a company secretary with some legal training and background at Riverstone Management. She returned from maternity leave in the Summer of 2019. In October 2019 Mrs Garrod announced she was pregnant again. Around the same time, she also raised grievances against some managers for what she said amounted to bullying, harassment and discriminatory behaviour relating to her maternity. Some of the grievances dated back before her maternity leave and subsequent return.

Mrs Garrod was invited to a meeting where a "without prejudice" offer was made of £80,000. This discussion did not proceed successfully. The completion of the grievance hearing which followed resulted in each of Mrs Garrod's grievances not being upheld by her employer. She resigned and brought claims for constructive dismissal, discrimination and harassment. Some key issues that the EAT addressed are important:

- In an attempt to use the 'without prejudice' offer discussion to support her claim, Mrs Garrod argued that raising a grievance did not itself necessarily mean that a dispute had arisen between the parties. While this is generally true, in this case due to her legal background, Mrs Garrod was aware of how the "without prejudice" rule worked. She had also in her grievance referred to early ACAS conciliation and her legal rights. The basis of her grievances also indicated a pre-existing dispute. The EAT found it was reasonable to assume litigation may follow as in fact it did! In this case, raising the grievance was sufficient for a dispute to have arisen although employers should be aware this will not always be the case.

- Mrs Garrod claimed the "without prejudice" discussion and the offer of a settlement figure was presented in such a manner as a means to get her out of the company. The EAT did not find this to be the case. It stated that it was not unusual for an offer to be made for termination during such discussions even where the employee wished to remain in the role. It was more often than not a part of the discussion. Provided there was no serious wrongdoing and the offer is genuinely made, this was permissible.

- The courts stressed that the only instance where the "without prejudice" rule could be disapplied was where the behaviour of a party was "unambiguously improper" which was not found to be the case here.

CONSULTATIONS ON EMPLOYEE HEALTH DATA AND EMPLOYEE MONITORING

With remote or hybrid working becoming an increasingly normal way of working for many workplaces post pandemic, it is not surprising that the Information Commissioner's Office (ICO) launched consultations on draft guidance on various modern employment practices. Specifically in two areas which are important for all employers.

(a) Monitoring Employees at Work – the consultation period closes on **20 January 2023**.

In summary, this guidance will cover key employee data processing and employee monitoring themes such as vehicle tracking, biometric data use for attendance and security, monitoring of remote workers in the home and balancing this with the right to privacy. It also covers issues such as notifying workers of how, what and why monitoring is taking place and the scope of use of that data once collected. This will include carrying out data protection impact assessments (DPIAs).

Full details can be found here: https://ico.org.uk/media/about-the-ico/consultations/4021868/draft-monitoring-at-work-20221011.pdf

(b) Guidance on Information on Workers' Health – the consultation period closes on **23 January 2023**

In summary, this in intended to provide clear guidance on obtaining, processing, retaining, use and sharing workers' sensitive health data amongst other things including using DPIAs in the employment context. Typical areas are, for example, management of short and long-term sickness absence recording, reasonable adjustments for disability and compliance with wider health & safety obligations for the specific industry sector.

Full details can be found here: https://ico.org.uk/about-the-ico/ico-and-stakeholder-consultations/ico-consultation-on-draft-employment-practices-guidance-information-about-workers-health/

A QUICK UPDATE ON ***RODGERS V LEEDS LASER CUTTING LIMITED*** (COURT OF APPEAL)

Regular readers of Maxlaw Global news will have followed the interesting case of Mr Rodgers and his refusal to return to work after the first lockdown during the Covid 19 pandemic in 2020. This resulted in a termination which Mr Rodgers claimed was automatically unfair. The ruling at first instance was that the termination was not automatically unfair or unfair at all. This was upheld at the Employment Appeal Tribunal. Mr Rodgers appealed to the Court of Appeal. Employers will be pleased to hear that the Court of Appeal has also upheld the initial ruling that the dismissal was not unfair. The reasoning of the EAT was sound and not an error of law (see Maxlaw Global Employment News Issue 36 for details). One point the Court of Appeal did make was that employees could not rely on s.100(d) of the Employment Rights Act 1996 for any "serious and imminent" health and safety concern outside the workplace although that may be legitimate. The concern must stem from the workplace. This clarity is welcomed as it narrows the scope when a dismissal may be considered *automatically* unfair.

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