

<https://darrennewman.org/>

Employment Law for Schools

24 June 2021

Darren Newman

Restriction of Public Sector Exit Payments Regulations 2020

- Came into force 4 November 2020
- Abandoned due to 'unintended consequences' 12 February 2021
- Regulations formally revoked from 19 March 2021

What comes next?

- Tweaking the Regs or back to the drawing board?
 - “For the avoidance of doubt, it is still vital that exit payments deliver value for the taxpayer and employers should always consider whether exit payments are fair and proportionate. HM Treasury will bring forward proposals at pace to tackle unjustified exit payments”
- Expect new Regulations ‘this year’ – but not clear what they will say. New consultation needed?
- MHCLG consultation on local government redundancy payments will need to be re-run.

What happened to the Employment Bill 2021?

- Nothing in the Queen's speech
- Commitments from Conservative manifesto 2019:
 - Redundancy protection for new parents
 - Flexible working
 - Carer's leave
 - Neo-natal leave
- Policies left over from the May premiership
 - Taylor review – gig economy, employment status, minimum wage
 - Ethnic pay gap monitoring
- Brexit – rules continue as before unless changed, and Government seems to have no plans to change anything

Flexible Working

- Government denies that all workers will be given a right to work from home
- But Conservative manifesto says flexible working will be 'default' unless employer shows good reason to refuse
- We may also see 'reasonable adjustment claims for flexible working to accommodate long covid
- In all cases, key will be business need – given increased acceptance of remote working as an option

Uber and others v Aslam and others

Supreme Court, 19 Feb 2021

- Uber Drivers are workers
- Tribunal right to ignore the provisions of the contract – start with the purpose of the statute
- Should these people be protected?
- Anything in the contract designed to avoid liability should be ignored
- Key issue was the control the employer exercised over the drivers
- That was what put them in a position of subjugation and dependence
- Would the same approach apply to “employee” status or is it confined to “workers”?

Hayford & Biddle v P&O Ferries

(17 June 2021)

- Ferry workers claim they are not getting their full holiday entitlement under the Merchant Shipping (Hours of Work) Regulations
- Their contractual entitlement was less than the statutory minimum
- But they had extended periods when they were not required to work – but were still paid an annual salary in 12 monthly instalments
- That meant that in reality they were getting the amount of fully paid leave required under the Regulations

Smith v Pimlico Plumbers Ltd

(EAT 17 March 2021)

- Smith established he was a ‘worker’ in the Supreme Court back in 2018
- This is his claim for unpaid holiday pay
- But his claim is out of time because it was brought more than three months after the last failure to pay him
- He argued that King v Sash Windows – meant that he could claim for a continuing failure to provide him with paid leave
- But here, he had taken his leave but not been paid, in King no leave had been taken
- EAT say that makes it different and dismisses the claim

Phoenix Academy Trust v Kilroy

(EAT 30 July 2020)

- Acting principal accused of gross misconduct by new academy owner
- He considers he is being 'forced out' and is summarily dismissed before his written resignation is delivered
- He appeals against decision to clear his name but makes it clear he does not intend to return
- Appeal is successful – and he claims constructive dismissal
- Held: his appeal affirmed the contract – it was a request to continue in his employment
- But breaches of trust and confidence in the conduct and result of the appeal could give a further right to claim constructive dismissal either on their own or alongside earlier breaches

Flatman v Essex County Council (EAT 29 April 2021)

- Learning support assistant required to lift disabled pupil – no training, leading to sickness absence and back pain
- While off sick, Headteacher in contact to give assurances about future welfare and changes to work
- Employee resigns claiming constructive dismissal
- Tribunal finds breach of Manual Handling Regulations 1992 – but no breach of trust and confidence given HT intervention
- EAT say you can't cure the breach – which had occurred before the HT intervened.
- Substitutes finding of unfair dismissal

Sinclair v Trackwork Ltd

(EAT 29 April 2021)

- Employee dismissed with less than two years' service
- Claims it is for health and safety reasons – carrying out the role designated by the employer
- Tribunal finds poor management led to miscommunication about his role – causing friction with employees
- That friction was the reason for dismissal not the activities themselves
- EAT say – can't make that distinction. The friction was the direct result of the activities and could not be separated from them

No jab, no job?

- Can an employer insist on employees proving that they have been vaccinated?
- If Government passes Regulations requiring that for certain sectors, then that will be fine
- If not – why are you considering the rule?
 - full risk assessment
 - taking account of local conditions
- First person in the ET is ‘it’

Health and Safety rights

- Right not to be dismissed or subjected to a detriment for staying away from work if:
- There are circumstances of danger
 - which employee reasonably believes to be serious and imminent
 - will background risk of infection be enough?
- Take account of employer's measures to reduce risk

K v L

(EAT 1 September 2020)

- Teacher charged with possession of indecent images of children
- Decision not to prosecute – not clear who downloaded images to one of the computers in his home
- Employer dismisses because can't exclude the possibility that he was responsible
- EAT says that isn't good enough – employer needed to make a finding on balance of probabilities
- Not enough evidence to give grounds for dismissal based on reputational risk – and that wasn't put to him in disciplinary

Gallacher v Abellio Scotrail

(EAT 11 August 2020)

- Employee told she is being dismissed at her annual appraisal
- Deteriorating relationship led to employer thinking she had lost confidence in her manager
- Not given any warning or chance to improve
- Dismissal held to be fair – employee did not dispute relationship had broken down and was ‘truculent’ in talks with her manager
- Following a normal procedure would have been ‘futile’
- Not a case for employers to rely on!

Mercer v Alternative Future Group Ltd (EAT 2 June 2021)

- Right not to be subjected to a detriment for taking part in union activities 'at an appropriate time'
- Previously held that this excludes activities amounting to industrial action
- Here allegation is that striking employee was disciplined for abandoning a shift
- EAT holds that exclusion of industrial action is a breach of Article 11 of European Convention on Human Rights
- Interprets law to include industrial action
- Does not prevent deduction of pay for work not done

Hammersmith and Fulham v Keable

- Heard by EAT on 12 January 2021
- Was employee unfairly dismissed when he made potentially offensive comments about 'Zionists' in a demonstration not related to work?
- Comment was reported on social media – then played on the news
- Local MP picked up the story, identified him as a Council employee and demanded the Council 'take action'
- Employer dismissed on basis that his conduct brought Council into disrepute

ISS Facility Services NV v Govaerts & Atalian NV (European Court of Justice, 26 March 2020)

- Maintenance manager responsible for three 'lots' under contract with the council
- After a tendering exercise, the contract for two lots was won by one contractor and the third went elsewhere
- ECJ holds that the division of the undertaking into several parts, going to several transferees does not prevent the Directive applying
- National court must determine how the contract is to be split (eg by time / value)
- Employee who is worse off a result is entitled to claim constructive dismissal
- Can this really apply in the UK?

McTear Contracts Ltd v Bennett

(EAT 25 February 2021)

- Local authority had contract with single contractor – split into two on re-tendering
- There were two separate teams – but not clear how their work was divided
- Tribunal finds there was a TUPE transfer – one team went to one contractor and one to another
- EAT rules that it is now necessary to consider whether individual contracts could be split into two, with employees working for both new contractors
- Applied Govaerts – even though this was a service provision change, not based on EU law

Forstater v CGD Europe (EAT 10 June 2021)

- Gender critical beliefs were philosophical beliefs under the Equality Act
- The ‘worthy of respect’ criterion only excludes extreme beliefs (Nazis!)
- Still to be decided – what was the reason she did not have her contract renewed?
- Was that because of her belief (direct discrimination) or because of something else, albeit connected

Omooba v Michael Garret Associates Ltd

(ET 8 February 2021)

- Actor gets lead role in 'The Color Purple' – features her in a same sex relationship
- Historical Facebook post arises in which she condemns homosexual activity on religious grounds – she confirms that is still her view
- Public outcry threatens production – part is withdrawn. Was that discrimination?
- No says the Tribunal. It was not on the grounds of her belief, but a result of the public outcry.

Key Care Support Ltd v Johnson (EAT, 11 June 2021)

- Agency worker sent on assignments where he alleges he was subjected to racial abuse by workers from different agency
- Raises issue with his agency but no evidence that this is followed up or pursued with client or other agency
- Tribunal finds agency was unreasonable in failing to act on the complaint and says that burden of proof had shifted – upholds claim
- EAT say unreasonable conduct not enough. Needs to be ‘something more’ that indicates that conduct might be based on race.
- Case to be reheard by fresh Tribunal



Darren Newman

EMPLOYMENT LAW

Questions?