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**EMPLOYMENT AND APPEALS COMMITTEE**

**Friday, 14th October, 2022**

# SUPPLEMENTARY PACK

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| **1.** | **LEGAL UPDATE** |

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# Employment Case Law Update October 2022

# Employment Committee

## Holiday pay

### Harper Trust v Brazel

The claimant worked as a music teacher during term-time on a contract which covered the whole year. She was paid based on the work she did and her hours varied.

All workers are entitled to 5.6 weeks' paid annual leave per year and in this case, she took her leave during school holidays. The Harper Trust based the holiday pay on 12.07% of the claimant's earnings, which she argued was not correct.

Despite failing in employment tribunal (ET), the claimant subsequently succeeded and the Supreme Court has confirmed that the correct method of calculating holiday pay for "part-year' workers should be based on average pay, ignoring weeks where an individual does not earn anything. This is the case, even if this means individuals receive a greater proportion of holiday pay than full-time workers. It was found that there is no legislative provision which means that part-timers cannot be better off than comparable full-time workers.

## Sleep in shifts and National Minimum Wage

### Royal Mencap society v Tomlinson Blake

The Supreme Court judgment was handed down in March 2021. The court held that individuals carrying out "sleep-in" shifts are not entitled to national minimum wage for time spent asleep at, or near, the workplace. Such workers are only entitled to national minimum wage when they are awake "for the purposes of working".

This was a particularly key decision for the charity and care sector, which faced significant liability for historic back pay had the outcome been different.

## Covid

Employee with long COVID was not disabled at time of dismissal

The Employment Tribunal (ET) has held that an employee who had COVID 19 at the time of dismissal was not disabled within the meaning of the Equality Act (EA) 2010. This contrasts to prior ET decisions which had found that employees suffering with long COVID were disabled and thus protected under the Act.

Mrs Quinn had been employed by Sense Scotland as their Head of People. On 11 July 2021, she tested positive for COVID 19 and subsequently suffered from fatigue, shortness of breath, pain, headaches, and confusion. These symptoms impacted the quality of her sleep and her ability to carry out work. On the 27 July 2021, she was dismissed by Sense. On three separate occasions in August 2021, she consulted her GP, and it was during this time that she was diagnosed with long COVID and deemed unfit to work. Mrs Quinn then brought a claim against Sense alleging direct disability discrimination.

Under the EA 2010, a person is deemed to be disabled if:

1. The person has a physical or mental impairment, and

2. That impairment has a substantial and long-term adverse effect on ability to carry out normal day to day activities

It was not disputed that Mrs Quinn satisfied the first limb of this test as she did have a physical impairment at the time of her dismissal. However, in relation to the second limb, although there was clear evidence that her symptoms had had a substantial effect on her ability to carry out day to day activities, the issue was whether it was long-term. Under the EA 2010, an impairment is long-term if at the relevant time it has lasted for at least 12 months or is likely to last for at least 12 months.

Crucially, at the time of her dismissal, the effect of COVID had only lasted two and a half weeks. The ET further noted that Mrs Quinn had not been diagnosed with long COVID until six weeks after her dismissal. While the ET acknowledged that someone who contracts COVID is in theory at risk of this developing into long-term illness, it stated that `the substantial majority of people who contract COVID do not go on to develop long COVID and do not suffer from it for more than a year`. Owing to these reasons, Mrs Quinn failed to satisfy the long-term element and thus was not disabled at the time of her dismissal.

This decision demonstrates that the timing of contracting COVID 19 is fundamental for determining whether an employee will be deemed disabled. This is what distinguishes the outcome of this case from previous cases where employees with long COVID were found to be disabled. However, while not every employee who has long COVID will be considered disabled, employers should nevertheless be mindful of employees who have been diagnosed or are displaying ongoing COVID symptoms and bear this in mind.

## Anti-harassment training

### Allay (UK) Limited v Gehlen

The Employment Appeal Tribunal (EAT) emphasised the importance of anti-harassment and diversity training being up to date and fit for purpose.

In this case, an employer's "stale" diversity training was not enough to defend a claim of harassment brought by an employee who had seen subjected to racist comments by a colleague in the workplace.

Employers are normally responsible for any discriminatory or harassing acts committed by their employees. However, there is a defence under the Equality Act 2010, for an employer who would otherwise be responsible, if the employer can show that it took "all reasonable steps" to prevent the employee from doing that discriminatory act.

Equal opportunity policies should be regularly reviewed, and refresher training provided as needed.

## Menopause discrimination

### Rooner v Leicester City Council

Can menopause symptoms amount to a disability? Yes, said the Employment Appeal Tribunal. In the first binding decision on the issue, the EAT held that it was wrong for a tribunal to find that an employee suffering from significant menopausal symptoms was not disabled under the Equality Act 2010.

Menopause itself is not specially mentioned in the Equality Act 2010. However, as this case shows, there is no reason in principle why menopausal symptoms cannot have the relevant disabling effect on an individual to afford the protection from discrimination under the Act.

## Redundancy appeals

### Gwynedd Council v Barratt and Others – Court of Appeal

This case confirmed that a failure to offer an appeal in a redundancy situation does not, on its own, automatically render a redundancy dismissal unfair.

The court held it would be wrong to find a dismissal unfair if lack of appeal is only defect in otherwise fair process. Instead, a tribunal will look at all the factors in any process before determining whether a redundancy process is fair.

Many employers will offer an appeal in a redundancy situation as a matter of course, and there are benefits to doing so. In some situations, there may be reasons why holding an appeal might not be recommended, and the absence of the appeal may not be fatal.

## Other key decisions

### Uber v Aslam (2021)

The Supreme Court decision held that Uber drivers definitely have the status of workers.

Although a very fact-specific case and judgment, it is a useful reminder for business who engage self-employed individuals to review their own arrangements.

### Forstater v CGD Europe

The EAT held that gender-critical beliefs are capable of being protected under the Equality Act 2010 as a philosophical belief.

The case was concerned only with the narrow legal issue of the scope of a philosophical belief but is of interest for highlighting that some beliefs may be capable of protection, even if they are controversial.

## General Updates

### National Minimum/Living Wage

From 1 April 2022, the following rates apply:

| Age group | Current | New | % Increase |
|---|---|---|---|
| 23 and over | £8.91 | £9.50 | 6.62 |
| 21 or 22 | £8.36 | £9.18 | 9.81 |
| 18 – 20 | £6.56 | £6.83 | 4.12 |
| Under 18 (above compulsory school age | £4.62 | £4.81 | 4.11 |
| Apprentices under 19 (or over 19 in year one of apprenticeship | £4.30 | £4.81 | 11.86 |

### Neonatal care and redundancy

The UK government has pledged to introduce a new right to 12 weeks' paid neonatal leave for parents whose babies spend time in neonatal care units.

The government's response to consultation confirmed they were going to legislate on this issue, although a definitive date is yet to be given.

It is anticipated that the leave would be a day one right. The definitions of "parent" and "neonatal care" are still to be confirmed, as are the notification requirements.

## Sick certificates

From July 2022, fit notes can be certified and issued by nurses, occupational therapists, pharmacists and physiotherapists in addition to doctors.

The aim of this is to ease the pressure on NHS doctors and GPs.

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