

Employment law update

21st April 2021



- Can no job mean no job?
- Can we negotiate directly with employees when negotiations with the union are at an impasse?
- After *Smith v Pimlico Plumbers Limited*, how far back can a worker who was wrongly classified as self-employed claim for unpaid holidays?
- When can costs justify indirect discrimination? Has the costs plus rule changed?
- April uplifts

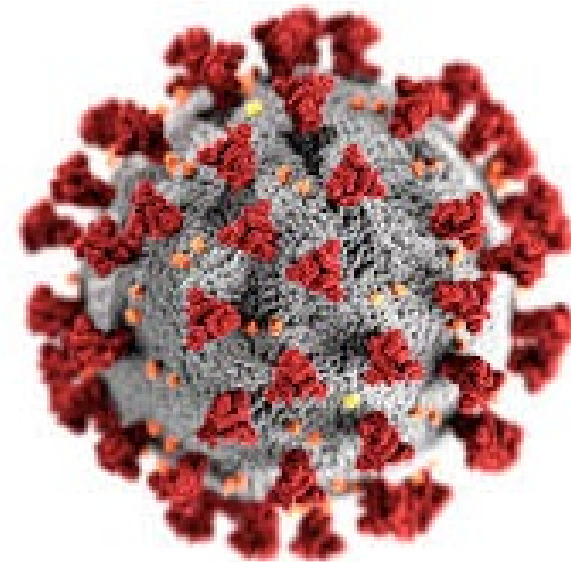


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## Can no job mean no job?



- Could vaccination become a mandatory requirement in the UK?
- Covid status certification review – 'vaccine passports'



# Can an employer require employees to be vaccinated against Covid-19?



- New starters
- Existing employees
- Key considerations





- Encouragement and information
- Paid time off to attend vaccine appointments
- Paid time off following vaccination
- Regular testing
- Covid-secure guidelines
- Alternative measures





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Can we negotiate directly with employees when negotiations with the union are at an impasse?



## Section 145B states:

- A worker who is a member of an independent trade union which is recognised, or seeking to be recognised, by his employer has the right not to have an offer made to him by his employer if
  - acceptance of the offer, together with other workers' acceptance of offers which the employer also makes to them, would have the prohibited result, and
  - the employer's sole or main purpose in making the offers is to achieve that result
- The prohibited result is that the workers' terms of employment, or any of those terms, will not (or will no longer) be determined by collective agreement negotiated by or on behalf of the union'





- *Kostal UK Limited v Dunkley [2019] EWCA Civ 1009:*
  - Trade union negotiations were at an impasse
  - Direct offers made in December 2015 and January 2016
  - 55 employees brought claims





- The Court of Appeal held that section 145B covers two situations:
  - 1 Seeking recognition – where a trade union is seeking to be recognised and the employer makes an offer whose sole or main purpose is to achieve the result that the workers' terms of employment will not be determined by a collective agreement
  - 2 Already recognised – where an employer makes an offer to end collective bargaining for some or all terms on a permanent basis



- Section 145B does not cover:

*'[Cases] where an independent trade union is recognised, the workers' terms of employment are determined by a collective agreement negotiated by or on behalf of the union, and the employer makes an offer whose sole or main purpose is to achieve the result that one or more of the workers' terms of employment will not, **on this one occasion**, be determined by the collective agreement'*





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**After Smith v Pimlico Plumbers Limited, how far back can a worker who was wrongly classified as self-employed claim for unpaid holidays?**



- *Smith v Pimlico Plumbers Limited* UKEAT/0211/19, UKEAT/0003/20 and UKEAT/0040/20
- Does a worker have the right to carry over payment for annual leave in circumstances where the worker is permitted to take annual leave but was not paid for it?
- *King v Sash Window Workshop Limited* (Case C-214/16) EU:C:2017:914



- Unlawful deduction from wages:
  - Section 13 of the Employment Rights Act 1996
  - *HM Revenue & Customs v Stringer and others [2009] UKHL 31*
  - *Bear Scotland Limited and others v Fulton and others UK EAT/0047/13*
  
- Holiday pay under the Working Time Regulations 1998:
  - Workers are entitled to be paid during statutory annual leave at the rate of a week's pay for each week of leave
  
- Time limits:
  - Within three months beginning with the date the payment should have been made (section 23(2), ERA 1996 and regulation 30(2)(a), WTR 1998)
  - Time limit begins to run from the last deduction (section 23(3), ERA 1996)
  - Claims presented outside of the time limit

# Facts of the Smith v Pimlico Plumbers Limited case



- Decision
  - The ECJ's decision in *King v Sash Window Workshop Limited* only applies to untaken holiday and employers do not have a potential liability in relation to unpaid holiday taken by workers over previous years
  - The EAT also continued to rely on its earlier decision in *Bear Scotland Limited and others v Fulton and others* that a gap of three months or more between periods of unpaid holiday breaks the chain in a series of deductions
  - Comments regarding the 'reasonably practicable' test
- Implications for employers



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## When can costs justify indirect discrimination? Has the costs plus rule changed?



# Indirect age discrimination



- A applies a provision, criterion or practice (PCP) to B
- A applies or would have applied the PCP to people not in B's age group
- The PCP puts, or would put, people in B's age group at a particular disadvantage compared with other people.
- The PCP puts, or would put, B at that disadvantage.
- A cannot show that the PCP is a proportionate means of achieving a legitimate aim (the 'objective justification' defence)



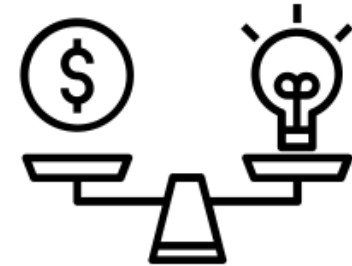
- A wish to save money cannot, on its own, amount to a legitimate aim capable of justifying indirect discrimination, although cost considerations may be taken into account along with other factors (*Cross and others v British Airways plc [2005] IRLR 423*)
- 'The saving or avoidance of costs will not, without more, amount to the achieving of a legitimate aim' (*Woodcock v Cumbria Primary Care Trust [2012] EWCA Civ 330*)





- *Heskett v Secretary of State for Justice [2020] EWCA Civ 1487:*
  - Probation officer for the National Offender Management Service
  - Change in pay policy
  - It now takes 23 years to reach the top of the pay scale instead of 7 to 8 years
  - Mr Heskett argued that those under 50 were subject to age discrimination





- The Court of Appeal held:
  - The costs plus principle is still applicable
  - The essential question – can the employer's aim fairly be described as no more than a wish to save costs?
  - The need to reduce expenditure to balance the books could constitute a legitimate aim in particular cases



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## April uplifts



	Previous rate	Rate from 1st April 2021
National Living Wage	£8.72	£8.91
21-22-year-old rate (previously 21-24-year-old rate)	£8.20	£8.36
18-20-year-old rate	£6.45	£6.56
16-17-year-old rate	£4.55	£4.62
Apprentice rate	£4.15	£4.30



- From 4th April 2021:
  - Standard weekly rates of statutory maternity, adoption, paternity, parental bereavement and shared parental pay increased to £151.97
- From 6th April 2021:
  - Weekly statutory sick pay rate increased to £96.35
  - Maximum amount of a 'week's pay' (used to calculate statutory redundancy payments and various awards including the unfair dismissal basic award) increased to £544
  - Limit on the unfair dismissal compensatory award increased to £89,493



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