Reflecting on employment law cases and developments in 2021

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What are the employment law highlights from the last 12 months? We've picked out some of the most interesting cases and other developments from 2021 for employers to reflect on as the year draws to a close.

COVID-19

- **Vaccines and the workforce:** employers had to grapple with the tricky issue of whether to require staff to be vaccinated against COVID-19. Introducing such a requirement raises the risk of unfair dismissal and discrimination claims, as well as raising a number of practical issues such as allowing time off to be vaccinated, how post-vaccination sickness is treated and the data protection implications of holding vaccination status information. You can read more about all of these issues in our two-part series of briefings **here** and **here**. You can also catch up on our "No Jab, No Job?" webinar **here**.
- **COVID-related dismissals:** claims of unfair dismissal for COVID-related reasons began to appear for the first time, with the Employment Tribunals taking a relatively robust approach. For example, in Kubilius v Kent Foods Limited the Tribunal held that an employee had been fairly dismissed for refusing to wear a face mask when attending a client's premises. You can read more about that decision **here**. Also, in Rodgers v Leeds Laser Cutting Ltd the Tribunal decided that an employee had been fairly dismissed for refusing to attend work because he was worried about catching the virus and giving it to his children. You can read more about that decision in our briefing **here**.

- **Furlough scheme extended and closed:** the furlough scheme was due to close at the end of April. Yet, in late March, the Chancellor **announced** that the scheme would be extended by five months and close on 30 September 2021. Throughout this extended period, furloughed employees remained entitled to be paid 80% of their normal wages for any furloughed hours, subject to the maximum cap of £2,500 per month. It is not yet known whether the scheme would be resurrected in the event of further national lockdowns in 2022. You can remind yourself of how the scheme operated and the impact of its closure in our guide to the scheme **here**.

- **Hybrid working here to stay:** as restrictions lifted on "Freedom Day" on 19 July 2021, many employers began to return staff to the workplace over the Summer and Autumn months. However, a full-time return was not on the cards, with the majority of employers preferring some form of hybrid working. This was recognised by Acas, who issued new guidance for employers on implementing hybrid working. You can read more about this in our briefing **here**. We also published some FAQs about the return to work and hybrid working **here**. In the last few weeks, the CIPD has published its own practical guidance on hybrid working, which you can view **here**.

- **The arrival of Omicron:** just as life had begun to return to some semblance of normality, the virus mutated yet again, with the Omicron variant being identified as a cause for concern. You can read our initial briefing on what Omicron meant for office-based employers **here** (as the situation is fast-moving please do get in touch with us for advice on the latest position).

Equality

- **Harassment:** in the harassment sphere there were a couple of important decisions for employers to note this year.

First, in the case of Driscoll v V&P Global Ltd and another, the EAT held for the first time that where an employee resigns in response to repudiatory conduct which constitutes or includes unlawful harassment under the Equality Act 2010, then the constructive dismissal itself is capable of amounting to an unlawful act of harassment. You can read the EAT's decision **here**. Second, in the case of Allay (UK) Ltd v Gehlen the EAT held that an employer's failure to provide regular and effective equality training meant that they could not rely on the "reasonable steps" defence to a race harassment claim. You can read more about this decision in our briefing **here**.

- **Sexual harassment:** a report from the Fawcett Society revealed the continued prevalence of sexual harassment at work, despite the rise in hybrid working. You can read more about this report in our briefing **here**. The Government also announced plans to reform sexual harassment laws to introduce a positive duty on employers to take all reasonable steps to prevent sexual harassment and reintroduce protection from third party harassment at work (e.g. harassment by a client or a contractor). You can read more about these reforms in our briefing **here**.

- **Sex discrimination and flexible working**: this year we saw a spate of discrimination cases arising out of the refusal of flexible working patterns requested by working mothers. In the case of Dobson v North Cumbria Integrated Care NHS Foundation Trust an employee and mother of three (including two disabled children) brought a discrimination claim after she was dismissed for refusing to work occasional weekends. The EAT ruled that Tribunals must accept as fact that women still bear the primary burden of childcare responsibilities and

this hinders their ability to work certain hours. You can read more about this decision in our briefing **here**. In the case of Keating v WH Smith Holdings Ltd the imposition of a Saturday working requirement on a single mother was held to be discriminatory and in Thomson v Scancrown Ltd t/a Manors a refusal to make modest adjustments to a maternity returner's working hours was also said to be discriminatory. You can read more about these decisions in our briefings **here** and **here**.

- **Associative indirect disability discrimination:** in another case concerning refusal of a flexible working pattern, an Employment Tribunal upheld a claim of associative indirect discrimination for the first time. In the case of Follows v Nationwide Building Society an employee refused to move from a hybrid working arrangement to an office-based working arrangement as she had caring responsibilities for her disabled mother. Her refusal led to her dismissal. The Tribunal held the requirement to work in the office full-time indirectly discriminated against the employee because of her association with a disabled person, even though she was not disabled herself. You can read the Employment Tribunal's decision **here**.

- **Sex discrimination claims brought by men:** 2021 saw two notable sex discrimination claims brought by men – with differing results. In the case of Price v Powys Council, the EAT held that it was not discriminatory to enhance pay for a female employee on adoption leave and not to do so for a male employee on shared parental leave. You can find out why in our briefing **here**. The male claimants in the case of Bayfield and Jenner v Wunderman Thompson (UK) Ltd were more successful. Here, the Tribunal decided that the dismissal of two senior male employees amounted to sex discrimination, where the dismissals had followed the announcement of the

employer's high gender pay gap figures and a radical new approach to diversity within the business. You can read more about this decision in our briefing **here** and you can also read Gareth Braham's article in the ELA Briefing on this topic **here**.

- **Gender critical beliefs are protected:** in the high-profile case of Forstater v CGD Europe and others, the EAT held that gender critical beliefs, including beliefs that biological sex cannot be changed and is different to gender identity, are protected beliefs.Although the beliefs may be offensive to some and could even result in the harassment of trans persons in certain circumstances, they were protected under the right to freedom of thought, conscience and religion under the European Convention of Human Rights and as philosophical beliefs under the Equality Act 2010. You can read more about this decision in our briefing **here**.

- **Menopause and the workplace:** the impact of the menopause on workers has been a hot topic this year. Two Parliamentary Inquiries were launched, with a view to introducing better legal protections for affected workers. Further, a new report highlighted the severe impact of the menopause on those working in the financial services sector. You can read more about these developments in our briefings **here** and **here**. We also saw the second ever appellate decision on a claim concerning the menopause. In the case of Rooney v Leicester City Council, the EAT held that an Employment Tribunal had been wrong to say that a woman suffering from a wide range of menopausal symptoms which affected her day to day life was not disabled for employment law purposes. You can read more about this decision **here**.
  If you would like a deep dive on menopause and the workplace, you can also listen to the **podcast** we recorded for Daniel Barnett's "Employment Law Matters"

podcast.

- **Equal pay:** the supermarket chain equal pay litigation continued in 2021, with David overcoming Goliath in two notable decisions. In Asda Stores Ltd v Brierley and ors the Supreme Court upheld a decision that a group of female retail store workers could compare themselves to a group of male distribution centre workers for the purposes of an equal pay claim, even though they worked at separate establishments. In Tesco Stores Ltd v Element and ors, the EAT upheld an order for the employer to disclose documents and provide information relating to the alleged pay comparators' contracts, job descriptions and pay. It rejected the employer's argument that the specific disclosure request amounted to a "fishing expedition". Both decisions will help claimants get equal pay claims off the ground. You can read the decisions **here** and **here**.

- **Pay reporting:** having been suspended in 2020 due to the pandemic, gender pay gap reporting resumed in 2021, albeit that the reporting date was postponed from April to October. You can read more about this in our briefing **here**. **Analysis by PwC** of the most recent round of reports shows a small decline in the average median pay gap from 14.2% in 2017/8 to 13.1% in 2020/21. By contrast, proposals to introduce ethnicity pay gap reporting appear to have stalled. The Government consulted on the issue in 2019 but, to date, has failed to publish its response. To mark this year's Race Equality Week in February, we published a **briefing** summarising where things currently stand.

Employment status, contracts and policies

- **Who is a worker?** In Uber BV v Aslam, the Supreme Court upheld a decision that drivers working for Uber were workers and not self-employed contractors. This

decision is important for employers engaging contractors as it highlights the continued willingness of the Courts and Tribunals to scrutinise the way a relationship works in practice, regardless of contractual labels. You can read more about this decision in our briefing **here**.

- **Reform of the IR35 regime:** the way in which the IR35 rules operate in the private sector changed on 6 April 2021. These reforms saw contractors lose the ability to determine their own tax status and placed the burden on those who engage them (often the end user). You can remind yourself of the new framework and the action points for clients and contractors in our guide to the regime **here**.

- **Changing terms and conditions:** a **survey** conducted by the CIPD this year revealed that 22% of employers have made changes to their employees' terms and conditions since the start of the COVID-19 pandemic, including to terms relating to place of work, hours of work and pay. Acas has published new guidance for employers on how to navigate changes to terms and conditions and they caution against the use of "fire and rehire" strategies. You can read more about this guidance in our briefing **here**.

- **Holiday pay:** in the case of Smith v Pimlico Plumbers the EAT decided that workers do not have a right to carry over holiday pay where they had taken unpaid annual leave. This contrasts with an earlier European Court decision where it was decided that workers are entitled to carry over unlimited annual leave which had *not* been taken because it was unpaid. You can read the EAT's decision **here**. This decision is of importance for organisations who engage people they think of as independent contractors who may, in fact, have worker status. It should be noted that this decision has been appealed to the Court of Appeal, with judgment expected

in 2022.

- **Flexible working reform:** the Government published a consultation seeking views on proposals to expand and improve the flexible working framework. The consultation looks at a range of proposals including whether the right to request flexible working should become a "Day 1" employment right and whether employers should be required to show they have considered alternatives before rejecting a flexible working request. The consultation closed on 1 December 2021 and the Government's response is expected in 2022. You can read more about the proposals in our briefing **here**.

- **New right to carer's leave:** the Government announced that a new right for employees to take up to one week of unpaid carer's leave per year will be introduced when Parliamentary time allows. The right will be a "Day 1" employment right and employees will be able to take the leave to care for and/or make arrangements to provide care for a dependant who has a long-term care need. In due course, employers should put in place a policy to outline the new right and how staff can take such leave. You can read more about the new right in our briefing **here**.

Whistleblowing

- **New EU Whistleblowing Directive:** the EU's new Whistleblowing Directive is due to be implemented by EU Member States by 17 December 2021. Legislation must be introduced which, amongst other things, requires private employers with 50+ workers to establish internal reporting channels, keep a whistleblower's identity confidential, confirm receipt of a whistleblower's report within seven days, and provide a response within a reasonable period which should generally not exceed three months. Post Brexit, the UK does not need to

implement the Directive, however, it may elect to enhance whistleblowing laws to keep pace with the EU. You can read more about the Directive in our briefing **here**.

- **World Whistleblowers Day and tips for employers:** World Whistleblowers Day fell on 23 June 2021 and looked at how best to support the mental wellbeing of whistleblowers. What can employers do to empower staff to speak up about malpractice and protect whistleblowers from reprisals? In our briefing **here**, we considered five actions employers could take to support whistleblowers within their business.

- **Dismissing whistleblowers:** in the case of Kong v Gulf International Bank (UK) Ltd the EAT handed down an employer-friendly decision, holding that in whistleblowing dismissal claims, it will rarely be the case that an employer will be fixed with the motives of anyone other than the person/s making the decision about whether to dismiss. The EAT also held that if a whistleblower is dismissed for the manner in which they conveyed or pursued their concern, this is genuinely separable from the raising of the concern itself and, as such, will not be automatically unfair. We understand this decision is to be appealed to the Court of Appeal. You can read the EAT's decision **here**.

- **Interim relief hearings should be heard in public:** in the case of Queensgate Investments LLP v Millet the EAT ruled that applications for interim relief should be heard in public, save where an order is made to restrict publicity. Interim relief is a powerful remedy open to claimants in a small number of specific claims for automatic unfair dismissal and is most commonly sought in whistleblowing dismissal claims. This is the first appellant authority on this point, with BDBF acting for the successful respondent to the appeal. You can read

more about the EAT's decision in our briefing **here**.

Termination

- **Constructive unfair dismissal:** in the case of Flatman v Essex County Council, the EAT held that a Tribunal misapplied the law by failing to identify whether a fundamental breach of contract occurred at any point up to the employee's resignation. In so doing, it reaffirmed the principle that once a fundamental breach has been committed, it cannot be cured. You can read more about this decision in our briefing **here**.
- **Misconduct:** in the case of Daley v Vodafone Automotive Ltd an employee was dismissed for gross misconduct for behaving in an offensive, threatening and intimidating manner towards a colleague. During the disciplinary investigation, the employee disclosed that he took medication for depression which caused side effects including anger and frustration. The employer took no action in response to this information and went on to dismiss. The EAT held that the Employment Tribunal should have considered whether the employer's failure to probe the impact of the employee's depression and medication rendered the dismissal process unfair. You can read more about this decision in our briefing **here**.
- **Redundancy and appeals**: in the case of Gwynedd Council v Barratt the Court of Appeal confirmed that, on its own, the absence of a right to appeal against dismissal for redundancy does not make it unfair. However, it is one of the factors to be considered when determining the overall fairness of the dismissal. You can read more about this decision in our briefing **here**.
- **Post-termination restrictions:** the Government launched a consultation about regulating the use of non-compete restrictions in employment contracts. Views were sought on proposals including requiring employers to pay

compensation for the duration of non-compete restrictions or banning their use altogether. The consultation closed on 26 February 2021 and the Government's response is awaited. You can read BDBF's response to the consultation **here**.

If you would like to know more about any of these developments please contact Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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