Employment Newsletter February 2022

COVID-19 Vaccinations

On 9 November 2021, the Government announced changes to COVID-19 vaccination requirements for health and care workers in England. From 1 April 2022, there will be a legal requirement for staff to be vaccinated against COVID-19 if they are working in an environment which is regulated by the Care Quality Commission (CQC) in England, unless you are clinically exempted. This applies to all workers, students, trainees and volunteers aged 18 or over who have direct, face to face contact with service users in the NHS or independent health sector. It will also include non-clinical workers such as receptionists and cleaners.

The government has published guidance to support the implementation of mandatory vaccinations from 1 April 2022. Two versions of guidance, one aimed at employers in social care settings other than care homes and another for healthcare employers, were published by the Department of Health and Social care and the NHS respectively. In addition, the mandatory vaccination regulations were amended to provide an exemption for those taking part in a clinical trial and to allow employees not previously working in care homes to be deployed if they receive their first vaccination 21 days before they start work and get their second vaccination within ten weeks. The government also confirmed its commitment to mandatory vaccinations for frontline workers in health and social care in a Parliamentary debate on 24 January 2022 in response to a petition calling for the prohibition of vaccine mandates by employers.

There remains much speculation in the press about whether the start date or the requirement itself will change but until or unless that is announced the implementation date will be 1 April 2022.

In *Allette v Scarsdale Grange Nursing Home Ltd*, an employment tribunal considered a claim brought by a care home employee who was dismissed after refusing to be vaccinated. Although the tribunal found that the requirement to be vaccinated was an interference with the employee's rights under Article 8 of the ECHR, it held that the interference was justified and the dismissal was fair. The facts of this case took place before the government mandated vaccination or exemption for care home workers, but the judgment may still offer useful guidance as to when dismissing an employee for refusal to be vaccinated may be reasonable.

Other key COVID-related developments at the start of this year included the Prime Minister's announcement of the lifting of Plan B restrictions; the consequences of most relevance to employers included the removal of the work from home guidance from 19 January 2022 and the removal of the legal requirement to wear face coverings from 27 January 2022. Regulations were introduced that extend the duty on employers to provide suitable personal protective equipment to all workers rather than just employees from 6 April 2022.

Fit Note Now Required After 28 Days

To increase GP capacity to support the vaccine booster programme, the Statutory Sick Pay (Medical Evidence) Regulations 2021 temporarily extend the time before which an employer can ask for proof of sickness from seven days to 28 days.

Self-Isolation Rules

On 14 December 2021, the requirement to self-isolate if a close contact was suspected or tested positive with Omicron was removed in England for fully-vaccinated people and, from 22 December, the required self-isolation period for positive COVID-19 cases was reduced from ten days to seven days, where someone receives two negative lateral flow test results on day six and day seven of the self-isolation period.

Discrimination And Poor Performance

In *Stott v Ralli Ltd* EA-2019-000772-VP, the EAT upheld a tribunal's decision that the dismissal of a paralegal for poor performance was not an act of discrimination arising from disability. Crucially the employer was able to demonstrate the justification defence as they had tried training,

supervision, correction and adjustments with no success. They were able to demonstrate that their aim of maintaining high standards was legitimate and their response proportionate.

Gig Economy

In *Stuart Delivery Ltd v Augustine* [2021] EWCA Civ 1514, the Court of Appeal found that a moped courier with a limited right of substitution satisfied the definition of "worker" under section 230(3)(b) of the Employment Rights Act 1996.

In *Stojsavljevic and Turner v DPD Group UK Ltd* EA-2019-000259, the EAT upheld an ET's finding that parcel delivery drivers engaged under franchise agreements describing them as "owner driver franchisees" were neither workers or employees. As there was no fetter on the right of substitution contained within the franchise agreements, this case fell within the fourth principle identified in the Pimlico Plumbers case. This was therefore a genuine right of substitution meaning that the drivers were self-employed.

In *Johnson v Transopco UK Ltd* the EAT held that a self-employed London black-cab driver, who was also registered with the MyTaxi app, was not a worker of the app operator. The EAT held that the tribunal was entitled to analyse the split between time spent and income earned as a self-employed driver and through the app.

Whistleblowing

In *Secure Care UK Ltd v Mott* EA-2019-000977-AT, a whistleblowing case, the EAT overturned a finding of unfair dismissal as the tribunal had applied the wrong standard of proof (asking whether the disclosures had a material influence, rather than whether they were the sole or principal reason for dismissal) and had failed to distinguish between qualifying and non-qualifying disclosures when considering the reason for dismissal.

Menopause in the Workplace

The EAT held in *Rooney v Leicester City Council* EA-2020-000070-DA and EA-2021-000256-DA that an Employment Tribunal erred in finding that an employee suffering from menopausal symptoms was not disabled under the Equality Act 2010 and in dismissing her disability and sex discrimination, harassment and victimisation claims. This case is an example of the difficulties faced by menopausal women in the workplace and the challenges that can arise in establishing that their symptoms amount to a disability. It is a growing area of employment law and employers must recognise the effect the menopause can have on its staff.

Working Time Directive

Two ECJ rulings in November provided further clarity on the parameters of the Working Time Directive (2003/88/EC). In *BX v Unitatea Administrativ Teritoriala D (*Case C-909/19) EU:C:2021:893, the ECJ considered time spent undertaking vocational training to fall within the meaning of the Directive. Conversely, standby periods were held to be outside of working hours under the Directive, in *MG v Dublin City Council* (Case C-214/20) EU:C:2021:909), if the time could be used for other professional activities.

Procedural Fairness

In *Burn v Alder Hey Children's NHS Foundation Trust* [2021] EWCA Civ 1791, the Court of Appeal upheld the High Court's refusal to grant the claimant an injunction to prevent an NHS trust concluding an investigation before having interviewed the claimant, having already had sight of all the claimant's relevant documents. Of note in this case are the comments expressed by Underhill LJ that there could be an implied duty of procedural fairness arising from the nature of an internal disciplinary process, separate from any duty derived from the implied term of mutual trust and confidence.

Dismissed Following Sickness Absence

In *Gray v University of Portsmouth* EA-2019-000891, Mr Gray was dismissed following a two-year sickness absence related to his disability, and an Employment Tribunal rejected his claim for discrimination arising from disability, finding that the treatment was objectively justified. The EAT allowed the claimant's appeal and remitted the case, because although the tribunal had found that it was "obvious" that continuing to hold the job open was significantly disruptive to the university, this had not been substantiated; a Tribunal in this situation must carry out its own assessment of objective justification and provide sufficient reasoning of the evaluation to reach that conclusion.

Employee Fairly Dismissed Following Vexatious and Frivolous Grievances

In *Hope v British Medical Association* EA-2021-000187 the EAT upheld a Tribunal decision that an employee had been fairly dismissed without any formal warnings for bringing numerous

vexatious and frivolous grievances, refusing to progress them, and failing to comply with a reasonable management instruction to attend the grievance meeting. The decision suggests that, where a grievance has not been resolved informally, it may be open to the employer, in fairness to all parties concerned, to insist that the employee either withdraw it or cooperate in pursuing it formally to its conclusion. Repeated abuse of the grievance process may, depending on the circumstances, be seen as misconduct.
However, this is not to say that employers should necessarily adopt such a binary approach in all cases. It is not uncommon for informal complaints to be made to HR where there has, for example, been low-level bullying or harassment, and the victim wants to bring this to the employer's attention but not (yet) treat it as a formal grievance. Employers should still retain the ability to handle such complaints in the manner they consider most appropriate in the circumstances.

New ACAS Guidance

The Government blocked the Private Member's Bill that aimed to curb "fire and rehire" practices, stating that it intended to wait for Acas guidance on how and when dismissal and re-engagement should be used, this was published on 11 November 2021.

Consultations

The Government held a consultation on making flexible working the default that closed on 1 December and we await the outcome.

As part of the National Disability Strategy, the Government published the consultation on disability workforce reporting, which will close on 25 March 2022.

The Government's consultation on reforming the Human Rights Act 1998, Human Rights Act Reform: A Modern Bill Of Rights is also now open and will be accepting responses online until 8 March 2022.

Increase to National Minimum Wage

In the Autumn 2021 Budget the Chancellor announced the increase to the national minimum wage rates from 1 April 2022 as follows:

- National living wage £9.50 (was £8.91)
- 21-22 year old rate £9.18 (was £8.36)
- 18-20 year old rate £6.83 (was £6.56)
- 16-17 year old rate £4.81 (was £4.62)
- Apprentice rate £4.81 (was £4.30)
- Accommodation offset £8.70 (was £8.36)

Increase to Family – Friendly Payments

The Department for Work and Pensions have announced new rates for a number of family – friendly payments effective from 11 April 2022 as follows:

- Standard rate for Statutory Maternity Pay and Statutory Adoption Pay (which applies after 6 weeks of leave) will increase from £151.97 to £156.66 per week (or paid at 90% of the employees weekly earnings if that amount is lower)
- Statutory Paternity Pay, Statutory Shared Parental Pay and Statutory Parental Bereavement Pay will also increase from £151.97 to £156.66 per week (or paid at 90% of the employee's weekly earnings if that amount is lower);
- Maternity Allowance will increase from £151.97 to £156.66 per week (or paid at 90% of the individual's weekly earnings if that amount is lower); and
- Statutory Sick Pay will increase from £96.35 to £99.35 per week.

If you have any queries regarding this newsletter and its contents or need employment advice please contact a member of the Employment Team on employment@rowberrymorris.co.uk or by telephone on 0118 951 6621.

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