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CD corporate disputes

COMPLEX EMPLOYMENT LITIGATION AND INVESTIGATIONS

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MINI-ROUNDTABLE

COMPLEX EMPLOYMENT LITIGATION AND INVESTIGATIONS

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Nicola Rabson is a partner in the employment & incentives group at Linklaters LLP. She advises clients on their most challenging and sensitive employment issues and tackles the most complex of employment disputes, with extensive experience of high court and tribunal litigation. She is a frequent speaker and commentator on employment issues, with a particular interest in diversity, whistleblowing and culture. She is also a CEDR accredited mediator.

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Judith Sutton is a counsel in the employment & incentives group at Linklaters LLP. She is experienced in advising on complex and multifaceted workplace investigations and disputes, often involving reputationally sensitive issues. She works closely with senior stakeholders to advise on investigation and litigation strategies and has extensive experience defending claims before the employment tribunals.

CD: What are some of the key trends and developments you have seen in employment law litigation over the past 18 months or so? How would you describe case levels?

Rabson: By the time employment disputes reach the employment tribunal, the type of claims being heard do not always reflect the trends we are seeing in real time. A recent Employment Lawyers Association survey has shown that more than 40 percent of lawyers are waiting more than a year for their clients' cases to reach a hearing in the tribunal. As the pandemic has evolved, so too have the trends we have seen in internal disputes, and consequently, where such disputes cannot be resolved, in employment litigation. When the UK first went into lockdown in March 2020, the disputes we were seeing mostly related to redundancies and the immediate issues that arose as workforces transferred to remote working. The focus then quickly shifted to health and safety issues, changes to working terms or conditions, such as temporary reductions in pay or deferred bonuses, and questions being raised about the approach to furlough. As we move back to the physical workplace, we expect to see issues which may have been held back during lockdown to surface. We expect a steep rise in flexible working requests, and managers need to be joined up internally in how they respond to these.

Ollivent: Some of the trends in employment disputes are already starting to show in the cases before the employment tribunals. As at July 2021, the latest statistics show that firstly, since the pandemic, despite there being a fall in quarter one of 2021, there has been a steady rise in the number of new claims being submitted, and secondly, complaints of age discrimination saw a stark increase in the latter half of 2020, along with those related to the Part-Time Worker Regulations and failure to inform and consult on redundancy. Statistics also show an increase in race discrimination complaints, which we expect may be connected to the Black Lives Matter (BLM) movement.

Sutton: Tribunals are still playing catch-up and dealing with a backlog of claims. Reports suggest that tribunals have been progressing claims slowly since before the pandemic, and it is likely there will be a significant backlog for some time to come. This, coupled with the transfer of many in-person hearings to remote hearings, is causing logistical issues and slowing down the processing of claims even further. The pandemic has also distracted from other trends that were forecast for employment litigation at the start of 2020, including worker status claims – following changes to off-payroll tax rules and following in the footsteps of the gig-economy – and equal pay. As we hopefully move past the

pandemic, over the coming months, we expect these types of claims to resurface.

CD: Have there been any common themes in the types of disputes between employers and employees, during the coronavirus (COVID-19) pandemic?

Ollivent: We have seen an increase in disputes relating to working conditions and what employers can ask of their employees, including data protection issues, and matters connected to health and safety at work. Also, in the early period of the pandemic, questions around the categorisation of workers as essential or key workers who needed to attend their ordinary workplace. Increasingly, societal issues are becoming workplace issues. More and more employees are expecting their employers to take a stance on societal issues such as racism and sexual harassment and it is no longer possible for employers to ignore these issues or remain neutral. With increased awareness of workplace rights and developments in technology, social media and instant communication channels, employees – by speaking up or taking steps to draw attention to an issue which they believe their organisation should be doing something about – can become activists within their workplaces very quickly. While 'workplace activism' is not a new trend, it is one which has been exacerbated by the circumstances of the pandemic and we are already seeing this transcend into workplace disputes.

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Rabson: In the past 18 months, we have noticed an uptick in the use of fire and rehire practices. But we have also seen a backlash against such use in some sectors. Unions are pushing for these practices to be banned and some report that they are impacting younger workers more as a result of the pandemic. As various bodies lobby for change, the UK government is considering the use of fire and rehire practices and we expect to see more developments in this space. In the meantime, there will be a spotlight on procedural fairness of dismissals. Employers should be mindful of

reputational issues if these types of processes are not handled appropriately. Coming out of the pandemic, we are also advising on more team moves than we have since the last recession. The work of employment lawyers is often cyclical, and we can see trends like these being repeated over time. Employers are now looking at how they will evolve out of the pandemic, with some looking to boost teams or turn to new areas of business as they make plans for the remainder of 2021 and 2022.

CD: When conducting an employee-related investigation, what best practices should shape the process? What practical and regulatory considerations do companies need to factor into the investigation strategy?

Rabson: Preparation at the outset of any investigation is key to managing risk and avoiding decisions being open to later challenge. Too often, employers rush into commencing the investigation, even with the best intentions, without taking the time to plan their investigation strategy. It is imperative to consider the basics at the outset, including the scope of the investigation, the right process, who the decision makers will be, the application of privilege to legal advice, confidentiality, and any regulatory obligations, which are often time critical. There will also be stakeholders that may need to be updated, internally and externally, and the communications in this area can take time to get right.

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>
> *Judith Sutton, Linklaters LLP*

Sutton: We are seeing a clear trend where internal and external communications are an important element of an internal investigation, for all parties, particularly if an individual will be out of the business until an investigation concludes. Individuals want to know what will be said to their team, their clients and the board, among others, at the start, during and at the conclusion of an investigation. It is often a stressful and emotive time for the individuals involved, and it is important to handle communications carefully to avoid allegations of further detriment or victimisation. It is important to

consider how much to disclose, to who and at what stages throughout the process. As a practical step, it is often good practice to inform people on a 'need to know basis' and bear in mind that any internal communications about why an investigation is being conducted, or its progress, is likely to be disclosable. It is safer to assume that any communications could be made public, and that should feed into the strategy for what is communicated about an internal investigation, to whom and when.

Ollivent: At the outset, employers should be considering what, if any, regulatory obligations might be relevant. It is crucial to understand what regulatory notifications may be needed, when to notify and report, how much to report and when to update the regulator. Across many sectors we are seeing an increased regulatory spotlight on the design and effectiveness of internal policies and procedures relating to the handling of misconduct. It is therefore important to keep policies and procedures for managing employee investigations under constant review.

CD: In what ways has the coronavirus (COVID-19) pandemic affected internal investigations? Have there been any challenges in carrying out interviews and gathering information in a remote working environment, or when subject to restrictions?

Rabson: While the law has not changed in how employees bring disputes or how investigations are managed, often it has been the practicalities which have complicated these processes over the past 18 months. Yet the same requirements for procedural fairness and concerns over trust and confidence have remained. In our experience, the volume of investigations has not changed materially, as our clients have, to the extent they can, carried on business as usual. But what has changed is the amount of time human resources and employee relations need to commit to the coordination of those processes, as they have learnt to deal with employee disputes remotely. Even with the most sophisticated technology, it is well recognised that communication via video conference can be harder and drains human connection, making it more difficult to 'read' people or pick up cues from body language. There is always an inevitable risk that holding witness interviews remotely will be perceived as less formal, especially if witness interviews are taking place in the comfort of witnesses' homes. On the other hand, we have seen witnesses find virtual interviews more intense and tiring, without the obvious cues for breaks or in-person support from their companion.

Sutton: There are also the obvious and practical risks around confidentiality. In some cases, it may be prudent to make dial-ins for hearings and interviews password-protected and secure, so third

parties do not deliberately or accidentally join, and never forget to consider how these are labelled in peoples' diaries. Employers have had to adapt to the shift to evidence and investigation packs in soft copy, as opposed to more traditional hard copies. When we first went into lockdown that did give rise to practical difficulties, but we have all adjusted and I do think that will be a lasting change in how investigation packs are prepared, ordered and managed in soft copy, and how they are shared. I think that is a change for the better. We have adapted quickly, because we all had to.

Ollivent: Covert recording has been a real concern when holding virtual interviews. There is the risk a witness at home could record conversations and meetings without others' consent, using their phone or another device. While it is not a risk that can be eliminated, we recommend asking the witness at the start of all remote hearings or interviews to confirm they are not making any recording, and possibly also making clear what the potential consequences are, if it is found that the meeting was recorded without the knowledge of those 'present' or without consent.

CD: If an employee-related investigation may result in litigation, what general steps should employers keep in mind when conducting the investigation?

Rabson: Many investigations involve high-profile and senior individuals within a business and reputationally sensitive issues. This often means they have, or are likely to, attract media attention. It is often imperative, as part of the investigation strategy, to consider public communications early, to prevent, avoid or mitigate potential reputational damage. Communications are an increasingly important part of the investigation strategy and can help an employer to retain control over the dissemination of information and curb workplace gossip. It is important to have the right stakeholders informed at the right stages of the process who can act quickly and advise on public relations and communications strategy throughout the process. We are also seeing employees who are aware of a colleague being suspended or investigated asking for updates from their manager or human resources – whether they are or are not updated in any way requires careful consideration.

Sutton: It is also crucial to consider privilege at the outset of an investigation and keep your strategy and approach under review. In many cases, whether privilege attaches to a document will be straightforward, but that is not always the case. If there is a question mark over whether a document that is produced will or may not be privileged, the best time to address that is at the outset of an investigation, not after the investigation has concluded and a report produced and disseminated.

The risks of it not being privileged should then filter into the approach from that get-go. Whether a document is or is not privileged is important in litigation; employment proceedings are often won or lost on the basis of documentary evidence.

CD: Given the potential complexity of employment-related litigation, which may involve a large amount of documents, what advice would you offer as far as the document gathering, review and disclosure process is concerned?

Sutton: Spending time considering the scope of the process at the outset is important. Where fact-finding investigations are potentially going to uncover large volumes of documents, employers will need to consider the parameters of their search very carefully, and how they will approach assessing what is relevant for the decision makers to review.

Rabson: Disclosure is often one of the most time consuming and costly exercises for employers in employment litigation, made more so in recent years as workplace communication channels have become easily accessible and instant. The cost of disclosure can often be disproportionate to the value of employment claims and tribunal judges regularly complain about the volume and size of hearing bundles. But there are often ways in which the process can be managed to make it more efficient. There is an increased willingness to use artificial intelligence based solutions to streamline disclosure processes, using predictive coding and technology assisted review. It is a relatively new area and while it will not suit every claim, we are excited to see its application and how it develops.

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> *Nicola Rabson, Linklaters LLP*

CD: In your opinion, what are the key employment-related risks facing companies as we look to the months ahead? Do you expect to see a rise in employment litigation activity?

Rabson: We anticipate COVID-19-related litigation will continue into 2022. Some will relate directly to the pandemic – for example, disputes relating to health and safety in the workplace – but others indirectly, such as employers requiring employees to return to the physical workplace and employers refusing flexible working requests. The pandemic has accelerated change in attitudes towards flexible and agile working. Across some industries and sectors, employers will grapple with aligning their business needs with the differing expectations and desires of their workforce. The UK government has committed to consulting on whether flexible working should be the default, but in the meantime, we anticipate seeing increases in requests for flexible working as employees feel they have proven their case for working remotely over the past 18 months. For the first time, employers may feel on the back foot for explaining why this might not be a viable request or meet business needs. Employers also need to be mindful of employee wellbeing and mental health. Reports suggest the past 18 months has taken its toll on employees, physically as well as mentally, and this may impact resilience. Employers may see a rise in mental health-related issues among their workforces and should consider their legal duties relating to health and safety in the workplace, including mental health and wellbeing, as well as the physical set up of the office.

Sutton: As confidence grows with a return to the workplace, companies are being more acquisitive, which may lead to employees jumping ship and seeking out new opportunities. The future of non-compete clauses will come under closer scrutiny, and we expect to see more team-moves. At the start of the pandemic, many executives and senior leaders were asked to take temporary reductions in pay in light of forecasted profit reductions and to reflect the pain being suffered by the wider workforce during the pandemic. As profits start to resume to pre-pandemic levels, these individuals may be seeking to realign their pay, but also question whether any reductions were justified for those organisations that did not suffer the fall in profits that was forecast. From a legal perspective, the contractual terms of any arrangement will be key here. But from an employee relations and cultural perspective, employers may be thinking about how they can best retain their senior leadership teams in the short term. As businesses continue to review and assess their business models and cost bases over the coming months, we also expect to see further redundancies that flow even after government support schemes, such as furlough, have ended.

Ollivent: In the longer term, workplace activism will continue. We expect to see more social movements which will dictate employment trends, such as #MeToo and BLM. Since the last

recession, we have seen a year-on-year increase in whistleblowing claims before the tribunals. As the focus on environmental, social and governance (ESG) and workplace culture continues, we expect the rise in speaking up and workplace activism will follow. The focus on diversity and inclusion will also continue. While gender pay gap reporting requirements were suspended during the pandemic, reports suggest the pandemic has had a disproportionate impact on women and so we expect to see more coverage of these issues in the short term, as well as focusing on other strands of diversity, including ethnicity. As these issues become more 'mainstream', employees are more likely to consider their own position carefully and raise issues or even litigation. Equal pay claims have naturally dropped off in the past 18 months, but we believe these are only on pause as a result of the pandemic, as many employees have been on furlough. Once retail and hospitality sectors are up and running, we expect these trends to gather pace again. CD