SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

QUICK LINKS

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

OFF-PAYROLL WORKING RULES

On 17 October 2022, the Chancellor of the Exchequer announced that the Government will not be going ahead with the majority of the tax measures in its September Growth Plan, including the proposed changes to the off-payroll working rules. The Government had said it would reverse the amendments that were made to the IR35/personal service company tax rules in 2017 and 2021. Those amendments make the end user (client) rather than the intermediary responsible for determining whether the off-payroll rules apply (in other words, whether the working arrangements meet the deemed employment test for tax purposes) and, if they do, to deduct tax and employee National Insurance Contributions through PAYE. The repeal of the amendments would have meant that responsibility for income tax and NICs would have reverted to the contractor. In his emergency statement, the Chancellor announced that the reversal of the amendments will no longer go ahead. For the time being, therefore, the end user remains responsible for determining whether the off-payroll rules apply.

REDUNDANCY SELECTION CRITERION WITHOUT CONSULTATION WAS UNFAIR

Summary: The Employment Appeal Tribunal (EAT) decided that an employee was unfairly dismissed for redundancy where the sole criterion for selection, adopted without prior consultation, was that her fixed-term contract was due to be renewed before that of a colleague. In order to be a fair redundancy procedure, individual consultation must take place at a stage when the employee can influence the outcome (*Mogane v Bradford Teaching Hospitals NHS Foundation Trust*).

Key practice point: The EAT found that because the choice of a "pool of one" led inevitably to the employee's dismissal, the employer should have consulted the employee before deciding on the pool. It is clear that an employer cannot justify a failure to consult individually before a redundancy is finalised by arguing that the employee is the only person who could be made redundant - the employee may say something that could change the employer's mind about dismissal, for example. However, the EAT goes further here in saying that the employer should not have decided on the pool without consultation. Previous case law established that decisions on redundancy pools and selection criteria are matters for the employer and provided the employer "genuinely applies its mind" to the choice of pool, it is difficult for an employee to challenge it. The EAT had previously found, in *Halpin v Sandpiper Books Ltd*, that this principle applied to a pool of one.

The second point to note is the EAT's finding that the redundancy selection pool had to be one which a "reasonable" employer could adopt; the implied trust and confidence term applies to the choice of pool.

Facts: Financial circumstances led to the need for a reduction in staff in the Trust's research unit. The claimant, and another Band 6 nurse, were employed on fixed term contracts. The second nurse had been appointed for the first time on a two-year contract which had been confirmed shortly before the start of the redundancy process. The

claimant had been employed for three years on a series of one-year contracts, the most recent of which was due to expire prior to the expiration of the second nurse's fixed term. The Trust decided that the claimant should be made redundant; the sole reason given was that her contract was coming up for renewal. An Employment Tribunal decided that she had been fairly dismissed for redundancy, finding that where all relevant employees were on short-term contracts it was within the band of reasonable responses for the Trust to take a decision based on which employee had a contract due for renewal at the particular point where there was a diminution in the requirement for employees. The claimant appealed.

Decision: The EAT allowed the appeal and held that the dismissal was unfair. The absence of meaningful consultation at a stage when the employee had the potential to affect the decision was indicative of an unfair process.

Applying the principles in the leading case on collective redundancies, *Williams v Compair Maxam Ltd* (which the EAT regarded as applicable to individual redundancy cases), the EAT found that, in order for consultation to be meaningful and genuine, it ought to take place at the formative stage of a redundancy process; in other words, when the employee had the potential to affect the outcome. The EAT noted that although a tribunal should not interfere with an employer's decision as to the pool, it had to consider not only whether there was a rational explanation for the pool but whether it was a pool that a reasonable employer could adopt in all the circumstances. The requirement, under the implied term of mutual trust and confidence, that an employer will not act arbitrarily between employees applied to a decision on the selection pool.

Once the decision had been made that the employee whose contract was up for renewal should be the person dismissed, it immediately identified a pool of one and made any consultation on the issue of dismissal otiose. The decision on the pool, and as a consequence that the claimant should be dismissed, was complete long before any meetings about her selection or consultations took place. This resulted, in the EAT's view, in an arbitrary choice, related solely to the question of the ending of the fixed-term contract. This was a clear departure from the *Williams* standards. The consultation was not at the stage where the employee could influence the outcome, with the effect that if the consultation which did take place on redeployment was unsuccessful (as it turned out to be), she would be dismissed.

Analysis/commentary: It appears that there were no permanent nurses who could have been in the selection pool, so the question of whether confining the pool to fixed-term employees could have led to less favourable treatment under the Fixed-term Employees Regulations, unless objectively justified, did not arise.

SETTLEMENT AGREEMENT DID NOT PREVENT SUBSEQUENT AGE DISCRIMINATION CLAIM

Summary: The Employment Appeal Tribunal (EAT) held that an employee's age discrimination claim could proceed even though he had signed a settlement agreement referring to age discrimination. The agreement was signed before the employee knew of the existence of a claim (*Bathgate v Technip UK Limited*).

Key practice point: This decision confirms that a settlement agreement can only protect an employer from claims which have been made or raised by the employee at the date of the agreement. One way of reducing the risk of possible future claims may be to include a warranty that the employee has identified to the employer all claims they believe they may have, or to withhold part of the settlement sum until the time limit for the employee to lodge a claim has expired. It is advisable to execute the settlement agreement as near as possible to the termination date, to minimise the risk of claims arising after the agreement is signed. If there is a need to execute the agreement before termination, the employer should consider requiring the employee to enter into a second settlement agreement, to ensure the waiver of any claims that may have arisen in the interim period before termination.

Facts: The claimant, the Chief Officer on a ship, accepted voluntary redundancy and entered into a settlement agreement. The agreement stated that its terms were in full and final settlement of "*the Employee's particular complaints and claims … namely claims … for direct or indirection discrimination, harassment or victimisation relating to … age, under Section 120 of the Equality Act 2010 and/or Regulation 36 of the Employment Equality (Age) Regulations 2006*". Over a month after the agreement was signed, the employer decided that "additional payments" in the redundancy package should not be made to employees, including the claimant, who were aged 61 or over. The Employment Tribunal rejected the claimant's age discrimination claim, on the basis that it had been settled. The claimant appealed.

Decision: The EAT allowed the appeal, finding that the age discrimination claim had not been settled because the settlement agreement did not "*relate to the particular complaint*", as required by Section 147(1)(b) of the Equality Act 2010. The inclusion of a claim defined by reference to its legal character or section number did not satisfy Section 147(1)(b). (The EAT went on to find that it did not have jurisdiction to hear the claim because the claimant worked outside the UK/EEA waters and on a Bahamas registered ship.)

The EAT discussed the Court of Appeal's decision in *Hinton v University of East London*, where a whistleblowing claim was allowed to go ahead on the basis that general wording in the settlement agreement was not sufficient and the whistleblowing claim had not been listed as one of the specific claims. The Court of Appeal in *Hinton* went on to find that if the agreement had mentioned public interest disclosures or the relevant section of the Employment Rights Act 1996, that would have settled the claim. The employer in *Bathgate* relied on this to argue that, because the settlement agreement included a reference to age discrimination and specific provisions of the Equality Act, the "particular complaint" had been identified. The EAT rejected this argument, finding that the two cases had different background facts. The circumstances giving rise to the whistleblowing claim in *Hinton* had already occurred, whereas the claim in *Bathgate* was hypothetical when the settlement agreement was signed. The EAT commented that its interpretation was backed up by evidence from Parliamentary debates when the legislation on settlement agreements was introduced and by the broad purpose of Section 147 – to protect employees when agreeing to relinquish the right to bring proceedings. The EAT was not prepared to accept that the claimant had (or could lawfully have) signed away his right to sue for age discrimination before he knew whether he had a claim.

INDUSTRIAL ACTION AND MINIMUM SERVICE LEVELS

The Government has announced the publication of the *Transport Strikes (Minimum Service Levels) Bill*. The Bill establishes a framework to enable the Government to implement minimum levels of service to be provided by "specified transport services" during strike action. The transport services affected will be set by legislation, following consultation. Under amendments to Section 219 of the Trade Union and Labour Relations (Consolidation) Act 1992, trade unions will lose their immunity from liability for industrial action if they fail to take reasonable steps to ensure that workers specified in the employer's "work notice" do not take part in the strike. Specified workers who take strike action will lose their protection from automatic unfair dismissal.

The level of services provided will depend on agreements between each employer and trade unions. Where agreement cannot be reached voluntarily, it will be referred to the Central Arbitration Committee (CAC) to make a determination. Employers and trade unions will be bound by minimum service level agreements set by the Secretary of State until an agreement is reached by the parties or created by the CAC.

The Bill is in its early stages in Parliament and there is no indication yet as to when it is likely to become law.

Meanwhile, the removal of the restriction on the **use of temporary staff during official strike action** took effect from 21 July 2022. Regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 prevented an employment business from supplying the employer with temporary workers to perform the duties normally performed by a worker who was on strike or taking industrial action, or the duties normally performed by any other worker who had been assigned to cover the striking worker. The restriction applied only to official industrial action (in other words, authorised by trade unions in accordance with the balloting rules). The Government announced the removal of the restriction in June 2022 and it took effect a month later. However, the TUC has reported that eleven trade unions have launched a judicial review of the Regulations, arguing that they are unlawful because of the Secretary of State's failure to consult unions and because they violate fundamental trade union rights protected by the European Convention on Human Rights. At the time the Regulations were introduced in Parliament, the Government said it had considered the responses to its 2015 consultation on the issue.

HORIZON SCANNING

What key developments in employment should be on your radar?

21 July 2022	Removal of the restriction on employment businesses supplying temporary workers to cover striking staff
2022	Consultation on Statutory Code of Practice on "fire and rehire"
2022	Extension of ban on exclusivity clauses to lower paid workers
2022-2024	• Transport Strikes (Minimum Service Levels) Bill: minimum service levels on specified transport services Private Members' Bills with Government support: • Worker Protection (Amendment of Equality Act 2010) Bill: duty to take reasonable steps to prevent sexual harassment of employees; protection from harassment by third parties • Protection from Redundancy (Pregnancy and Family Leave) Bill: extension of circumstances in which employers must offer suitable alternative employment to parents at risk of redundancy • Carer's Leave Bill: entitlement to one week's unpaid leave for employees who are carers (expected to come into force in 2024) • Employment (Allocation of Tips) Bill: obligations on employers to deal with tips, gratuities and service charges • Neonatal Care (Leave and Pay) Bill: right to paid leave to care for a child receiving neonatal care
31 December 2023	Retained EU Law Bill: expiry of EU-derived secondary legislation e.g. TUPE, Working Time Regulations and Regulations protecting part-time, fixed-term and agency workers, unless Government legislates to incorporate it into UK law (or extends sunset to no later than 23 June 2026)
Date uncertain	Legislation expected to provide for: • Trade unions required to put employer pay offers to a member vote • Extension of permissible break in continuous service from one week to one month • Right to request a more predictable contract • Single enforcement body for employment rights

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

- **Employment status:** *Griffiths v Institution of Mechanical Engineers* (EAT: whether trustee of professional body is worker for whistleblowing protection); *HMRC v Professional Game Match Officials Ltd* (Supreme Court: whether referees were employees for tax purposes)
- **Employment contracts:** *Cox v Secretary of State for the Home Department* (Court of Appeal: whether employer withdrawal of check-off arrangements was in breach of employment contract; *Benyatov v Credit Suisse Securities (Europe) Ltd* (Court of Appeal: whether employer had duty of care to protect employee from criminal conviction)
- **Discrimination / equal pay:** *Higgs v Farmor's School* (EAT: whether a Christian employee's gender critical beliefs were protected under Equality Act 2010); *Arvunescu v Quick Release Automotive Ltd* (Court of Appeal: whether claim for aiding discrimination caught by COT3 settlement agreement); *Secretary of State for Work & Pensions v Beattie* (EAT: whether the temporal limit on the pension exemption for age discrimination is unlawful)
- **Redundancies:** *R (Palmer) v North Derbyshire Magistrates Court* (Court of Appeal: whether administrator could be prosecuted for failure to notify Secretary of State of collective redundancies); *EasyJet plc v EasyJet EWC* (EAT: whether the Transnational Information and Consultation of Employees Regulations continue to apply to UK businesses)
- **Trade unions:** *Morais v Ryanair DAC* (Court of Appeal: whether workers are protected from detriment for participating in industrial action during working hours); *Tyne and Wear Passenger Transport Executive v NURMT* (Court of Appeal: whether employer can claim rectification of a collective agreement)
- **Unfair dismissal:** *Fentem v Outform* (Court of Appeal: whether bringing forward the termination date on payment of a contractual PILON was a dismissal); *Rodgers v Leeds Laser Cutting Ltd* (Court of Appeal: whether dismissal of an employee who had refused to return to work due to his concerns about exposure to COVID-19 was automatically unfair); *Hope v BMA* (Court of Appeal: whether dismissal for raising numerous grievances was fair)
- **Working time:** *Chief Constable v Agnew* (Supreme Court: whether a gap of more than three months in a series of unlawful deductions from holiday pay breaks the series)

CONTACT

- PADRAIG CRONIN
- PARTNER
- T: +44 (0)20 7090 3415
- E: Padraig.Cronin@SlaughterandMay.com

- PHIL LINNARD
- PARTNER
- T: +44 (0)20 7090 3961
- E: Phil.Linnard@SlaughterandMay.com

- LIZZIE TWIGGER
- SENIOR COUNSEL
- T: +44 (0)20 7090 5174
- E: Lizzie.Twigger@SlaughterandMay.com

- SIMON CLARK
- ASSOCIATE
- T: +44 (0)20 7090 5363
- E: Simon.Clark@SlaughterandMay.com

- LUCY DUANE
- ASSOCIATE
- T: +44 (0)20 7090 5050
- E: Lucy.Duane@SlaughterandMay.com

- PHILIPPA O'MALLEY
- ASSOCIATE
- T: +44 (0)20 7090 3796
- E: Philippa.O'Malley@SlaughterandMay.com

- DAVID RINTOUL
- ASSOCIATE
- T: +44 (0)20 7090 3795
- E: David.Rintoul@SlaughterandMay.com

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650