Tolley’s Employment Handbook
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Tolley’s Employment Handbook

by

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Thirty sixth Edition
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Editor’s Introduction to the thirty sixth Edition

This is the 36th edition of Tolley’s Employment Handbook. That you are reading these words means that the team of contributing editors have pulled off their annual miracle. With this edition we say goodbye to Paul Greatorex who has passed Probability Employees (37) and Time Off Work (50) to rising star Katherine Taunton.

As we go to press there is hope that the COVID pandemic may at last be waning. The furlough scheme is a warm, if increasingly distant, memory and Employment lawyers are now seeking to deal with (what we pray is) the aftermath. Two issues have emerged as particularly problematic. The first is place of work. Many businesses transitioned to home-working during lockdown and many are finding that their workforces are reluctant to transition back again. Some employers are embracing this change in working pattern and that will, no doubt, have consequences for a body of Employment Law that has not been developed with remote working in mind. Others want things back to “normal” and in one civil service office a Minister has been spotted going from empty desk to empty desk leaving polite but passive aggressive notes like a disgruntled, Edwardian C-3PO. Meanwhile newspapers asked anxiously how workers can be made to resume their daily commutes.

The second issue is the emergence of “long COVID”, a condition (or constellation of conditions) that can be debilitating physically and which may also have adverse cognitive impacts. As at 6 May 2022, 2.8% of the population were experiencing self-reported long COVID symptoms (Source: ONS). Those with Long Covid frequently complain of a “brain fog”. For those who suffer only a cognitive impairment, it may not always be obvious to them that they have long COVID. The difficulty that this creates medium to large employers is that they are very likely currently to employ people with the condition and a question arises as to whether they are disabled for the purposes of the EqA 2010. On 7 May 2022, the EHRC Twitter account tweeted: “Discussions continue on whether ‘long covid’ symptoms constitute a disability. Without case law or scientific consensus, EHRC does not recommend that ‘long covid’ be treated as a disability.” Employment lawyers with Twitter accounts immediately convened to scold the EHRC, reminding it that the only test is that set out in EqA 2010, s 6 and that since the Tribunal will likely approach the question on a case-by-case basis the EHRC’s recommendation was apt to mislead. The EHRC re-embraced orthodoxy two days later with a post on its website.

The prize for most high-profile Employment Law matter of the year must go to P&O Ferries’s decision to dismiss 800 members of staff without prior collective consultation, instead immediately offering them settlement payments that reflected their likely tribunal compensation. The public response was outrage and demands that there should be some kind of penalty for employers who fail to engage in collective redundancy consultation. Perhaps we could call it a “protective award” (see Redundancy II (40)).

Some of the most interesting cases this year have focused on trade unions. The Supreme Court decision in Kostal UK Ltd v Dunkley [2021] UKSC 47 is the most prominent example. Kostal recognised Unite for the purposes of collective bargaining. In the course of bargaining, Kostal made a pay offer to the union. The union balloted its members and the offer was rejected. The offer was then made directly to the employees. The great majority of them accepted. The Supreme Court upheld the tribunal’s decision that, by making the offer, there had been a breach of the right conferred on workers by with TULR(C)A 1992, 145. The section is an unusual one; it protects workers against pay offers. That might not immediately sound like something that workers need protecting against, but sometimes the pay offer may have an ulterior purpose; causing some or all of the terms of employment not to be (or no longer to be) determined by collective bargaining. If achieving that “prohibited result” is the sole or main purpose of making the offer, it will breach the employees’ right. Kostal argued that the section should only bite where the offer required workers to forgo or relinquish collective bargaining rights. They were not
seeking to achieve that, they argued, they were simply faced with an impasse in that particular round of collective negotiation. The union’s argument was that the scope of the clause was much broader: any offer which would result in at least one term of employment being agreed directly rather than collectively would be unlawful. The Justices took a third way (or, more accurately, a third and fourth way). All upheld the Tribunal’s finding that the section had applied. However, addressing the question as to what an employer may do when they are unable to agree terms collectively, the majority decided that an offer could be made directly when collective bargaining had been exhausted. The minority took the view that a direct offer could be made only where the employer could show that their sole or main reason for making the offer was a genuine business reason. Applying the decision in practice is likely to lead to some very interesting further caselaw.

Meanwhile, the Court of Appeal has had to consider TULR(C)A 1992, s 146, which prohibits employers from subjecting workers to detriments on grounds related to union membership or trade union activities. The Employment Appeal Tribunal decided “trade union activities” had to be interpreted so as to include industrial action. That was to ensure that it was compatible with Art 11 of the European Convention. The Court of Appeal decided that it would not be appropriate to grant a certificate of incompatibility because it was, in truth, not a question of s. 146 being incompatible with Art 11. The proper analysis was that the Act contained a lacuna; it did not provide a protection that Art 11 could be said to require. That meant that “the extent of the incompatibility [was] unclear and the legislative choices [were] far from being binary questions”. The decision is described in this edition by Daniel Stilitz QC, who appeared in the case.

Circling back to fire and rehire, the High Court granted an injunction to prevent Tesco using the tactic in Usdaw & others v Tesco Stores Limited QQB-2021-000988. Employees had been promised that a particular pay protection measure would be a “protection for life” at the Tesco site they were engaged at and was described as a “permanent feature” in a collective agreement. When Tesco tried to remove the protection the High Court held them to their (ill-chosen) word.

Since the last edition, the Employment Appeal Tribunal has acquired a new President: Mrs Justice Eady. Her appointment continues a fantastic run of good fortune for the Appeal Tribunal. Mrs Justice Eady was one of the very best Employment Law barristers before going onto the bench. She spent a number of years sitting in the EAT as an “HHJ” before her elevation and made her mark as a judge whose extensive knowledge of the Law and acuity was combined with a great kindness. There is no doubt that, as President, she will have a considerable influence on how Employment Law develops over the next few years, but she is also commendably active in trying to make the Employment Bar and the judiciary a more diverse community.

The arrival of a new President means, of course, the loss of the former incumbent. We bid a genuinely fond farewell to Mr Justice Choudhury. He has delivered some exceptionally important judgments including, for instance, Forstater (see DISCRIMINATION AND EQUAL OPORTUNITIES I (12)). Whilst it is difficult to imagine how any future role could truly match his stint as a contributing editor to this work, it is plain there are great things ahead of him.

Finally, may I express on behalf of myself and my colleagues our profound thanks (and apologies) to the fantastic team at LexisNexis for the hard work done and the great patience expended on bringing us to another publication day.

The law is stated as at 1 April 2022, with later developments included wherever possible.

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