Employment Law Highlights 2021, Performance & Misconduct When Working From Home and UK GPDR Update

Wednesday 8 December 12noon-1pm
Employment Law Webinar

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Employment Law Highlights 2021

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Legislative Changes 2021

- Introduction of “new” immigration visas following Brexit;
  - Skilled Worker visa replaces Tier 2 visa
  - Rules and procedure almost the same as former regime
  - Now applies to EU workers without settled or pre-settled status
  - Slightly lower requirements regarding skills and a more straightforward procedure

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Legislative Changes

- New Off Payroll Rules came into effect in April
- Affects IR35 regime and end users engaging consultants through a intermediary
- Main change is that it is the end user rather than the intermediary which will now assess if a consultant is in disguised employment and should be subject to PAYE

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Legislative Changes

- Acas Conciliation period extended from 4 to 6 weeks in December 2020.
- Health and Safety detriment rights under s44 ERA 1996 extended to workers from 31st March
- Gender pay gap reporting deadline extended due to Covid
- Closure of furlough scheme 30th September 2021

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Changes to Statutory Rates

- NMW and National Living Wage changes:
  - National Living Wage increased from £8.72 to £8.91 and now applies from age of 23 and over rather than 25 and over
- Statutory family pay increased to £151.97 per week
- Statutory sick pay increased to £96.35 per week
- Statutory limit on a week's pay increased to £544 per week
- Maximum award for unfair dismissal increased to £89,493 and maximum statutory redundancy payment to £16,320

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Case Law

- Brazel v Harpur Trust
  - Holiday pay case involving a term time only worker, working around 30-35 weeks per year
  - Employer paid holiday based on pro-rating holiday to weeks actually worked in a year and paid 12.1% of the pay received in the weeks actually worked, based on advice published by Acas
  - ET found in favour of Employer's approach
  - Overturned by EAT; EAT decision affirmed by Court of Appeal

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Case Law

- Brazel v Harpur Trust
  - Both EAT and CA found that there was nothing in the Working Time Regulations 1998 which provided for pro-rating holiday for part-time workers
  - Mrs Brazel was entitled to 5.6 weeks holiday which should be paid in accordance with the calculation of a weeks' pay set out in the working time regulations.
  - The calculation of a weeks' pay should have been made by reference to the average over the previous 12 weeks (this is now 52 weeks following a change to the WTR in April 2020)
  - Weeks in which no work is performed do not count towards the calculation of the average.

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Case Law

- Brazel v Harpur Trust
  - This means that Mrs Brazel would receive 5.6 weeks of holiday pay from performing around 33 weeks of work – so holiday pay is around 17% rather than 12.1% of annual earnings received by a full-time worker.
  - CA took view that employers simply had to accept this anomaly favouring part-year workers
  - Concern amongst employers that WTR do not fairly address modern working practices
  - Appeal heard in Supreme Court in November

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Case Law

- Royal Mencap Society v Tomlinson Blake
  - Supreme Court decision February 2021
  - Working time case brought by a worker who provided overnight supervision at a residential institution. Expected to sleep but to deal with any problems which arose.
  - Worker claimed she was due NMW for entire shift not just hours when she was awake and working.

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Case Law

- Royal Mencap Society v Tomlinson Blake
  - Regulation 32 of the WTR states:
    - *"Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home.*
    - *In paragraph (1), hours when a worker is 'available' only includes hours when the worker is awake for the purposes of working, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping."*

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Case Law

- Royal Mencap Society v Tomlinson Blake
  - Supreme Court found in employer's favour – that a worker who is asleep is not available for work.
  - Decision overrules some previous cases where sleeping workers had been found to be actually working or available for work while sleeping.

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Case Law

- Uber v Aslam
  - Supreme Court heard final chapter of the Uber v Aslam saga regarding whether Uber drivers were self-employed or had worker status
  - Uber appealed decisions of lower courts that Uber drivers were workers, and were working for Uber while they were logged into the app and ready and willing to accept fares

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Case Law

- Uber v Aslam
  - Supreme Court upheld decision of lower courts, and found drivers were workers based on 5 main factors:
    - Uber set the fare and therefore dictated the driver's rate of pay
    - The terms of the agreement between the drivers and Uber were not negotiable
    - Once logged into the app, the driver choice whether to accept a fare was constrained by Uber
    - Uber exercised significant control of the manner in which drivers provided the services by the use of a rating app
    - Uber restricted and prevented communication between passenger and driver beyond what was necessary to perform a particular trip

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Case Law

- Uber v Aslam
  - Drivers were therefore entitled to holiday pay, rest breaks and to receive NMW while working

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Case Law

- Efobi v Royal Mail
  - Supreme Court case regarding burden of proof in discrimination claims
  - Prior to Equality Act 2010 discrimination legislation required the Claimant to prove facts from which the Tribunal could conclude that an act of discrimination has been committed;
  - It was then for the employer to prove that its actions or omissions were not discriminatory.
  - However s136 of the Equality Act is worded slightly differently – it said that discrimination could be found "*if there are facts*" from which the Tribunal could conclude there had been discrimination rather than "*where the Claimant proves facts*"

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Case Law

- Efobi v Royal Mail
  - Mr Efobi was unsuccessful with a claim for discrimination following his being rejection from many applications for IT roles because he had not presented facts to the Tribunal from which it could infer the reason for rejection was discrimination;
  - He appealed to the EAT saying that the wording of the Equality Act meant there was no longer a burden on him to prove facts from which discrimination could be inferred.
  - The EAT agreed, departing from the previous orthodoxy of the two stage test.

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Case Law

- Efobi v Royal Mail
  - Royal Mail successfully appealed to the Court of appeal who restated the two stage test:

First, the burden is on the employee to establish facts from which a tribunal could conclude on the balance of probabilities, absent any explanation, that the alleged discrimination had occurred. At that stage the tribunal must leave out of account the employer's explanation for the treatment. If that burden is discharged, the onus shifts to the employer to give an explanation for the alleged discriminatory treatment and to satisfy the tribunal that it was not tainted by [discrimination].

  - Mr Efobi appealed the Court of Appeal decision, which was confirmed unanimously by Supreme Court

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Case Law

- Forstater v CGD Europe
  - Maya Forstater is a “gender critical” feminist
  - Her contract with CGD was not renewed after she Tweeted from her personal account that it was not possible to change sex, which some trans people found offensive and transphobic
  - She brought a claim for discrimination on the basis that her gender critical views were protected as a philosophical belief under s10 of the Equality Act

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Case Law

- Forstater v CGD Europe
  - The Employment Tribunal found that her belief that gender is immutable was not protected as a philosophical belief because that view was not worthy of respect in a democratic society
  - This was overturned by the EAT, who found that the belief was not akin to beliefs such as Nazism or totalitarianism, which would warrant it being found not worthy of respect.

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Case Law

- Forstater v CGD Europe
  - The decision now opens the path for the case to reheard in the Employment Tribunal
  - Ultimately it is likely to proceed to the higher Courts.

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Covid Cases

- First instance Tribunal cases of interest:
  - Rodgers v Leeds Laser Cutting Ltd
    - Dismissal of employee who refused to return to work as worried about infecting children held to be fair
  - Prosser v Community Gateway Association Ltd
    - No unlawful discrimination where a pregnant worker was sent home until protective measures in place
  - Kubilius v Kent Foods Ltd
    - Dismissal for refusal to wear face mask on client's premises held to be fair
  - Mhindurwa v Lovingangels
    - Failure to consider furlough as alternative to redundancy rendered dismissal unfair

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Looking Forward

Vaccination Status

- Vaccination for care home staff became mandatory on 11th November but will not be enforced until 1st April 2022
- Frontline healthcare workers also expected to be subject to mandatory vaccination from 1 April 2022
- But this is (or will be) enshrined in legislation
- So what can employers who are not subject to legislation do?

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Vaccination

- Making vaccination for employees mandatory is untested in law.
- It would therefore be risky to dismiss employees who refuse a vaccine.
- Employers would need to show they have a fair reason to dismiss if an employee has more than two years service.

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Vaccination

- Potential fair reasons could include:
  - If it is necessary for employees to be vaccinated to mitigate health and safety risks (for example where employees work in settings with vulnerable individuals)
  - Where vaccination may be a statutory requirement for entry to overseas locations and travel is a requirement of the role
  - If an employer can establish that its business will require vaccination for some other reason – for example where health and safety risks are significant and cannot be mitigated by other measures

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Vaccination

- Pitfalls
  - It may be difficult to establish mandatory vaccinations are required outside a healthcare setting
  - Potentially discriminatory if an individual cannot receive the vaccine because of a disability
  - Possible, if unlikely, that an “antivax” belief could constitute a philosophical belief and be protected
  - A few employees may have religious objections or other objections based on a protected belief
  - The area is legally untested – there is no case law to guide us

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Vaccination

- Employers will need to:
  - Establish a genuine and reasonable basis for a requirement for mandatory vaccinations
  - Explore alternatives such as incentivising vaccination, requiring regular testing or using other means to mitigate risk
  - Make sure they consider exceptions for employees who cannot or will not be vaccinated

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Vaccination

- In the absence of further government guidance or statutory requirements for vaccination most employers may find it difficult to justify a requirement to impose mandatory vaccination and dismiss non-compliant staff with more than 2 years service;
- Easier to impose vaccination requirement on new members of staff or to take steps to encourage vaccination

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Menopause

- Menopause will be a significant focus of employment law in near future
- In July the House of Commons Women and Equalities Committee opened an enquiry titled “An invisible cohort: Why are workplaces failing women going through menopause”
  - 3 in 5 women negatively affected by the menopause
  - Time to “uncover and address this huge issue”

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Menopause

- Enquiry coincided with the reading of a private members in House of Commons – the Menopause (Support and Services) Bill
- Includes a requirement for Government to consider its strategy with regard to workplace policies and adaptations to support women to work through the menopause
- Plus considerable media attention on the issue in recent months – World Menopause Day

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Menopause

- Menopause is not a protected characteristic, but its symptoms can lead to claims for sex and disability discrimination
- Rooney v Leicester City Council – 18th October 2021 – EAT
  - EAT found that menopause symptoms had a significant detrimental effect on day to day activities and that Mrs Rooney was disabled;
  - It had been wrong for ET to strike out disability discrimination claims.
- Latest in a line of cases which confirm menopause symptoms can be a disability, and where woman have successfully brought claims of sex and disability discrimination
  - Merchant v BT plc
  - Davis v Scottish Courts and Tribunal Service
  - A v Bonmarche Ltd
- Most employers do not have specific policies or training in place

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Other potential developments

- Prior to Covid the Government was considering changes with regard to:
  - Restrictive covenants
  - The right to request flexible working
  - Extending redundancy protections for pregnancy/maternity.
  - Prevention of sexual harassment – duty on employers to prevent harassment of employees
- Expect further developments on these topics as and when the Government finds parliamentary time.

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Paul McAleavey
Partner

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Performance and Misconduct When Working From Home

Topics we'll cover

- Performance issues when WFH.
- Misconduct issues when WFH.
- Practical tips for handling them.
- Implications of long COVID and how to manage them.

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Home working – performance issues:

- Producing work of poor quality.
- Missing online meetings without good reason.
- Being uncontactable.

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Home working – performance issues:

- Taking too long to respond to emails or calls.
- Not engaging in their duties.
- Doing household chores instead of work.

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Home working – potential misconduct:

- Using the employer's time to apply for/interview for a new job.
- Doing a second job.

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Home working – potential misconduct:

- Copying the employer's confidential or sensitive information.
- Breaching client confidentiality.

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Practical tips (1)

- Identify the reason(s).
- Be aware of disability risks.
- Check and amend your policies.
- Difficult conversations generally better face-to-face.

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Practical tips (2)

- Usual guidance continues to apply, but be **adaptable**.
- Remote investigations – usual level of robustness.
- Greater scope for evidence gathering?
- Employee monitoring tools.
- Privacy notices.

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Practical tips (3)

- "Virtual" Performance Improvement Plans.
- Think in advance about timing and forum for meetings.
- Right to be accompanied.
- Is the employee recording the meeting?

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The trends emerging from the Employment Tribunals

- Miss L Livesey v Slater & Gordon (UK) Ltd (June 2021 – Manchester ET case no. 2408568/2020).

- Miss N Browne-Marke v NR Solicitors Limited (April 2021 – East London ET case no, 3201519/2020).

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The employment implications of "long COVID" (PASC)

- Post-acute sequelae SARS-CoV-2 infection (**PASC**).
- Is it an Equality Act disability?
- Severity dependent - likely to be in some cases.

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Equality Act 2010, section 6

Equality Act 2010

- Physical or mental impairment;
- Has substantial and long-term adverse effect on ability to carry out normal day-to-day activities.
- Examples – walking, driving, typing, writing, cooking and **activities relevant to their working life**.
- PASC symptoms – extreme fatigue, shortness of breath, sleeping difficulties, depression (https://www.nhs.uk/conditions/coronavirus-covid-19/long-term-effects-of-coronavirus-long-covid/)

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Managing PASC/"long COVID" (1)

- Protected groups seem to be disproportionately impacted.
- Keep up to date with developments.
- Seek professional medical opinion(s).
- Consider reasonable adjustments.

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Managing PASC/"long COVID" (2)

- But look out for any illegitimate cases.
- Ensure capability/dismissal decisions are fully informed.
- Review policies and adjust to reflect relapsing nature of PASC.
- Train managers.

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UK GDPR Update

Carl Vincent
Head of Employment Law

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Outline

- Context
- Subject Access Requests
- Compensation
- Vicarious liability
- Monitoring
- The future

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Context

- GDPR – 25 May 2018
- Harmonization within EU
- Brexit
- Transition period – 31 December 2020
- UK GDPR & Data Protection Act 2018

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Subject Access Requests (1)

- Article 15 GDPR
- Confirmation of processing of PD
- Access to PD
- One month
- Extension (extra 2 months)
- Necessary (complexity or number of requests)

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Subject Access Requests (2)

- Article 77
- Complaint to ICO
- Duty to investigate – to the extent appropriate
- Priorities/Resources
- Enforcement Notice

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Subject Access Request (3)

- First Choice Selection Services Ltd

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Compensation Claims

- UK GDPR breaches
- High Court or County Court
- Material or non-material damage
- Distress
- No prescribed level
- Tort damages

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Fines

- Amazon - $877m (cookie consent)
- WhatsApp - $255m (data processing)
- H&M – $41m (recording return to work meetings)
- BA - $26m (customer data compromised)

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Real World

- Tesco
- Lost employee's HR records (including medical info)
- Settlement @ 3k

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Real World

- Johnson v Eastlight Community Homes
- Rent statement of tenant emailed to 3rd party
- 6,941 pages
- Contained
  - Name
  - Email address
  - Rent payments
- Claim for 3k for distress

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Real World

- But…
- Class actions
- BA – 500,000
- Marriott
- EasyJet
- Morrisons

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Vicarious Liability

- Employer data controller is generally liable for DP breaches committed by staff
- Morrisons case
- Stolen payroll data
- 10,000 employees
- ‘frolic of his own’
- Data controller

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Monitoring

- Data protection principles
- Lawfulness
  - ✓Consent
  - ✓Necessary for performance of contract
  - ✓Compliance with legal obligation
  - ✓Vital interests of data subject
  - ✓Legitimate interests pursued by controller

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Monitoring

- Privacy law
- Human Rights
- Implied term of trust and confidence
- Investigatory Powers Act

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Monitoring

- Notification
- Justification
- Proportionality
- Impact assessment
- ICO Employment Practices Code

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The Future

- DCMS
- Possible reforms
- Consultation 19/11/21
- Remove
  - Burdens on business
  - Barriers to innovation
- Less prescription - risk based approach
- DSAR proposals

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Any questions?

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