King & Spalding

Client Alert

Global Human Capital and Compliance

SEPTEMBER 23, 2024

For more information, contact:

Tessa Cranfield
+44 20 7551 7567
tcranfield@kslaw.com

Marie Hoolihan
+44 20 7551 7587
mhoolihan@kslaw.com

Matthew Sharples
+44 20 3929 5317
msharples@kslaw.com

King & Spalding

London
8 Bishopsgate
London, EC2N 4BQ
United Kingdom
Tel. +44 20 7551 7500

Workers in 'Standby' Mode – and Other UK Updates

Next month's update will cover the eagerly awaited new government's employment law reforms, to be announced mid-October 2024. Some details are emerging, including that 'day one' termination rights will be subject to a six-month probation period and that there will be a right to compensation for being contacted out of hours under the 'right to disconnect'. We know that the changes will be significant. We can provide individualised briefings to clients as to what these will mean for your business – please reach out to your usual contact to set this up.

For now, we round up key cases covering:

- Settling future claims
- Recognising 'employees' versus 'workers'
- Paying employee for 'rest' time,
- New rules on payment of tips to staff, and
- A success for opponents of the practice of "fire and rehire".

SETTLING FUTURE CLAIMS

In a case concerning an employee who signed a Settlement Agreement when he transitioned onto long term disability insurance (but remained employed), the Courts have confirmed that a Settlement Agreement can effectively waive future claims. This is good news for employers, but with the warning that the release wording in this case was very specific, and was limited to future claims in relation to the employee's disability claim and related complaints. A careful approach is needed to secure a valid release, and this is unlikely to cover all claims that have not yet materialised.

Mr Ian Clifford v IBM United Kingdom Ltd

FOOTBALL REFEREES ARE EMPLOYEES

A Supreme Court decision has held that part-time football referees were employees.

Although a niche area, some of the factors in the Court's decision will be relevant to employees generally.

Referees contracted separately for each game they refereed. Once contracted, they could drop out but in practice, a good reason was expected or there could be sanctions. The Supreme Court held that this was enough for the referees to have 'employment' status and rights, on the basis that there was mutuality of obligation and control for the length of each 'match' contract. It did not matter that either party had the right to cancel the engagement without penalty. There was also some degree of control as to how the referees ran the match, and submitted a report after it. They did not have to show the 'employer' had the right to give them direct instructions.

The case highlights that in certain circumstances, multiple short term contracts can constitute an ongoing employment relationship. The court will look at the overall picture, and important rights can follow.

Commissioners for His Majesty's Revenue and Customs v Professional Game Match Officials Ltd

WORKING OR RESTING? HOW TO TREAT TIME SPENT ON 'STANDBY'

In this case, police staff claimed compensation for breach of rights to rest time, where they were on 'standby'. The conditions of standby were that they were not allowed to consume alcohol, had to remain at home, and were paid a fixed 'on call' allowance. If this were treated as 'working time', this would have breached their right to 11 consecutive hours' rest in each 24-hour period (Reg 10, Working Time Regulations) and given a potential right to compensation.

The Tribunal recognised that some of the features of the standby arrangement were not 'work' and only applied to on call activities, but did not amount to working time. In the Tribunal's view, working time was any time spent carrying out duties (e.g., actually attending to call outs or spending time in the workplace).

However, the requirement to respond immediately, stay at home, or very close to home, the frequency and unpredictability of calls, and the need to remain mentally alert meant that the Tribunal found that the standby was also 'working time'.

This highlights the need for employers to exercise caution when planning their 'on call' arrangements. If these requirements excessively burdensome or restrictive, the entire on call period may be considered to be working time, and therefore would affect the employer's statutory duty to provide sufficient rest periods (and may also trigger payment of the national minimum wage).

Mr K Thomas and others v The Chief Constable of Humberside

EMPLOYMENT (ALLOCATION OF TIPS) ACT 2023 TO COME INTO FORCE ON 1 OCTOBER 2024

The Employment (Allocation of Tips) Act 2023 comes into force on 1 October 2024. The Act will cover all tips, gratuities and service charges over which an employer has control or influence. Key points include:

- **Allocation**: Employers must fairly allocate 100% of employer-received tips (or worker-received tips where an employer exercises control over the tips) to staff without deductions, except any deductions prescribed by law, for instance, tax deductions.
- **Timely Payment**: Tips must be paid to workers by the end of the month following their receipt.
- **Written Policy**: Employers must consult on a clear, fair, and compliant written policy on tip distribution.

- **Record-Keeping**: Employers are required to keep records of tip distributions for three years. Workers are permitted to request specific information regarding their employer's tipping practices within the last three years.
- **Remedies**: The Act provides for remedies for non-compliance such as making a declaration that the employer has failed to comply with its obligations, orders for revision of tip allocation, or compensation payments of up to £5,000 per affected employee.
- **Claims Period**: Employees have up to 12 months to file a claim for non-compliance.

TESCO CANNOT 'FIRE AND REHIRE' TO HARMONISE TERMS

The Supreme Court has unanimously allowed the appeal brought by the Union of Shop, Distributive and Allied Workers and others, blocking Tesco, the larger retail chain, from 'firing and rehiring' distribution center employees.

In 2007, Tesco attempted to incentivize employees, who were required to relocate to additional sites, to stay at the company by offering them "retained pay". The retained pay took the form of a contractual entitlement amounting to over 30% of their wages, to apply" permanently".

In 2021, Tesco announced its intention to remove retained pay in an attempt to 'ensure fairness' across all employees. Employees with the contractual entitlement were offered a lump sum payment (equaling 18 months of retained pay) to agree to the change in contract. They were warned if they turned down the offer they would instead be 'fired and rehired'. The Supreme Court has now ruled in favour of the employees, and injuncted the employer so that it could not go through with the intended terminations. A Court will very rarely force an employer to continue employing staff, but in this case it was held that damages would not be a sufficient remedy for employees who were terminated. This case demonstrates the need for clear wording (including limits or conditions) when providing new benefits to employees. Bigger picture, it also chimes with the new government's promise to outlaw "fire and rehire" practices as pledged in its 2024 election manifesto.

Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers and others