HILL DICKINSON

HRizon

September 2021

hilldickinson.com

EMPLOYMENT

Welcome to our September HRizon employment law newsletter. We consider the government's commitment to introduce unpaid carer's leave and its consultation about making changes to the right to request flexible working. We also look at the first known UK finding of indirect associative discrimination and highlight other recent employment law cases and HR news from the last month.

In the Employment Appeal Tribunal (EAT):

Was a part-time worker who did not receive the same rest breaks as full-time workers on the same shift treated less favourably?

Part-time workers must not to be treated less favourably regarding the terms of their contract due to their part-time status when compared to their full-time counterparts. The effective and predominant reason for the difference in treatment must be their part-time status, but this does not need be the only or sole reason. The EAT has recently considered whether a part-time worker was treated less favourably when he did not receive the same rest breaks as full-time workers working alongside him on the same shift.

C, a phlebotomist, worked an average of 16 hours pw. C's shift pattern included 4-hour midweek shifts and 6-hour weekend shifts. Workers were given a 'complimentary' 15-minute paid rest break during shifts which lasted six hours or more. C claimed that, due to his part-time worker status, he did not receive a complementary paid break of 15-minutes during his shorter 4-hour shifts and sought to compare himself with full-time colleagues who did receive the breaks because their shifts lasted at least six hours. The employment tribunal (ET) upheld C's part-time worker discrimination claim.

Upholding the employer's appeal, the EAT held that the ET had erred when it had concluded that the reason for the difference in treatment between C and his full-time comparator was 'on the ground' of his part-time status. It was an agreed fact before the ET that the criteria for whether a shift included a break or not depended solely on the length of the shift in question. The ET had also made further factual findings which were consistent with that agreed position. The ET had made no factual finding which would support any causal link between shift length and part-time status. Therefore, there was no basis on which the ET could properly have come to the view that the difference in treatment was C's status as a part-time worker. The real reason C was not entitled to the complimentary rest-breaks during his mid-week shifts was the fact they were of a shorter shift length of four hours, not due to his status as a part-time worker. The EAT substituted a finding that C's claim be dismissed. *(Forth Valley Health Board -v- Campbell [2021] UKEAT 0003_21_2708)*

Was an employee contractually entitled to annual increases in his income protection payments?

Permanent health insurance or income protection cover is a popular contractual benefit offered to staff. If a worker has a long-term illness and cannot return to work, the cover provides them with a percentage of their salary. Although some employers self-fund this benefit, many take out insurance cover. The EAT has recently considered whether an employee was contractually entitled to annual increases (which were not covered by the insurer) in the income protection payments he received.

When L, a test engineer, commenced employment he was given various documents that set out the level of income protection cover he was entitled to under a long-term sickness scheme. The documentation included reference to an 'escalator' of 5% per annum, which would apply after the first 52 weeks of income protection payments. This 'escalator' was designed to ensure that inflation did not erode the level of cover over time. L began a period of long-term sickness absence and began to receive income protection payments in 2009. After L's employment TUPE transferred, he noticed that the income protection payments he was receiving did not include the annual escalator. The new employer said that its underlying insurance cover did not provide for the 'escalator' to be applied to income protection payments. L brought a claim for unlawful deduction from wages.

The employment tribunal upheld L's claim and held that L was contractually entitled to the annual escalator payments. The EAT dismissed the employer's appeal. The EAT held that the summary of benefits originally provided to L had contained terms that were clear and certain. Objectively, it was clear that those terms were intended to be incorporated into his employment contract. The terms gave L a contractual entitlement to the escalator. The fact that the terms referred to underlying insurance cover did not limit L's contractual entitlement to the income protection provided by the insurance cover. L's employer was bound by the contractual commitment it had inherited from his previous employer on his TUPE transfer. *(Amdocs Systems Group Ltd -v- Langton [2021] UKEAT 001237_19_2408)*

In the employment tribunals (ET):

Indirect associative discrimination: was it discriminatory to dismiss a homeworker who refused to switch to working in the office because she needed to care for her disabled mother?

Indirect discrimination occurs where an employer applies a provision, criterion or working practice (PCP) equally to all workers, but this inadvertently puts a group of workers sharing a protected characteristic at a particular disadvantage in comparison to other workers. The European Court of Justice has previously held, in the context of a race claim, that it is also possible to claim 'associative' indirect discrimination: provided the worker also suffers the disadvantage, they do not themselves have to hold the protected characteristic to form part of the disadvantaged group. *(CHEZ Razpredelenie Bulgaria AD -v- Komisia za zashtita ot diskriminatsia and third parties [2015] EUECJ C-83/14)*. The first known case to consider the domestic application of the CHEZ principle has recently been heard by London Central ET, considering whether it was indirectly discriminatory to dismiss a homeworker who refused to switch to working full-time in the office because she needed to care for her disabled mother.

F worked as a senior lending manager for a building society. She was employed on a homeworker contract - her principal place of work was her home, but she attended the office on two to three days a week. The employer was aware that the primary reason F worked from home was because she was the carer for her disabled mother. In October 2017, the employer decided that there would be a reduction in the number of senior lending managers (from 12 to 8). It was also decided that the roles would be office-based, because feedback from junior staff suggested dissatisfaction with the levels of supervision they received. F's role was placed at risk of redundancy and volunteers were sought for voluntary redundancy. F did not volunteer and expressed the wish to remain in employment and continue as a homeworker. Although more than enough volunteers came forward, the employer asked some of them to remain in employment and F was selected for redundancy. F brought various claims, including one of associative indirect discrimination.

The ET firstly considered whether the CHEZ principle could apply and held that s19 Equality Act 2010 (indirect discrimination) must be read in a manner consistent with the ECJ's judgment in CHEZ. The protection from indirect discrimination applies both to the employee's own protected characteristic and to employees who are associated with a person with a relevant protected characteristic. The employer had conceded that it had applied a PCP that senior lending managers could no longer work from home on a full-time basis. The ET held that carers for disabled people were less likely to be able to be office-based than non-carers. Therefore, as her principal carer, F was put at a substantial disadvantage because of her association with her mother's disability.

On the issue of whether the PCP was objectively justified, the ET held that the need to provide effective on-site supervision could not be a legitimate aim because it was itself discriminatory. In the alternative, even if it had been a legitimate aim, dismissing F was not a proportionate means of achieving that aim, because hybrid working could have achieved the aim given F's track record of providing effective supervision to junior staff from home. The ET noted that the employer was fully aware of both F's mother's disability and the disadvantage that F would suffer by the application of the PCP to be office-based. The ET considered that the PCP did not correspond to a real need of the employer, and it was based on the employer's subjective view rather than on any actual evidence or rational judgment. The employer had not taken reasonable steps to avoid the disadvantage to F. The ET held that F had been indirectly discriminated against on the grounds of her association with her disabled mother.

Brexit: CHEZ, as pre-Brexit ECJ case law, forms part of retained EU law. Courts and tribunals must continue to interpret domestic legislation in line with EU law. Only the Supreme Court and the Court of Appeal may depart from EU case law when it appears right to do so. *(Follows -v- Nationwide Building Society [2021] ET 2201937/2018V)*

Was it automatically unfair to dismiss a probationary employee for refusing to deliver equipment to the home of someone who was self-isolating?

Several health and safety-related grounds for dismissal are treated as inadmissible reasons for the purpose of automatic unfair dismissal, and no qualifying period of service is required. For example, where the employee is dismissed because, 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 other persons from danger. The employee is also protected where they bring circumstances connected with their work, which they reasonably believed were harmful or potentially harmful to health or safety, to the attention of their employer. Cardiff ET recently considered whether an employer had automatically unfairly dismissed a probationary employee for refusing to deliver equipment to the home of someone who was self-isolating.

The employee, H, commenced work in November 2019 as an area supervisor for a cleaning services firm. The contract provided that the first six months of employment was a probationary period. After the first national lockdown was announced in late March 2020, H was given an instruction by his manger to collect some equipment from a school and deliver it to her home. At the time, the manager was self-isolating at home with her daughter due to suspected COVID-19 symptoms. In response to this instruction, H spoke to his manager on the telephone and queried whether the journey was 'essential travel' (in light of the ban on non-essential travel) and whether it was sensible for him to deliver the equipment to her house as instructed while she was self-isolating with possible COVID-19. H's reluctance to follow his manager's instructions led to a heated discussion in which she said: 'I am your manager and you should not question me, and if I tell you to do something you should do it'. H again raised concerns about his health and noted that the school was closed so the equipment could be collected once the national lockdown ended. H was subsequently dismissed for failure to follow a reasonable management instruction and his 'poor and inappropriate attitude'. In his internal appeal against his dismissal, H expressed concern for his and his family's health.

The ET held that H's dismissal was automatically unfair because it was for the principal reason that he had raised health and safety concerns. When H raised concerns about being instructed to go to the home of two self-isolating individuals during late March 2020, he was raising concerns that he reasonably believed the instruction was harmful or potentially harmful to his health and safety, and by refusing to follow the instruction he had sought to take appropriate steps to protect himself from danger in circumstances which he reasonably believed to be serious and imminent. Although H's line manager was inexperienced and dealing with much uncertainty at the beginning of the pandemic, her reaction to H raising those concerns was unreasonable. H's dismissal was automatically unfair, and he was awarded £16,640 in compensation. *(Ham -v- Esl Bbsw Ltd [2021] ET 1601260/2020)*

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.

In the news

Mandatory COVID-19 vaccination in health and social care sector

The Department of Health and Social Care has published a consultation on making COVID-19 vaccination a condition of deployment in the health and wider social care sector. It is intended that the requirement to be vaccinated would apply to all those that are deployed (either as workers or volunteers) to undertake direct treatment or personal care as part of a Care Quality Commission regulated activity (whether this is privately or publicly funded). The consultation closes on 11 October.

New gender pay gap toolkit

The Chartered Management Institute and the Equality and Human Rights Commission (EHRC) have joined forces to create a practical toolkit 'close your gender pay gap', which aims to support organisations to take action to tackle their gender pay gap. The toolkit uses case studies to highlight how differing employers have taken action to reduce their gender pay gaps. The ECHR recently warned that the gender pay gap disparity has widened during the pandemic, and that some employers may de-prioritise the issue in their focus on economic recovery. The extended publication deadline for 2020-21 pay gap reports is 5 October 2021.

Public consultation on post-Brexit reform of UK data protection law

The Department for Digital, Culture, Media & Sport (DCMS) has published 'Data: a new direction', a public consultation on widespread post-Brexit reform of UK data protection law (including the UK General Data Protection Regulation, Data Protection Act 2018 and the Privacy and Electronic Communications Regulations 2003). The consultation closes on 19 November 2021. Key headline proposals include:

- Reducing data protection 'red tape'
- Allowing data controllers to charge fees for dealing with subject access requests
- Providing an exhaustive list of pre-approved legitimate interests to justify processing
- Making changes to the rules regarding automated decision-making and anonymous data
- Allowing easier data sharing among public authorities as well as between public bodies and their data processors
- Significant reform of the regulator the Information Commissioner's Office

We explore the proposals in more detail here.

Pregnancy loss pledge

The Miscarriage Association is encouraging employers to commit to supporting employees through the distress of miscarriage by taking the pregnancy loss pledge, agreeing to:

- Encourage a supportive work environment where people feel able to discuss and disclose pregnancy and/or loss without fear of being disadvantaged or discriminated against
- Understand and implement the rules around pregnancy-related leave, ensuring staff feel able to take the time off they need
- Show empathy and understanding towards people and their partners experiencing pregnancy loss
- Implement a pregnancy loss policy or guidance, or ensure it is included in sickness, bereavement or other workplace policies – being mindful of the needs of partners, too
- Encourage line managers to access in-house or external guidance on how to support someone experiencing pregnancy loss
- Support people back to work by being responsive to their needs and showing flexibility wherever possible

Businesses have repaid £1.3 billion in furlough cash

British businesses, buoyed by the UK's economic recovery, have returned £1.3 billion in furlough cash since July 2020, according to new statistics published by HM Treasury. Businesses that wish to repay some or all of the grants they received under the coronavirus job retention scheme (CJRS) can make a repayment online through HMRC's online repayment service. The CJRS closes on 30 September 2021.

Flexible working: public consultation

The Department for Business, Energy & Industrial Strategy (BEIS) has launched a public consultation asking for views on whether to make flexible working the default position. The consultation closes on 1 December 2021.

What changes are being proposed?

The consultation sets out five main proposals for reshaping the existing statutory regime governing the right to request flexible working:

1. It is proposed that the right to request flexible working should become a 'day one' right, by removing the current 26-week qualifying period of continuous service, so that employees can ask about flexible working from the point of recruitment;
2. Seeks views as to whether the eight existing business reasons for refusing a flexible working request remain valid or whether they need reform;
3. Considers whether employers who intend to refuse a flexible working request should be required to suggest alternative flexible working options which can be accommodated (eg if a request to work three days pw from home cannot be accommodated, but working remotely on two days pw would work);
4. Considers the administrative process underpinning the right to request flexible working and specifically whether it remains appropriate to: (a) place a limit of one request per year per employee; and (b) allow an employer three months to deal with a request; and
5. Proposes the introduction of a right to request a temporary flexible arrangement for a short-term period (eg so a parent can support their child's transition from nursery into school or so an employee can support their elderly parent to move into a care home).

Further steps to encourage increased flexible working

The consultation also sets out other steps the government intends to take to help make flexible working the default. For example, it intends to:

- Invite the 'flexible working taskforce' to consider how to move on from the immediate response to COVID-19 and make the most of the lessons learnt (both good and bad) over the last 18 months; and
- Consider how to secure a genuinely flexible working-friendly culture across and within organisations.

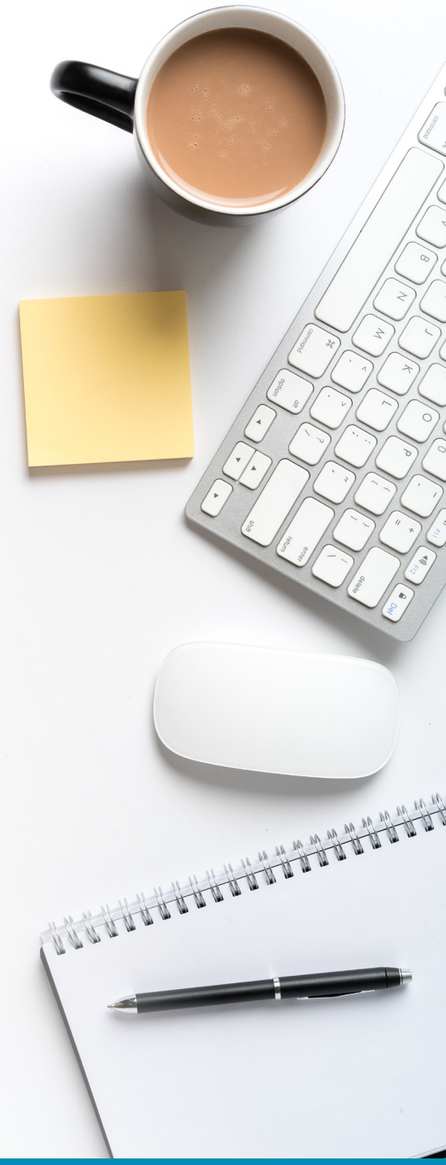
Further call for evidence

The government also intends to launch a further call for evidence looking at:

- The sorts of 'extra' flexibility people may need to help them live their lives in the best way they can – both at work and at home; and
- The need for 'ad hoc' and informal flexibility.

Next steps

We will report the consultation response, and details of any draft legislation, when they are published. No specific timeline for the changes has been announced.



Government commits to introduce one week of unpaid carer's leave a year

The Department of Business, Energy and Industrial Strategy (BEIS) has published its response to its March 2020 consultation on the introduction of a new right to carer's leave, and this confirms that the government intends to introduce a new right for employees to take one week of unpaid carer's leave a year.

How can carer's leave be taken and why?

- Carer's leave will consist of one week of unpaid leave per year
- This can be taken flexibly in half-day blocks or as a whole week
- Carer's leave can be used for providing care or making arrangement for the provision of care for a dependant who requires long-term care

Which workers will be eligible?

Only employees can take carer's leave; the right does not extend to workers.

The right to take carer's leave will be a 'day one' right, meaning no minimum length of service is required.

An employee's entitlement to take carer's leave will:

- Rely on their relationship with the person being cared for, which will broadly follow the definition of dependant used in the right to time off for dependants – a spouse, civil partner, child, parent, a person who lives in the same household as the employee (other than by reason of them being their employee, tenant, lodger or boarder) or a person who reasonably relies on the employee for care; and
- Depend on the person being cared for having a long-term care need. This will be defined as a long-term illness or injury (physical or mental), a disability as defined under the Equality Act 2010, or issues related to old age. There will also be limited exemptions from the requirement for long-term care, for example in the case of terminal illness.

What will the notice and evidence requirements be?

The notice requirement will be in line with that of annual leave, where an employee must give notice that is twice the length of time being requested as leave, plus one day.

To enable employers to manage and plan for absences, employers will be able to postpone, but not deny, the request for carer's leave. The grounds on which they can do so will be strictly limited to where the employer considers that the operation of their business would be unduly disrupted.

The employee wishing to take carer's leave will be able to self-certify their entitlement to take carer's leave and they will not be required to provide the employer with evidence of reason the individual they care for has long-term care needs.

When will carer's leave be introduced?

The response confirms that the government will legislate, when parliamentary time allows, for employees to introduce the right to carer's leave. We will report any developments in due course.

Meet the team

Charlotte Jones
Legal Director, Health Employment

What is your greatest achievement?

My daughter, Olivia (18 months).

Name your three top movies of all time?

The Wizard of Oz, Home Alone (the ultimate Christmas classic!), White Chicks.

What is your favourite book?

This is Going to Hurt – Secret Diaries of a Junior Doctor by Adam Kay – the only book I have read that has made me publicly laugh out loud uncontrollably. I've heard they are making the book into a TV show soon and I cannot wait to watch it!

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

Cape Town, South Africa. Sunshine, exceptional wine and the most amazing animal encounters; diving with great white sharks was an amazing experience!

What is the bravest thing you have ever done?

Riding SheiKra at Busch Gardens – for someone who doesn't like rollercoasters a 200ft drop from the sky at 70mph was a brave (and completely crazy) decision. Needless to say, I didn't go on the ride a second time!

What are your favourite/least favourite foods?

I absolutely love food! Sushi and steak are my favourites. I do not like the texture of Halloumi.

If you would like to know more about us, or any other services we provide please visit our website or contact:

Jeff Middleton
Partner (Manchester)
+44 (0)161 817 7260
jeff.middleton@hilldickinson.com

Kerstie Skeaping
Partner (Liverpool)
+44 (0)151 600 8498
kerstie.skeaping@hilldickinson.com

James Williams
Partner (London)
+44 (0)20 7280 9245
james.williams@hilldickinson.com

Michael Wright
Partner and head of Health Employment North (Manchester)
+44 (0)161 817 7266
michael.wright2@hilldickinson.com

Amy Millson
Legal Director (Leeds)
+44 (0)113 487 7969
amy.millson@hilldickinson.com

Luke Green
Partner and head of education/schools (Liverpool)
+44 (0)151 600 8791
luke.green@hilldickinson.com

HILL DICKINSON

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.

hilldickinson.com