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Insights

UNLAWFUL DEDUCTIONS BACKSTOP, RELIGIOUS BELIEF DISMISSALS, PLUS A NEWS ROUND-UP

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SUMMARY

Our employment law update for February sees new cases on the two-year backstop on compensation in unlawful deductions cases and a Court of Appeal decision on religious belief discrimination relating to social media posts. We also have a general news round-up including new ONS data on hybrid working, a new expert panel to report on neurodivergency inclusion in the workplace, and the introduction of the LGB Alliance Business Forum.

TWO-YEAR LIMITATION ON UNLAWFUL DEDUCTIONS AWARDS IS UNLAWFUL

Most of you may be familiar with the two-year time limitation on retrospective compensation in unlawful deductions cases. This was introduced by a set of 2014 Regulations which state that no matter how far back in time the compensation award actually goes, it stops at two years. It is sometimes known as the two-year backstop.

The limitation was highlighted in the 2023 case of *Police Service of Northern Ireland v Agnew*, as Northern Ireland is the only part of the UK where the two-year backstop does not apply. *Agnew* was a case involving around 3,380 police officers and about **£30-£40m** in compensation. In the rest of the UK the compensation level would not have been possible because of the two-year backstop.

But is the backstop lawful?

No, said the tribunal, in a case mostly concerned with employment status. The individuals were drivers for a private hire taxi company, and it was held that the respondent taxi company exercised too much control over the individuals, including imposing penalties for refusing work, for them to be considered as genuinely self-employed.

However, in an unexpected development, the tribunal also held that the two-year backstop was unlawful, as the way in which it has been implemented is beyond the authority of the Regulations which brought it into force.

In a “legal” constitutional law decision, the tribunal held that the two-year backstop was only intended to apply to unlawful deductions of basic EU paid holiday, not any other kind of unlawful deduction. The UK Govt Secretary of State could enforce a backstop through Regulations, but the authority of the 2014 Regulations were limited to rights of basic holiday entitlement derived from EU law.

However, in practice, the limitation of the two-year backstop (for EU derived holiday entitlement) had not been followed. The two-year backstop had/has been applied to all unlawful deductions claims, including those involving entitlements under purely domestic law, such as salary supplements, contractual commission payments and contractual holiday pay outside basic EU entitlement. In the tribunal’s view, only primary legislation (an act of parliament) could achieve this and enforce the two-year backstop across the board. The 2014 Regulations were enacted for a specific purpose but had been applied too widely. This makes them unlawful and, to use a legalistic term, *ultra vires*.

Although the tribunal expects this finding to be appealed, and the position regarding the two-year backstop will not change yet, if the limit were ultimately removed it could be a substantial concern to employers, who might face claims for retrospective holiday pay (and other forms of pay) going way beyond two years. This could lead to:

- claims where the two-year limit had been applied being re-opened for additional compensation; and
- new claims being brought, demanding retrospective compensation from the date of the first non-payment.
- both types of claims might include an application to adjourn any remedy hearing pending the outcome of the appeal(s) in relation to this decision.

WHY THIS MATTERS

The potential loss of an important limitation on awards will always be important to employers. The potential exposure to compensation involved in *Agnew* is enough to intimidate any employer.

The big test will be how the decision fares on appeal, so watch this space.

Afshar v Addison Lee Limited

DISMISSAL FOR “OFFENSIVE” SOCIAL MEDIA POSTS EXPRESSING RELIGIOUS BELIEF IS DISCRIMINATORY

This Court of Appeal decision relates to an employee with strong religious beliefs posting "offensive" comments contrary to their employer's policies on social media.

The claimant is a Christian who worked as a pastoral administrator and work experience manager at the respondent school. In 2018, the respondent's Head Teacher received an email complaining about Facebook posts made by the claimant which were described as communicating "homophobic and prejudiced views".

Her posts, partly her own and partly forwarding others of a similar nature, related to sex and relationship education in schools and reflected the claimant's strong beliefs relating to same-sex marriage/relationships and transgender issues. They included language such as "***THEY ARE BRAINWASHING OUR CHILDREN!*** ", **"….children will be taught that all relationships are equally valid and 'normal'"** and "**the LBGT crowd…….are destroying the minds of normal children by promoting mental illness**".

The posts were both potentially offensive and contrary to the respondent's policies on inclusion and tolerance. Following a disciplinary process, the claimant was summarily dismissed for gross misconduct.

The claimant brought tribunal claims for direct discrimination and harassment because of her religious belief. The tribunal rejected her claims on the basis that the claimant's dismissal was not related to her religious belief, it was based on the respondent's concerns regarding its reputation. The respondent had legitimate reputational concerns and might suffer damage because of the posts, and tribunal seemed to believe that anyone holding the client's beliefs and expressing them in the way she had was a threat to the respondent's reputation. Summary dismissal was an appropriate sanction. The claimant appealed.

The Employment Appeal Tribunal (EAT) took a different view. In particular, the EAT held that the tribunal had been too willing to interpret the claimant's views through the "prism" of the school's policies, and in particular had not carried out any examination of whether the posts were a manifestation of the claimant's religious beliefs. The EAT believed:

- that there could be a close or direct nexus/connection between the offending posts and her underlying Christian beliefs;
- there needed to be more analysis of the alleged reach, impact and reputational damage of the posts; and
- there also needed to be more analysis of whether a summary dismissal was a proportionate response to the claimant's posts. Could there have been a lesser sanction?

The case then came before the Court of Appeal, which ultimately concluded that the school's decision summarily to dismiss the claimant was discriminatory because of her religious belief.

In arriving at that decision, they weighed up the facts to assess the proportionality of the school's decision. They considered the factors set out by the EAT in its 2023 judgment, including the audience, content and tone of the statements, their potential to cause reputational damage, and the nature of the employer's business.

In legal terms the Court of Appeal considered the following:

- There is no objective justification test for direct discrimination except in cases of age discrimination. The Court of Appeal held that, in cases of direct discrimination involving expression of religious or philosophical belief, the Equality Act 2010 (EqA) must be interpreted in accordance with the European Convention on Human Rights (ECHR). This includes the objective justification test in Article 9(2) of the ECHR, which deals with freedom of religious belief and the right to express such beliefs. Article 9(1) permits the holding of (virtually) any religious or philosophical belief but under Article 9(2), which deals with expressing such beliefs, the individual is subject to limitations. Essentially the expression must not be unlawful and must not threaten the protection of the rights and freedoms of others. This is a high bar, and Court of Appeal clearly felt the claimant was nowhere near it;

- Direct discrimination in religious/philosophical belief cases can be justified and is different from other protected characteristics. It requires a more flexible approach. It is an individual being discriminated against because of something they have done, rather than what they are; and

- The posts unquestionably used offensive language but, taking all the circumstances into account, the respondent's decision to dismiss for gross misconduct was not objectively justified. Even if there had been a legitimate aim, the sanction of a gross misconduct dismissal was disproportionate, and a reduced sanction should have been considered.

In terms of more practical points, which focused on why dismissal was not a proportionate response, the Court of Appeal held that:

- no-one would believe the claimant's posts represented the respondent's views. The posts were on her personal Facebook account, had a reach of around 100 friends, and were posted under a name (the claimant's maiden name) not used at work. There was no reference to the school, and in fact the post was "inspired" by a different school. There was obviously one person who had identified her individual, the person who reported her to the Head Teacher, but there was no evidence others recognised who she was;

- the posts did not intend to incite hatred for gay or trans people. The Court noted that the posts were "*hyperbolically expressed*" and "*unquestionably used offensive language*" but the accusations of "child abuse" and "mental illness" were unlikely to be taken literally, at least in the context of what the claimant was posting and re-posting;

- The posts were made outside work on a private Facebook account – the outcome may have been different if the posts had been more public, and could be interpreted as being connected with the respondent. The nature of the account and the limited 100-person reach was critical;
- Partly as a result of the above, there was no evidence that the respondent's reputation had been damaged. The posts may have been offensive to some, but this was within the claimant's rights under Article 9(2);
- The claimant said she would not express her views or exhibit any prejudice towards gay or trans people in the work environment. There was no evidence she would do so, and no evidence on this featured in the dismissal letter;
- The court accepted that the claimant would not have let her views influence her work – in addition she had not repeated her views at work or displayed discriminatory attitudes to pupils; and
- There had been no complaints about the claimant in her six years working at the respondent.

The one question that seemed to be left open, although this was accepted by the EAT, was whether the posts in question were a bona-fide manifestation of religious belief, as opposed to political/other comment. The posts were in response to government consultation on schools and it seems not to have been questioned that, although the content of the posts may have derived from the claimant's religious belief, they were not a manifestation of it.

WHY THIS MATTERS

Following on from this decision, employers should be cautious of disciplining employees for social media posts (or similar statements) when there may be a religious or philosophical belief element. This is even the case when the posts might be offensive and where they conflict with the employer's DEI/social media policies. This decision provides guidance in assessing what kind of posts/social media activity might be actionable by the employer.

As the bar for what constitutes "offensive" is high, the focus might be more whether the posts have any connection with the employer, whether they represent the employer, proving damage to the employer or its reputation, and the type of forum/reach on which the posts are made.

Employers should also ensure that, if there is any disciplinary action/dismissal, it is a proportionate response to the conduct in question.

Higgs -v- Farmor's School

NEWS ROUND UP

HYBRID WORKING STILL VERY POPULAR, ESPECIALLY IN LONDON

Today's percentages are all as at January 2025, and the figures are from the ONS.

Although fully remote work is on the decline, with a drop from 38% in June 2020 to 16% now, hybrid working is still proving popular. There has been a reduction with hybrid workers making up 31% of workers in November 2023, but down to 25% now.

Counter-intuitively perhaps, the most popular day to work from home is not Monday or Friday, it is Tuesday, with the figures for favourite WFH days being 58% choosing Monday, 67% Tuesday, 64% Wednesday, 63% Thursday and 65% Friday. The choice of Monday as the most popular day to come into the office is surprising.

The number of workers who commuted to their place of work reached a post-pandemic peak of 60% in March 2022, but this too has reduced, and the number of commuters is at 41%.

The figures also feature regional variations. London and the South-East seem very keen on hybrid working, at 35% and 30% respectively, whereas the East Midlands and Wales come in at 22% and 21%. This is possibly explained by the concentration of financial and professional services roles (AKA – "laptop jobs") in London, with lower concentrations in other parts of the UK.

However, the main message from the data is that hybrid working doesn't seem to be going anywhere, and it may be the case that the way in which the pandemic completely changed working patterns is here to stay.

DEPARTMENT FOR WORK AND PENSIONS (DWP) LAUNCHES NEW NEURODIVERGENCY PANEL

The DWP has launched a new expert panel to improve employment opportunities for neurodiverse people.

The goal is to create more neurodiverse inclusive workplaces and generally improve job prospects for neurodiverse people. The panel will advise the government regarding neurodiverse individuals in the workforce.

Data shows that, while 54.7% of disabled people are currently in employment, the figure reduces to 31% when applied to neurodivergent conditions such as autism. The disability inactivity rate was 41.7% in the third quarter of 2024, compared to 14.7% for non-disabled people. These disparities highlight the need for workplace support and inclusion. The panel, headed by Professor Amanda Kirby, will make recommendations to address these disparities and promote neuroinclusive practices.

The panel will also focus on identifying actions employers can take to create a more inclusive work environment and remove barriers for neurodivergent individuals. The government will work closely

with charities, disabled people and people with health conditions. The panel's recommendations are expected this summer.

LAUNCH OF THE LGB ALLIANCE BUSINESS FORUM

The LGB Alliance Business Forum has been launched by the LGB Alliance to address concerns that DEI initiatives have been adversely affected by the promotion of certain ideologies. This is a sensitive area but the forum, comprised of senior lesbian, gay, and bisexual executives, aims to work with business leaders to re-establish fair workplace policies and protect the rights of LGB workers.

Its programme aims to appoint a representative in every UK business employing 250 or more people.

The LGB Alliance claims that some DEI initiatives have misinterpreted the law and created a difficult work environment for LGB employees and those who object to certain gender identity ideologies.

The Business Forum argues that these initiatives might (for example) have led to the replacement of women's facilities with gender-neutral ones, compelled employees to use certain pronouns, and resulted in bullying and dismissal of employees who express gender critical beliefs in biological sex.

The Business Forum seeks to promote freedom of speech and conscience in the workplace, while protecting the rights of all LGB employees. The group plans to share best practices and knowledge with business leaders and HR departments to highlight divisive and homophobic initiatives.

This is potentially a very powerful group and, although working in potentially difficult and divisive areas, may exercise an equally powerful effect in the workplace.

RELATED PRACTICE AREAS

- Employment & Labor

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