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Client Alert

Global Human Capital and Compliance

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November Employment Law Alert: A Hair-Raising Harassment Case, and Other Updates

November saw several significant developments in employment law through the courts and following the Labour Government's Autumn Budget, announced on 30 October 2024.

BUDGET HIGHLIGHTS

The new Labour Government has announced the rates of the National Living Wage (NLW) and National Minimum Wage (NMW). From 1 April 2025, the NMW rates will be increased as follows:

- **21 years old and over**: the NLW of £12.21
- **18-20 years old**: £10.00
- **16-17 years old and apprentices**: £7.55

Employers will also see changes to National Insurance (NI) contributions. A rise of 1.5% has been announced, increasing employer NI contributions from 13.8% to 15%. More notably, the threshold on which NI contributions are payable will be reduced from £9,100/ year to £5,000/ year. This change may result in additional casual and part-time employees being captured, leading to a higher overall NI bill for employers.

A HAIR-RAISING HARASSMENT RULING

The EAT has upheld a decision that an employee was harassed based on his sex due to being derogatorily referred to as "bald". This ruling establishes that comments about physical characteristics that are more prevalent in one sex can be considered sex-related harassment. In this case, "bald" was deemed inherently related to sex because baldness is more common in men, broadening the scope of what can be considered sex-related harassment under the Equality Act 2010.

This case also serves as a warning to employers about the dangers of “workplace banter”. Employers need to show they have taken “all reasonable steps” to prevent “unwanted” harassment. Extra protections are due to be introduced in respect of harassment by third parties under the new Employment Rights Bill.

British Bung Manufacturing Company Ltd & Mr J King v Mr A Finn [2023] EAT 165

ENGLISH NATIONALISM – A PROTECTED BELIEF?

A consultant was terminated due to non-disclosure of a spent conviction. He alleged that the termination was actually due to his philosophical belief in “English nationalism”, and brought a claim for discrimination on the grounds of religion or belief. The consultant’s beliefs were described as a long-standing interest and pride in the identity of being English (rather than British), with some English nationalists advocating a devolved English Parliament or re-establishment of an independent sovereign state of England outside the UK.

The Employment Appeal Tribunal (EAT) held that whilst some political beliefs could be protected beliefs, those of the consultant strayed beyond this. His beliefs included public statements where he had agreed with the forced removal of Muslims from the UK. The EAT found that his views directly conflicted with the fundamental rights of others. This was put it outside the protections for beliefs under the Equality Act, that for a belief to be protected it must be “worthy of respect in a democratic society”.

An interesting takeaway from the Employment Tribunal’s original decision was that English nationalism **could**, in specific circumstances, be capable of amounting to a philosophical belief which would be legally protected.

Mr S Thomas v (1) Surrey and Borders Partnership NHS Foundation Trust and (2) Ms A Brett: [2024] EAT 141

ARE CHARITY TRUSTEES WORKERS?

A charity trustee, following the making of several protected disclosures, was expelled from the charity. The trustee argued that his protected disclosures afforded him whistleblowing protection, which covers “workers” as well as “employees” – effectively requiring a lower degree of connection and control.

The EAT first considered whether the trustee’s role amounted to a worker relationship. They found that it did not. Whilst the trustee’s responsibilities were substantial, there was no contractual relationship or intent to enter into a worker relationship.

The EAT secondly considered whether Articles 10 and 14 of the European Convention on Human Rights (ECHR) provided grounds for whistleblowing protection for trustees, on the basis they may form unique forms of detriment not otherwise covered by the Employment Rights Act 1996. The EAT found that in this case they did not. However, the EAT noted that in principle it is possible for charity trustees (and individuals in non-contractual positions) to benefit from whistleblowing protections in certain circumstances – particularly those in governance roles intersecting with clear public interest principles. The EAT confirmed that when considering if a non-employee/ worker benefits from whistleblowing protection, all circumstances (and not just remuneration) should be considered.

A smaller, but significant, point of law clarified in this case was that employees/ workers **are** protected against detriment for making a protected disclosure prior to starting the employment in which they received the detriment.

Dr Nigel MacLennan v The British Psychological Society: [2024] EAT 166

DRIVING CHANGE – BOLT DRIVERS ESTABLISH WORKER STATUS

This case involved Bolt drivers who claimed they were misclassified as "independent contractors" instead of "workers" under UK employment law, bringing claims for National Minimum Wage and holiday pay. The Employment Tribunal (ET) found that when drivers were within their licensed area, had the Bolt App on, and were ready to accept

trips, they were "workers". This was due to Bolt's level of control, including setting fares, managing payments and imposing performance conditions.

Bolt claimed it acted as "an agent or intermediary" between passengers and drivers, facilitating the relationship by collecting payment and processing services. This was rejected by the ET which held instead that Bolt's business was "transportation" rather than as a provider of the technology or intermediary linking the passenger and driver.

The litigation is ongoing as, having established worker status at the preliminary hearing, the ET will next consider the claims for National Minimum Wage and holiday pay. In the meantime, this decision has significant implications for the gig economy, particularly for app-based transportation services, as it reinforces the need for companies to provide worker protections even in flexible working arrangements. Companies with similar models may need to reassess their worker relationships to comply with employment laws. This has implications for both costs and organization of work.

Bandi and Others v Bolt (2206953/2021)

GROUP CONSULTATION – NOT REQUIRED FOR SMALL SCALE REDUCTIONS

A recruitment consultant brought a claim for unfair dismissal after being made redundant. The EAT held his dismissal was unfair on the basis the decision to make him redundant had been carried out **before** consultation had started (because a selection process was completed prior to the first consultation meeting). The EAT added that even in smaller-scale redundancies, in non-unionised workplaces, the affected workforce should be consulted at some group level. This raised questions as to how in practice, this would work as it is not common practice.

The Court of Appeal has now rejected this suggestion. Employers must still engage in meaningful individual consultations with affected employees, but they are not obligated to implement a one-size-fits-all approach. Whilst it is well established that consultation must take place at a formative stage, the Court of Appeal confirmed that "what matters is that the employer still has an open mind" and the "employee can realistically still influence the decision".

This ruling provides clarity and flexibility for employers, allowing them to tailor their redundancy processes provided overall fair and reasonable, and with no blanket rule that all employees in an impacted area need to be consulted.

Haycocks v ADP RPO UK Ltd [2024] EWCA Civ 1291
