



NI Employment Quarterly Update – September 2021

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Contents

Introduction	1
No disability discrimination as hypothetical comparator would have been treated in the same manner	2
B&M settles disability discrimination claim for £5,000	3
The high price of failing to comply with the statutory procedures on dismissals	4
Belfast Health & Social Care Trust settled a claim for discrimination on the grounds of sexual orientation for £2,000	5
Horizon Scanning – Northern Ireland	6
Immigration updates: Right to work checks	7



Introduction



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Welcome to the latest issue of TLT's Northern Ireland (NI) focused employment law updates. This supplements TLT's periodical employment law bulletin which covers important developments and key decisions coming out of Great Britain and Europe. This NI update shares news and insights arising from local cases as well as looking ahead to legal developments which could impact on NI businesses.

This quarter we look back on some of the interesting news and case decisions from June – August 2021 in Northern Ireland, and highlight our key takeaways for employers. We include details of recent media reporting on settlement of Industrial Tribunal claims where the Claimants were supported by the Equality Commission for Northern Ireland (ECNI). Settlements are rarely reported upon because there is usually an agreement between the parties to the claim that the fact and terms of the settlement will remain confidential. However, cases which have the support of the ECNI will often differ and, whilst the cases are settled without admission of liability and in the absence of a legal determination by the Tribunal, the ECNI may report on the nature of the claim and the value of the settlement.

We also take a look at what's on the horizon with mandatory vaccinations being introduced in England for care home staff - will the same be introduced here? We also examine recent changes to right to work checks.



We take a look at what's on the horizon with mandatory vaccinations being introduced in England for care home staff - will the same be introduced here?

No disability discrimination as hypothetical comparator would have been treated in the same manner – **Case:** Harbinson v Hovis Ltd [2021]

The Claimant, an employee of Hovis Ltd (the Respondent), brought a claim before the Industrial Tribunal alleging disability discrimination, namely a failure to provide reasonable adjustments. The Tribunal found that the complaints were not well founded and the claim was dismissed.

Background

Mr Harbinson (the Claimant) has a shoulder condition (Bilateral Calcific Bursitis). Prior to the proceedings, Hovis Ltd (the Respondent) had introduced a number of adjustments to the Claimant's role as a result of his shoulder condition.

In January 2019, the Claimant was absent from work due to a flare up of his condition. The Respondent made a referral to occupational health (OH). This report was not received by the Respondent until August 2019, at a time when the Claimant's sick note had expired and he had already returned to work. The OH report noted that the Claimant's existing duties would lead to an aggravation of his shoulder condition, even with the existing adjustments that were in place, and it was suggested that redeployment be considered. Upon receipt of the report the Respondent suspended the Claimant on medical grounds.

In October 2019, the Respondent confirmed that there were no alternative roles available, but following a further assessment by OH, the Claimant was able to return to his substantive role.

The Claimant claimed that there had been direct disability discrimination on the basis of his suspension from work. He further asserted that there had been a failure to provide appropriate reasonable adjustments which should have included alternative roles or working with reduced duties.

On the direct disability discrimination argument, the Tribunal found that the hypothetical comparator would be someone who did not have a disability but for whom OH had advised that it would be harmful to continue working. The finding was that such an individual would have been medically suspended. Therefore, the treatment would have been the same, thus there was no discrimination.

On the point of reasonable adjustments, it was held by the Tribunal that the adjustment would have been to find the Claimant alternative work. However, to expect this to be in place straightaway would not have been reasonable as they would have to assess whether the alternative work was safe and compliant with their duty of care to the Claimant. Accordingly, the case was dismissed.

An interesting aside, one of the Respondent's witnesses was questioned as to whether he had prepared his own witness statement for the hearing and the witness confirmed that he had not. The Tribunal criticised this approach greatly, stating that it was for the witness to prepare his own evidence. It was on that basis that the Tribunal only accepted the witness's evidence where it had been corroborated by oral evidence of other witnesses or documentary evidence.

Our insight

This case is a good example of how a Tribunal considers a claim of direct discrimination using a hypothetical comparator. On the face of it, suspension of a worker who has a disability may appear discriminatory, however on closer inspection, a non-disabled hypothetical comparator would have been treated in the same manner where it was harmful for them to continue working. Furthermore, the decision to suspend had been taken as the employer recognised it had a duty of care towards the Claimant to protect his health.

Of note was the Tribunal's critique of the Respondent in relation to witness statements and the fact that one witness accepted that they had not written their own statement. Whilst ultimately it did not sway the outcome which was decided in the Respondent's favour, it did limit the weight that was given to that witness's evidence, which could have impacted the Respondent's defence if there had not been further witnesses or sufficient documentary evidence to bolster the witness's evidence.

B&M settles disability discrimination claim for £5,000 –

Case: Spence v B&M Retail Limited

The Claimant, an employee of the Respondent, brought a claim before the Industrial Tribunal alleging disability discrimination. The claim has now been settled by way of a £5,000 financial settlement.

Background

Mr Harvey Spence (the Claimant) has a learning disability. He was employed for 18 months at B&M in a stock-filling role. During his employment the Claimant states that he was subjected to disability harassment by some colleagues, which included being excluded from conversations and subjected to derogatory remarks.

The Claimant stated that he left employment with the Respondent as the experience was making him “feel very sick” and he was “so worried about how they would treat me if I went back in”.

The Claimant took proceedings for constructive unfair dismissal and disability discrimination; his claim was supported by the Equality Commission of Northern Ireland (ECNI).

The matter has now settled without admission of liability for £5,000. As part of the settlement, the Respondent has confirmed its commitment to the principle of equality of opportunity in employment.

Furthermore, the Respondent has undertaken to liaise with the ECNI to review its equal opportunities, disability policies, practices and procedures as applicable within Northern Ireland to ensure that they are effective and conform with the Disability Discrimination Act 1995 (as amended).

Dr Evelyn Collins, Chief Executive of ECNI, said:

“The sort of behaviour that Harvey describes really has no place in any workplace. Harvey was entitled to be treated with dignity and respect at work just like everyone else.

The employment rate for disabled people in Northern Ireland is 37.3%, the lowest of all the UK regions, and this needs to improve. Harvey’s experience at work highlights that much remains to be done to challenge barriers to employment for many disabled people and to ensure they can secure and retain paid employment.”

Our insight

The importance of employers having robust grievance and complaints handling processes in place to enable them to deal promptly and seriously with complaints of discrimination or harassment cannot be understated.

This is particularly important when defending discrimination claims, as one potential defence to such claims is that the employer took all reasonable steps to prevent the discrimination or harassment from happening. Whilst there is no fixed list of what would amount to reasonable steps, it would typically include:

- having effective policies on equality of opportunity, bullying and harassment/dignity at work, and ensuring the policies are kept up to date;

- ensuring staff, especially managers, are trained and regularly refreshed on the content of those policies (keeping training records for all staff members is recommended); and
- ensuring any discrimination or harassment complaints or allegations are investigated fairly and thoroughly, and any issues are addressed.

To rely on this defence an employer will need to evidence that they have taken such steps. Simply having a complaints procedure in place is not sufficient. The employer will need to ensure that the procedure is accessible and is applied consistently.

The high price of failing to comply with the statutory procedures on dismissals – **Case:** *Andrius Sakalauskas v B. Hughes & Sons Ltd*

The Claimant, an employee of the Respondent, brought claims for unfair dismissal and failure to pay holiday pay. The Tribunal found that the Claimant had been automatically unfairly dismissed and awarded the Claimant uplifted compensation.

Background

Andrius Sakalauskas (the Claimant) brought claims for unfair dismissal and holiday pay against his former employer, B. Hughes & Sons Ltd (the Respondent).

There is limited factual background in the written decision, but the Respondent did not attend the final hearing and the Tribunal proceeded in their absence, satisfied that case management orders and the dates for the hearing had been properly communicated to the parties.

The Claimant's sworn testimony at the hearing was accepted as truthful and accurate and the Tribunal determined that the Claimant has been automatically unfairly dismissed by reason of the Respondent's failure to follow the statutory dismissal procedures in any respect.

In addition to a basic award, notice pay and a compensatory award in respect of loss of earnings, a statutory uplift of 50% on the compensatory award was also made to reflect the Respondent's failure to comply with the statutory procedures.

The statutory dismissal and dispute resolution procedures are set out in the Employment (Northern Ireland) Order 2003 and require minimum steps to be followed in the event an employer is contemplating dismissal or other disciplinary action short of dismissal. Failure to follow the procedure will render the dismissal of an employee automatically unfair. In addition, a failure to follow the statutory procedure will result in the Tribunal award being adjusted by up to 50% to reflect the failings.



Failure to follow the procedure will render the dismissal of an employee automatically unfair.

Our insight

Statutory dispute resolution procedures were repealed in Great Britain in 2010, but they still very much exist in Northern Ireland.

The case serves as a reminder to employers of the importance of adhering to those procedures, and the impact of failing to follow them both in respect of liability and remedy. It is recommended that employers ensure the three-step procedure is built into their internal procedures and strictly followed in each case.

It is also important that employers understand in what circumstances the statutory procedures will operate. As well as conduct dismissals, and action short of dismissal in conduct and capability situations, the three-step procedure should be applied to dismissals on grounds of capability, redundancy (save in circumstances where the dismissal is one of a number of redundancies covered under an employer's duty to collectively consult with nominated representatives) and on expiry of a fixed term contract.

Belfast Health & Social Care Trust settled a claim for discrimination on the grounds of sexual orientation for £2,000 – Case: Harbinson v Belfast Health & Social Care Trust

The Claimant, an employee of the Respondent, brought a claim before the Industrial Tribunal alleging discrimination on the grounds of sexual orientation. The claim has now been settled by way of a £2,000 financial settlement.

Background

Mr Rory Harbinson lodged a claim of harassment on grounds of sexual orientation after an incident with his manager regarding his display of Pride posters in work. The posters had been advertised on the Trust's intranet page, seeking volunteers for its stand at the event and encouraging Trust employees to take part.

The day after the Claimant had put the posters up, he came into work to find that most had been removed by his line manager. When he asked his manager why she had taken the posters down, it resulted in a "bad tempered" exchange. During the exchange, the Claimant reported his manager saying, "oh here we go" in response to his comment that his manager's actions could be seen as homophobic.

Mr Harbinson took claims for sexual orientation discrimination and his claim was supported by the Equality Commission for Northern Ireland (ECNI).

This case was settled with the Trust for £2,000 without admission of liability. In settling the case, the Trust affirmed its commitment to the principle of equality of opportunity and also agreed to liaise with the ECNI in respect of its policies, practices and procedures.

Speaking about the claim, the Claimant said "I was glad to settle this case, it was a very unpleasant experience and I felt shocked and humiliated by the whole episode."

Director of Legal Services at the ECNI, Anne McKernan, said of the case that there were two issues involved; the first concerned the removal of the posters and the second was that "promoting dignity and respect for and amongst employees is a critical part of developing a good and harmonious workplace."

She said, "Our view is it is legitimate for an organisation at corporate level to endorse the principles of equality and diversity and to promote those goals.

So when an employer commits to supporting and promoting an initiative like Belfast pride, it should ensure that there is clarity around the promotion of its material within the workplace and that all employees are clear on this."



...the Claimant reported his manager saying, "oh here we go" in response to his comment that his manager's actions could be seen as homophobic.

Our insight

As highlighted in Anne McKernan's comments, the case highlights the need for employers to be clear around the promotion of events and display of promotional material in the workplace. In this instance, the Claimant was putting up posters that had been created by the Trust regarding their own participation at a Pride event.

However, a similar situation could arise in relation to events or initiatives that employees might be involved with outside of work but wish to promote within the workplace, for example involvement in a fundraising event for charity. In order to be consistent and clear in their approach, employers should consider preparing guidance on what permissions an employee may need in order to display promotional material or publicise an event in the workplace. As many employers now have presence online and on social media, the same considerations should apply to posting and sharing material in that forum.

Particular care should be taken to ensure that a consistent approach is applied to all requests so as to limit the risk of allegations of disparity in treatment and potential unlawful discrimination.

Horizon Scanning – Northern Ireland

Mandatory vaccinations

In England, from 11 November 2021, Covid-19 vaccination will effectively be compulsory for anyone working or volunteering in a care home, unless they can demonstrate they are clinically exempt. Those working at Care Quality Commission (CQC) registered care homes will need to comply with The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021.

Legislative powers for health and social services are devolved in Northern Ireland with the Regulation and Quality Improvement Authority (RQIA) responsible for registering and inspecting a wide range of services, including care homes. At the time of writing there are no proposals for similar legislation around compulsory vaccination for Northern Ireland yet and we understand from news reports that the Health Minister for Northern Ireland does not wish to introduce a mandatory policy. Unions have also expressed concern at potential for enforcement rather than encouragement and the high levels of staff vaccination already in the sector here has been highlighted.

Regardless of industry and a lack of specific legislation, employers considering any form of vaccination policy will need to tread carefully to ensure that they are acting proportionately and are not inviting discrimination claims.

Employee wellbeing post-pandemic

While the guidance for Northern Ireland remains (at the time of writing) to work from home where possible, it's obvious we are moving towards more hybrid and flexible working.

Employee wellbeing generally, including tackling increasing rates of mental ill health, has risen up the agenda and we discuss some of the issues and trends in this area in our latest employment podcast which is available to listen [here](#).

Surveys conducted on how employees would like to work in a post COVID world appear to show a general consensus towards retaining flexibility with working hours and location. A number of NI employers have taken the decision to continue with remote working going forward, most recently with the news that Liberty IT has told its workers that they will not be expected to attend their office in Belfast on a regular basis going forward. We are certainly seeing an increased demand from clients for advice around hybrid working, including provision of policies and clauses for employment contracts and we expect this trend to continue.

In other developments, we have also seen the introduction of a 'Right to Disconnect' code of practice in the Republic of Ireland this year which gives employees a right to switch off from work regardless of whether they are at home or in work. It forms part of a wider initiative by the Irish Government to create more flexible and family friendly working arrangements. In Great Britain, it is also expected that the government will push ahead with legislation that will give workers the legal right to work flexibly.

There is a lot going on in this space and it is fast moving. It remains to be seen what steps our local government might take to legislate in this area, but it is clear that many employers are already devising well-being strategies and plans that will evolve the way in which we work in the long term.



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Right to work checks

Whilst employers have always been well advised to check that all employees have the right to work in the UK, the way in which this is checked will change from 1 July 2021 for EU, EEA and Swiss nationals (European Nationals).

This is because, as a consequence of the UK's exit from the European Union, European Nationals no longer benefit from freedom of movement and they must therefore obtain further immigration approval to remain and work in the UK.

For most European Nationals, this will likely involve showing prospective new employers that they have obtained status under the EU Settlement Scheme (EUSS). For those who arrived in the UK on or after 1 January 2021, it is likely that some other immigration approval which entitles them to work in the UK (for example, a work visa under the UK's points-based system) will need to be obtained.

Who do we check and why?

As always, employers should complete right to work checks for all new recruits - irrespective of their nationality - to confirm that they have a valid right to work in the UK and minimise discrimination risks. Checks should be carried out before employment commences. If the worker's right to work is time-limited, the employer will also need to complete follow-up checks in accordance with Home Office guidance to ensure that the worker has retained their right to work.

Completing right to work checks in line with the Home Office requirements gives employers a defence against the civil offence of employing an illegal worker, which can result in fines of up to £20,000 per illegal worker. If a compliant check is carried out, this would give an employer a "statutory excuse" against said fines if the worker in question turns out to be working illegally. Whilst failing to complete a compliant right to work check is not, by itself, an offence in the UK, carrying out a compliant check is the only way that a statutory excuse can be obtained. It is therefore crucial that checks are carried out.

How do I carry out checks and what changed on 1 July 2021?

The Home Office guidance contains two lists which set out the documents that employers can accept as evidence of right to work in the UK: List A and List B (the Lists). If an employee can produce a document on List A, this usually means that they have an indefinite right to work in the UK and no further right to work checks are required. If a document on List B is produced, this indicates that the employee has a temporary or time-limited right to work in the UK, and as such a follow-up right to check will be required before the expiry of their current immigration permission.

Up until 1 July 2021, European Nationals were able to evidence that they had the right to work in the UK simply by providing their passport or national ID card. These were List A documents. However, now that free movement has ended, the Lists have been updated. From 1 July 2021, European Nationals are no longer able to rely on their EEA passport or national ID card, as this is no longer acceptable evidence of a right to work in the UK and has been removed from the Lists. European Nationals are required to provide alternative documentation from the newly updated Lists to evidence a right to work in the UK.

For most European Nationals, the new process will involve checks of their Settled or Pre-settled Status under the EUSS. However, individuals with these permissions have not been issued with physical proof of status by the Home Office. Instead, their immigration status is stored digitally on Home Office systems. Employers will be able to check the status of individuals with EUSS status digitally via a Home Office online checking service. This online checking service will confirm the employee's immigration status and any relevant time limits on their ability to work and will be acceptable for statutory excuse purposes.



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Are employers required to conduct retrospective checks on existing European National staff?

No. The Home Office has confirmed that no retrospective checks will be required against existing European National staff who commenced employment before 1 July 2021.

What if an existing employee hasn't applied to the EUSS by 30 June 2021?

The Home Office has announced that further transitional measures will be in place until 31 December 2021 which will allow eligible applicants to make a late application for Settled or Pre-Settled Status.

As such, the employer will not immediately have to terminate employment if it discovers that the employee has not applied to secure EUSS status.

The Home Office guidance states that employers in such circumstances should:

1. Advise the individual that they must make an application to the EUSS within 28 days and ask them to provide a copy of their Certificate of Application (CoA);
2. Once the CoA has been shared, the employer should use the online Employer Checking Service (different to the online checking service referred to above) to confirm that the individual has applied under the Scheme;
3. If a Positive Verification Notice is received, this is essentially confirmation that the Home Office has received the individual's application and that they can continue to work for the employer pending a decision on their application. Once a Positive Verification Notice is received, a statutory excuse will be secured for six months, allowing for the application to be processed;
4. A repeat check via the Employer Checking Service must be conducted before the Positive Verification Notice expires; and
5. Repeat step 4 until such time as the application has been finally determined. If EUSS status is issued to the individual, then this should then be checked and kept on file.

If an employee fails to make an application after they have been advised to do so, the employer may need to consider termination of employment to prevent illegal working. Employers may wish to seek legal advice to mitigate the risk of employment claims such as unfair dismissal or discrimination.

What if I completed a check before 1 July, but the individual starts employment after this date?

In these circumstances, the Home Office's pre-1 July 2021 Right to Work guidance would apply and so an employer would be permitted to accept, for example, an EEA passport. The updated guidance will apply to all right to work checks carried out from 1 July 2021, including follow-up checks.

Covid-19 adjusted checks

Employers should remember that there are adjustments in place due to the Covid-19 pandemic which allow employers to carry out right to work checks virtually. At the time of writing, the period for adjusted checks has been extended and is due to expire on 4 April 2022, with in person checks required from 5 April 2022. It is, of course, worth noting that these adjustments only apply to the "manual" process of checking physical documents and is unlikely to have a substantial impact on online checking processes.



Employers should remember that there are adjustments in place due to the Covid-19 pandemic which allow employers to carry out right to work checks virtually.

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