



## Employment Law Watch – December 2020

Welcome to our monthly newsletter, with a summary of the latest news and developments in UK employment law.

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### Case law updates.

**Collective redundancy consultation:** Collective redundancy consultation: The European Court of Justice (ECJ) has ruled on the reference period and threshold numbers required for the Collective Redundancies Directive, and has concluded that where the threshold number of dismissals is met at any point across the relevant reference period, then dismissals occurring both before and after that point are subject to collective consultation rules. This raises questions as to whether section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), which applies the Directive in the UK (and which excludes the need to count employees whose proposed dismissal consultation has started) is compatible with the Directive. In the absence of amendments to TULRCA to clarify the situation, employers planning redundancies will need to have this case in mind, with an understanding of past redundancies as well as anticipated ones, when assessing whether the relevant thresholds for collective consultation are met. [*UQ v. Marclean Technologies* - NB: no English transcript is currently available]

**Discrimination:** The Court of Appeal has upheld the 'cost plus' basis for seeking to justify indirect discrimination, i.e., cost savings alone cannot be a legitimate aim and will rarely succeed as a defence, although it may be a factor where there is 'something else' (including where an employer is subject to financial constraints and is required to reduce its costs). Although not changing established principles, this case acts as a reminder that cost in itself should not be relied upon to rationalise potentially discriminatory practices. Incidentally the court also said that the phrase 'cost plus' should be avoided as inelegant. [*Heskett v. Secretary of State for Justice*]

**Health and safety detriments:** Following a judicial review, the High Court has held that the UK failed to properly implement the EU Health and Safety Framework Directive in the Employment Rights Act 1996 when only providing protection against detriment on health and safety grounds to employees and not also to workers. The Independent Workers' Union of Great Britain, which initiated the proceedings, is calling for the government to urgently amend UK legislation to reflect this decision, which would significantly expand the scope of protection at a time when health and safety is particularly pertinent. [*IWUGB v. DWP*]

**Settlement agreement – COT3:** Where arguments are being made to set aside a COT3 settlement due to misrepresentation, it is permissible for the tribunal to consider without prejudice communications. [*Cole v. Elders*]

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**Summary termination:** A firm was entitled to rely on a self-employed stockbroker's repudiatory breach of contract to summarily terminate their relationship, notwithstanding the firm also having committed a repudiatory breach. [[Palmeri v. Charles Stanley & Co](#)]

**Tribunal hearings:** An appeal against a decision to hold a merits hearing in person rather than remotely during the pandemic has been dismissed, reiterating the strong case management discretion held by judges. [[Omooba v. Michael Garrett Associates](#)]

**Tribunal procedure – applications to amend pleadings:** The Employment Appeals Tribunal has provided detailed guidance on the procedure to be followed when considering applications to amend, including how arguments in support of such an application should be approached, the matters to consider before such an application is made, and the importance of showing the consequences of the amendment being refused. This also reminds us that the tribunal has wide case management powers, and the appellate courts will seldom interfere. [[Vaughan v. Modality Partnership](#)]

**Whistleblowing:** The Court of Appeal has upheld the principle that multiple separate communications taken together could amount to a protected disclosure even if none of them, taken separately, would do so. Whether it is appropriate to take this approach is a matter of common sense and fact dependent, and it is not necessarily an error for the tribunal to fail to consider the composite approach. In the present case, the claimant failed to clarify which of his 37 communications should be grouped together, and the specific protected disclosure which arose from that combination. [[Simpson v. Cantor Fitzgerald Europe](#)]

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## Law reform and legislative developments.

**ACAS early conciliation:** With effect from 1 December 2020, there is a standard six-week early conciliation period in employment tribunal claims, the timeframe having been extended from a month.

**Brexit:** The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, which ends free movement of people under retained EU law from 11pm on 31 December 2021, is now enacted.

**Public sector exit payments:** With effect from 4 November 2020, there is a £95,000 cap on exit payments in the public sector – Restriction of Public Sector Exit Payments Regulations 2020 (SI 2020/1122).

**Transactions:** The government has introduced the National Security and Investment Bill 2019-21 (see [press release](#)), which, if passed, will broaden the government's powers to intervene in transactions on the grounds of national security.

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## COVID-19 update.

**Coronavirus Job Retention Scheme (CJRS):** The CJRS has been extended, UK-wide, until 31 March 2021 (and not until December 2020 as initially announced) and we now have a Treasury Direction and guidance on the scheme's operation to the end of January 2021. The extended scheme largely follows the same principles and rules that applied previously (save for some adjustments in dates), but the following key points should be noted:

There is no longer a minimum furlough period, nor a cap on the number of employees who can be claimed for.

- **The grant:** The grant will cover 80 per cent of an employee's salary for hours not worked, up to a cap of £2,500 per month. The employer will be responsible for paying employer NICs and pension contributions, as well as paying for any hours worked. These contribution levels are likely to form part of January's review and so may change next year.

- **Publication of claimants:** From December 2020, HMRC will publish the names of businesses claiming under the scheme, along with a 'reasonable indication' of the amount claimed (by reference to a financial band). The rationale behind this is to help with the prevention of fraud. The only exception to publication is where the employer can evidence a serious risk of violence or intimidation to certain individuals, or any individual living with them.
- **No claims for notice:** Claims cannot be made for any employee serving contractual or statutory notice (including of resignation or retirement) between 1 December 2020 and 31 January 2021. (NB: this date may get extended when the guidance for February 2021 onwards is released.)
- **Claim deadlines:** There are tight deadlines around making a claim for a grant, although the guidance contains some detail on what counts as a 'reasonable excuse' for missing it.
- **Calculation of a week's pay:** The regulations introduced in the summer to ensure that a 'week's pay' for statutory calculation purposes is based on normal pay (and not reduced furlough pay) have been amended to reflect the CJRS extension, and now run to 31 March 2021.

**Job Retention Bonus (JRB):** As a result of the CJRS extension, the JRB (which had been due to be paid in February 2021 for employers who retained staff) will now not go ahead. The government has said that an incentive plan will be introduced at the relevant time.

**Job Support Scheme (JSS):** As the CJRS has been extended, the JSS, which was set to replace it, has now been postponed and all previously published guidance on the scheme has been withdrawn.

**Paying CJRS grants back:** The government has issued [guidance](#) on how employers can repay grants if they have overclaimed, do not need the grant, or wish to repay on a voluntary basis. Payments can either be corrected in future claims or, once the employer has obtained a payment reference number, be made directly to HMRC. Failure to repay an overpayment risks penalties being applied, and HMRC has published [guidance](#) on how penalties are worked out where businesses have wrongly claimed, or have been overpaid, grants through the various financial support schemes.

**Support for businesses:** This [webpage](#) details all the various support schemes available for businesses, including new local restrictions grants available for businesses affected by the latest lockdown and restrictions.

**Working safely:** The 'work from home where possible' message remains notwithstanding a return to the tier system from 2 December. The [guidance for clinically extremely vulnerable workers](#) and the various [workplace-specific guidance](#) notes on working safely during the pandemic have been updated to reflect this. Clinically extremely vulnerable employees in tier 3 areas who are concerned about going into work should discuss this with their employer, and the guidance reiterates that there is an option to furlough these individuals, who may also be eligible for SSP. The guidance does not rule out specific shielding measures in the worst affected tier 3 areas, but this would be a decision for the future based on advice from the chief medical officer.

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## Other news

**2022 public holidays:** It has been announced that there will be an extra bank holiday for the Platinum Jubilee in 2022. The late May bank holiday will be moved to Thursday, 2 June (from Monday, 30 May), and there will be an additional bank holiday on Friday, 3 June. Something to look forward to!

**Discrimination – gender identity:** The Supreme Court has granted permission to appeal a case about whether the Home Office should issue gender neutral passports.

**Funding for employment:** In his spending review, the chancellor announced significant public spending on supporting employment, including investment in the 'Plan for Jobs' announced earlier in the year, supporting those out of work and improvement of skills.

**Gender pay gap:** An annual survey by the Office for National Statistics has found that the gender pay gap has more than halved in the past two decades, with a woman working full-time now being paid, on average, 7.4 per cent less than her male counterpart, a fall from 9 per cent the year before. Among full-time workers under the age of 40, the pay gap is now close to zero. The fall has been attributed in part to a rise in women moving into the highest

tiers of management, where pay is greater.

**Immigration:** The new points-based system for skilled workers opens for applications from 1 December 2020.

**Minimum wages:**

- **National minimum wage:** In the spending review, the chancellor confirmed that the following national minimum wage rates will apply from April 2021:
  - Aged 21-22: £8.36 (up from £8.20)
  - Aged 18-20: £6.56 (up from £6.45)
  - Aged 16-17: £4.62 (up from £4.55)
  - Apprentices: £4.30 (up from £4.15)
- **Living wage:** The chancellor also confirmed that the living wage rate would be increased to £8.91 and be extended to 23 and 24 year olds, having previously only applied to those aged 25 and over.
- **Real living wage:** Although a recommended rather than legal wage rate, the real living wage is voluntarily paid by many employers as a minimum wage rate. The rate is increasing to £9.50 (£10.85 in London).

**Public sector pay:** With the exception of the lowest paid and NHS workers, public sector workers will be subject to a pay freeze in 2021/22.

**Unemployment:** Unsurprisingly, figures continue to show an increase in unemployment. The rate now stands at 4.8 per cent and is predicted to reach 7.5 per cent by spring 2021.

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## Contacts

If you have questions or would like additional information on the material covered in this newsletter, please contact one of the authors – listed below – or the Reed Smith lawyer with whom you regularly work.



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