IN CASE

PAYNE HICKS BEACH

EMPLOYMENT LAW NEWSLETTER

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JAMES TOWNSEND
Partner
Employment
jtownsend@phb.co.uk

DOMINIQUE MCRAE
Senior Associare
Employment
Payne Hicks Beach

INTRODUCING OUR NEWSLETTER

In this quarter's round-up of key employment and HR developments we focus on the latest updates and proposals affecting Employment Law; consider the case of a senior employee who was denied their appeal before the Court of Appeal and made to comply with a 12-month non-compete covenant; look at how employers are adapting drug testing protocols to keep up with a world where cannabis is fast becoming socially (and legally) acceptable. We also have a guest feature, which takes a hard-nosed look at the 'transgender bathroom debate', asking what the legal reality is.

EMPLOYMENT LAW UPDATE - AUTUMN 2023

Redundancy protection for pregnancy and family leave

At present, during any redundancy process an employer must offer those on maternity leave, adoption leave or shared parental leave suitable alternative employment (if it exists) as a priority over other employees provisionally selected for redundancy.

The Protection from Redundancy (Pregnancy and Family Leave) Act 2023 increases this protection so staff are protected during or after any period of maternity, adoption or shared parental leave. It is not yet clear how long this protection will last after a return to work (with the Government indicating it may for a period of up to 18 months after the child's birth). Further Regulations are anticipated which will set out this further detail but they are not expected to come into force until at least April 2024.

Carers leave

The Carers Leave Act 2023 introduces a right for employees to take at least one week's unpaid leave during any period of 12 months to either arrange or provide care for a dependant with a long-term care need.

Further Regulations are required to set out exactly how this entitlement will work but it is anticipated that the employee will be required to give notice twice the length of the leave in order to benefit from this provision and that the time can be taken as partial or full days.

Employees are also protected from dismissal or detriment due to taking this leave and may complain to an employment tribunal if their employer has unreasonably postponed a period of carer's leave or if they prevent (or attempt to prevent) the employee from taking such leave.

Neonatal leave

The Neonatal Care (Leave and Pay) Act 2023 has been introduced which makes provision for up to 12 weeks statutory leave and pay for employees whose children are admitted to neonatal care for at least seven days, albeit the new rights will not come in to force until April 2025.

For those who qualify, this would become a day one right, so there would be no minimum service requirement to take advantage of this new proposal. Regulations are still required to confirm the eligibility criteria in detail but once introduced, employers will need to implement new policies and procedures to reflect this new right and likely make amendments to contracts of employment to reflect this new entitlement.

Flexible working

Currently, employees who have worked for 26 weeks can make a flexible working request (for any reason) once per year and employers must notify the employee of the outcome of that request within a three-month period.

It was mooted in the 2019 Queen's speech that there would be changes to this arrangement to effectively make flexible working the default position. The Employment Relations (Flexible Working) Act 2023 proposes:

- introducing a new requirement for employers to consult with employees when they intend to reject a flexible working request;
- allowing two statutory requests a year;
- equiring employers to provide a decision within a period of two months; and
- removing the existing requirement for an employee to explain what effect, if any, the change requested would have on the employer and how that effect might be dealt with.

Whilst there is not yet an implementation date for these changes, employers should familiarise themselves with the proposed amendments and prepare to update or replace their policies. In some cases, the legislative amendments may also require updates to contracts of employment and may necessitate the introduction of additional training for staff.

Employers should also be aware of:

Retained EU Law (Revocation and Reform) Act 2023

Whilst the Retained EU Law (Revocation and Reform) Act 2023 has not introduced any immediate changes to existing employment law, it is likely to have wide-reaching consequences in the mid to long term.

The main thing to note is that retained EU employment laws do curretly remain in place and so will still need to be interpreted in line with EU requirements. Lower courts will however have the right to refer legal points to the higher courts who may use their powers to overturn EU-based case law.

It is likely therefore that there will be change to some areas in the employment sphere – with the most likely being related to holiday entitlement / pay and to working hours. We therefore anticipate changed to

the Working Time Regulations 1998, Agency Worker Regulations 2010, and the Transfer of Undertakings (Protection of Employment) Regulations 2006.

Allocation of tips

The Employment (Allocation of Tips) Act 2023 received Royal Assent in May. It is anticipated it will come into force in 2024, likely in May. It requires employers to ensure all tips and service charges are allocated fairly between its workers. 'Fairly' is not defined, but employers are required to have regard to a Code of Practice, which is being developed and will be put out for consultation in due course.

It also compels employers to have a written policy on how it deals with tips and to keep records of all tips and service charges received for three years.

Predictable working patterns

The Workers (Predictable Terms and Conditions) Act 2023 has recently received Royal Assent, although it is not expected to come into force for at least another year. Once implemented it will allow workers and agency workers to ask for a more predictable working pattern, with penalties for employers who fail to follow the proposed process for responding to such a request or rejecting a request for an impermissible reason. It is expected that there will be a 26 week length of service requirement to make such a request but that will need to be set out in further Regulations.

MIGHT WE SEE A NEW EMPLOYMENT RIGHTS BILL IN THE NEAR FUTURE?

If the wind continues to blow in the direction of Labour, then we very might well. Oliver breaks down what was said, by who at the Labour Party Conference, and what that might mean for employees and employers in the future.

Labour Party Conference 8-11 October 2023

During conference the Labour party presented its vison for Britain. Amidst the introduction of new policy ideas designed to turn the heads of voters, Labour announced a raft of measures designed at improving the employment rights of workers.

Who announced the policies?

The new policies were announced by three key members of the shadow cabinet: Angela Rayner, The Shadow Secretary of State for Levelling Up, Housing and Communities, Anneliese Dodds, The Shadow Secretary of State for Women and Equalities and the Shadow Chancellor Rachel Reeves. Angela Rayner opened the conference with a speech that in part focussed on employment issues and detailed Labour's proposed plans to tackle the issues.

OLIVER STACEY
Trainee Solictior
Employment
ostacey@phb.co.uk

What are the policies?

Angela Rayner announced that she would personally table a new Employment Rights Bill within 100 days of entering Parliament which would enact Labour's "New Deal". The 'New Deal for Working People' is a pledge to strengthen workers' rights and make Britain fairer for working people. The proposed Bill will, according to Angela Rayner, give 'workers basic rights from day one'. One aspect of this is removing the need for qualifying periods of service to be able to claim basic protections such as the right to not be unfairly dismissed, the right to claim sick pay and the right to claim parental leave.

It will also include new rules to end the practice of firing and rehiring as well as banning zero hours contracts. They further commit in this proposed bill to banning the practice of blacklisting. Strike laws introduced by the Conservative Party since 2016 are also in their sights with Labour signalling they will be repealed as part of this proposed bill. Labour have produced a green paper (the best policy a party can propose without firmly committing to its implementation) setting forward these plans in addition to these speeches at the conference.

What does this mean for the future?

Labour still have to get over the hurdle of winning the next election, but, if this comes to pass, we should expect a series of rapid changes to employment law. The banning of zero hours contracts will have the most widespread ramification due to their prevalence, especially amongst the hospitality and healthcare industries.

In addition, the proposed speed of change will mean that employers will have to react with alacrity. The Bill will be proposed within 100 days. Its passage through parliament is always an uncertain thing to estimate, but given its central role in the Labour party's policies, one may expect it to be given a quick passage. This means that employers will need to have strategies in place to comply with these proposed changes should Labour come to power next year.

All of this remains hypothetical given the fact that the Labour party are not in power yet, but with the polls currently indicating that Labour are on track to return to power for the first time in 14 years, now may be the time to start planning to accommodate a new Employment Rights Bill.

THE COURT OF APPEAL UPHOLDS A 12-MONTH NON-COMPETE CLAUSE

A senior employee at a pharmaceutical company announced his intention to join a direct competitor following his resignation despite a 12-month non-compete clause. The High Court found against the individual, enforcing a revised version of the clause. The individual unsuccessfully appealed, the Court finding that the work was niche enough to justify wide terms of protection.

KIM CRANGLE
Associate
Employment
kcrangle@phb.co.uk

Dr Boydell was a senior employee at NZP Ltd, which operates in a very niche area of the pharmaceutical industry and is part of a larger group of companies.

Dr Boydell's contract of employment with NZP included a 12-month non-compete clause which, amongst several other restrictions, prevented him from working for any competing business of NZP or its group companies.

Following Dr Boydell's resignation from NZP, he stated his intention to join a direct competitor. NZP sought an injunction from the High Court to enforce two sets of restrictive covenants, in particular a non-compete clause. Dr Boydell argued that the non-compete clause was too wide and therefore unenforceable since it was an unfair restraint on trade.

The High Court upheld a revised version of the non-compete clause, removing references to NZP's group companies. The effect of this was that the non-compete restriction remained but only in relation to NZP's particular activities, rather than those of the group companies.

Dr Boydell appealed to the Court of Appeal, submitting that the wording of the restriction was still too wide and prevented him from working at any company producing pharmaceutical products.

The Court of Appeal upheld the High Court's decision. It found that the non-compete sought to protect NZP's specialist work and so, due to being incredibly niche, it was appropriate in this case to enforce a wide non-compete clause in order to give adequate protection to NZP's legitimate interests.

WHY DO EMPLOYERS OPT FOR DRUG TESTING?

NAOMI LATHAM
Associate
Employment
nlatham@phb.co.uk

As cannabis is increasingly legalised and decriminalised across the world, both for medical and recreational use, companies conducting drug testing must adapt protocols to keep up with changing social and political norms. Naomi Latham, Associate in our Employment Department and specialist in employment and partnership law, answers the questions that HR teams are asking about this sensitive issue.

Why do employers opt for drug testing?

Employers have a general duty under the Health and Safety at Work etc. Act 1974 to ensure, as far as reasonably practicable, the health, safety and welfare of their staff. Furthermore, the use of drugs can affect a person's ability to perform to an effective and safe standard. Therefore, conducting drug testing in the workplace

can reduce the risk of accidents or injuries in the workplace and ensure a safe working environment for all. However, given the intrusive nature of drug testing, employers should only introduce or use such testing where it is necessary.

How do HR professionals navigate workplace drug policies as recreational and medical cannabis is increasingly accepted/not criminalised?

Employers do not have to limit their policies to drugs prohibited under the Misuse of Drugs Act 1971, of which cannabis is one of many. The misuse of other substances, including prescribed or over-the-counter medication, can also be a legitimate cause for concern. It is worth noting, however, that the Misuse of Drugs Regulations 2001 allows for the legitimate use of controlled drugs and includes unlicensed cannabis-based medicinal products, which can be prescribed under certain circumstances.

In the circumstances where an employee fails a drug test and attributes that to the use of medicinal cannabis, then HR professionals will need to apply the usual rules regarding disciplinary processes, in accordance with any workplace policy and/or ACAS Code, and conduct an appropriate investigation and verification of the position.

Employees should also be encouraged to speak up and disclose the use of medicinal cannabis, even if there are no obvious safety concerns, to ensure reasonable adjustments and risk assessments are undertaken where necessary. Where such a disclosure is made, an employer may wish to ensure that the employee can substantiate any prescription and appropriate consideration will need to be given to when and on what basis the individual will be taking the prescribed medicine and how that might pose a risk in the workplace. Consideration should also be given where an employee's prescription of medicinal cannabis relates to a condition which may constitute a disability under the Equality Act 2010. In such circumstances, employers should consider referring the employee to occupational health in order to identify the extent of any potential disability and the need to make reasonable adjustments.

What should HR professionals keep in mind regarding drug-testing?

There are both employment and data protection implications. Drug-testing in the workplace is likely to engage UK data protection legislation, specifically where test results are processed and kept by HR, as this would amount to processing special category personal data. Nonetheless, HR should obtain employee's consent, in writing, prior to any drug testing taking place. Employees should also be aware of the circumstance(s) in which any medical testing may take place, the nature of the testing, how information obtained through testing will be used, and the safeguards that are in place.

Furthermore, assuming an employer's request for an employee to submit to a test is reasonable and proportionate in the circumstances, a refusal to undergo such testing may amount to misconduct, on the basis that it may constitute a refusal to follow a lawful and reasonable instruction and therefore form grounds for disciplinary action. Case law has established that the possession of cannabis at work may amount to gross misconduct and an employer's decision to dismiss on that basis may fall within the range of reasonable responses and therefore render a dismissal potentially fair. Employers should still be alive to the risk of an unfair dismissal claim, particularly where an employee has two years' service. In each instance, an employer should ensure that it follows a fair and proper procedure in relation to a disciplinary situation and identifies a potentially fair reason for any subsequent dismissal. Now that we find ourselves in a hybrid working world, it is also worth considering how and whether the use of drugs, prescribed or otherwise, whilst working from home may be considered conduct that pertains to the employment relationship. Particularly where such conduct may affect the employee's working arrangements, either because of the particular nature of the work or because of the potential damage to the employer's reputation. In this regard, employer's should revisit and update their existing policies on this issue and bear in mind the changing landscape when it comes to hybrid working.

LADIES AND GENTLEMEN

Much has been made in the media and in popular discourse of the issue of transgender individuals using public bathrooms designated for men or women, but what is the law around such practices in the UK? Guest author Naomi Cunningham of Outer Temple lays out the policies on the books and provides practical solutions for employers.

NAOMI CUNNINGHAM
Outer Temple
naomi.cunningham@outertemple.com

Employers are required by regulation 20 of the Workplace (Health, Safety and Welfare) Regulations 1992 to provide separate toilets for men and women, unless their facilities are single-user fully enclosed rooms that are lockable from the inside. If you let any man (however he may identify) use the ladies', you've made it mixed, so you'll be in breach of the regulations. It's not sex discrimination to obey the law in this respect, so long as your men's and women's toilets are of an equal standard, so you don't need a specific exception from the Equality Act to give you permission to do what you have to do under the Regulations.

It's often suggested that refusing to let a "trans woman" use women's facilities is gender reassignment discrimination because a woman without the protected characteristic of gender reassignment wouldn't be refused access. This is a misunderstanding of the law.

To understand the error, you have to be able to realise that under the Equality Act 2010 "trans women" is not a subcategory of women, but a subcategory of men. A man who asserts a female identity remains legally as well as biologically a man until and unless he gets a gender-recognition certificate. So the correct comparator to test whether a trans-identifying man has suffered discrimination because of gender reassignment is a man without that protected characteristic: see R (Green) v Secretary of State for Justice. A man without the protected characteristic of gender reassignment would equally be refused access to the ladies', so it's not his PC of gender reassignment that is the reason for the treatment complained of, but his sex.

A gender-recognition certificate ('GRC') complicates matters. There are no statutory words excluding the 1992 regulations from the scope of the Gender Recognition Act, so until and unless Lady Haldane's judgment in FWS2 is overturned on appeal, we have to assume that a man with a GRC declaring him to be a woman counts as female for the purposes of those regulations.

Section 22 of the GRA makes it a criminal offence for someone who has acquired knowledge of a GRC-holder's GRC status in an official capacity to disclose that information to anyone else unless one of a list of narrowly defined conditions applies.

This creates a bind for an employer faced with a male employee who i dentifies a woman and wants to use shared facilities provided for women. They will have to choose between three possibilities:

- refuse to let him use the ladies'
- let him use the ladies'
- ask him if he has a GRC, and only let him use the ladies' if he can produce one.

There are risks and difficulties whichever course you take.

Refuse to let him use the ladies'

If you refuse to let a trans-identifying man use the ladies', he may sue you for harassment or discrimination under the Equality Act 2010. Subject again

to the potential complications caused by a GRC (discussed below), he ought to fail. That's because he's being excluded from the ladies' not because of his protected characteristic of gender reassignment, but because of his sex; and excluding men from the ladies' is not sex discrimination, as explained above. As for harassment, even if he can persuade a tribunal that excluding him has the effect of creating an intimidating, hostile and so on environment for him, he'll still have to get past the tribunal's obligation to consider whether it is reasonable for it to have that effect; and the "other circumstances of the case". Those other circumstances will include the fact that his female colleagues have the right – backed explicitly by the 1992 regulations, and implicitly by the harassment provisions of the Equality Act – not to meet a biological male in the ladies'.

Let him use the ladies'

If you let a trans-identifying man use the ladies', your female staff may object. They may not like having to rustle sanitary protection packaging in the hearing of a male colleague, or stand beside him to wash their hands (or even underwear) after dealing with a menstrual flood, or meet a male colleague in a state of undress in a shared changing area. Some may not want to brush their hair, touch up their makeup or adjust their hair-coverings in the presence of a biological male. You are probably in breach of the 1992 regulations (subject to the effect of a GRC, discussed below), and on top of that your policy may amount to indirect sex, race, or religion and belief discrimination. If it is a breach of the regulations, it's hard to see how you're going to justify it as a "proportionate means of achieving a legitimate aim".

And you are at risk of facing harassment claims on all sides, either because your female employees complain that having a biological man in the ladies is an intimidating, hostile etc environment, or else because they say things to or about him while he is there which create an intimidating, hostile and so on environment for him. If the workforce is large they may be completely surprised by the sight or sound of a biologically male stranger in the ladies, and may not realise that they are supposed to pretend to believe that he is a woman.

Let him use the ladies' if he has a GRC

The short list of lawful reasons to disclose that a person has a GRC does not include "for the purpose of managing the workplace" or "for the purpose of protecting the privacy and dignity of your female staff", or anything of that kind. So if you ask your male employee who identifies as a woman whether he has a GRC to "prove" it, and he is able to produce one, you can't tell anyone else. And if it is known that your policy is only to let biological males use the ladies' if they have a GRC, letting this particular man use the ladies' will be a bit of a giveaway. Even if you adopt that policy but keep it a secret, what are you going to say when his female colleagues complain? And how practical is it going to be anyway to keep it secret? Suppose you have two trans-identifying male employees, Gloria, who has a GRC, and Nancy, who doesn't. If you let Gloria use the ladies' but not Nancy, what are people going to think?

Besides, even if you can get around the problem of implicit disclosure (for example, by getting Gloria's consent to disclose), it's far from clear that following this policy is going to protect you from harassment claims from your female staff. A GRC doesn't give a man a right to access female-only spaces; it merely deems him to be female in those circumstances in which the law attaches consequences to whether someone is male or female. A GRC doesn't in itself confer those kinds of rights at all: it can only confer rights contingent on being a woman through the operation of other legislation.

Gloria might argue that not letting him use the ladies' would be direct discrimination on grounds of gender reassignment. The law deems him to be a woman, so the reason he's not admitted to the ladies' is that he's a woman by operation of law, not biology. The employer might try to rely on schedule 3 to the Equality Act, which permits discrimination on grounds of sex and gender reassignment in relation to services; but that defence is likely to fail on the grounds that this is workplace discrimination contrary to part 5 of the Equality Act, to which schedule 3 doesn't apply. There are no comparable exceptions in part 5.

There isn't an obvious defence to Gloria's discrimination claim that the employer did what it had to do to avoid discrimination or harassment claims, or both, from its female staff. That's because the general "statutory authority" defence that was present in all the pre-Equality Act discrimination legislation has made its way into the Equality Act only in fragmented and incomplete form. In particular, there is no general statutory authority exception covering part 5 of the Act. Absent an express exception, direct discrimination is always unlawful.

I want to pause here and make a bit of a fuss about how bad a glitch in the legislation this is. On the face of things, employers are left in a bind in which they may be liable under the same Act, or under the Equality Act and another piece of legislation respectively, for doing something if they do it, and for not doing it, if they don't.

If this conundrum ever comes to court, no doubt both sides will rely on their Convention rights:
the trans-identifying man relying on article 8, and his female colleagues relying on articles 3 and 8.
I honestly can't predict how a court would resolve it[1].

Practical solutions

One option is to provide fully separate, enclosed single-occupancy unisex toilets with integral washing facilities, and the additional cleaning that the lack of urinals will inevitably necessitate. The problem with that solution is that it's all very well in smart offices with a fairly light total footfall; it may be simply impracticable in a warehouse or factory where facilities need to cater for hundreds of staff, often in a hurry.

And in any case, most people continue to prefer fully separate facilities.

For most employers, most of the time, following the guidance we have set out in Toilets Matter: a simple guide to toilets and the law will be the right course: have separate male and female facilities and offer a unisex option. Have a clear policy which makes explicit that individuals are not permitted to use opposite-sex facilities, even if they have a GRC.

But the interaction between the Gender Recognition Act and the Equality Act does create litigation risk for an employer faced with a trans-identifying member of staff in possession of a GRC – whatever course it chooses.

[1] I can't in the time I'm able to devote to this short article, anyway. I'd be delighted to spend some more time – and your money – thinking harder about it, if instructed.

GUEST WRITER
NAOMI CUNNINGHAM
Outer Temple

PAYNE HICKS BEACH

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