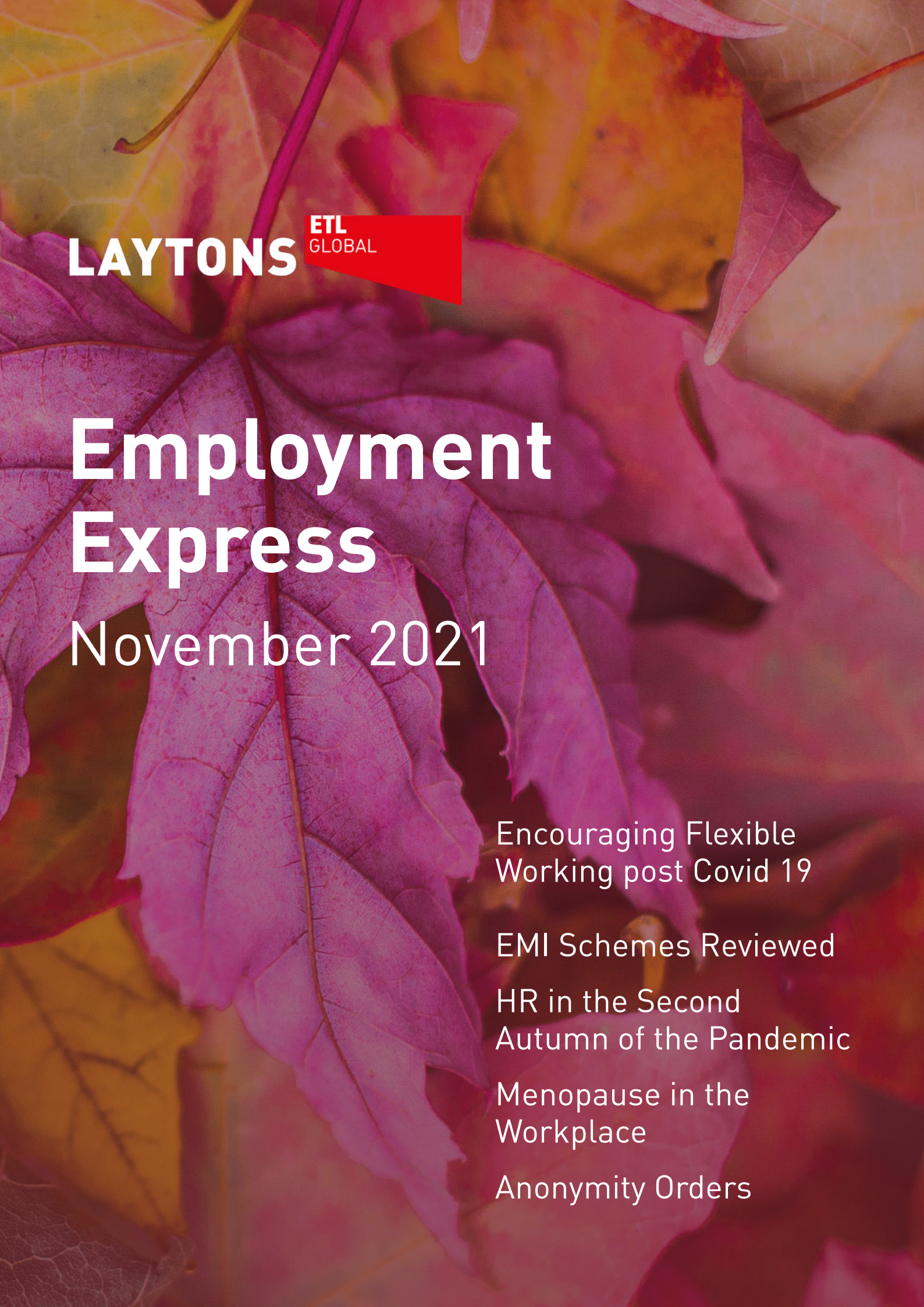

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Employment Express

November 2021

Encouraging Flexible Working post Covid 19

EMI Schemes Reviewed

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Employment Express

Welcome to our Autumn edition of the Employment Express.

One of the biggest shifts during the pandemic has been to adopt flexible working arrangements. Proving successful for many and with a consultation closing next month, it is likely to result in some significant changes. We also highlight the consultation concerning the menopause launched by the Woman and Equalities Committee to review legislation and workplace practices for those experiencing the menopause.

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Encouraging Flexible Working post Covid-19

The Department for Business, Energy & Industrial Strategy has published a consultation called 'Making Flexible Working the Default' with a closing date for submissions of 1st December 2021.

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The consultation seeks to build on existing legislation and the current government's 2019 manifesto "to encourage flexible working and consult on making it a default unless employers have good reason not to". It identifies that flexibility in working patterns is something which all employees would benefit from, not just a limited sub-set; at present the vast majority of requests are made by women with young families.

The consultation aims to build on the July 2019 "Good Work Plan" which proposed to promote greater transparency about flexible working and family-related leave and pay policies, and suggested a requirement for employers to include whether the role was suitable for flexible working in the actual job advert.

The impact of Covid-19 is undoubtedly a driving force for the change, as employees and employers have come to realise that the old, one-size fits all, working hours arrangements are not necessarily the right way forward. A large proportion of employers have already indicated that they intend to offer flexitime, staggered hours and compressed hours.

The consultation identifies that the ability to work flexibly does not just benefit employees but also employers by rewarding them with better employee performance and thus higher financial returns. Simply put, flexibility has led to a more content and motivated workforce who perform better.

One area of concern which has been identified in the consultation is the inequality which has been shown up in the workforce being able to work flexible hours, with a marked difference between London and the South-East of England and the remainder of the country. This clearly reflects the different types of industries found in the different regions of the U.K.

Most office-based jobs can be performed from any computer, in any location in the world, whilst in industries such as manufacturing, hospitality, retails and warehousing jobs require employees to perform their jobs in situ. These requirements have and will continue to create a marked differentiation in the flexibility which can be built into the working patterns of different business sectors.

The proposals in the consultation invite comment on the possibility of making flexible working the default unless employers have good reasons not to deviate from a 9-to-5 pattern of working hours.

A summary of the five key proposals of the consultation is as follows:

1. making the right to request flexible working a "day one" right
2. whether the eight business reasons for refusing the request all remain valid
3. requiring the employer to suggest alternatives
4. the administrative process underpinning the Right to Request Flexible Working; and
5. requesting a temporary arrangement.

"The proposals in the consultation invite comment on the possibility of making flexible working the default unless employers have good reasons not to deviate from a 9-to-5 pattern of working hours."

"Anticipating the needs for flexible working and engaging in a collaborative consultation to match business needs and employee requests is likely to become law."

One of the options being mooted is to alter or reduce the above criteria to make it easier for employees to make and succeed with such requests.

The possibility is also proposed of making the right to request flexible working a 'day one right' instead of the current requirement of 26 weeks employment before being able to make the request.

The consultation also questions whether the eight business reasons which currently exist for allowing employers to refuse a flexible working request all remain valid. It recommends requiring the employer to suggest alternatives and engage more in the process including permitting temporary arrangements.

The consultation talks of a "rebalancing" of the current framework and making it available for all, rather than the current focus in legislation about what is not possible per the eight available reasons for rejection. It is clear that a cultural shift is required in the way we think about work and how and where it can be done.

The intention overall is to better support employees to start the conversation about contract changes, and to require employers to respond and engage in the process in a more positive and collaborative way. The government would seek it to be a conversation between the parties, about how best to balance particular work requirements and specific individual needs.

Recent headlines of Tribunal decisions concerning flexible working requests are further promoting the importance of this issue, although when drilling down on the facts of the cases in question there is often a significant degree of entrenchment between the parties and other aggravating factors around the actual flexible working request. It is true however that previously flexible working cases received very little attention; the tide is definitely turning.

During the pandemic 47% of the workforce stayed at home, and the government consultation makes clear that employers would be wise to anticipate the likely legislative changes which are keen to make flexible working part of the DNA of the modern workforce.

Anticipating the needs for flexible working and engaging in a collaborative consultation to match business needs and employee requests is likely to become law following the consultation, so employers would be wise to start to anticipate this now.

EMI Schemes Reviewed

Many of us are familiar with, or may have adopted Enterprise Management Incentive (EMI) Schemes. Typically around 4000 companies grant EMI options each year.

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For those who are not, they are flexible share option schemes for employees who work more than 25 hours per week, and give generous tax advantages for employees. If EMI options are granted at market value, employees pay no income tax or national insurance contributions on any increase in share values between the date the options were granted and the date the options were exercised. HMRC will agree the market value for the shares in advance of a grant to remove any guesswork. Once options have been exercised (any conditions having being met), gains arising from disposal of the shares are normally subject to capital gains tax (CGT). Some employees may be eligible for a reduced (10%) CGT rate through Business Asset Disposal Relief, if there is a period of two years between the date an option was granted and the disposal date of the shares. There is also corporation tax relief for employers. This means cash-constrained small employers can offer more attractive remuneration packages, using shares, helping them recruit and retain skilled employees. All in all it is a very attractive package, and of course, it comes with a host of restrictions to prevent abuse.

As part of the review announced at Budget 2020, the government published an EMI consultation at Budget 2021. Normally, the message would be "get in quick before the rules change".

However, this consultation and call for evidence, which closed in May this year, was said to be about whether and how to expand the current EMI scheme to ensure it offers effective support for high-growth companies seeking to recruit and retain key employees.

In particular, the government was seeking views on whether:

- the current scheme is fulfilling its policy objectives of helping Small and Medium Enterprises (SMEs) recruit and retain employee
- companies that are ineligible for the EMI scheme because they have grown beyond the current qualification limits are experiencing structural difficulties (i.e. in the labour market) when recruiting and retaining employees
- the government should expand the EMI scheme to support high growth companies and how
- other forms of remuneration could provide similar benefits for retention and recruitment as EMI for high-growth companies.

As a 'discretionary' scheme, EMI options can be offered to individual employees at the discretion of the employer. An employer may grant qualifying share options up to a value of £250,000 per employee in a three-year period. The total market value of unexercised qualifying share options a company may grant under EMI cannot exceed £3 million. To qualify for EMI, a company must, at the relevant time, have:

- less than £30 million in gross assets
- fewer than 250 full-time employees and
- carry out a qualifying trade (many activities are excluded, such as banking, professional services, property development, the hotel trade, operating care homes, farming and a host of others)

A company must also have a permanent establishment in the UK and must not be a 51% subsidiary of another company.

No news yet, crystal ball time, but watch this space. The hope is that the government will increase the size of companies which can qualify under the scheme and reduce the number of exclusions and restrictions.

HR in the Second Autumn of the Pandemic

In Autumn 2021, with the pandemic still very much around, but life getting "back to normal", here are some key considerations in the movable feast that is employment law...

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"The pandemic has been a rollercoaster for employers and their HR teams, and it needs to be recognised how adaptable employees have been in the new landscape. As we head into the much forecasted "Winter of Discontent", employers need to ensure good communications and keep policies updated and clear."

Health and Safety Issues

Employers must continue, as far as is reasonably practicable, to ensure the health, safety and welfare of their employees. We continue to encourage risk assessments and policy updating to ensure compliance in this crucial area, where the consequences for failing to comply can impose criminal liabilities for the employer.

Vaccination Policies

These should now have been firmly put in place, with the advice being to "encourage but not force" staff to be vaccinated. If holding the information about staff vaccinations, GDPR considerations and policies must be adhered to.

Flexible Working and hybrid working

The pandemic has shifted the way we think about flexible working. With many employees settling well into "wfh", managing their role from home successfully during lockdown, and enjoying the associated lifestyle benefits, it is proving difficult for an employer to insist on a full-time return to the office. A current Government Consultation entitled "Making Flexible Working the Default" is seeking to promote flexible working and encourage a better discussion between the employer and the employee.

End of Furlough

With the Coronavirus Job Retentions Scheme now officially over, employers may be looking to restructure their workforce, which may lead to redundancy consultations.

Mental health Issues

Employers need to be alive to the fall out from the lockdown and pandemic more generally vis-à-vis their employees' mental health and look to support and assist employees with reasonable adjustments. Mental health illnesses can often mean the employee meets the definition of disability, as set out in the Equality Act 2010, and thus any unfair treatment can give rise to a claim for disability discrimination.

Tribunal Claims

Due to the general delay and backlog in the Employment Tribunal systems, we are now starting to see tribunals hearing Covid-19 related issues which arrived at the start of the pandemic. Cases have included whether the dismissal of an employee refusing to wear a face mask was fair, the treatment of pregnant woman being asked to work from home during lockdown, and whether employees made redundant should actually have been placed on furlough. All decisions are currently first instance, but they present a whole new set of facts and circumstance for the Employment Tribunals to consider.

Menopause in the Workplace

An inquiry into "Menopause in the Workplace" was launched in July 2021 by the Women and Equalities Committee to review current legislation and workplace practices in relation to those experiencing the menopause.

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The aims of the inquiry were to:

- seek views on whether employers should be required to put in place a workplace menopause policy, and
- ask whether existing discrimination legislation and workplace practices are sufficient to support women suffering adverse consequences to their employment, including having to leave their jobs, as a result of the menopause.

In 2019, a survey conducted by BUPA and CIPD, found that 60% of women between the ages of 45 and 55 were negatively affected at work. The survey also found that almost 900,000 women in the UK left their job because of menopausal symptoms. The knock-on effect of this is significantly affecting diversity in the workplace, losing women with key experience at the peak of their careers who may be eligible for senior manager roles. This can further pointedly contribute to the gender pay gap.

At present, menopause discrimination is only covered by the Equality Act 2010 if a claim is brought under three protected characteristics: of age, sex, and disability discrimination. The inquiry is set to review and consider whether further legislation is required to protect menopausal workers.

The symptoms of menopause can be physical (including hot flushes, headaches, heavy periods) and also psychological (including memory loss, confusion and depression). The symptoms vary in severity from person to person, but can have a significant impact on a person's ability to carry out day-to-day activities and perform as usual in the workplace.

"Having an appropriate policy should start to address the issue of nearly 900,000 women in the UK leaving their job because they suffer from menopausal symptoms"

The issue of menopause as a disability was considered in the case of *Donnachie v Telent Technology Services Ltd* ET/13000005/20. The Tribunal held that Ms Donnachie's menopause experience of having hot flushes eight times a day which led her to feelings of fatigue and anxiety as well as and memory and concentration difficulties, all of which impacted her ability to carry out day-to-day activities including walking, reading, writing, using a computer and sleeping. The Tribunal further held that the impact of these symptoms was more than minor or trivial and it could not see any reason, in principle, why "typical" menopause symptoms could not amount to a disability.

Caroline Noakes, Chair of the Women and Equalities Committee leading the inquiry, has stated that the lack of clarity in the legislation is resulting in many claims for disability discrimination. Caroline has also stated the Committee may seek to change the Equality Act entirely to include menopause as a protected characteristic in its own right, rather than employees having to prove their symptoms amount to the protected characteristic of disability, in order to then explain why they have suffered discrimination.

The inquiry closed in September 2021 and, whilst we wait for the outcome, employers should start to consider whether they may benefit from introducing menopause policies at work in any event. Such policies can help foster an inclusive and supporting working environment. The policies tend to work practically to encourage employers to carry out risk assessments, remove any stigma or embarrassment, and engage in open conversations, which can include the involvement of Occupational Health and medical advisers.

Menopause policies may become a necessity for employers if menopause becomes a protected characteristic in the Equality Act. In any event menopause policies are good practice, assisting with an issue which affects a significant proportion of staff. Having an appropriate policy should start to address the issue of nearly 900,000 women in the UK leaving their job because they suffer from menopausal symptoms and will therefore help to ensure that the workplace can remain diverse at a senior level. We will keep you updated.

Anonymity Orders

Since February 2017, all tribunal judgments and written reasons entered on the public register are published online in accordance with the Employment Tribunal Rules (ET Rules). The result of this is that anyone who has the foresight to conduct a Google search on a potential employer or employee would be able to find and read any cases that have been brought against that employer or whether that employee has ever brought an employment tribunal claim.

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"It is not difficult to foresee circumstances that may arise where individuals may wish to make a similar application under rule 50, especially in this day and age where employers and employees alike are likely to perform internet searches on potential candidates"

Consequently, the tribunal has the power under rule 50 of the ET Rules to make an order preventing or restricting the public disclosure of any aspect of the proceedings as it considers necessary in the interests of justice and to protect the rights of any person under the European Convention on Human Rights (ECHR). This can include anonymising personal data during proceedings or in documents which form part of the public record. This is a particularly important power of the tribunal as you could be minding your own business in your employment only to discover that your name has been mentioned in a judgment on the internet for all to find.

It is easy to see how naming a person in a judgment may infringe their right to privacy under Article 8 of the ECHR. However, an order anonymising their personal data in proceedings may consequently interfere with Article 6, which states that judgments shall be pronounced publicly, as well as the right to freedom of expression under Article 10. In deciding whether or not to grant an anonymity order, a tribunal must balance the competing rights under the ECHR and also consider the principle of open justice.

The Employment Appeal Tribunal (EAT) recently considered an application for an anonymity order by an individual who was named and referred to in an unfavourable manner in an Employment Tribunal (ET) judgment, but was not a party to, nor a witness in, those proceedings (*TYU v ILA Spa Ltd EA*-2019-000983-VP).

Unfair and wrongful dismissal proceedings were brought against ILA Spa Ltd by two of the appellant's relatives. The appellant, whom we shall refer to as Ms X, had also worked for the respondent company but was not involved in the dismissal proceedings. The judgment had named Ms X and indicated that she had been suspected of dishonesty offences in the workplace, which had been referred to the police by her employers, and that other employees at ILA Spa Ltd had informed an internal investigation that they were frightened by intimidatory behaviour involving her. Ms X made an application under rule 50 of the ET Rules for an order that her name be redacted from or anonymised in the judgment (an anonymity order).

The ET had in the first instance decided that Article 8 was not engaged in these circumstances as *"she could not have had any reasonable expectation of privacy because information revealing her identity had been discussed in a public trial"* and, alternatively, that if they were engaged they did not outweigh the countervailing rights protected by Articles 6 and 10, and so dismissed the application.

Ms X appealed to the EAT, which confirmed:

1. rule 50 applications may be made after judgment has been handed down (*X v Y* [2021] ICR 147) and that an application may be made by a non-party who contends that their ECHR rights require protection

2. with regards to the ET's decision that Ms X's right to privacy was not engaged for the reason stated above, that the ET judge had erred in law as he had wrongly regarded the prior publicity fatal to her application. The EAT specifically referred to the prospect of damage to Ms X's reputation as being *"sufficiently self-evident for the purposes of Article 8 engagement, in particular given that a link to the Dismissal Judgment features prominently in search engine results on her name and given the contents relate to her suspected dishonesty and intimidatory behaviour in the workplace"*

3. that the ET had failed to conduct a balancing exercise between the proportionality of interfering with the competing ECHR rights and that they had failed to consider whether measures could be adopted that would be less intrusive of Ms X's Article 8 rights.

The EAT allowed the appeal and remitted the question of whether the rule 50 application should be granted to the ET as there was, at present, a lack of fact-finding as to the extent of the impact of the interference of Ms X's Article 8 rights. In the interim, the EAT granted an extension of the ongoing temporary anonymity order pending the remitted determination.

It is not difficult to foresee circumstances that may arise where individuals may wish to make a similar application under rule 50, especially in this day and age where employers and employees alike are likely to perform internet searches on potential candidates/companies and we are constantly reminded to be wary of our digital footprint. Employers note, your managers may not want their names mentioned in judgments where their behaviour in internal disciplinary or grievance procedures has been scrutinised.

We look forward to the Employment Tribunal's imminent decision.

Expertise

Employment & HR

Employment law has an impact on businesses and individuals alike. It is complex and mistakes can be costly and time-consuming. We combine legal expertise with commercial acumen to provide our clients with practical solutions, not just information.

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