KIPPEN CAMPBELL LLP

EMPLOYMENT LAW BULLETIN

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EMPLOYMENT LAW UPDATE

1. Flexible working to become a day one of employment right

The Flexible Working (Amendment) Regulations (SI 2023/1328) eliminate the necessity for employees to possess a minimum of 26 weeks' service to qualify for submitting a flexible working request, and these regulations will be effective from 6 April 2024.

The Employment Relations (Flexible Working) Act 2023 received Royal Assent on 20 July 2023. This Act introduces various alterations to the right to request flexible working, notably allowing employees to make two requests (instead of one) within any 12-month period. Additionally, employers must respond to requests within two months, a reduction from the previous three-month timeframe. Commencement regulations will be established to fully implement the Act, accompanied by an updated Acas statutory Code of Practice.

Upon the Act's passage, the Government declared its commitment to make the right to request flexible working a "day one" entitlement through secondary legislation. The Flexible Working (Amendment) Regulations 2023 were presented to Parliament on 11 December 2023 and will be in effect from 6 April 2024. These regulations annul regulation 3 of the Flexible Working Regulations 2014, which mandated a continuous employment period of at least 26 weeks for an employee to be eligible to make a flexible working request. Consequently, as of 6 April 2024, no prior service requirement will be necessary to submit a flexible working request. These regulations apply to England, Scotland, and Wales.

This is an important change and employers should be ready for employees making applications from 6th April 2024 even if, in some cases, they have only just commenced employment.

2. The Employment Tribunal considered whether a university professor had been directly discriminated against, harassed and victimised for her gender-critical beliefs.

Gender-critical beliefs include the belief that sex is biological and immutable, people cannot change their sex and sex is distinct from gender-identity.

The Employment Tribunal has affirmed the claims made by a former professor against her previous employer, the Open University. The allegations included direct discrimination, harassment, victimisation, and constructive dismissal based on her gender-critical beliefs. Her perspectives, such as asserting that a person cannot alter their biological sex and emphasising the distinction between sex and gender identity, met the *Grainger* criteria and were protected under the Equality Act 2010.

The Grainger criteria

The Grainger criteria are important background for all three cases. There are five criteria such a belief must meet:

(i) The belief must be genuinely held.

(ii) It must be a belief and not, [simply], an opinion or viewpoint based on the present state of information available.

(iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour.

(iv) It must attain a certain level of cogency, seriousness, cohesion and importance.

(v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others

Professor Phoenix expressed her gender-critical views by co-signing a letter to The Sunday Times in 2019, leading to harassment and direct discrimination by colleagues. In one instance, the Deputy Head of Department likened her to "the racist uncle at the Christmas dinner table."

In 2021, Professor Phoenix and others established the Gender Critical Research Network (GCRN), an academic research group focusing on sex, gender, and sexualities from a gender-critical perspective. An open letter, signed by 368 colleagues, opposed the GCRN, calling for its closure due to perceived hostility and harm to the trans community. Professor Phoenix filed a grievance of bullying and harassment, citing false allegations of being hostile to trans rights, damage to her professional reputation, and mental health issues, including death threats. Six months after GCRN's launch, she

resigned following a statement from the Vice Chancellor that failed to condemn the campaign against her.

The Tribunal determined that Professor Phoenix had the right to express her beliefs by initiating and participating in GCRN. The publication of the open letter by colleagues, encouraging a "pile on" from others, was deemed harassment based on those beliefs. Several other instances of similar harassment were also upheld. Although the university did not disaffiliate GCRN, it failed to adequately protect Professor Phoenix from harm, fearing support for gender-critical beliefs. Specifically, it neglected to address her grievance while still employed and refused to remove certain online statements. This failure to act constituted harassment, and the decision to terminate the grievance process after Professor Phoenix resigned amounted to post-employment victimisation. The university's breaches of implied terms of trust and confidence and the duty to provide a suitable working environment resulted in constructive dismissal.

This case emphasises the importance for employers to be aware that employees may have legally protected beliefs like this and to keep abreast of developments in the law to avoid this sort of, usually, expensive and long running, highly publicised case which might follow a failure by the employer to act in accordance with the law. If you have issues such as this developing in the workplace please take advice at the earliest possible stage.

3. **Is a lengthy delay any longer enough to destroy a case of constructive dismissal? Not necessarily say the EAT. All the relevant features of the case must be considered, not just the length of any delay.**

The Employment Appeal Tribunal, (EAT) has held that a decision to affirm the employment contract in a constructive dismissal claim needs to address all potentially relevant features rather than relying solely on the fact of delay.

At one time in constructive dismissal a delay in resigning could be enough to lead to an unsuccessful claim.

Affirmation is the technical term for an employee indicating that they intend to continue with their employment contract rather than exercising the right to resign and claim constructive dismissal.

The claimant had worked as an academic at a university for 40 years. Between January 2019 and June 2020, he raised concerns with his employer about how it handled various grievance-related issues. In July 2020 the claimant contacted solicitors and negotiations were made between his solicitor and the university. The claimant identified the failure of the negotiations on 7 September 2020 as the last straw and resigned.

He claimed constructive dismissal. The Employment Tribunal found that the claimant had realised at the end of June 2020 that the university would not help him and that he had affirmed his contract by waiting until 7 September

2020 to resign. The claimant appealed, and the only issue before the EAT was whether or not he had affirmed the contract.

The EAT considered the factors in play from the end of June 2020 to 7 September 2020. It acknowledged that the claimant's 40 years of service meant that resigning might have involved particular upheaval and distress, potentially taking him some time to decide. In the context that the claimant was a university academic the EAT also looked at the work he had been doing over the summer holiday period and whether he was doing work of such a nature or significance that continuing to do work itself constituted affirmation. It also considered the point that the claimant hoped that the negotiations over the summer would resolve his concerns.

The EAT held that the tribunal had relied too heavily on the pure fact of delay with insufficient consideration of these other relevant factors. The appeal was upheld and remitted back to the same tribunal.

This case emphasises the fact that employees may well have a longer time now to decide whether to resign and claim constructive dismissal than once was the case.

4. **In the case of *Holbrook v Cosgrove KC and others* [2023] EAT 168, the Employment Appeal Tribunal (EAT) affirmed that extending the time for filing a belief discrimination claim, submitted five months late by an experienced barrister, was not deemed just and equitable.**

The EAT concluded that a tribunal rightly denied an extension of time for the claimant to present his belief discrimination claim. The claimant, a barrister with over 30 years of experience, tweeted in January 2021 about a schoolgirl repeatedly sent home due to her Afro hairstyle, gaining media attention. His colleagues perceived the tweet as offensive and racist, resulting in his expulsion from chambers. The claimant, asserting a belief in social conservatism, filed a belief discrimination claim submitted five months beyond the deadline.

The claimant contended that the tribunal should extend the time on a "just and equitable" basis, arguing he believed the case *Forstater v CGD Europe and others* ET/2200909/2019 (which initially held that Ms Forstater's gender critical belief wasn't a protected belief) suggested his claim's lack of success.

He claimed to have read the reversed EAT decision in *Forstater v CGD Europe and others* UKEAT/010520 two months after publication due to preoccupation with Bar Standard Board (BSB) proceedings.

The Employment Tribunal rejected the claim, deeming it unreasonable for the claimant to rely on a non-binding authority and to delay reading the EAT decision. The claimant appealed.

The EAT upheld the tribunal's decision, stating there was "no real uncertainty as to the legal position." Given Forstater's tribunal judgment was a first-instance decision and the EAT decision was based on established principles, the claimant's prioritisation of BSB proceedings wasn't a valid reason for missing time limits. The Tribunal's assessment of prejudice to the claimant was found without error.

Belief based tribunal claims are now becoming more and more common and employers must be aware of the possibility of such claims arising in their workplace.

Fortunately, for the employers in this case the Tribunal did not extend the time limit for the barrister claimant.

It is also a good reminder to Tribunal litigants that all cases are published online and available for public scrutiny. The claimant here, given his profession, may well rue the day that he did decide to litigate, given the outcome and reasons for same!

5. Pensions – gender pay gap revealed

Research has unveiled a significant disparity between UK women's and men's retirement savings. On average, women would need to engage in full-time employment for an additional 19 years to attain a pension pot equivalent to that of men. The study reveals that women retiring at 67 currently possess an average pension savings of £69,000, whereas men have £205,000.

The report, conducted by NOW: Pensions and the Pensions Policy Institute, underscores the need for girls to save at three to match the retirement savings of their male counterparts, especially considering that pension auto-enrolment typically begins at 22. Various factors contribute to this gender pension gap, including caring responsibilities, childcare expenses, career breaks, and lower income.

In response to these findings, NOW: Pensions advocates for governmental action to eliminate the £10,000-a-year earnings threshold for pensions auto-enrolment. This threshold disproportionately affects women working part-time, holding multiple jobs, or working as freelancers. Additionally, the organisation calls for the commencement of auto-enrolment at age 18 and urges the government to introduce a supplementary contribution for individuals who take time off work to care for children or other family members.

6. The Council of the EU publishes AI Act

The most recent version of the Artificial Intelligence Act has been released by the Council of the European Union, aiming for approval from the European Parliament, which is expected to occur in April 2024. Council approval was granted on 2 February, 2024, following a political agreement reached in December 2023 after an extensive fifth trilogue meeting. This updated text incorporates an analysis of changes made since the previous published

versions of the Act. Notable alterations encompass the final definition of an AI system, prerequisites for a fundamental rights impact assessment, restrictions on real-time biometric identification, and regulations for general-purpose AI systems. The European Parliament will review the latest text before a final vote by Members of the European Parliament (MEPs) scheduled for 10 April 2024. Upon approval, the Act is set to come into effect later in the year following its publication in the Official Journal

7. Fixed fee of £55 is proposed for Employment Tribunal claims and EAT appeals

The Ministry of Justice (MoJ) has initiated a consultation on the potential reinstatement of fees for Employment Tribunal claims and appeals to the Employment Appeal Tribunal (EAT). The proposed structure involves a fixed fee of £55 for both claims and appeals, accompanied by a fee remission program for individuals meeting specific financial criteria.

Commencing on 29 January 2024, the MoJ's consultation revisits the concept of fees, previously introduced in 2013 but invalidated by the Supreme Court in 2017 due to its disproportionate impact on access to justice *R (Unison) v Lord Chancellor* [2017] UKSC 51. The current proposal suggests a modest £55 issue fee for all Employment Tribunal claims, excluding those related to payments from the National Insurance Fund (typically arising from employer insolvency), which would be exempt. This fee remains fixed at £55, irrespective of the number of complaints or claimants on the form. Unlike the 2013 scheme, no separate hearing fee is suggested; the £55 issue fee covers the entire claims process. For EAT appeals, a proposed fee of £55 applies to each judgment, decision, direction, or order being appealed.

The consultation maintains the authority of tribunals to order a respondent to reimburse a successful claimant's fees through a costs award (rule 76(4), ET Rules).

The MoJ asserts that a £55 fee is reasonable and generally affordable. Claimants falling below certain income and savings thresholds can apply for fee remission for the Employment Tribunal and EAT.

In contrast to the 2013 fees regime, where fees ranged from £160 to £950, the Government acknowledges that the previous structure did not strike the right balance between funding the tribunal system and safeguarding access to justice. The proposed reinstatement of fees aims for consistency with other civil courts and tribunals while generating funds (estimated at £1.3m–£1.7m annually) to invest in Acas dispute resolution, reducing costs to taxpayers.

The government anticipates tribunal fees may incentivise parties to resolve disputes through Acas early conciliation.

The consultation period spans eight weeks, concluding on 25 March 2024.

Many commentators believe that this, in contrast to the previous regime, is a reasonable proposal. The introduction of fees in 2013 was seen by many employers as a very positive thing as it instantly reduced the amount of tribunal claims. It remains to be seen whether the considerably reduced fee proposed will have the same effect.

Kind regards

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