NI Employment quarterly update |

June 2021

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 case decisions as well as looking ahead to legal developments which could impact on NI businesses.

In a year of significant disruption which has seen the closure of the Industrial Tribunal and Fair Employment Tribunal building due to the coronavirus, we look back on some of the cases that have been decided in 2020 and 2021, and highlight our key takeaways for employers. We also take a look at what's on the horizon with the potential for parental bereavement legislation and the possible impact of the appeal against the Northern Ireland Court of Appeal's ruling concerning the Police Service of Northern Ireland's holiday pay claims, due to be heard in the Supreme Court later this month.

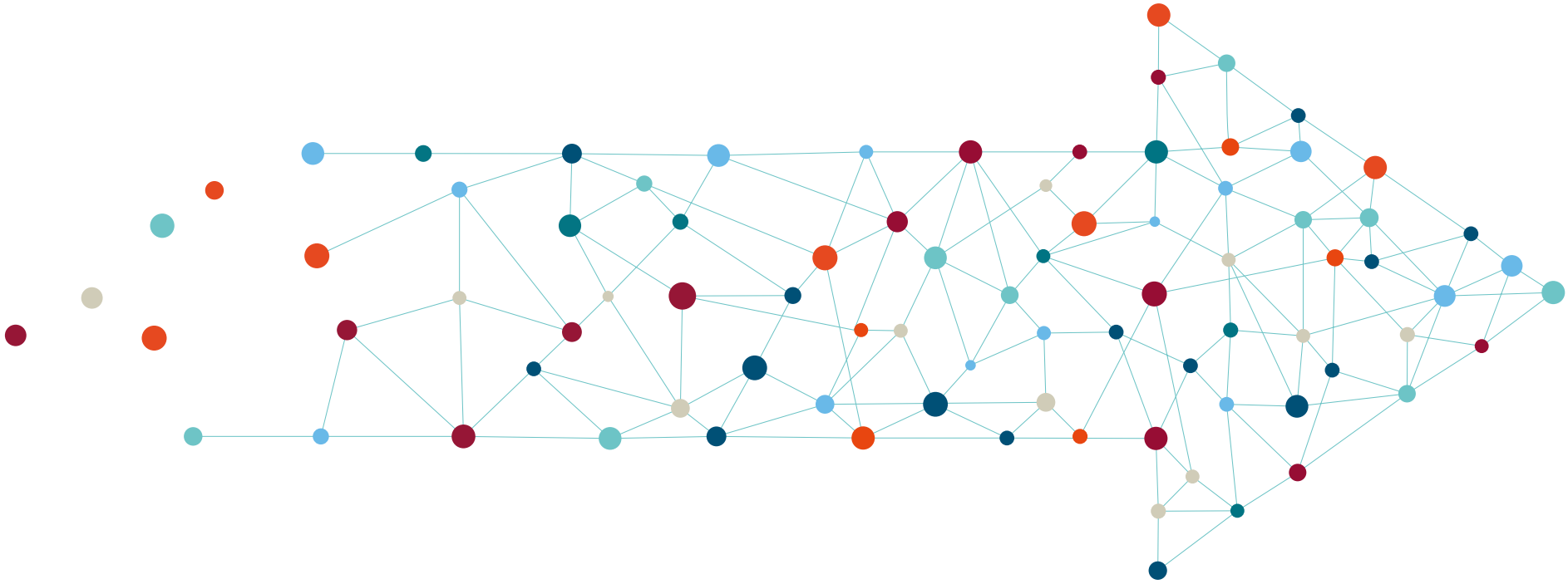
Key contacts

Leeanne Armstrong
Legal Director

T 0333 006 1545
leeanne.armstrong@TLTsolicitors.com

Amy Collins
Solicitor

T 0333 006 0802
amy.collins@TLTsolicitors.com



Determining disability and employer requirements

Case: Luka Grzincic v Premier Employment Group Ltd and Kelly Eccles

In a case that considered the question of whether an employer had constructive knowledge of a potential disability, a Tribunal held that the Respondents had made every practical effort to assist the Claimant to remain in work and to take steps to assess the extent of the Claimant's mental state with suitably qualified health professionals.

The case involved an employer who had refused to provide an employee with work due to concerns regarding his mental state, pending a medical opinion from occupational health (OH).

Background

The Claimant worked for Premier Employment Group Ltd as a health care support worker. The first Respondent is a recruitment agency who, amongst other things provides care personnel to Northern Ireland health trusts. This included a 'nurse bank' which temporarily placed nursing staff at hospitals as and when a shift needed to be covered. The second Respondent is employed by the first Respondent as a Healthcare Team Leader.

In March 2019, the Claimant informed the second Respondent that his GP had referred him to undergo a mental wellbeing assessment. The Claimant produced a referral which noted he was able to work at that time. Having read the referral letter and spoken to the Claimant, the second Respondent developed concerns about the Claimant's mental wellbeing, including with regard to clicking noises he was making with his mouth and that he wasn't making any sense when talking to her. There were also concerns about his personal presentation and hygiene.

A subsequent mental health assessment concluded that there were "concerns about his mental state, which could have the potential to impact his performance at work".

Concerned that the Claimant might be unable to tend appropriately to the needs of the vulnerable patients in his care, the Respondent took steps to ensure that the Claimant would not be offered further shifts via the nurse bank until he was declared fit by an OH assessor.

It was the first Respondent's evidence that they had sought to engage with the Claimant to arrange an occupational health (OH) assessment but attempts to contact him were unsuccessful.

Evidence was given by the second Respondent that she had sought to help the Claimant during this time by providing him with information about his entitlement to statutory sick pay (SSP) and providing extra uniforms as the Claimant had told her he had no gas or electricity in his home.

The Claimant alleged that by refusing to allocate shifts to him and leaving him without an income, the Respondents had subjected him to unlawful disability discrimination, namely direct disability discrimination and harassment.

Our insight

Whilst the Claimant failed to satisfy the Tribunal that he was a disabled person within the meaning of the Disability Discrimination Act 1995, the Tribunal held that even if he had fallen within that definition, they were satisfied that the Respondents did not know he was disabled and could not reasonably have been expected to have such knowledge.

This case is a reminder to employers of their obligation to do all that is reasonable to find out whether an employee is disabled. The question of whether enough has been done is fact specific. Whilst case law suggests that reliance on the opinion of a medical practitioner to compile a defence of lack of knowledge will not always be enough, it demonstrates the importance of taking reasonable steps to obtain medical advice as part of a employer considerations as to whether an employee is disabled.

Defamatory email amounted to trade union detriment

Case: Walsh v Chief Constable of PSNI and Nichola Murphy

The Claimant made a claim to the Industrial Tribunal alleging he had suffered a detriment due to his trade union involvement contrary to Article 73(1) of the Employment Rights (Northern Ireland) Order 1996.

The Tribunal also gave consideration to the application of time limits here considering whether the time limit for bringing the complaint ran from the date of the detrimental email or the date the Claimant became aware of the detrimental email.

Background

The second Respondent sent a damaging and defamatory email on 11 September 2017 to one of the Claimant's trade union colleagues. In the email, the second Respondent alleged that the Claimant had used his position as a trade union representative to obtain preferential treatment for a firearms application. At the time, the Claimant was involved with NIPSA members in the Firearms and Explosives Branch (FEB) of the PSNI regarding a period of unrest due to a deluge of applications following changes to online firearms applications.

In fact, the Claimant's application had not been escalated, and he had not sought or been granted any special status in relation to it.

It was accepted by the parties that the relationship between the second Respondent and Claimant had broken down when he became aware of the second Respondent's email following attendance at a training course with his colleague on 5 June 2018. The Claimant lodged his grievance with his employer and issued proceedings with the Industrial Tribunal on 3 September 2018.

After hearing all the evidence, the Tribunal was of the belief that the second Respondent arrived at a conclusion that the Claimant had used his trade union position to advance his firearms application without being in full possession of the facts relating to the Claimant's application. The Tribunal reached the conclusion that the second Respondent was motivated by a desire to undermine and discredit the Claimant in his role as a trade union representative, and her email had been damaging and defamatory.

The Tribunal was also unable to determine why the Claimant's application in particular came to the second Respondent's attention, and the Respondent accepted that there were 1000s of applications and it seemed more than 'unfortunate' that the Claimant's application was singled out for scrutiny.

On the question of whether the Claimant's claim had been lodged within time, the Tribunal held that the three month time limit began when he became aware of the defamatory email sent by the Respondent and not the date it was sent.

The Tribunal upheld the Claimant's claim of detriment because of his trade union activities, and awarded him £3,000 for injury to feelings linked to the embarrassment he suffered as a result of unfounded allegations being sent to colleagues.

Our insight

This case highlights the importance of compliance with internal investigation processes to properly consider allegations of inappropriate conduct/behaviour. In this instance, an employee was found to have made defamatory comments about another employee's actions without evidence of what investigation had been done to reach those conclusions. The absence of any plausible explanation for the Claimant's application being reviewed alongside evidence of a breakdown in the relationship between the Claimant and second Respondent assisted the Tribunal in reaching conclusions as to the link between the detrimental treatment and the Claimant's trade union involvement.

The high bar of seeking costs

Case: Porter v Chief Constable of PSNI

This case provides another example of the high threshold that must be met in order to persuade a Tribunal to exercise its discretion to order costs in an Employment Tribunal.

Background

The costs application followed a decision of the Industrial Tribunal to reject the Claimant's claims of unlawful disability discrimination. It was also held that the Claimant's musculoskeletal condition did not meet the definition of disability within the meaning of the Disability Discrimination Act 1995 ("DDA").

In its decision the Tribunal concluded that even if the Claimant had been covered by the disability provisions under the DDA, the Respondent did not have the requisite knowledge of the musculoskeletal condition as a disability and therefore a claim for failure to make reasonable adjustments would have failed.

The Respondent made an application for costs on the basis that the Claimant has acted unreasonably in bringing proceedings, and specifically pursuing a claim that his musculoskeletal back condition amounted to a disability under the DDA, in light of all the evidence available to him.

In presenting its application to the Tribunal, the Respondent made reference to a 'without prejudice save as to costs letter' which had been sent to the Claimant in advance of the hearing.

The Tribunal reviewed the relevant case authorities on the Tribunal's discretion to award costs, noting that costs orders do not normally follow the event in the Employment Tribunal, unlike in civil courts.

The Tribunal concluded that it was not satisfied that the Claimant had acted unreasonably in bringing and pursing the proceedings or that it could come to the conclusion that the Claimant's claim of disability discrimination had no reasonable prospects of success.

They noted that the threshold of unreasonableness had not been established in this case, and as such it would not have been appropriate to award costs. However, it went one step further in stating that even if the threshold had been reached, taking into consideration that costs are the exception to the rule, it would not have exercised its discretion to award costs.

On considering the 'without prejudice save as to costs letter', the Tribunal acknowledged that it had placed the Claimant on notice that the Respondent intended to make an application for costs against the Claimant. However, the Tribunal noted that the letter was served at a late stage in the proceedings. This gave the Claimant very little time for due consideration of its contents and was not significantly detailed as to the reasons why costs were being pursued.

Our insight

Costs warning letters can be an effective and important tool for parties in employment proceedings under the right circumstances. This case shows that as well as the high bar that exists when it comes to recovering costs in Employment Tribunals, care should be taken by the drafter to consider the contents of the letter and the timing of its service to strengthen any future costs application should it be necessary.

Constructive unfair dismissal – who really ended it?

Case: Kelly v MBCC Costa Ireland Limited & others

The Claimant, a senior employee of the Respondent, brought a claim before the Industrial Tribunal alleging constructive unfair dismissal. The Tribunal ruled that his claims of constructive unfair dismissal were not founded and the claim was dismissed.

Background

The Claimant was employed by the Respondent in a senior capacity and also held directorship of a group company.

In around November 2018 the Managing Director of the Respondent was provided with an anonymous letter that stated that the Claimant had a conflict of interest involving a firm known as "38 Espresso". Later in December 2018 an employee of the Respondent suggested to the Respondent that the Claimant had been soliciting staff to work for 38 Espresso. This employee reported that he had been invited to attend a meeting with the Claimant and 38 Espresso where he was requested to sign a non-disclosure agreement. The employee stated that after signing the agreement he was informed that the Claimant intended to leave the Respondent's employment and encouraged him to do so also.

Following this disclosure the proprietor of the Respondent's business held a meeting with the Claimant whereby he discussed the allegations with the Claimant that he had solicited staff, had an ongoing conflict of interest, and also had pursued other business interests at the expense of the company during company time.

During the meeting the Claimant resigned from his post by way of a handwritten letter. In his claim the Claimant states that he was under undue pressure and duress to resign and as such he had been constructively dismissed. The Respondent denied this allegation and contested that the Claimant had voluntarily resigned.

In the decision the Tribunal spent a substantial amount of time considering the weight it could place on each witness's evidence. The Tribunal paid particular attention to the inconsistencies that appeared in the Claimant's evidence and the assessment of his character whereby they found that the Claimant was capable of employing "disinformation" in his personal dealings with a number of work colleagues or former colleagues some of whom were close friends of the Claimant.

The fundamental question for the Tribunal was "who really ended it?". In consideration of this question the tribunal assessed the relative credibility of the witnesses who had provided two conflicting versions of events and the quality and weight of any relevant evidence provided. The Tribunal found that on the balance of the evidence provided, the Claimant had not been constructively dismissed and his claim was dismissed in its entirety.

Our insight

This case serves to highlight the importance of providing consistent and accurate witness evidence, and the potential damage inaccuracies may have to a case. In this matter the Tribunal harboured a number of concerns regarding the Claimant's evidence due to a number of evidential conflicts. Both Claimants and Respondents should ensure that any evidence that they provide by way of witness statement or by way of oral evidence has been fully considered and is factually accurate.

Northern Ireland Housing Executive settles religious discrimination/ sectarian harassment claim for £12,500

Case: Elliott v Northern Ireland Housing Executive [unreported]

The Northern Ireland Housing Executive ("NIHE") has settled a claim for £12,500 with a worker who claimed he was the victim of a campaign of sectarian harassment. The Claimant was supported by the Equality Commission for Northern Ireland ("ECNI"), in bringing a claim of discrimination on the grounds of religious belief and/or political opinion.

Background

The Claimant, was employed as a plasterer by the NIHE's direct labour organisation since 2013. The Claimant, a Catholic, described that Catholics were referred to as Fenians and by other derogatory terms. He further described events that took place in July 2018, whereby he was sent messages on his phone wishing him a "Happy King Billy's Day" and, whilst he was at work, his work van was draped with a Union Flag and the Claimant was told to personally remove it.

The Claimant stated that he had reported his concerns to NIHE on a number of occasions and that his concerns had not been dealt with. The Claimant raised a grievance in respect of the alleged discriminatory treatment in April 2019, but he did not receive the outcome of this until December 2019. By this point the Claimant had commenced a period of sickness absence, which he claimed was a direct result of the harassment and discrimination he faced.

Following the settlement, the NIHE released a statement, confirming that the matter had been settled on a compromise basis, without admission of liability, however it did recognise that were issues around its handling of the Claimant's complaint.

Geraldine McGahey, Chief Commissioner of the ECNI, said: "There is no place for harassment of any type in our workplaces; everyone is entitled to be treated with dignity and respect at all times.

Employers have a responsibility to provide and promote a good and harmonious working environment."

Our insight

This case is a timely reminder of the importance of having appropriate grievance and complaints handling processes in place that enable employers to deal promptly and seriously with complaints of discrimination or harassment.

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 and harassment and ensuring the policies are kept up to date;
- ensuring staff, especially managers, are trained and regularly reminded about the policies, and that you can demonstrate this if necessary; 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.

Horizon scanning – Northern Ireland

Parental bereavement legislation for Northern Ireland

Last year the Department for Economy ran a public consultation on parental bereavement leave and pay. In January this year, the department's response was published, indicating the intention "to introduce the same entitlement to Parental Bereavement Leave and Pay for Northern Ireland employees as that presently afforded to employees in Great Britain". Provisions were already enacted in England and Wales in April 2020 to provide parental bereavement leave and pay for employed parents following the death of a child or a stillbirth.

The Parental Bereavement (Leave and Pay) Bill was introduced to the Northern Ireland Assembly on 1 June 2021 and, at the time of writing, is working its way through the legislative process.

'Right to disconnect' introduced in the Republic of Ireland

Following a request from the Irish government, the Irish Workplace Relations Commission (WRC) has prepared of Code of Practice for employers and employees on the right to disconnect.

It seeks to ensure both employers and employees benefit from changed ways of working, including digital and remote working and gives guidance on best practice for employers to create a 'right to disconnect policy', but also recognises employee responsibility. It has been signed by the Tánaiste and comes into immediate effect for all types of employment, regardless of remote working.

The right to disconnect consists of three elements enshrined in the Code:

1. The right to not have to routinely perform work outside normal working hours
2. The right to not be penalised for refusing to attend to work matters outside of normal working hours
3. The duty to respect another person's right to disconnect

While failing to follow the code is not an offence in itself, a Code of Practice will be admissible and taken into account where deemed to be relevant to legal proceedings.

We are not aware of any similar proposals for Northern Ireland, but this is nevertheless an interesting development in a neighbouring jurisdiction, and one of particular interest for those with cross border operations.

Regardless of whether a right to disconnect is set to become law here or not, with changed ways of working, employers should be considering work-life balance and encouraging employees to disconnect and maintain boundaries between home and work.

Irish Government consultation on right to request remote work

The Irish Government has also sought views on introducing a statutory right to request remote working. There is currently no legal framework in Ireland around how to make remote working requests or how they should be handled by employers. A recent consultation will inform new legislation under the National Remote Working Strategy which was launched in January 2021.The strategy seeks to ensure "that remote working is a permanent feature in the Irish workplace in a way that maximises economic, social and environmental benefits".

This will be a hot topic of discussion for employers in all UK jurisdictions in the coming months, as we ease out of lockdown and begin to re-establish in office working in some form again.

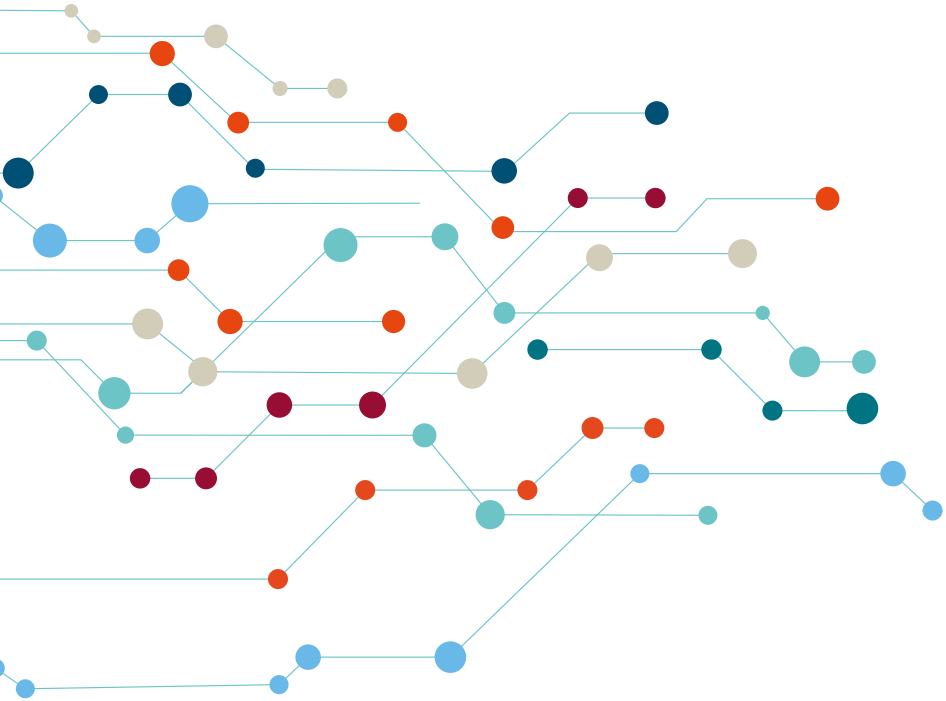
Holiday pay claims

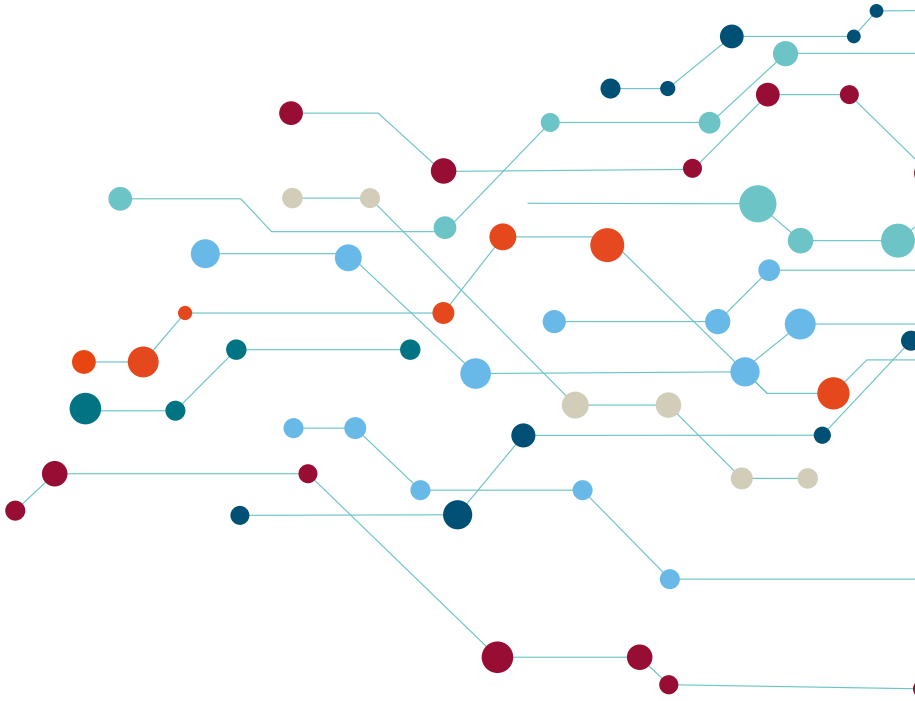
The appeal against the Northern Ireland Court of Appeal's landmark ruling in Chief Constable of the Police Service of Northern Ireland, Northern Ireland Policing Board v Alexander Agnew and others [2019] NICA 32 is still due to be heard in the Supreme Court this month.

The decision of the Northern Ireland Court of Appeal (NICA) leaves the Police Service of Northern Ireland (PSNI) facing a £40 million bill in respect of underpayment of holiday pay. It also leaves open the realistic prospect that employees in Northern Ireland could pursue holiday back pay claims as far back as the introduction of the Working Time Regulations in 1998, as the two year backstop on the ability to claim holiday back pay does not extend to Northern Ireland.

The Supreme Court ruling will be significant for holiday pay claims, not least given the current inconsistency between the Employment Appeal Tribunal's authority in Bear Scotland and the NICA. While NICA decisions are not binding in other jurisdictions a Supreme Court decision would be binding on all UK employers.

At the time of writing it is noted that the Police Federation for Northern Ireland are reporting that they have agreed to mediate with the PSNI on behalf of all Claimants they act for, and have agreed to a formal letter being sent to the Supreme Court requesting permission for a postponement of the appeal hearing pending the mediation. This leaves open the prospect that a settlement will leave the existing NICA decision as is, and raises questions as to how the Industrial Tribunals will approach the thousands of holiday pay claims currently registered with them.





Business immigration

Cross border workers in Northern Ireland – do your employees need a permit?

From 1 January 2021, EEA citizens who live in the Republic of Ireland and currently work in the UK, including Northern Ireland, or who wish to do so in the future (termed frontier workers), require additional permits or immigration clearance.

Current cross border talent

Save for Irish citizens, EEA citizens who are living in the Republic of Ireland and who began working in the UK on or before 31 December 2020 will need to apply for a Frontier Worker Permit under the Frontier Worker Permit Scheme. The scheme entitles individuals to secure their 'frontier worker status' and continue to work and access benefits and services in the UK in the same way as they did pre-Brexit. To be eligible for a permit, the cross border working arrangement must have been in place before 1 January 2021.

Fortunately, permits are free and are valid for five years, and applicants can apply to renew their permit for as long as they continue to be frontier workers in the UK.

Until 30 June 2021, frontier workers will benefit from a grace period and will be able to continue entering the UK simply with a valid passport or national identity card. However, from 1 July 2021, frontier workers will need to have a permit to enter the UK. After this date, individuals who require but do not hold a permit could be refused admission at the border.

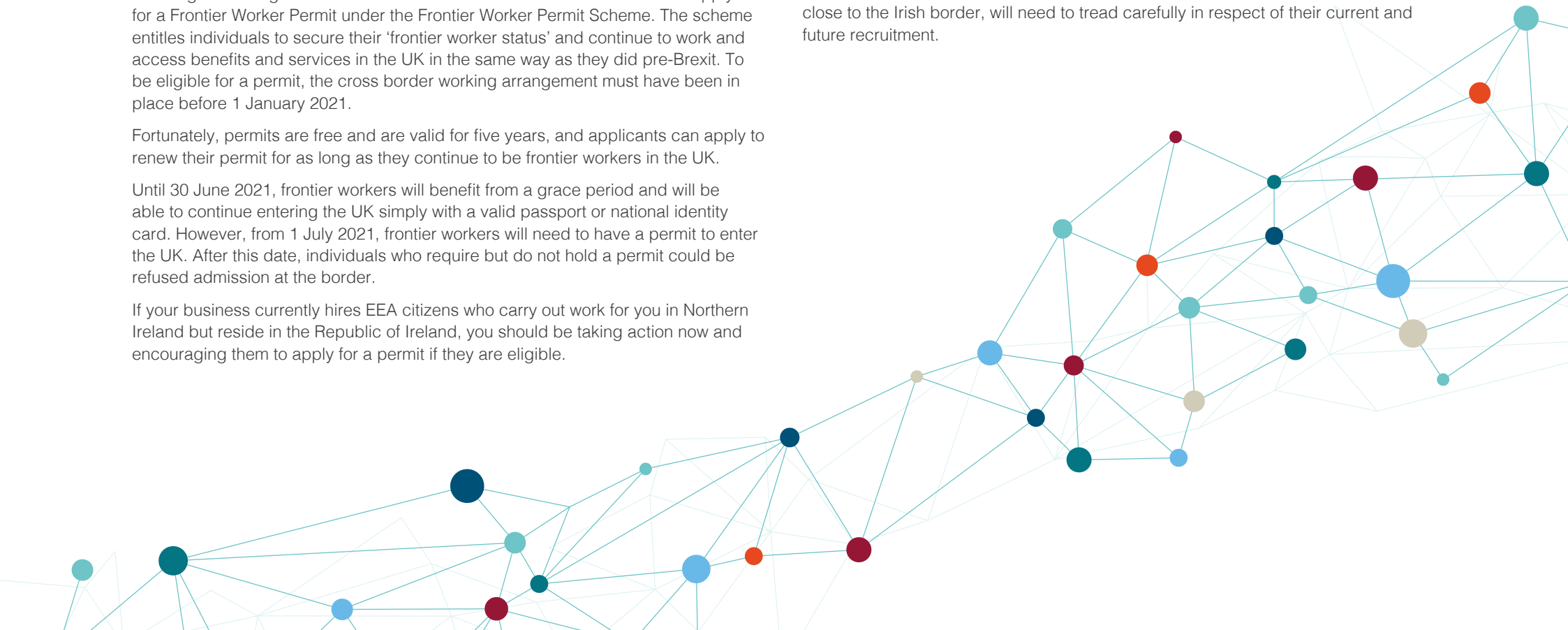
If your business currently hires EEA citizens who carry out work for you in Northern Ireland but reside in the Republic of Ireland, you should be taking action now and encouraging them to apply for a permit if they are eligible.

What about future recruitment?

Frontier workers who began their working relationship after 31 December 2020 will not be eligible to apply for a permit. These workers will need to consider other routes available, most likely under the UK's new Immigration Rules.

From 1 January 2021, EEA citizens who reside in the Republic of Ireland (and who do not have any additional immigration status in the UK) will no longer be eligible to work in the UK without obtaining further immigration clearance. If employers fail to recognise this they may find themselves falling foul of the UK's illegal working laws and could face penalties of up to £20,000 per illegal worker.

It's clear that employers in Northern Ireland, particularly those with operations close to the Irish border, will need to tread carefully in respect of their current and future recruitment.



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