SLAUGHTER AND MAY/

NEWSLETTER

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# EMPLOYMENT BULLETIN

QUICK LINKS



## EUROPEAN COURT CONFIRMS THAT COLLECTIVE REDUNDANCIES SHOULD BE COUNTED OVER A ROLLING PERIOD

**Summary:** The Court of Justice of the EU (CJEU) has decided that a rolling period should be used to count redundancies in order to determine whether the threshold for collective redundancy consultation under the EU Collective Redundancies Directive has been satisfied over the 90-day period set by the Directive (*Marclean Technologies v UQ*).

**Key practice point:** The requirement for collective consultation with elected employee representatives under UK law (which is derived from the Directive) adopts a forward-looking approach, applying where the employer "proposes" to dismiss as redundant 20 or more redundancies within a period of 90 days or less. Despite this, the CJEU decision that redundancies must be counted both backwards and forwards from an individual dismissal means that employers effecting redundancies in small batches need to take care to ensure that they do not exceed 20 redundancies over 90 days.

**Facts:** An employee working for a Spanish company brought a claim for unfair dismissal, arguing that her dismissal formed one of a number of "covert" redundancies over an eight-week period and the correct collective redundancy procedure had not been followed. The Spanish Court referred the case to the CJEU, questioning whether, under the Directive, the threshold should be calculated retrospectively or prospectively from the date of the dismissal, or whether account should be taken of dismissals taking place at any point within the 90 days.

**Decision:** The CJEU held that, for the purposes of assessing whether an individual dismissal is part of a collective redundancy, the reference period under the Directive must be calculated both prospectively and retrospectively from the date on which the individual dismissal took place. If the threshold number of dismissals is reached at any point across the period, the Directive's collective redundancy rules apply. This was the only method that did not undermine the purpose of the Directive (strengthening worker protection in the event of collective redundancies).

**Analysis/commentary:** The wording of UK law, in referring to "proposed" redundancies, is inconsistent with this decision. However, as the judgment was given during the Brexit transition period it is binding in the UK. Under the terms of the European Union (Withdrawal Agreement) Act 2020, only the Court of Appeal and Supreme Court will be able to depart from existing EU case law. There are clearly practical difficulties for employers in re-opening consultation on redundancies that have already happened. However, where a small number of dismissals occur on regular basis, totalling 20 over a 90-day period, employers will need to comply with collective consultation requirements, as well as the duty to inform the Government by completing form HR1.

## AGE DISCRIMINATORY CHANGES TO SALARY SCALES WERE JUSTIFIED

**Summary:** The Court of Appeal confirmed that changes to salary scales, with the effect that progression would take considerably longer than previously, were indirectly age discriminatory but justified as a proportionate means of achieving a legitimate aim. The


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employer's need to reduce its expenditure, and specifically its staff costs, in order to "balance its books" could constitute a legitimate aim (*Heskett v Secretary of State for Justice*).

**Key practice point:** The decision confirms that the need for an employer to reduce its expenditure in order to meet financial constraints can constitute a legitimate aim for justification of a provision, criterion or practice (PCP) which is potentially indirectly discriminatory. However, proportionality also needs to be established in order to make out a justification defence; a key issue will be whether there were any less discriminatory ways of addressing the financial pressures.

**Facts:** As part of Government policy to limit public sector pay increases, changes were made to the pay grades for probation officers, increasing significantly the time taken to progress up the scale. This disproportionately affected younger employees as their progression was slower than that of older colleagues. One employee claimed that the new pay scheme meant that those under the age of 50 were at a significant disadvantage compared with those over 50. He argued that the employer could not defend the scheme on the basis of the public sector pay constraints because that was a "costs alone" justification, which EU and UK case law has established is an impermissible basis for justifying indirect discrimination.

**Decision:** The Court of Appeal, confirming the decisions of the Employment Tribunal and Employment Appeal Tribunal, found that the indirect discrimination was justified as a proportionate means of achieving a legitimate aim. The employer's need to observe the constraints imposed by the pay freeze was a legitimate aim. On the particular facts of this case, the employer's aims could not simply be described as cost cutting. Its budget for paying its employees had been frozen, so that it was required to reduce the rate of pay progression in order to "live within its means".

The Court also confirmed that it was open to the employer to seek to justify its measures on the basis that they represented a proportionate short-term means of responding to a problem, albeit that in the longer term the employer would need to take steps to eliminate the lengthy pay progression policy. The Court commented that the employer's time for addressing the problem was close to running out.

**Analysis/commentary:** The Court of Appeal's decision should make it a little easier for employers to justify cost-related decisions affecting employees that do not have an equal impact on every age group. However, the distinction between a need to reduce costs and a desire to do so (or to avoid increased costs) is narrow. Employers, particularly in the private sector, may find it difficult to establish that the measures they took were necessary in order to "live within their means" or "balance the books". The need to show that the PCP was a proportionate means of achieving that aim may also present difficulties; the short-term nature of the measures in this case were central to the finding that they were proportionate.

## HIGH COURT FINDS WORKERS ENTITLED TO SAME HEALTH AND SAFETY PROTECTIONS AS EMPLOYEES

**Summary:** The High Court has decided that the UK has failed properly to implement EU health and safety law by confining some protections to "employees". The Court found that protection should extend to the broader category of "workers" (*Independent Workers' Union of Great Britain v Secretary of State for Work and Pensions*).

**Key practice point:** The Government is expected to set out its formal response to the judgment shortly. In the meantime, employers should ensure that they provide the same health and safety protection for employees and workers and be aware that both categories will be protected from detrimental treatment, including where they leave or refuse to attend work due to a reasonable belief that there is a serious and imminent danger.

**Facts:** The Independent Workers' Union, IWGB, who represent gig economy and other workers who are not "employees" under UK law, asked the High Court for a declaration that the UK had failed properly to transpose EU Directives on health and safety into domestic law. In particular, the IWGB was concerned with Section 44 of the Employment Rights Act 1996, which protects employees from suffering a detriment in specific health and safety cases, including absence from work and taking/proposing to take steps to protect themselves or others in the reasonable belief that there is a serious and imminent danger.

**Decision:** The High Court ruled that the UK had not implemented EU law correctly: neither the protection from detriment under Section 44 nor the requirements for employers to provide PPE applied to "workers" as required by the EU Directives. The Court accepted the IWGB's argument that the reference to "workers" in the EU Directives is wider than "employees" and includes any person who performs services for and under the direction of another in return for remuneration. This broad definition includes "workers" as defined under Section 230(b) ERA (known as "limb (b) workers") – those who do not have an employment contract. It was not sufficient that a worker could bring a claim for whistleblowing detriment under the Employment Rights Act 1996, as this part of the legislation requires the worker to have made a protected disclosure.

**Analysis/commentary:** Although workers cannot claim unfair dismissal, as a result of this case they could now make a claim if they were subject to detriment (such as a threat of dismissal) for leaving work because of a lack of adequate PPE, for example. We can also expect this decision to be used in other cases about worker status, such as in relation to TUPE. In *Dewhurst v Revisecatch* last year, an Employment Tribunal made a non-binding decision that the definition of "employee" in TUPE included a limb (b) worker (see our Employment Bulletin December 2019).

## GOVERNMENT CONSULTATION ON RESTRICTING THE USE OF NON-COMPETE CLAUSES

On 4 December 2020, the Government published a consultation paper on measures to restrict post termination non-compete clauses in employment contracts. Two options are discussed: mandatory compensation or a ban. Although the Government looked into non-compete clauses in 2016 and concluded that no action was necessary, the consultation paper refers to Covid-19 having had a profound impact on the labour market. The consultation, which closes on 26 February 2021, is not concerned with confidentiality clauses or intellectual property rights.

**Option 1: Mandatory compensation**

The announcement accompanying the consultation paper suggests that this option, which is the model used by Germany, France and Italy, is the one favoured by the Government. Post termination non-compete clauses in contracts of employment would be enforceable only where the employer provides compensation during the period the employee is prohibited from working for a competitor or starting their own business. The consultation asks for views on:

- The level of compensation – the Government suggests a percentage (60% or more) of employee's average weekly earnings prior to termination.
- Whether other post termination restrictions should also require compensation and whether other contracts (such as consultancy agreements) should be covered.
- A requirement for employers to disclose the exact terms of the non-compete agreement to employees before they enter into the employment relationship.
- Statutory limits on the length of clauses – the consultation notes that Courts tend to enforce non-compete restrictions of no more than 12 months.
- Removal of the flexibility for an employer unilaterally to waive a non-compete clause. This is intended to avoid employers inserting non-compete clauses and then waiving them at termination to avoid paying compensation. Another possibility would be to allow a waiver only within a set period before termination.

**Option 2: Ban all post-termination non-compete clauses in employment contracts**

The Government says it is also interested in exploring options, short of a ban, to limit their enforceability but the paper does not include any specific suggestions.

## HORIZON SCANNING

What key developments in employment should be on your radar?

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| **31 December 2020** | Transitional arrangements under UK-EU withdrawal agreement expected to end unless extended |
| **January 2021** | Review of the Coronavirus Job Retention Scheme extension – employers may be asked to contribute more |
| **31 March 2021** | End of the CJRS extension |
| **6 April 2021** | Extension of off-payroll working rules to private sector – client rather than intermediary will be responsible for determining whether IR35 applies |
| **6 April 2021** | Changes to income tax treatment of some post-employment notice payments on termination |

We are also expecting important case law developments in the following key areas during the coming months:

- **Employment status:** *Uber v Aslam* (Supreme Court: whether drivers are workers for employment protection, minimum wage and working time purposes); *Addison Lee v Lange* (Court of Appeal: whether private hire drivers were workers); *IWGB v CAC* (Court of Appeal: whether couriers are workers for trade union recognition purposes); *Smith v Pimlico Plumbers Ltd* (Employment Appeal Tribunal: claim for arrears of holiday pay following Supreme Court decision on worker status)
- **Discrimination / equal pay:** *Ravisy v Simmons & Simmons* (Court of Appeal: territorial jurisdiction); *Asda Stores v Brierley* (Supreme Court: whether workers in retail stores could compare themselves with those working in distribution depots for equal pay); *Royal Mail Group v Efobi* (Supreme Court: shift of burden of proof); *Page v Lord Chancellor* (Court of Appeal: whether magistrate was discriminated against for expressing faith-based views in media)
- **Trade unions:** *Jet2.com v Denby* (Court of Appeal: refusal of employment)
- **Unfair dismissal:** *Awan v ICTS UK* (Court of Appeal: dismissal while employee entitled to long-term disability benefits)
- **Working time:** *Chief Constable of the Police Service of Northern Ireland v Agnew* (Supreme Court: backdated holiday pay claims); *East of England Ambulance Service v Flowers* (Supreme Court: whether holiday pay must include regular voluntary overtime).

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