MACROBERTS

NEWSLETTER

Employment Law

Spring 2023

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Welcome.

Welcome to the Spring 2023 edition of MacRoberts' quarterly employment law newsletter. We hope you find this helpful and informative.

The aim of this newsletter is to supplement our usual articles, webinars and podcasts with a more horizon-scanning type of publication to keep you both informed and ahead of the curve in terms of:

NEWS IN BRIEF ROUND-UP

Our selection of short snippets from the world of employment law.

GOVERNMENT CONSULTATIONS & CALLS FOR EVIDENCE

Marking your card so you can engage with these to shape policy or look out for what's around the corner and how your business may be impacted.

CASE LAW ROUND-UP

A selection of recent case decisions reflective of recent trends and topical issues in the UK labour market.

KEY CASE TRACKER

A snapshot of key cases with the potential to disrupt the status quo.

As always, if you would like to discuss anything mentioned in this newsletter, or if you would like to share any feedback, please do so via your usual MacRoberts contact or ***click here*** to contact us.

With best wishes,

MacRoberts' Employment Law Team

NEVER MISS A BEAT

Legal changes can have a dramatic impact on you and your business. To ensure you are kept up-to-date with the latest developments and have the knowledge to make timely, effective decisions, ***click here*** to sign up to receive our free legal updates and seminar invitations, or both.

UK Government announces Brexit changes to Employment Law

Although the UK Government has recently pulled back on the plan to revoke all EU regulations currently on the UK statute book beyond the end of this year, there are still **some post-Brexit changes to employment law on the horizon**. The Department for Business and Trade has published a ***new policy paper***, entitled *"Smarter Regulation to Grow the Economy"*, setting out its intentions for new legislation "when Parliamentary time allows", in relation to various areas of employment law and regulation.

Working Time Regulations (WTR)

The Department for Business and Trade believes that the WTR, which derive from retained EU legislation, "place disproportionate burdens on business, specifically in relation to recording working hours and other administrative requirements".

Proposals for reform include permitting **rolled-up holiday pay**, so that workers may be paid their holiday pay with every payslip, as well as **merging "normal" holiday leave with "additional" holiday leave**, to create one entitlement. There is also a proposal to **remove the requirement for employers to keep records of all individuals' working hours**, which is an obligation that originates from EU case law. The UK regulations only expressly require adequate records to show whether weekly working time limits and night work limits are being complied with.

TUPE

Proposals for reform include **removing the requirement to consult with appointed representatives when there are fewer than 50 employees in the business and transfers affecting less than 10 employees irrespective of the size of the business**. The UK Government considers that *"this will save businesses red tape and improve engagement with workers. These reforms will simplify the transfer process, while ensuring that workers' rights continue to be protected"*.

In these scenarios there would be no requirement for elections of representatives and employers could inform and consult directly with the affected employees.

Non-compete Clauses

The Department for Business and Trade also proposes **limiting the length of non-compete clauses to three months**. It has been made clear that this will not interfere with an employer's ability to use paid notice periods, garden leave, non-solicitation clauses or confidentiality clauses.

There is limited detail available in the new policy paper, with the UK Government stating that the change will *"employers to grow their businesses and increase productivity by widening the talent pool, and improving the quality of candidates they can hire"*.

This is certainly a legislative development to watch because of the significant potential impact it could have on employers in sectors where six or 12-month non-compete clauses are standard practice.

Among the points not clear from the policy announcement are:

- Does this only apply to employment contracts, or does it extend to wider commercial agreements such as shareholder agreements or in a business sale context?
- Would existing restrictions as at the date any new legislation comes into force remain effective or be impacted retrospectively either by being void or being read as reduced to three months' duration?

NEWS IN BRIEF ROUND-UP

Updated Vento Injury to Feelings Bands

The Presidents of the Employment Tribunals have issued ***the annual update to the Vento guidelines.*** These guidelines set out the bands of compensation which can be awarded in discrimination cases and the figures have been adjusted to take account of the RPI measure of inflation. This type of compensation is known as an injury to feelings award. These updated figures apply to cases presented on or after 6 April 2023.

The new bands are:

A lower band of **£1,100 to £11,200** (one-off or less serious cases of discrimination)	A middle band of **£11,200 to £33,700** (cases of discrimination that do not merit an award in the upper band)	An upper band of **£33,700 to £56,200** (the most serious cases of discrimination), with the most exceptional cases capable of exceeding £56,200.

Resolution Foundation Report on Labour Market Compliance and Enforcement

The Resolution Foundation has published its report, ***"Enforce for Good: Effectively enforcing labour market rights in the 2020s and beyond"*** ("the report"), which concludes a four-year work programme at the Resolution Foundation (supported by Unbound Philanthropy) exploring the what, why and how of labour market enforcement.

The report looks at evidence form five cross-country studies to show **how the UK could do better when it comes to enforcing labour market rights**. It found, amongst various other things, that the **UK labour market enforcement system is highly fragmented**, with six core bodies plus local authorities overseen and funded by seven different Government departments. This was found to contrast with practice in many other OECD countries, including the five considered in this report, where most, if not all, enforcement functions are brought together into a single organisation.

The report also found that the UK has **0.29 labour market inspectors per 10,000 workers, which is one third less than the minimum standard benchmark, set by the International Labour Organisation, of one labour inspector per 10,000 workers**. This means the UK is ranked 27th out of 33 comparable OECD countries.

The report's recommendations include, amongst other things, **a recommendation to double the number of labour market inspectors** and advocates **the introduction of a power to levy a financial penalty** up to four times any arrears owed for rights.

It also recommends **strengthening the employment tribunal system** for cases that require adjudication by extending application times to six months and enforcing awards adequately. It remains to be seen whether any of the recommendations in the report will be brought forward in any future legislation.

Managing Stress at Work: New Acas Guidance

Acas has published ***new advice for employers on managing work-related stress***. This follows on from an Acas -commissioned YouGov poll which found that a third of British workers believe their organisation is not effective at managing work-related stress.

The new guidance covers the following:

- causes and signs of stress;
- understanding the law on work-related stress;
- supporting employees with work-related stress; and
- preventing work-related stress.

The Acas guidance sets out the definition of stress as being "*the adverse reaction people have to excessive pressures or other types of demand placed on them*". The guidance makes clear that, if not properly managed, stress can lead to other conditions such as anxiety and/or depression.

Although stress is not categorised as a medical condition on its own, an employee may fit the legal test for being disabled if a) they have a "physical or mental impairment" and b) this is likely to have a "substantial and long-term adverse effect on their ability to carry out normal day-to-day activities". This emphasises the importance of **not only taking action to support employees and workers** with work-related stress but, more importantly, **taking proactive steps towards preventing work-related stress**.

Reasonable Adjustments for Mental Health: New ACAS guidance

Acas has published ***new guidance on making reasonable adjustments*** for employees with mental health conditions, aimed at both employers and employees.

The new guidance covers the following:

- what reasonable adjustments for mental health might look like;
- examples of reasonable adjustments for mental health;
- requesting reasonable adjustments for mental health;
- responding to reasonable adjustments for mental health requests;
- managing employees with reasonable adjustments for mental health; and
- reviewing policies with mental health in mind.

The Acas guidance in relation to supporting employees with work-related stress, states: "*It's **important to talk about stress** and create an **open and honest environment** at work. This can help employees to talk about how they are feeling, and to get the support they need.*"

One suggestion given by the Acas guidance is that "*if an employee is experiencing work-related stress but is not disabled, the employer **should still talk with them about adjustments that might help**. Often, it's enough to agree **simple changes to working arrangements or responsibilities with the employee**.*" Such adjustments could include flexible working hours, allowing more rest breaks or helping the employee prioritise their workload.

In addition to this new guidance, Acas has also ***published advice for employers*** in response to their study on 9 March 2023, which found that three in five employees feel **stressed specifically due to the rising cost of living**. The recurring theme of this advice is **ensuring regular, consistent and calm communication**, particularly in relation to the internal and external support available to employees.

Under the Equality Act 2010, employers are legally required to make reasonable adjustments if they know, or could reasonably be expected to know, that a member of staff is disabled and placed at the relevant disadvantage (section 20, Equality Act 2010). Having said that, the new Acas guidance encourages employers to try to make reasonable adjustments **even if the issue is not a disability** and therefore where there is no legal obligation to do so.

Previous guidance on reasonable adjustments has often focused on making physical adjustments or providing adapted equipment for those employees with physical disabilities.

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Reasonable Adjustments for Mental Health: New ACAS Guidance (contd.)

The new Acas guidance states: *"Mental health includes our emotional, psychological and social wellbeing. It affects how we think, feel and behave"*. The guidance is very helpful in highlighting what types of adjustments might be appropriate for those with mental health conditions, although the guidance makes it clear that every situation is different and what works for one employee might not work for another. It also highlights the fluctuating nature of mental health.

It also provides advice for employers on **how to respond to a request for reasonable adjustments** and how to agree to reasonable adjustments with the employee. It recommends a **trial period and monitoring** of any agreed adjustments.

The guidance also goes on to underline the importance of treating mental health conditions with the same care as physical illness and reminds employers of the benefits of making reasonable adjustments, including helping with the recruitment, retention and training costs of employees, as well as potentially reducing absence (and associated costs) and increasing productivity.

Alongside the guidance, Acas has also published a number of ***case studies*** showing how some organisations have helped staff with reasonable adjustments for mental health.

Autism Employment Review

In April, it was announced that Sir Robert Buckland KC MP is to lead a ***new Autism Employment Review*** ("the Buckland Review") which will focus on **supporting employers to recruit and retain autistic people** and *"reap the benefits of a neurodiverse workforce"*.

At present, there are fewer than three in 10 autistic adults in work, although many more will want to work and have a lot to offer companies. It is estimated that around one in seven people are ***neurodivergent***, which encompasses a range of conditions including autism, dyslexia and dyspraxia.

The Buckland Review will ask businesses, employment organisations, specialist support groups and autistic people to **identity the barriers to securing and retaining work**, as well as **issues with progressing their careers**.

The issues covered by the Buckland Review will include the following:

- how employers identify and better support autistic staff already in their workforce;
- what more could be done to prepare autistic people effectively for beginning or returning to a career; and
- working practices or initiatives to reduce stigma and improve the productivity of autistic employees.

The review will focus specifically on autistic people, and its aim is to **develop solutions** which:

- will be acceptable to autistic people,
- will be effective at **improving autistic people's outcomes**, and
- will be **feasible for employers or public services to deliver**.

The charity Autistica, a UK autism research and campaigning charity, will be supporting the review which began in May 2023. Dr James Cusack, Chief Executive of Autistica has commented: *"This will help us to rethink how we approach autistic people's access to work and perhaps drive a wider rethink around how we accommodate everyone in work, as we all think differently with unique strengths, challenges and needs"*.

Recommendations from the Buckland Review are due to be presented to the Secretary of State for Work and Pensions in September 2023.

Ethnicity Pay Reporting: Government Guidelines for Employers

In the Government's March 2022 response to the Report of the Commission on Race and Ethnic Disparities, it confirmed that it would not be introducing mandatory ethnicity pay reporting for employers. Instead, it would support employers to report on a voluntary basis by publishing guidance.

The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 define a pay gap to be the difference between the median (or mean) hourly pay of employees in category A and the median (or mean) hourly pay of employees in category B. This is expressed as a percentage of one group's earnings.

This ***new guidance*** was published on 17 April 2023 and covers:

- collecting ethnicity pay data for employees;
- data issues such as confidentiality, aggregating ethnic groups and the location of employees;
- recommended calculations with step-by-step instructions on how to do those calculations;
- analysing and understanding the results of these calculations;
- reporting the findings;
- further analysis to understand the underlying causes of any disparities;
- the importance of taking an evidence-based approach towards actions.

The Government states that the aim of the new guidance is *"to develop a consistent, methodological approach to ethnicity pay reporting, which can then lead to meaningful action, while remaining proportionate and without adding undue burdens on business"*.

The new guidance recommends that the calculation of the ethnicity gap should mirror the approach of the gender pay gap reporting regime; however, it may be a more complex exercise if employers conduct the data analysis and calculation across different ethnic groups, which is the recommended approach, rather than adopting a binary comparison between white/white British and other ethnic minorities. The guidance recommends adopting the harmonised ethnicity standard currently used in the public sector and recommends a minimum category size of between five and 20 employees for internal reporting and a minimum of 50 employees for external reporting. This will help to ensure that the calculations produce a more robust result, without being distorted by a very small sample size.

Employers who decide to publish their ethnicity pay findings may wish to consider producing a supporting narrative with a summary of why the employer believes any pay disparities exist. The guidance states that it is up to employers to do further work or collate other available data such as staff surveys, data on recruitment and progression, to identify and understand the underlying causes which may not be as a result of discrimination. The guidance also suggests that employers should consider publishing an action plan setting out clear and measurable but realistic targets for reducing any gaps.

It is already a statutory requirement for employers with at least 250 employees to measure and report gender pay gaps.

GOVERNMENT CONSULTATIONS & CALLS FOR EVIDENCE

Government Review of Whistleblowing Framework

The Department for Business and Trade has recently launched a review of ***whistleblowing legislation***. This review will examine the effectiveness of the current whistleblowing legisltaiton in meeting its original objectives, as it looks to develop the laws protecting workers who "blow the whistle" in the workplace.

The review will seek the views and evidence from whistleblowers, charities, employers and regulators and will cover central topics, key to the whistleblowing, such as:

- who is covered by whistleblowing protections;
- the availability of information and guidance for whistleblowing purposes (both on gov.uk and that provided by employers); and
- how employers and prescribed persons respond to whistleblowing disclosures, including best practice.

It is expected that research for the review will be concluded by Autumn 2023. Although the review itself will not change any part of the current legislation automatically, it is important for employers to make sure they have in place appropriate internal channels for whistleblower reporting in terms of resource, accountability and protecting confidentiality, particularly as protections for workers who "blow the whistle" may be strengthened as a result of this review. It will likely be next year before we know whether any substantive changes will be made to the law in this area.

Joint Committee on Human Rights Inquiry into Protection of Human Rights at Work

The UK Parliament's Joint Committee on Human Rights launched a new inquiry in February to examine ***how human rights are protected and respected at work***. This inquiry is specifically looking at how the protections from the European Convention on Human Rights apply to work and the rights of workers.

Chair of the Committee, Joanna Cherry KC MP, commented that: *"There is an obligation on the Government to ensure that there is a comprehensive framework in place that ensure the rights enshrined in the European Convention on Human Rights are protected at work. The Joint Committee on Human Rights has launched this inquiry to understand how rights are currently protected at work and pinpoint where greater safeguards may be needed."*

By way of context, every country that has signed up to the European Convention on Human Rights has an obligation to protect against breaches of human rights. In an employment context, this can include ensuring employers do not interfere with a workers freedom of association, for example by preventing them from joining a trade union or to ensure surveillance and workplace monitoring does not amount to a breach of the right to private and family life.

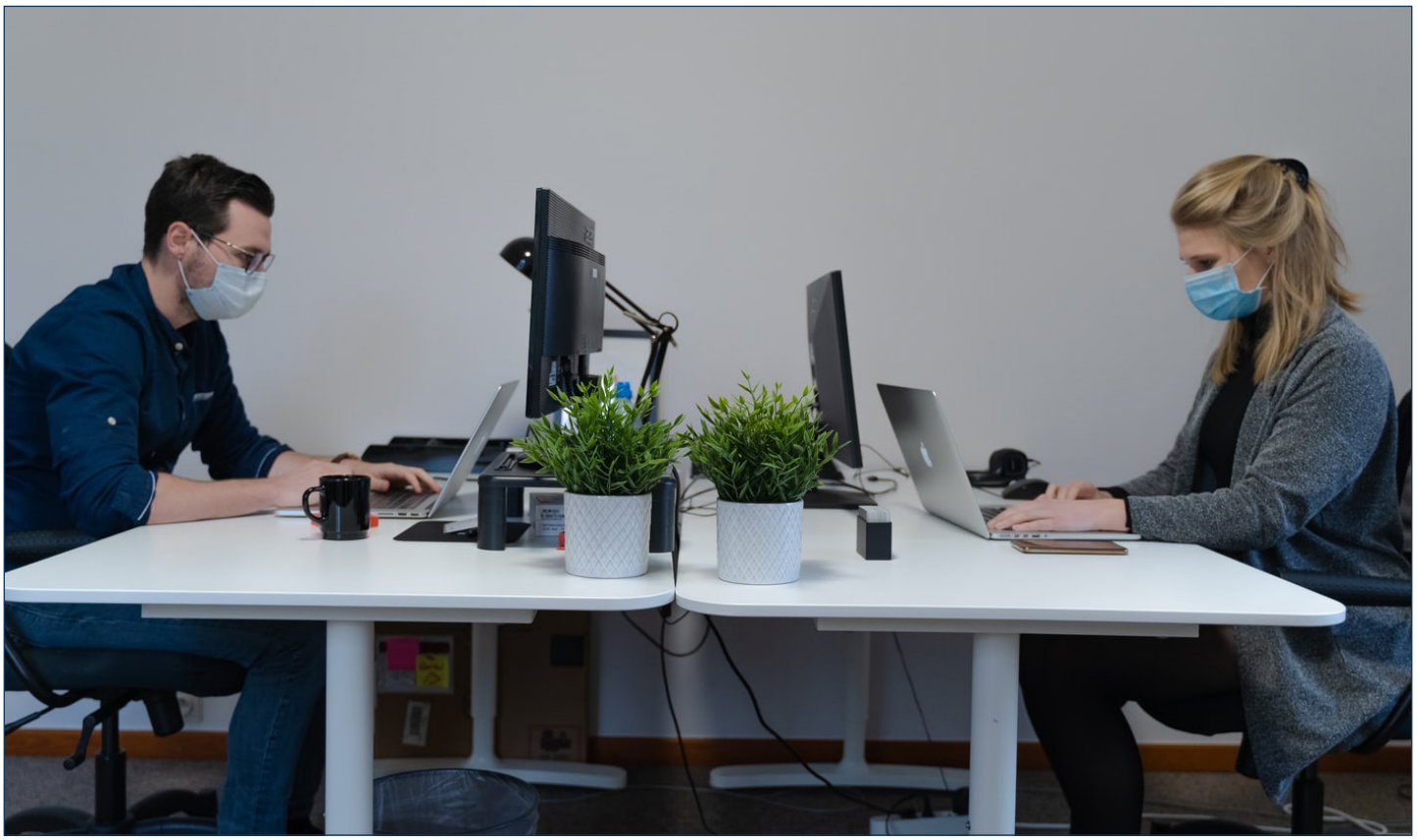
The deadline for submitting written evidence to the Committee (which can be viewed ***here***) was 24 March 2023 and the outcome from this inquiry is awaited.

CASE LAW ROUND-UP

In this section, we round up recent notable cases.

Please refer to our ***Knowledge Hub*** for more in-depth analysis of other recent cases, and don't forget to ***sign up*** to receive our free updates and event invitations directly to your inbox.

CASE LAW ROUND-UP



Mones v Lisa Franklin Ltd [2022] EAT 199

Employer had not made unauthorised deductions from wages during Employee's furlough period

The Employment Appeal Tribunal (EAT) upheld an employment tribunal decision that an employer had not made unauthorised deductions from wages in circumstances where it paid a furloughed employee in accordance with her varied employment contract but not in accordance with the Coronavirus Job Retention Scheme (CJRS).

The claimant had been employed as a part-time receptionist from November 2018. The claimant's original contract of employment provided for working hours of nine hours per week, usually on a Saturday. However, working hours had been varied from January 2020, by agreement, to six hours per week on a Friday.

At the beginning of the COVID-19 pandemic, the employer sent a "Furlough Letter" to the claimant, setting out the terms by which she would be furloughed whilst the employer could receive financial assistance through the CJRS. This letter stated that from 1 April 2020, HMRC would cover 80% of average pay received since moving into the new working arrangement in January 2020.

The claimant queried this proposed method of calculation, but from 3 April 2020 until 7 September 2020 she received furlough pay in accordance with the terms set out in the letter. A claim for unlawful deduction from wages was brought, with the claimant alleging that pay should have been calculated in accordance with the Treasury Directions to HMRC regarding the CJRS, instead of in accordance with the terms of the Furlough Letter. A tribunal dismissed the claimant's claim and she subsequently appealed.

The EAT dismissed the appeal. It was noted that nothing in any Treasury Direction expressly imposed upon an employer an obligation to adopt the CJRS or any formulae set out in it whilst calculating pay. The EAT stated a valid variation had taken place, although this position may have been different had no written agreement been documented covering the calculation of furlough pay. In such circumstances, it could have been argued that there was an implied term that the employer would calculate furlough pay in line with the formula set out in the CJRS.

Meaker v Cyxtera Technology UK Limited [2023] EAT 17

An employer could rely on "without prejudice" correspondence to establish a dismissal

The Employment Appeal Tribunal (EAT) upheld an employment tribunal decision finding that a "without prejudice" letter to an employee was an effective dismissal letter, despite it erroneously stating that the termination of employment was by mutual agreement and that the correspondence was "without prejudice". The effective date of termination (EDT) was held to be the date as stated in the letter, resulting in the employee's claim for unfair dismissal being out of time.

The claimant suffered back injuries and was off work for an extended period of time.

In January 2020, Cyxtera's HR Manager verbally advised the claimant that the company was considering the possibility of terminating his employment, including the possibility of a settlement agreement.

He subsequently received a letter from Cyxtera on 5 February which was headed "without prejudice", stating that his last day of employment was mutually agreed to be 7 February (with payment being made of any amounts of holiday pay and payment in lieu of notice due up to that date). This letter also included a settlement agreement which detailed Cyxtera's offer of an ex-gratia payment, subject to the signing of the settlement agreement. While the claimant informed them that he did not accept this offer, Cyxtera made a payment directly to the claimant's bank account covering outstanding holiday pay and notice. They wrote to the claimant stating that he could not return to work.

The claimant did not accept the termination of his employment and brought a claim for unfair dismissal on 19 June.

The tribunal dismissed the claimant's case at a preliminary hearing as he had not brought this within three months of the date of dismissal. The EDT was held to be 7 February, the date of termination as per the "without prejudice" letter, and the claimant had not shown that it had not been reasonably practicable for him to have presented his claim in time. The claimant appealed, contending that the "without prejudice" letter did not effectively dismiss him, and even if it did, the decision on the EDT being 7 February was incorrect.

The EAT dismissed the claimant's appeal. They found that letter had set out that Cyxtera had intended to terminate the claimant's employment effective on 7 February. The law requires that an employer must clearly communicate that they are terminating employment on an identifiable date. That occurred here.

Interestingly, it was also found that, although the letter was headed "without prejudice", it had only been the ex-gratia payment which was conditional upon M signing the settlement agreement, not the termination in and of itself but demonstrates the need to take care when determining whether correspondence is on an open or without prejudice basis and the difficulties which can ensue when including both in the same correspondence.

KEY EMPLOYMENT LAW CASE TRACKER

Cases recently decided:

Case Name	Case Outline
Chief Constable of the Police Service of Northern Ireland and another v Agnew and others Heard by the **Supreme Court** on 14 and 15 December 2022	**Holiday pay** The Supreme Court heard this landmark holiday pay case in December 2022. This is a Northern Irish case where the Northern Ireland Court of Appeal held that a "series" of unlawful deductions from holiday pay would not be interrupted by gaps of more than three months. Whilst this is not yet binding on Employment Tribunals in Scotland, England and Wales, if upheld by the Supreme Court it will be binding and change the established law as it pertains to holiday pay. The case will also look at the issue of whether it should be assumed that the four weeks paid annual leave mandated by the WTR is taken first when ascertaining if there has been an underpayment of holiday pay.
Trustees of the Barry Congregation of Jehovah's Witnesses v BxB Judgment delivered by the **Supreme Court** on 26 April 2023	**Vicarious liability** The Supreme Court has clarified the position of when organisations will be held responsible for the actions of non-employees particularly in cases of sexual abuse. In this case, the Court found that the organisation was not vicariously liable for the actions of its Elders. Employers are generally held to be liable for the actions of their employees where these actions are done in the course of employment. If an employment relationship does not exist as was the case here, a two stage test will be applied to see if the organisation is vicariously liable. The first step is to look at whether the relationship between individual and the organisation is akin to employment. The second step is to apply the "close connection" test, and consider whether the alleged conduct is so closely connected with acts authorised, that it is fairly and properly regarded as being done with the organisation's authority. In this particular case it had previously been held in the High Court and Court of Appeal that the organisation was vicariously liable for an incident of rape committed by one its Elders against an adult member of the congregation. The Courts found there was a strong causative link between the wrong-doing and his position and conduct as an Elder. Therefore liability attached to the organisation. However, in a unanimous decision, the Supreme Court reversed the earlier decisions, finding that irrelevant factors had been taken into account when analysing the requisite close connection, including the failure of the organisation to condemn previous behaviour exhibited by the individual to other congregation members. Further, the decision clarified that in cases of sexual abuse, it is not necessary to tailor the test of vicarious liability.

Case Name	Case Outline
F.F. v Österreichische Datenschutzbehörde, Case C 487/21 Judgment delivered by the Court of Justice of the European Union (ECJ) on 4 May 2023	**Employee data protection** In this case, the ECJ has provided clarity on what is within the scope of a data subject's right under Article 15(3) of the General Data Protection Regulation (EU) (2016/679) to receive a "copy" of their personal data undergoing processing. It was held that a data controller must give a data subject a faithful and intelligible reproduction of all personal data undergoing processing. This was explained to also include an obligation to provide copies of personal data, including in certain circumstances a right to copies of extracts from documents or even entire documents or extracts from databases containing those data.
Darren Miles v Driver and Vehicle Standards Agency Judgment delivered by the EAT on 28 April 2023	**Termination of employment** The EAT upheld an Employment Tribunal decision that an employee (a driving examiner with chronic kidney disease) had not been automatically unfairly dismissed in accordance with section 100(1)(d) of the Employment Rights Act 1996, as well as upholding that the employee did not suffer any unlawful detriment in accordance with section 44(1)(d) of the Employment Rights Act 1996 for refusing to return to work (and later resigning) after the first COVID-19 "lockdown" despite the employer having made various adjustments to its usual practices. The EAT concurred with the Employment Tribunal's decision that so long as there was a safety representative or committee for (not necessarily at) the place at which the claimant worked, this was sufficient to preclude claims being brought under sections 44(1)(c) and 100(1)(c). The EAT also agreed with the Employment Tribunal's assessment that it was not reasonable for the claimant to believe he was in serious and imminent danger. This assessment was based on a consideration of the government guidance and legislation in place at the time, in addition to material from Public Health England. Certain disability claims were however remitted to the ET.

Contact Us

We hope you have found the articles in this newsletter interesting and informative.

If you would like to discuss any matters mentioned, or if you would like to share any feedback on this newsletter, please do so via your usual MacRoberts contact, or contact a member of our specialist Employment Law team:

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