NI Employment Quarterly Update – December 2021

For what comes next
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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 September to date in Northern Ireland, and highlight our key takeaways for employers. We include details of recent decisions where processes were heavily scrutinised, including failure to follow the 3 step Statutory Disciplinary and Dispute Resolution procedure. We also provide our own summary and insight on the widely publicised whistleblowing case of Bronckaers v Department of Agriculture, Environment and Rural Affairs (DAERA).

We also take a look at what's on the horizon including an update on the Parental Bereavement Leave Bill which is currently making its way through the Consideration Stage in the NI Assembly, and in our corporate immigration update, Amy Collins looks at remote right to work checks and the current position regarding travel restrictions.

“We include details of recent decisions where processes were heavily scrutinised, including failure to follow the 3 step Statutory Disciplinary and Dispute Resolution procedure.

Case: Michelle Byrne v Aware Defeat Depression Limited

Claimant awarded £9,920 due to constructive unfair dismissal and unlawful disability discrimination in a case highlighting a need for caution when addressing a request for flexible working in circumstances where the legal duty to make reasonable adjustments is triggered.

Background

Following the end of her maternity leave, Michelle Byrne (the Claimant) entered a period of sick leave following a diagnosis of ulcerative colitis. At a meeting to discuss her return to work, the Claimant sought a variation to her working pattern. She left the meeting believing this had been granted, but no notes were kept or written confirmation issued after the meeting. The tribunal later noted *"This amateurish approach to a serious issue is regrettable"*.

Almost two months later the Claimant was informed that a four day working week had been agreed, but on a trial basis for six months, and her application to work at home on one of those days was refused. The Claimant didn't challenge this, expecting a trial to become permanent.

The Respondent said the Claimant's role needed to be carried out in the office. They alleged difficulties arranging meetings around a four day week, and in contacting the Claimant when working from home. However, they couldn't point to "any specific, dated or documented difficulty", and didn't raise these difficulties with the employee. Although the arrangement had been in operation for almost a year, the Claimant was then invited to apply for a variation of her contract under an internal flexible working policy in order to retain her working arrangements.

The Claimant was referred to Occupational Health (OH) after a three week absence for stress (which exacerbated her illness).

Despite OH recommending that she should return to work with the variation to her working hours, the Respondent wrote to the Claimant to confirm they would like her to return on a phased basis with a view to her being full-time within three weeks. After challenging this decision as a breach of her employer's legal duty to make reasonable adjustments under the DDA, the Respondent again referred the Claimant back to its flexible working procedure. The Claimant resigned soon after and issued claims in the Tribunal for constructive unfair dismissal and disability discrimination (namely less favourable treatment and failure to make reasonable adjustments).

During the hearing, the ET heard evidence of inconsistency of treatment with another colleague who was on reduced hours on a temporary basis, but had received assurance that it would be made permanent. The Tribunal found that this amounted to less favourable treatment of the Claimant on grounds of her disability.

The Tribunal upheld the Claimant's claims and she was awarded a basic award of £2,420.30 with £500 for loss of statutory rights and no compensatory award for loss of earnings in respect of constructive unfair dismissal. The Claimant was also awarded £7000 for injury to feelings in respect of the unlawful discrimination.

Our insight

The case highlights the importance of employers remembering their legal duty to make reasonable adjustments, particularly in the context of flexible working processes. Reduced hours or flexible working may, in certain circumstances, amount to a reasonable adjustment under the DDA, and in those cases employers should be mindful of requiring a disabled employee to make a formal flexible working application. The Tribunal was also highly critical of the poor record keeping in some aspects of this case, a timely reminder to employers of the importance of retaining notes of meetings, including in respect of return to work following sickness absence.

The tribunal later noted *"This amateurish approach to a serious issue is regrettable"*.

Case: Richard Craig v The Management Committee of Assistance Dogs Northern Ireland

Tribunal awards Claimant £11,449.98 after finding that he had been automatically unfairly dismissed, and the Respondent had failed to comply with its duty to make reasonable adjustments in the context of a redundancy process.

Background

Richard Craig (the Claimant) was a dog trainer for The Management Committee of Assistance Dogs Northern Ireland (the Respondent). He worked on a new program of training which involved a period of looking after puppies at his own home without additional remuneration or time off. He later became unhappy with the effect his role was having on his home life and family. He also struggled with a requirement to produce training reports. The Tribunal heard in evidence that the Claimant required assistance from his wife and additional time to complete administrative tasks and reports. A reduction in working hours took place with an additional part-time trainee trainer employed. The Respondent highlighted that part-time working had been problematic in the past and they would try to accommodate on a temporary basis but may have to end his contract if they felt he was unable to carry out all aspects of contractual duties.

Subsequently a decision was taken by the board to make the two part-time roles redundant and create a single full-time role, which the Claimant was invited to apply for, but "he did not want to work full time because of *injuries and mental health*". Attending an appeal meeting following his dismissal, the Claimant said he suffered from learning difficulties and dyslexia. The appeal manager claimed that she did not know. Meeting notes, however, recorded by another colleague before the redundancy decision noted that the Claimant had dyslexia.

At the hearing, whilst not persuaded that the employer was clearly informed that the Claimant had dyslexia prior to his employment commencing, the Tribunal was persuaded that *"prior to the Claimant's dismissal the Respondent had constructive knowledge of the Claimant's disability and that it was likely to put him at a substantial disadvantage given the issues they were clearly aware of regarding his completion of administrative tasks".*

They found that that the duty to make reasonable adjustments was breached, and further that *"on balance the Respondent's real reason for the Claimant's dismissal was due to concerns about inefficiency/perceived performance related issues rather than a genuine redundancy situation …"* The dismissal was found to have been automatically unfair due to the Respondent's failure to follow step 1 of the Statutory Disciplinary and Dismissal Procedures – he was not issued with a statement of grounds for action and invited to a meeting. An uplift of 20% was made to the Claimant's compensatory award as a result.

> Attending an appeal meeting following his dismissal, the Claimant said he suffered from learning difficulties and dyslexia.

Our insight

The duty to make reasonable adjustments will only be triggered if the employer had knowledge that the person was disabled.

Tribunals will consider whether employers had actual or constructive knowledge of the disability, constructive knowledge being whether the employer ought reasonably to have known about the employee's condition. As the Tribunal stated in its decision here, "a formal diagnosis is not necessary for an employer to have knowledge of disability. Knowledge is a question of fact for the tribunal."

This can be a difficult area for managers, but ignoring or turning a blind eye to information or indicators of a possible disability can be fatal to a defence of disability discrimination. This case highlights the importance of making enquiries into an employee's health or medical condition, particularly where there are identifiers such as sickness absences or performance issues. Seeking occupational health advice is a good starting point for employers, as well as maintaining open lines of communication with the employee throughout.

It's also a further reminder of the ensuring statutory three step procedure is complied with in a redundancy scenario.

Case: Dr Tamara Bertha Johanna Bronckaers v Department of Agriculture, Environment and Rural Affairs (DAERA)

Tribunal finds whistleblower was subjected to detriment and automatically unfairly dismissed because of having raised protected disclosures.

Background

Dr Bronckaers (the Claimant) brought a whistleblowing claim against her former employer, Department of Agriculture, Environment and Affairs (DAERA) namely that she had been subjected to detriment due to raising protected disclosures, and resigned following those detriments which, when viewed together, amounted to a repudiatory breach of the implied contractual term of trust and confidence in her contract.

The Claimant asserted, and the Tribunal accepted that she had made two protected disclosures over the course of a year:

1. She raised issues of concern about the welfare of animals in livestock markets particularly in Ballymena Livestock Market; and
2. She raised issues about the deletion of cattle moves in the recording carried out by livestock markets and the effect that had on traceability of cattle, and the risk of Tuberculosis (TB) in particular.

The Claimant's overarching allegation was that she was professionally ignored and undermined by colleagues following her whistleblowing. This detriment took various forms, including being excluded from emails on subjects that fell within her remit, and ignoring the Claimant's emails. In all instances, the Tribunal found that the Claimant's allegations were well founded. It was also found that comments made to the Claimant at an appraisal meeting about an unidentified complainant alleging the Claimant was disruptive, and warning her to watch how she dealt with people in what she said, were reasonably taken by the Claimant as a warning, and therefore amounted to a detriment.

The Tribunal held on the constructive unfair dismissal, *"We are therefore satisfied the detrimental acts and omissions outlined … did undermine the trust and confidence to such a serious extent that it amounted to a breach of the implied contractual term of trust and confidence. … We are further satisfied that the course of conduct culminated in a last straw which led the Claimant to resign in response."*

On the claim of detriment, the Tribunal found, from an analysis of all the evidence that *"the fact the Claimant had raised protected disclosures was the cause of the detrimental treatment ie it was not simply the context for it. We are satisfied that the principal reason for the dismissal was the fact that she had raised protected disclosures and her dismissal was thus automatically unfair."*

> The Claimant's overarching allegation was that she was professionally ignored and undermined by colleagues following her whistleblowing.

Our insight

This case highlights the importance of ensuring that employers recognise protected disclosures when they are made, and understand how they should be addressed/investigated. A well implemented whistleblowing policy can be helpful in this regard.

Employers should also consider the interaction with grievance procedures. Whilst it is wise to separate grievance and whistleblowing policies, the issues often overlap. Employees should be provided with guidance on which procedure to use to effectively remedy any potential whistleblowing detriment internally.

Whistleblowing is a highly complex area of law so employers should consider seeking legal advice at an early stage if issues of this nature are raised.

Case: Andrea O'Donnell v Craigantlet Farms Ltd

Claimant establishes she was unfairly selected for redundancy, and Tribunal is highly critical of employer's lack of documented redundancy process and procedure.

Background

Andrea O'Donnell (the Claimant) brought a claim for unfair dismissal against her former employer, Craigantlet Farms Ltd (the Respondent), having been made redundant. The Claimant worked as a pastry chef in the Respondent's hotel.

As a result of the Covid-19 pandemic the Respondent began to consider redundancies, neither party disputed that there was a valid redundancy situation whereby the Respondent was faced with closures and uncertainty around reopening.

Four stand-alone positions, including the Claimant's, were identified for redundancy. Each position selected was a management level role, reason being that the events that role was typically involved in had been negatively impacted by the pandemic. The role of Head Chef, which was at a comparable level to the Claimant's position, was not considered for redundancy despite the Head Chef being involved in similar events as the Claimant. There were no contemporaneous records held by the Respondent of how they had been pooled for redundancy, or how selection would be made.

The Claimant was subsequently invited to a consultation meeting to discuss redundancy and alternatives to redundancy on 1 July. On 8 July, the Claimant was informed she would be made redundant. She was advised of her right of appeal and the timeframe to do so.

The Claimant contacted HR during the necessary appeal timeframe with concerns about the process. However, it was not marked as a formal appeal. The Claimant's concerns were not addressed.

The Tribunal found that whilst the Respondent was facing a genuine redundancy situation, they had failed to genuinely consider who should be in the pool for consideration for redundancy, and did not carry out a proper redundancy procedure when dismissing the Claimant, by failing to invite the Claimant to an appeal meeting.

The Claimant's claim of unfair dismissal was upheld. A separate remedy hearing will be convened at a later date.

> This is a timely reminder to employers to ensure that in approaching a redundancy exercise, they consider and document thoroughly and fairly what groups of employees are at risk and how they have been pooled.

Our insight

The Tribunal raised serious concerns in this case about *"the lack of paperwork produced by a Respondent in relation to its redundancy exercise."* This is a timely reminder to employers to ensure that in approaching a redundancy exercise, they consider and document thoroughly and fairly what groups of employees are at risk and how they have been pooled. Employers should have a defined scoring or selection process that is applied consistently across each pool.

Employers are also reminded of the need to ensure that appeals against the dismissal or other sanction, including in respect of the process, are addressed in accordance with their internal procedures and the Statutory Disciplinary and Dismissal Procedures. It will not be an excuse for an employer to state that they did not recognise it as an appeal because it was not clearly marked as such. Failure to do so may ultimately render the dismissal unfair, and indeed automatically unfair.

Horizon Scanning – Northern Ireland

Work from Home message strengthened

On 23 November 2021 the Northern Ireland Executive strengthened "the message that people should work from home where possible" to help reduce the risk of transmission of Covid-19 in and out of the workplace. The announcement recognises that it "may present challenges in some work areas" but asks employers to support employees working from home where possible.

Planned consultation on mandatory COVID-19 and flu vaccination for new health and social care recruits

Northern Ireland's Health Minister has announced his intention to consult on making Covid and flu vaccination compulsory for people starting new jobs in health and social care.

While we await details and timing of the consultation for Northern Ireland we note this comes alongside similar proposals in England, and the Health Minister says he will closely monitor the situation in England. There, following consultation, the UK Health Secretary has announced Covid vaccination as a condition of deployment for all frontline health and social care workers, with exemptions for staff who do not have face-to-face contact with patients, or who are medically exempt. In England, requirements for flu jabs are not being introduced at this stage, but will be kept under review.

For NI, the Health Minister's announcement on 9 November highlights all "options remain under consideration" and there is "no predetermined outcome" so we shall continue to follow developments.

Parental Bereavement Leave & Pay Bill

Earlier this year we wrote about the introduction of The Parental Bereavement (Leave and Pay) Bill to the Northern Ireland Assembly. Following Committee Stage, the Bill completed Consideration Stage on 30 November.

The Assembly's Committee for the Economy's report outlining the consideration of the Bill highlights overwhelming support for its introduction. It also notes that there were calls "for the Bill to be widened to extend bereavement leave and pay rights in the event of miscarriage". Amendments in this regard were brought forward and passed during this sitting. At the time of writing we await scheduling of the Further Consideration stage, but will continue to monitor progress and the final legislation being published.

NI conviction rules "incompatible" with ECHR

A recent High Court ruling has declared that obligations to disclose any prison sentence in excess of 30 months are incompatible with human rights legislation.

In JR123 Application for Judicial Review [2021] NIQB 97 an applicant (granted anonymity) challenged the legality of of Article 6(1) of the Rehabilitation of Offenders (Northern Ireland) Order 1978 ("the 1978 Order"), which prevents his previous convictions from ever becoming "spent".

The applicant had been convicted in 1980 for various offences totalling a sentence of 5 years. Since then they have had no further convictions or involvement in the criminal justice system but continue to have to disclose these convictions. The applicant felt "he has experienced a number of difficulties and negative consequences of his convictions over the years, for example, in securing employment and insurance".

The court noted that "the whole question of rehabilitation of offenders is under review", and declared that "Article 6(1) of the Rehabilitation of Offenders (NI) Order 1978 is incompatible with Article 8 of the ECHR by reason of a failure to provide a mechanism by which the applicant can apply to have his conviction considered to be spent, irrespective of the passage of time and his personal circumstances."

> "The court noted that "the whole question of rehabilitation of offenders is under review"

In England and Wales sentences of up to 48 months can become spent after a certain period of time. Earlier this year a Department of Justice Northern Ireland consultation sought views on proposals to reform rehabilitation periods in Northern Ireland.

OFMDFM produced guidance for employers back to 2007 on recruiting people with conflict-related convictions. Conflict related convictions effectively cover convictions arising from the most recent period of conflict in Northern Ireland. The basic principle coming out of a working group set up to consider the issue was that for conflict related convictions that pre-date the Good Friday Agreement (April 2008), they should not be taken into account unless it is "materially relevant to the employment being sought."

This recent challenge covers criminal convictions falling outside of those that are conflict related in Northern Ireland to examine the existing legal position on spent and unspent convictions.

Zero Hours Contracts

On 15 November, The Employment (Zero Hours Workers and Banded Weekly Working Hours) Bill was introduced to the Northern Ireland Assembly and at the time of writing currently awaits Second Stage being scheduled.

It seeks to replace zero hours contracts with banded hours, giving workers entitlement to a band of minimum and maximum working hours. Work patterns are proposed to be kept under review every three months with employers obligated to notify a worker of their entitlement to banded hours in writing.

The Bill also seeks to make exclusivity terms, which seek to prevent a zero hours worker taking on other work, unenforceable, and to make employers pay a worker for the equivalent of three hours work at their hourly rate if they are called out to work but subsequently not given work.

We will continue to monitor this bill's progress.

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It [the Bill] seeks to replace zero hours contracts with banded hours, giving workers entitlement to a band of minimum and maximum working hours.

The Trade Union and Labour Relations (Amendment) Bill

On 30 November the Trade Union and Labour Relations (Amendment) Bill was introduced to the Northern Ireland Assembly. Per the Bill's explanatory memorandum it seeks to *"amend the Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order") and the Trade Union and Labour Relations (Northern Ireland) Order 1995 ("the 1995 Order") to enhance the rights of employees that are subject to dismissal from their employment whilst taking part in protected action and to extend rights to employees of smaller companies by removing the requirement that the workplace must employ at least twenty-one employees before a trade union can submit a request to be recognised by the employer."*

Business Immigration Update

Remote right to work checks to continue until 5 April 2022

The Home Office has confirmed that the end of the temporary COVID-adjusted right to work measures that was due to end on 31 August 2021 has been extended to 5 April 2022. This means employers can continue to conduct remote checks to support their employees in the new world of remote working. This will allow the UK government some time to review their revised plans to be implemented from 6 April 2022 onwards. They have indicated they intend to adopt a new, more secure, long-term digital service for remote right to work checks, which will also include a provision for both UK and Irish nationals.

The Home Office announced earlier in the year that employers will not have to carry out retrospective checks once the COVID-19 adjustments end for all checks done between 30 March 2020 and 5 April 2022 inclusive.

Sponsor licence priority service

Since the UK left the EU the number of UK-based employers applying for a licence to sponsor non-UK workers has increased significantly.

This has caused a steady increase in the processing times for sponsor licence applications. Based on recent experience applications for sponsor licences are taking up to eight weeks to process and sometimes longer.

Since 2020, there has been an option to avail the pre-licence priority service, costing employers an additional £500 for their application to be expedited from eight weeks to two weeks. Whilst this is certainly a positive move for UKVI and for our clients who want to obtain their sponsor licence as soon as possible, it is however limited to a maximum of ten applications per day available on a first come first serviced basis. With an increase in demand it is becoming harder to secure priority service slots.

Unfortunately, there is no guarantee that an application will be accepted for the priority service, so clients should ensure they build in adequate time in their recruitment plans to account for the full 8-week turnaround time should they be unsuccessful in obtaining the priority service.

Travel restrictions

The Covid-19 pandemic continues to impact those in Northern Ireland and those across the world. With the rise in cases globally and the discovery of a new variant Omicron, many states and countries are reintroducing travel restrictions and quarantine arrangements.

Employers with mobile workforces, or those who are recruiting from outside of the UK should pay close attention to such restrictions and quarantine arrangements as they change quickly and usually without much warning and may interrupt or impact your recruitment and resourcing plans.

Employers should consider the impact that such restrictions and quarantine arrangements may have on their recruitment and resourcing plans from the outset and would be prudent to build in additional time to such plans in case they are impacted by restrictions of mandatory quarantine.

Information on restrictions in non-UK countries can be found at: **Foreign travel advice - GOV.UK (www.gov.uk)**

Information on restrictions within Northern Ireland can be found at: **Coronavirus (COVID-19): travel advice | nidirect**

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