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EMPLOYMENT

Welcome to our July HRizon employment newsletter. We outline the new right to work checking regime, and consider how a requirement to work flexibly, or to work weekends, can lead to a finding of indirect sex discrimination due to childcare disparities faced by working mothers. We also highlight other recent employment law cases and HR news from the last month.

In the Court of Appeal

Does historic illegality prevent enforceability of contractual and statutory rights?

Rights cannot normally be enforced in relation to an illegal contract. The Court of Appeal has recently considered whether historic illegality, which has since been rectified, prevents the enforceability of contractual and statutory rights. R worked for Q from 2007 to 2017 under a contract which expressly stated that R was responsible for paying her own tax. However, in early 2014, Q discovered that no taxes had been paid on R's income. In July 2014, Q began to make deductions from payments to R and put them aside to cover the tax liability. R was dismissed in 2017 and she brought claims for wrongful and unfair dismissal, which were rejected by the employment tribunal (ET) on grounds of illegality. The Employment Appeal Tribunal (EAT) went on to hold that, after July 2014, the contract was not performed illegally, and R could bring her claims for wrongful and unfair dismissal. The Court of Appeal dismissed Q's appeal, upholding the decision of the EAT. The Court of Appeal held that a flexible approach to assessing whether a claim was barred for illegality was required and a court should, in addition to considering what a party knew and whether they participated in the illegality, also consider the degree of culpability attributable to the party trying to enforce the contract, the seriousness of the illegality and the proximity of the illegality to the bringing of the claim. The EAT had been entitled to find that R's illegality between 2007 to 2014 did not prevent her from asserting her rights under the contract after this period of illegality had ended. Historic acts of illegality can be relevant, but they need to be considered in conjunction with the seriousness of the illegality, how much time has passed between any acts of illegality and the claims being brought and how closely the illegality was connected to the claims. It is also possible to sever periods of illegality from periods of time during which contractual arrangements were conducted lawfully. *(Robinson -v- Al-Qashimi [2021] EWCA Civ 862)*

In the Employment Appeal Tribunal

Whistleblowing: if the decision to dismiss is motivated by the worker's protected disclosures, are the motives of other managers relevant?

It is automatically unfair to dismiss a worker because they are a whistleblower who has made a protected disclosure. The ET will consider if the whistleblowing is the reason, or principal reason, for the dismissal. Ordinarily, a tribunal need look no further than the reasons given by the appointed decision maker, but they can look behind those reasons (to the underlying motivations of the employer or more senior managers) if they have been manipulated by others to dismiss for an invented reason and innocently acted on that basis (this is known as the Jhuti principle). The EAT has recently considered whether the motives of other managers are relevant where the decision maker's decision to dismiss is itself motivated by the worker's protected disclosures.

The employee, F, a nurse, worked as a clinical care co-ordinator for the district nursing service of an NHS trust. She had 38 years' unblemished service with the NHS and been personally commended by the Care Quality Council. In 2015, a change in policy by the local authority, meant that F's team of district nurses had been subjected to an increasing workload. Concerned about the increasing workload of her staff, F began to express concerns about matters that she believed were impacting upon her team of nurses and the quality of care being provided to patients. Between December 2015 and October 2016, F made 13 protected whistleblowing disclosures. In October 2016, following the death of a patient, F informed a senior manager that she intended to invoke its formal whistleblowing policy. After taking some annual leave, F was immediately suspended upon her return to work. F was then subjected to disciplinary investigation (during which she raised a grievance that was rejected), dismissed and her appeal against dismissal rejected.

The ET upheld F's unfair dismissal claim, holding that F's treatment was not only 'grossly unfair, but was the culmination of a process, involving numerous people, designed to get rid of her because she had made protected disclosures'. The tribunal found that F had been dismissed for the reason, or principle reason, that she had made protected disclosures. This was not a Jhuti type case, in which an innocent decision maker had been manipulated by others into dismissing the claimant, but a case in which the tribunal found as a fact that the reason, or principle reason, of the disciplinary hearing panel for dismissing F was her making protected disclosures.

The EAT partially upheld the employer's appeal:

- F's claims of pre-dismissal detriment were not considered in sufficient detail by the tribunal, because there was insufficient analysis of who were the relevant decision makers in respect of each specific detriment, and why it was concluded they had acted on the grounds of F having made protected disclosures. The case will be sent back for the tribunal to reconsider those claims;
- However, the employer's appeal regarding the unfair dismissal claim was dismissed by the EAT. The tribunal had properly considered the reasoning process of the chair of the panel (who was the only witness called by the respondent to explain the reasoning process of the panel) and concluded that the decision to dismiss was motivated by F's whistleblowing disclosures.

The EAT stressed that the Jhuti principle is not applicable if the decision maker is going along with an overall plan to remove a whistleblower. F's case could properly be distinguished from Jhuti. This was not a situation where an innocent decision maker had been deceived into dismissing her; the panel had knowingly dismissed F because she had made protected disclosures. Indeed, the fact that a whistleblower's dismissal appears to be the culmination of a plan to get rid of them, may be circumstantial evidence to support the conclusion that the decision maker dismissed because the worker had made a protected disclosure. *(University Hospital of North Tees & Hartlepool NHS Foundation Trust -v- Fairhall [2021] UKEAT 0150_20_3006)*

Constructive dismissal: Can a fundamental breach of contract be cured by subsequent actions?

Where an employer commits a fundamental breach of contract, an employee is entitled to resign and bring a constructive unfair dismissal claim. The EAT has recently considered whether an employer's subsequent actions can cure its earlier fundamental breach, and thus disentitle the employee to resign and claim they have been dismissed.

F worked as a school learning support assistant, whose duties included giving physical support and assistance to pupils. From September 2017, F was required to give support to a disabled pupil, and this involved her in daily weight-bearing and lifting work. F repeatedly requested manual handling training, but despite assurances that steps would be taken to arrange this, the training never materialised. Within a few months, F notified her employer that she had developed back pain. A few months later, in early May 2018, F was signed off for three weeks with back pain. When discussing her return to work, the head teacher said that the requested manual handling training was being organised for her and other staff in the following few weeks. On 5 June 2018, F resigned. She referred to her numerous requests for training, her continuing back issues and previous situations when she had sustained injuries and stress within her working environment. The employment tribunal dismissed F's constructive unfair dismissal claim. The tribunal held that while the employer had been in breach of the Manual Handling Operations Regulations 1992, it was not in fundamental breach of its implied duty to take reasonable care for F's health and safety. In holding this, the tribunal took account of communications that demonstrated that the employer had genuine concern for F's health and safety and had taken steps to ensure that she would not be exposed to danger in the future.

The EAT upheld F's appeal and substituted a finding of unfair dismissal. F's complaint was that the employer had breached the implied duty to provide a safe work environment when it failed, despite her repeated requests, to provide F with manual handling training over a period of many months. The tribunal had erred by only looking at the overall picture at the point of resignation; it had failed to determine whether a fundamental breach had occurred at some earlier stage. It is not possible for an employer's subsequent actions to cure its earlier fundamental breach. If the employer takes steps to put matters right after a fundamental breach, the employee can choose to affirm the contract, but they are under no obligation to do so and they do not lose the right to resign and claim constructive dismissal. *(Flatman -v- Essex County Council [2021] UKEAT 0097_20_1201)*

In the Employment Tribunals

Was an employee who remained in Italy at the outbreak of the pandemic automatically unfairly dismissed?

It is automatically unfair to dismiss an employee for specified health and safety reasons. These include where the reason (or principal reason) for their dismissal is that, in circumstances of danger which the employee reasonably believed to be serious and imminent, they took (or proposed to take) appropriate steps to protect themselves or others from the danger. An ET recently considered whether this could apply to an employee who was dismissed because he remained in Italy at the outbreak of the pandemic.

M, who is Italian, was hired in February 2020 to provide IT services to a major retailer (B) on behalf of his employer. He had previously provided those services for B via a different contractual relationship. As he was already working for B, the employer did not provide M with an induction. M was not given a staff handbook and had not been given access to his employer's staff HR systems (which should be used to request holiday). Shortly after his employment began, and not appreciating that there was a process for getting holidays approved, M emailed the managing director asking for two days' annual leave (on 9 and 10 March 2020) to attend his sister's wedding in Italy. M believed that this request had been granted and travelled to Italy for the wedding. On 9 March 2020, Italy went into lockdown due to COVID-19. At the same time, UK government guidance required 14 days' isolation on return from Italy. M contacted his employer to inform them of this and, on 10 March 2020, he was told to keep his mobile and laptop on and wait for instructions. The next day [11 March 2020], the employer dismissed M by a letter sent to his home address in London (despite knowing he was in Italy). The letter confirmed that M was dismissed with effect from 6 March 2020 for failure to follow company procedures and taking unauthorised leave. However, as the letter was sent to his home and he was in Italy, M was oblivious to his dismissal. M therefore continued to provide IT services to B remotely from Italy. M also continued to send information to his employer about the Italian travel restrictions. M learned of his dismissal when, on 1 April 2020, he received his P45 and final payslip by email.

M successfully claimed that he had been automatically unfairly dismissed on health and safety grounds. The ET held that declaration of a global pandemic, and the risk of catching COVID-19 in Italy in March 2020, amounted to circumstances of danger. M reasonably believed that the danger from COVID-19 was serious and imminent, and had taken appropriate steps to protect himself and others. M had sent his employer information about the current situation in Italy, and had asked for advice and instructions. In the absence of communication or instructions from his employer, M communicated directly with B and continued his work on a day-to-day basis providing services to B on his employer's behalf. The ET rejected the employer's evidence as to the reason for M's dismissal, holding that it had not been credible. The ET held that the real reason for M's dismissal was the fact that he had notified his employer that he was effectively trapped in Italy due to the difficulties posed by the COVID-19 pandemic and that he proposed to work remotely from Italy until circumstances changed and he could return to the UK. *(Montanaro -v- Lansafe Ltd [2021] ET/2203148/2020)*

Did a change of shift pattern, to require Saturday working, amount to indirect sex discrimination?

Indirect sex discrimination occurs when an employer applies a provision, criterion or working practice (PCP) which, although on the face of it is neutral and applicable equally to all workers, in fact inadvertently puts women at a disadvantage in comparison to men. An indirectly discriminatory PCP may be objectively justified if it is a proportionate means of achieving a legitimate aim. London South ET recently considered whether a change of shift pattern, to require Saturday working, amounted to indirect sex discrimination and meant that the affected employee was constructively unfairly dismissed.

K worked as a retail assistant for a national retailer. K is a single parent with two children, the youngest of which was 8 at the relevant time. K's contract required her to work 20 hours per week, flexible to the needs of the business. K could be asked to: (a) work an extra eight hours per week if trading patterns required more staff; and/or (b) be required to work Saturdays, Sundays, or Public/Bank Holidays. In practice, for several years, K worked only on weekdays. Around the end of July 2018, for business reasons, K's manager decided to introduce a new Saturday rota, which would require the weekday staff to work one Saturday in every four. A series of meetings took place between K and her manager to discuss the new shift pattern. K raised concerns about her ability as a single parent to comply with the new requirement for her to work one Saturday in four and said that she had 'childcare costs to consider'. By early September 2018, K was told that she needed to sort it out with her colleagues and arrange shift swaps if she could not work the Saturday shifts that she was rostered. On the first Saturday she was rostered to work (13 October 2018), K was permitted to bring her eight-year-old daughter to work with her. K again explained to her manager that she had no one to look after her daughter on Saturdays. With no solution forthcoming, K resigned on 22 October 2018 with notice.

The ET upheld K's claims of indirect sex discrimination and constructive unfair dismissal. The ET held that the new shift pattern amounted to a PCP and that, due to childcare disparities, this placed more women at a disadvantage when compared to men. It was obvious to her manager that K had difficulty complying with the new shift pattern and the fact that K had needed to bring her daughter to work in October 2018 was 'a red flag to [K's] obvious and significant childcare issue'. The ET held that the manager's 'disinterest was rooted in his desire for [K] to sort out swaps with her colleagues or simply to find a childcare solution herself'. The ET accepted that the employer had a legitimate aim for its decision to introduce a Saturday rota, but when considering proportionality, the employer's case 'fundamentally collapsed' because there was no consideration or exploration of any other less discriminatory way of trying to achieve its legitimate aims. The ET held that it 'was a surprising neglect of his responsibility' for the manager not to explore whether any of the other eleven staff were prepared to work an extra Saturday each month. The prospect of recruiting only one dedicated Saturday worker was also not explored as a possibility.

Having upheld L's indirect sex discrimination claim, the ET went on to uphold her constructive unfair dismissal claim. The express flexibility provisions in K's contract were fettered by the implied term of trust and confidence. Where reliance on the clause would have an (avoidable or potentially avoidable) indirect sex discriminatory impact on K, it was not consistent with the implied duty of trust and confidence to permit such discretion to be exercised. The reliance on the flexibility clause in relation to K undermined and breached the implied term of trust and confidence.

Comment

Like the two EAT decisions considered in this month's feature article, Flexible working: disparities in childcare, the ET here drew on its collective industrial knowledge to hold that the requirement to work Saturdays put women at particular group disadvantage when compared with men. Women, statistically, are still the primary child carers of dependent children and more women than men are single-parent child carers. This disadvantages women more than men from being able to work on Saturdays when schools are not open. *(Keating -v- WH Smith Retail Holdings Ltd [2021] 2300631/2019).*

Note: ET-level decisions are merely of persuasive value, and are not binding upon future ETs, but can provide a useful indicator of how certain issues are currently being deal with in the ET.

Forthcoming legislation

Care home staff must be double vaccinated against COVID-19

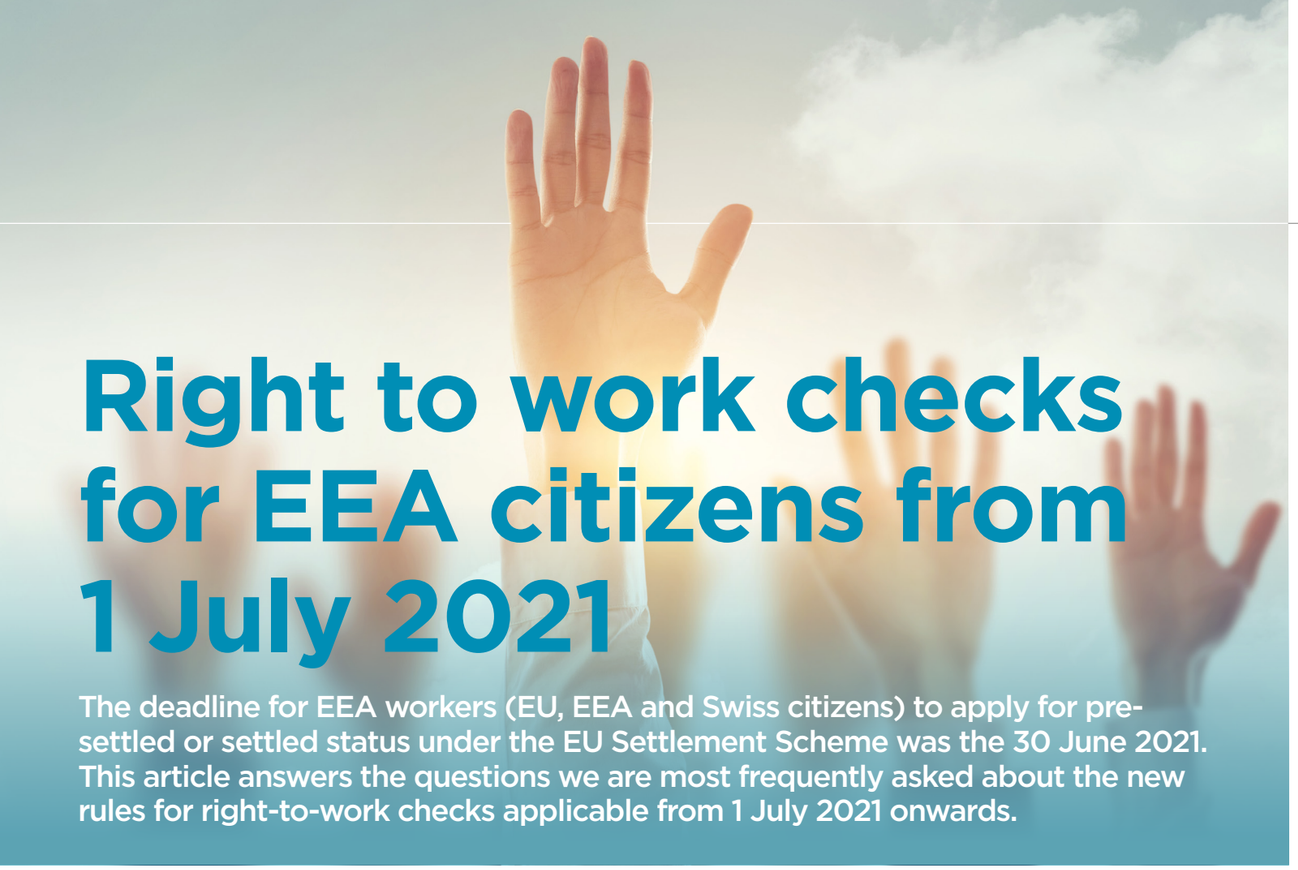
The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021, which came into force on 11 November 2021, require that the registered person for nursing and personal care in care homes must secure that (subject to certain exceptions) a person does not enter the care home premises for work purposes unless they provide evidence that they have been vaccinated with a complete course of an authorised vaccine against COVID-19. In summary:

- The requirement will apply to all staff – whether permanent or agency, but exemptions will apply to those under 18 and those with medical exemptions from vaccination (this is very strict – they must have a medical condition on a list of designated medical exemptions); and
- The requirement will also include anyone coming into the care home to work (not including visitors) eg hairdressers, chefs, handyman, but there will be exemptions for eg emergency services or emergency repairs.

In the news

The parliamentary Women and Equalities Committee has launched an inquiry into menopause in the workplace. The inquiry will consider whether more can be done to prevent women from leaving their jobs because of suffering menopausal symptoms. The call for evidence, which closes on 17 September 2021, seeks views on:

- What is the nature and the extent of discrimination faced by women experiencing the menopause?
- What is the economic impact of menopause discrimination?
- How can businesses factor in the needs of employees going through the menopause?
- How can practices addressing workplace discrimination relating to menopause be implemented?
- How should people who experience the menopause but do not identify as women be supported in relation to menopause and the workplace?
- How well does current legislation protect women from discrimination in the workplace associated with the menopause?
- How effective has government action been at addressing workplace discrimination related to the menopause, and what more can the government do to address this issue?
- How effectively is the Government Equalities Office working across government to embed a strategic approach to addressing the impact of menopause in the workplace?



Right to work checks for EEA citizens from 1 July 2021

The deadline for EEA workers (EU, EEA and Swiss citizens) to apply for pre-settled or settled status under the EU Settlement Scheme was the 30 June 2021. This article answers the questions we are most frequently asked about the new rules for right-to-work checks applicable from 1 July 2021 onwards.

Do I have to retrospectively check whether my existing EEA staff have the right to work from 1 July 2021?

No, there is no requirement for a retrospective check to be undertaken on EEA citizens who started employment on or before 30 June 2021. The employer will maintain a continuous statutory excuse against liability for a civil penalty if the initial checks were undertaken in line with the right-to-work check guidance, which was in place when the worker started work (or when any repeat check was completed).

If it comes to the employer's attention that a worker hired before 30 June 2021 has not applied for pre-settled or settled status, and they have missed the deadline to apply, transitional measures may apply until 31 December 2021 (see below), which mean that the employer does not need to cease their employment immediately.

What is the status of EEA staff who have applied for, but not yet been granted, 'pre-settled' or 'settled' status?

EEA citizens, and their family members, who have made an application to the EU Settlement Scheme (EUSS) on or before 30 June 2021, have a right to work in the UK until their application (including any appeal) is finally determined.

EEA citizens with an outstanding application to the EUSS made on or before 30 June 2021, will be issued with either:

- A digital EUSS Certificate of Application (DCOA);
- A paper EUSS Certificate of Application (PCOA); or
- An EUSS email confirming receipt of their application.

If the worker has a DCOA, they will be able to provide the prospective employer with a share code and use the online right to work service to evidence their right to work. The Home Office online service will provide confirmation of their right to work and advises when a follow-up check is required.

If the worker has a PCOA or an EUSS email, the employer must request a right-to-work check from the Employer Checking Service. The employer must make a copy of their PCOA or their EUSS email receipt and retain this with the response from the employer checking service to have a statutory excuse against liability for a civil penalty.

What is the status of EEA staff who have missed the deadline to apply for 'pre-settled' or 'settled' status (transitional provisions until 31 December 2021)?

Until 31 December 2021, transitional provisions may apply if the following pre-conditions are met:

- The worker was hired before 30 June 2021
- The worker missed the deadline to apply for pre-settled or settled status

Where the transitional provisions apply, the employer does not need to cease the worker's employment immediately. The employer should take the following steps:

1. Advise the worker that they must make an application to the EUSS within 28 days and provide the employer with either a DCOA or PCOA. If the worker fails to make an application to the EUSS within 28 days, the employer must take steps to cease their employment.
2. Once it has been provided with either a DCOA or PCOA, the employer must then contact the Employer Checking Service to confirm that the worker has applied to the EUSS. The employer may be asked to provide evidence of the start date of the worker's employment.
3. If the worker has made an application to the EUSS, the employer will be given a Positive Verification Notice (PVN). Retaining the PVN and a copy of the worker's DCOA or PCOA will then provide the employer with a statutory excuse against a civil penalty for six months. This allows sufficient time for the worker's EUSS application to be concluded and enables the worker to maintain their employment with you during that time.
4. Before the PVN expires, the employer must do a follow-up check with the Employer Checking Service in order to maintain its statutory excuse against a civil penalty. If the worker has been granted settled or pre-settled status under the EUSS before the PVN expiry date, they can prove their right to work to the employer using the online Home Office right to work service.
5. If the follow-up check confirms that the worker's EUSS application is pending, the employer will be given a further PVN for six months and would then repeat step four until such time as the application has been finally determined.
6. If the follow-up check confirms that the EUSS application has been finally determined and refused, then the employer will not be issued with a PVN and must take steps to cease the worker's employment.

The current Home Office caseworker guidance under the EUSS is very generous to EEA citizens who miss the 30 June 2021 deadline to apply under the EUSS. One example given of an acceptable reason to miss the deadline is that the relevant national forgot to apply on time.

Employers are advised to record and maintain accurate records of checks and actions taken in respect of such transitional workers.

How do I check the right to work of new EEA staff hired after 1 July 2021?

This depends on several factors:

1. Have they been granted 'pre-settled' or 'settled status'?
2. Have they got an outstanding application for 'pre-settled' or 'settled status' which was made on or before 30 June 2021?
3. Are they an Irish citizen?
4. Are they an EEA citizen with Indefinite Leave to Enter/Remain?
5. Do they have a points-based visa?
6. Does an exemption apply:
   - (a) Frontier Worker Permits (an EEA citizen who is resident outside the UK but is economically active (employed or self-employed) in the UK;
   - (b) Service Provider of Switzerland visas (an individual of any nationality who is required by their Swiss employer to execute a pre-existing contract to temporarily provide services for a party in the UK); or
   - (c) A worker with an outstanding application to the Crown Dependency EUSS?

Prospective workers with 'pre-settled' or 'settled' status

If an EEA citizen has been granted status under the EU Settlement Scheme (EUSS), they will have been granted their immigration status digitally and they can prove their right to work using the Home Office online right to work service. They must provide the prospective employer with a share code and their date of birth, which will enable the prospective employer to check their immigration status. The employer will obtain a statutory excuse against liability for a civil penalty if it carries out the check using the online service.

There are two types of status:

- Settled status: the individual will have a continuous right to work
- Pre-settled status: the individual will have a time-limited right to work and the employer must carry out a follow-up check (as notified by the online service).

Prospective workers with an outstanding application for 'pre-settled' or 'settled status' made on or before 30 June 2021

EEA citizens, and their family members, who have made an application to the EU Settlement Scheme (EUSS) on or before 30 June 2021, have a right to work in the UK until their application (including any appeal) is finally determined.

EEA citizens with an outstanding application to the EUSS made on or before 30 June 2021, will be issued with either:

- A digital EUSS Certificate of Application (DCOA);
- A paper EUSS Certificate of Application (PCOA); or
- An EUSS email confirming receipt of their application.

If the worker has a DCOA, they will be able to provide the prospective employer with a share code and use the online right to work service to evidence their right to work. The Home Office online service will provide confirmation of their right to work and advises when a follow-up check is required.

If the worker has a PCOA or an EUSS email, the employer must request a right to work check from the Employer Checking Service. The employer must make a copy of their PCOA or their EUSS email receipt and retain this with the response from the employer checking service to have a statutory excuse against liability for a civil penalty.

Prospective workers who are Irish citizens

These individuals continue to have unrestricted access to work in the UK. From 1 July 2021, they can prove their right to work using their Irish passport or Irish passport card, or their Irish birth or adoption certificate together with an official document giving the person's permanent National Insurance number and their name issued by a government agency or a previous employer. Irish citizens can also apply for a frontier worker permit, this permit can be issued digitally or as a physical permit, so they may choose to prove their right to work using the Home Office online right to work service or present their physical permit if they have one.

Prospective workers who are an EEA citizen with Indefinite Leave to Enter/ Remain

EEA citizens with Indefinite Leave to Enter or Remain (ILE/R) are not required to make an application to the EU Settlement Scheme but can do so if they wish. From 1 July 2021, EEA citizens can prove their right to work in the same way as other foreign nationals who do not have an immigration status that can be shared digitally. Employers can carry out a manual check of their Home Office documentation such as an endorsement / vignette in a current passport stating, 'indefinite leave to enter or remain' or 'no time limit'. Some may have a current Biometric Residence Permit (BRP) and this can be checked manually. Alternatively, they may choose to use their BRP to access the online right to work service. Carrying out either a manual check of the documents or the online check, as set out in this guidance will provide the employer with a statutory excuse against liability for a civil penalty.

Does another exemption apply?

There are specific rules which apply to:

- Frontier Worker Permits (an EEA citizen who is resident outside the UK but is economically active (employed or self-employed) in the UK
- Service Provider of Switzerland visas (an individual of any nationality who is required by their Swiss employer to execute a pre-existing contract to temporarily provide services for a party in the UK)
- A worker with an outstanding application to the Crown Dependency EUSS

These individuals cannot use the Home Office online system and will instead evidence their right to work using specified documents. A full explanation of these exemptions is beyond the scope of this note (for further details see this guidance).

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Flexible working: disparities in childcare

Employment Appeal Tribunal rules that mothers should not be dismissed for refusing to work on weekends.

A mother who was dismissed by her employer for refusing to work weekends has won a 'landmark' appeal for working parents. The Employment Appeal Tribunal (EAT) has directed that going forward, tribunals must consider the issue of 'childcare disparity' where relevant.

Background

Gemma Dobson worked as a community nurse in Cumbria. In 2016, Ms Dobson's employer, Integrated Care NHS Foundation Trust North Cumbria, sought to introduce more flexible working. This included a requirement that community nurses were to work flexibly, including at weekends.

Ms Dobson made it clear to her employer that she was unable to do so, owing to her commitments to care for her three children, two of whom are disabled. Ms Dobson was subsequently dismissed on the grounds that she refused to work her dictated hours. Her employer declined to consider Ms Dobson's personal childcare responsibilities.

Ms Dobson proceeded to lodge claims of unfair dismissal and indirect sex discrimination with the Employment Tribunal (ET). Both claims were dismissed.

On appeal, the EAT held that the ET had erred in not taking judicial notice of the fact that women, because of their childcare responsibilities, were less likely to be able to accommodate certain working patterns than men.

What does this mean in practice for employers?

Childcare disparity is a factor that employers should consider when they are making decisions about working hours.

In the words of Mr Justice Choudhury, childcare disparity means that women are more likely to find it difficult to work certain hours (eg nights) or flexible hours (the changes here dictated by the employer) than men due to childcare responsibilities.

In this instance, the arrangement was to 'work flexibly, including at weekends'. It was therefore not an arrangement whereby staff had any flexibility to choose their working hours or days within certain parameters. The EAT held that this requirement would result in a group disadvantage to women on the basis that women are more likely than men to be child carers.

Furthermore, the EAT outlined that it does not need to be impossible for an employee to comply with a working requirement before there is a disadvantage to women. There can still be a disadvantage even where compliance is possible but with real difficulty.

This is not the only recent case to emphasise caution around childcare arrangements when seeking to justify changes to working hours.

In Hughes -v- Progressive Support Limited UKEAT/0195/20 (heard in May this year), Ms Hughes was guaranteed 'considerate' hours in line with her childcare responsibilities by her employer. However, her employer briefly stopped offering Ms Hughes her 'considerate' hours and sought to implement a requirement for staff to work '24/7' in line with their service needs. Although Ms Hughes was not subjected to any sanction for being unable to work the hours offered to her, she still lost pay. Ms Hughes brought a claim of indirect sex discrimination to the ET, which was dismissed.

On appeal, the EAT confirmed in this instance that by requiring Ms Hughes to work whatever hours were allocated to her (similarly to Dobson), the employer had applied a provision, criterion or practice that amounted to unlawful indirect sex discrimination.

Dobson -v- North Cumbria Integrated Care NHS Foundation Trust

Summary

In light of the COVID-19 pandemic and with an increased focus on the delicate balancing act between childcare and work, both of these cases will be of particular note to employers looking to improve flexibility within their workforce.

In practice, this means that employers should identify any disadvantage caused by childcare disparity when amending working patterns or introducing a requirement to work weekends or evenings. Where such disparity exists, to mitigate the risk of a claim for indirect discrimination, the employer will need reasonable justification for any changes to working hours.

If you have any questions about flexible working, please get in touch with your usual Hill Dickisnon contact or the author.

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Meet the team

Orla French
Senior Associate, Health Employment

What is your greatest achievement?

Having my daughters and navigating work and parenting, especially during a pandemic! I'm particularly proud of achieving a promotion while on maternity leave. It proved to me that it is possible to progress in your career as a working mum and the firm has provided me with the flexibility and support needed in order to achieve my goals while finding a good work/life balance.

What is your favourite book?

The best book I have read recently is Normal People by Sally Rooney. It is such an intense, beautifully written story. I devoured it in a few days.

What advice would you offer your teenage self?

Trust your instincts and be confident in your own ability and decisions – everyone is winging it at life to some extent!

Where's your favourite place in the world to visit?

Portnoo – it a small seaside village in Donegal, Ireland with the most beautiful beach. It's so quiet and peaceful there and I feel like I can truly switch off and relax (well, perhaps not as much these days with two young kids in tow!)

What is the bravest or craziest thing you have ever done?

I can't decide if this was brave or crazy – possibly both! On a ski holiday in Austria, to mark my 30th birthday, I paraglided off a mountain on skis. It was an amazing, yet slightly terrifying experience!

What are your favourite/least favourite foods?

My favourite food has to be pizza – it wins every time, particularly when accompanied by a nice glass of red wine! Followed by a chocolate brownie.

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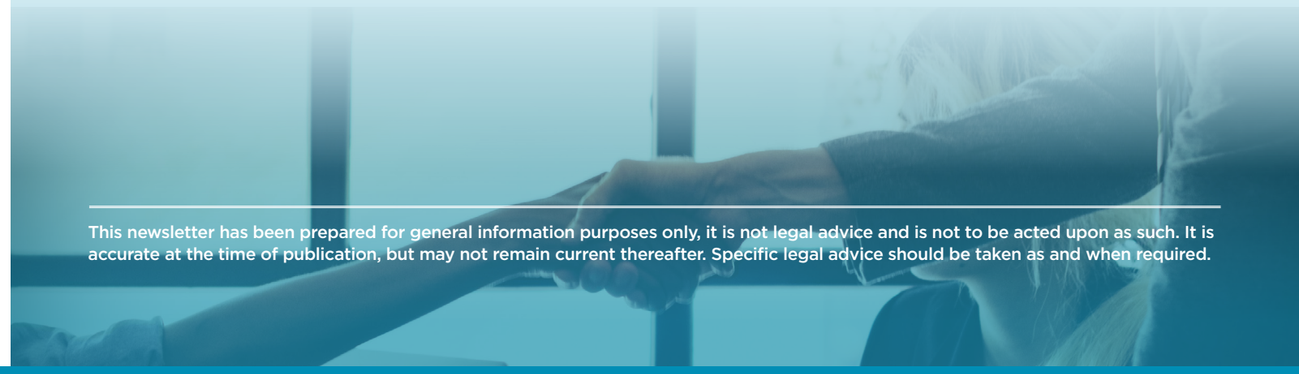

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About Hill Dickinson

Hill Dickinson LLP is a leading and award-winning international commercial law firm with more than 850 people including 185 partners and legal directors.

The firm delivers advice and strategic guidance spanning the full legal spectrum, from non-contentious advisory and transactional work, to all forms of commercial litigation. The firm acts as a trusted adviser to businesses, organisations and individuals within a wide range of specialist market sectors.

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