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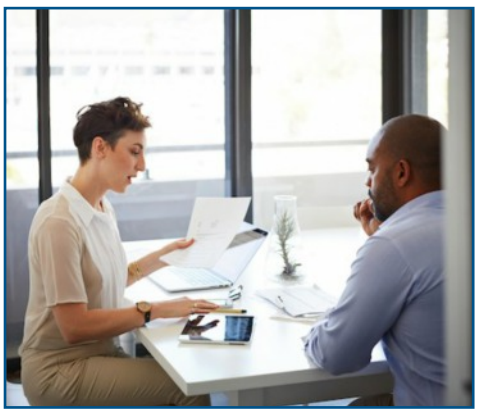
NASH KNOWLEDGE

November 2023

Plymouth Fireworks 2023



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Contact the Employment team on 01752 827081 or email employment@nash.co.uk

Or click to visit us at https://nash.co.uk/business/employment-law-team/

EAT upholds Consensual Termination of Employment in Riley v Direct Line Insurance Group Plc

In a recent case, Riley v Direct Line Insurance Group Plc [2023] EAT 118, the Employment Appeal Tribunal (EAT) upheld an employment tribunal's decision that a termination of employment was consensual rather than a dismissal. This case sheds light on the distinction between mutual consent and dismissal on grounds of ill health, highlighting the importance of understanding the context and actions of both parties involved.

Mr. Riley had been on leave from work due to anxiety and depression, during which he received 80% of his salary under a UNUM scheme. After an unsuccessful attempt to return to work, UNUM obtained medical reports suggesting that Mr. Riley was unlikely to recover sufficiently for his role in the near or medium future. Following discussions, Mr. Riley agreed in principle to end his employment and transition to UNUM's Permanent Health Insurance (PHI) scheme, ensuring he would receive payments until state pension age. Subsequently, a meeting took place to formalize the termination, but the employer informed Mr. Riley by letter that he was dismissed on grounds of ill health.

The key issue in this case was whether the termination was consensual or a dismissal. The EAT affirmed the tribunal's findings that it had been a consensual termination. This is significant because termination by mutual consent is not considered a dismissal under section 95(1)(a) of the Employment Rights Act 1996 so an employee cannot then bring a claim of unfair dismissal.

The tribunal concluded that Mr. Riley had not been coerced or deceived into agreeing to the termination: he actively participated in discussions, had sufficient time to consider the decision, and fully comprehended the implications. Moreover, the fact that the employer initiated the meeting to discuss the transition to the PHI scheme was not the sole determinant. The tribunal considered the entire context and the parties' subsequent actions to conclude that the termination was mutually agreed.

Crucially, the tribunal did not base its decision on mutual benefit alone. Instead, it provided an explanation for the motivation behind both parties' agreement to the termination. Regarding the "dismissal letter," the tribunal found that the termination had been consensually agreed upon before the letter was drafted, emphasizing the importance of focusing on the

substance of the agreement rather than the specific wording used in formal documents.

In essence, Riley v Direct Line Insurance Group Plc highlights the legal distinction between consensual termination and dismissal on health grounds. It underscores the need for thorough examination of the circumstances, actions, and motivations of both parties to determine whether a termination was genuinely consensual, and emphasised the importance of the distinction, given that a mutually agreed termination deprives an employee of unfair dismissal rights.

Conclusion

It is clear that Tribunals will be cautious in finding that an individual's employment came to an end by mutual agreement, so it is important that employers keep detailed records of what has been discussed and agreed. Employers should make clear that any discussions are voluntary, with no pressure to engage in them or make any particular decision, and that they are given time to ask questions and to reach an informed decision, potentially with the benefit of legal advice.

Do you have any specific employment law questions that you want answers to?

In future editions of Nash Knowledge, we'll take at least one question that we've been sent, and we'll publish a full answer and explanation.

So, now's your chance to ask that employment law question that you've always wanted an answer for! We're happy to keep it anonymous if you prefer!

Just email us your question to **marketing@nash.co.uk** by the 20th of each month, and we'll pick the best one that we've been sent. The answer will be in the following month's edition!

#AskNash #AskUsAQuestion

Death, Taxes and Predictable Working?

In this world, nothing can be said to be certain, except death and taxes – so said Benjamin Franklin – but he clearly didn't anticipate the Workers (Predictable Terms and Conditions) Act 2023 (I do appreciate this would have been hard to imagine back in the 18th century) which creates a right to request more predictable working patterns.

The most recent in a series of snappily named pieces of legislation, promises employees the right to *request* more predictable hours.

Initially a point in the Tory manifesto back in 2019, the Act is designed to tackle unfair working practices and re-balance the power between employers and works in atypical work – in their press release the government thinks that this will lead to better staff retention and higher job satisfaction.

The Act, despite being currently in force, needs further, secondary legislation, before a worker will be able to bring a request under it – this secondary legislation is currently expected to come into play in Summer 2024. In practice, the right will manifest in a very similar way to flexible working requests – however, employers have to notify workers within one month of their request as to the outcome of their decision.

If an employer wants to refuse the request, they'll have to rely on one of the six statutory grounds:

1. **Additional Cost:** Demonstrating that accommodating the request would result in excessive financial burden.
2. **Ability to Meet Customer Demand:** Showing that the request would impair the ability to meet customer demands promptly or sufficiently.
3. **Impact on Recruitment:** Providing evidence that accepting the request would negatively impact the ability to hire or maintain an adequate workforce.
4. **Impact on Other Areas of the Business:** Demonstrating that the request would have adverse effects on other essential business operations.

5. **Insufficient Work during the Proposed Periods:** Proving that there is insufficient work available during the periods requested by the worker.
6. **Planned Structural Changes:** Demonstrating that the business has planned structural changes that would be adversely affected by the requested changes.

Some employers will feel the impacts of this much more than others – those with a large base of zero-hours based workers will be hit much harder than those without; however, the Act creates a right to *request* a more predictable working pattern, it's not an outright right to be given a predictable working pattern so does not go as far as was recommended in the Good Work Plan many moons ago so employers who genuinely need the flexibility of variable working patterns are unlikely to see a significant change to their operational models.

Zero hours contract worker

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The last in the series

After working its way through the courts of Northern Ireland, the case of Chief Constable of Northern Ireland v Agnew has finally made it to a Supreme Court judgment and what a judgment it is.

The Court's decision, in a nutshell, found that a "series" of unlawful wage deductions wouldn't be halted by breaks longer than three months, provided these deductions were of a similar nature to each other.

The Backstory

The case was brought by over 3,300 police officers and 364 civilian employees against the Chief Constable of the Police Service of Northern Ireland and the Northern Ireland Policing Board. The police had calculated holiday pay based solely on basic salary, omitting overtime, since the 1998 inception of the Working Time Regulations (Northern Ireland).

Unravelling the Series

The term "series" in "series of deductions" was dissected, with the Court declaring that whether a deduction forms a series is ultimately a matter of fact, with nothing in the legislation requiring a gap of less than three months for a series to be valid. This is unfortunate for the Chief Constable of Northern Ireland, as the holiday had been consistently miscalculated since 1998 and, unlike in Great Britain, there is no two year back stop for holiday claims in Northern Ireland.

Different types of holiday

The benefit of a series of deductions being broken by breaks in that series being more than three months was that, due to the difference in how Working Time Regulations holiday pay is calculated, compared to Working Time Directive holiday, as long as the Working Time Directive holiday had been used up more than three months ago, employers had a good argument that they should not be liable as the series had been broken.

But when is Working Time Directive holiday taken? It used to be the case that it was taken "first" – that is before the "additional" holiday under Working Time Regulations. Sadly, the Supreme Court has also now shed light on the sequence in which leave is taken and it is not good news for employers.

The Supreme Court has found there is no implied reason that the four weeks' Working Time Directive holiday should be taken before the 1.6 weeks' Working Time Regulations holiday (also known as "additional holiday") – essentially saying it is all in one pot.

The Tribunal judgment, with which the Supreme Court agreed, said that the different types of holiday were taken all at once. So, if you have 30 days holiday (for a five day a week worker), each day's holiday taken would contained 20/30 Working Time Directive holiday, 8/30 Working Time Regulations holiday and 2/30 additional contractual holiday.

This is going to cause some problems for courts in calculating holiday pay owed as, in many circumstances, minimum holiday pay is greater for Working Time Directive holiday than Working Time Regulations holiday so how are we going to know what should have been paid and when?

So…

This is a decision which really moves the dial towards the protection of worker rights. Our concern is that, with the ever-evolving law around holiday and what should be included in holiday pay, the safety net that a series of deductions could be broken by virtue of a mid-series gap in deduction of three months has been removed.

Employers could find themselves with significant holiday pay claims if they are just paying "basic pay", instead of including other potentially eligible amounts, such as overtime and commission.

In better news, the government is consulting on whether there should be one basis for holiday calculation for all holiday (what a good idea), so we might find that holiday pay calculations revert back to basic pay only for all holiday; however, we wouldn't bet on it!

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Enhanced protection in respect of sexual harassment is due next year

It has been going back and forth between the House of Commons and the House of Lords, but a compromise has now been reached in respect of the Worker Protection (Amendment of Equality Act 2010) Bill 2022-23.

Initially, the bill included provisions regarding third party harassment, but there were significant concerns in the Lords that this would jeopardise free speech and be very onerous to employers. As such, these provisions have now been removed from the legislation, leaving the mandatory duty to prevent sexual harassment likely to proceed.

The bill introduces a compulsory duty on employers to take reasonable steps to prevent sexual harassment within the workplace. Essentially, reasonable measures need to be taken to prevent sexual harassment. Employment tribunals will be able to increase the compensation awarded in sexual harassment cases by up to 25% if an employer has not taken reasonable steps to prevent the harassment in the first place.

The law is not likely to come into effect for 12 months; however, in preparation, we would recommend businesses review existing policies, introduce, or improve, workplace training and awareness in respect of sexual harassment and consider the introduction of a harassment reporting mechanism which is available to all staff.

Redundancy payments when an employee changes their mind

Employees who are dismissed by reason of redundancy are usually entitled to a statutory redundancy payment, which provides financial support during the transition period to a new role.

For an individual to be eligible to a statutory redundancy payment, they must either be an employee who has been dismissed by reason of redundancy or become eligible for a redundancy payment because they have been laid off or kept on short time working AND they must have at least two years' continuous employment.

However, an employee's right to a statutory redundancy payment can be lost where they have unreasonably refused an offer of suitable alternative employment.

Changing your mind on an offer of alternative employment.

Love v M B Farm Produce Ltd

Mrs Love worked at a farm shop which was to be closed and so she was put at risk of redundancy. Her employer offered her an alternative role at another farm shop, subject to a trial period. She was worried about driving to an unfamiliar place so her employer offered to pay her reasonable mileage and fuel expenses and confirmed that she would not be expected to drive in snow if it would be too risky.

However, as Mrs Love was not a confident driver, she rejected the offer. Her employer considered the offer to be suitable and her refusal unreasonable, and so confirmed that she would not receive a statutory redundancy payment. Mrs Love then requested a meeting with her employer, at which she expressed interest in at least commencing a trial period for the alternate role originally offered. However, relied on her original rejection and confirmed her redundancy and lack of entitlement to a redundancy payment.

What did Mrs Love do next?

Mrs Love brought a claim for a statutory redundancy payment, but the employment tribunal found that the role offered was suitable and her refusal was unreasonable and, as a result, she was not entitled to a redundancy payment.

Although Mrs Love later reflected on the position and sought to change her decision, the Judge found that there was nothing in the law surrounding alternative employment that allowed an employee who had rejected an offer to change their mind and regain a right to a redundancy payment. As such, she had no right to a statutory redundancy payment.

But employers beware:

However, as is often the case, the Judge gave with one hand and took with the other: Mrs Love succeeded in her claim for unfair dismissal on the basis that the employer's refusal to allow Mrs Love to commence the trial period and, instead, to dismiss by reason of redundancy was not reasonable because the role was still vacant.

Key takeaways

For employees:

Employees must think carefully before turning down an offer of alternative employment, otherwise they are likely to lose their right to a statutory redundancy payment, even if they subsequently change their mind. Employees must ensure that any decision to refuse an offer of alternative employment is based on valid and reasonable reasons and is not made hastily.

For employers:

This is a reminder to employers that they are under no obligation to make a statutory redundancy payment to an employee who unreasonably refuses their offer, provided they can safely say the offer was suitable and the refusal is unreasonable.

Even where an employee has a change of heart, the entitlement to a redundancy payment is already lost and will not be restored; however, if an employer decides to continue with redundancy where an employee subsequently says that they would like to take up an employer's previous offer of alternative employment and that role is still vacant, they are very likely to find themselves at the wrong end of an Employment Tribunal Judgment for unfair dismissal.

Ultimately, once deductions had been made from the Tribunal's award in respect of benefits she had received since she had been dismissed, she received the princely sum of £1,820; however, she did, at least, give the world an interesting insight into suitable alternative employment.

If you need to get in touch...

You can contact the Employment team on 01752 827081 or email employment@nash.co.uk

Or click to visit us at https://nash.co.uk/business/employment-law-team/

Interesting cases on the horizon

Accattatis v Fortuna Group (London) Limited
Due to be heard in Employment Appeal Tribunal 20 December 2023
Was the Tribunal right to hold that COVID-19 concerns alone may not justify a refusal to attend work under health and safety legislation if employers have reasonably tried to accommodate employees' concerns and reduce transmission risk?

Manjang v Uber Eats UK Ltd Employment Tribunal
Employment Tribunal Awaiting hearing date
Was Uber's decision to use a facial recognition system to verify the identity of their drivers indirectly discriminates on the ground of race?

Chief Constable of the Police Service of Northern Ireland and another v Agnew & others
Supreme Court Judgment out – see this month's edition.

Kocur v Angard Staffing Solutions Ltd and anor
Was due to be hearing by Supreme Court on 7 December 2023 but the parties settled.
Does the right of agency workers to be informed of vacancy extend to the right to apply for and be considered for those vacancies – the courts have so far said "no".

USDAW v Tesco Stores Ltd
Due to be heard by the Supreme Court on 24 and 25 January 2024
Is there an implied term preventing an employee from being dismissed and re-engaged when the term being removed is one which was promised to them?

Hope v British Medical Association
Due to be heard by the Court of Appeal
If an employee brings numerous vexatious and frivolous grievances and then fails to attend grievance meetings, could this amount to gross misconduct to release the employer from payment of notice.

Important legislation changes ahead

Strikes (Minimum Service Levels) Bill
A proposed bill requiring a minimum level of service in critical sectors during periods of strike. Royal Assent received, but no date to come into force yet.

Retained EU Law (Revocation and Reform) Bill
The Bill would lead to EU laws either being put into domestic legislation or revoked, with a sunset provision automatically revoking any remaining EU derived law not in domestic legislation by the end of 2023; however, this has been amended so only specific laws will be revoked.

Workers (Predictable Terms and Conditions) Act 2023
An Act to allow workers on variable hours to request a more predictable working pattern. Due to come into effect in September 2024

Employment Relations (Flexible Working) Act 2023
An Act to introduce a requirement for employers to consult with employees before rejecting a flexible working request; to allow two flexible working requests a year; to reduce the time to make a decision to two months and to simplify the method making a request. Likely to come into force in July 2024.

Employment (Allocation of Tips) Act 2023
An Act to ensure workers receive 100% of their tips. Royal Assent received, but no in force date yet.

Neonatal Care (Leave and Pay) Act 2023
An Act to enable parents of babies who require specialist neonatal care to take up to 12 weeks' neonatal care leave. Such leave to be paid at the statutory rate. Likely to come into force in April 2025

Protection from Redundancy (Pregnancy and family Leave) Act 2023
An act to extend protection from redundancy after pregnancy or maternity to cover the period from the date that the employer is informed of the pregnancy through to six months after the employee returns from maternity leave. Awaiting secondary legislation to implement, but likely to come into effect in 2024.

Important legislation changes ahead (Contd)

Worker Protection (Amendment of Equality Act 2010) Act 2023
The Act introduces a duty on employers to take reasonable steps to prevent sexual harassment of their employees. Where the duty is breached an uplift of 25% compensation may be awarded. Likely to come into effect late 2024.

Carers Leave Act 2023
This Act makes provision for one week's unpaid leave for employees with caring responsibilities. Will not be implemented until at least April 2024

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RATES AND LIMITS (April 1st 2023-March 31st 2024)

National Minimum Wage from 1st April 2023

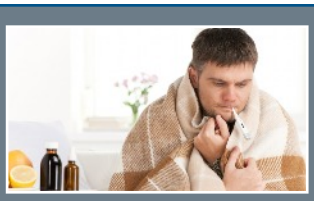
Workers aged 23 or over (the National Living Wage): £10.42 per hour
Workers aged 21 to 22: £10.18 per hour
Workers aged 18 to 20:£7.49 per hour
Workers aged 16-17: £5.28 per hour
Apprenticeships: £5.28 an hour
Accommodation offset limit (maximum daily deduction from NMW, per day): £9.10

Family Rights

From April 2023, the rates for Statutory Maternity Pay, Statutory Paternity Pay, Statutory Adoption Pay and Statutory Shared Parental Pay will increase to £172.48.

Sick Pay

From April 2023, the rate for Statutory Sick Pay will increase to £109.40 per week



Taxation: Scotland

In Scotland, for the tax year 2023/24:
Scottish Starter Tax Rate of 19% applies on annual earnings from **£12,571 - £14,732**
Scottish Basic Tax Rate of 20% applies on annual earnings from **£14,733 - £25,688**
Scottish Intermediate Tax Rate of 21% on earnings from **£25,689 - £43,662**
Scottish Higher Tax Rate of 41% on annual earnings from **£43,663 - £125,140**
Scottish Top Tax Rate of 46% on annual earnings above **£125,140**

Taxation: UK (Excluding Scotland)

In the UK (excluding Scotland), for the tax year 2023/24
Basic Tax Rate of 20% applies on annual earnings above PAYE tax threshold and up to **£37,700**
Higher Tax Rate of 40% applies on annual from **£37,701 to £125,140**
Additional Tax Rate of 45% applies on annual earnings above **£125,140**

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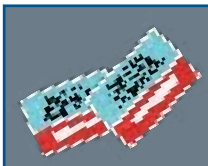
RATES AND LIMITS (Continued)

Limits

Maximum amount of a week's pay (used for calculating a redundancy payment or for various awards including the unfair dismissal basic award): **£643**

Limit on amount of unfair dismissal compensatory award: **£105,707**
Maximum guaranteed payment per day: **£35**



National Insurance

The lower earnings limits in respect of primary class 1 contributions is **£123 per week.**

The upper earnings limit for primary class 1 contributions is **£967 per week**

Auto Enrolment

The minimum contribution rates for defined contribution schemes, expressed as a percentage of a job holder's qualifying earnings, is **3% for employers and 5% for employees.**

automatic enrolment

Vento Bands

Injury to feeling and psychiatric injury:

Lower Band of £1,100 - £11,200 (Less serious cases)

Middle Band of £11,200 - £33,700 (cases that do not merit an award in the upper band)

Upper Band of £33,700 - 56,200 (The most serious cases), with the most exceptional cases capable of exceeding **£56,200**)

Statutory Minimum Notice

Statutory or Contractual Notice?
There are two types of notice period: statutory and contractual. Statutory notice is the minimum legal notice that can be given.

Length of Employment	Notice required from employer
Under 1 month	No statutory notice requirement
1 month to 2 years	1 week
2 years to 12 years	1 week for each completed year of service
12 years or more	12 weeks