Employment Newsletter October 2021

COVID-19

The new regulations (Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 (SI 2021/891) (Amendment Regulations)) will dictate that anyone entering a care home, and all care home workers, must be fully vaccinated following 11 November 2021. The government has also launched a call for evidence from businesses regarding a proposed mandatory vaccine certification scheme in venues and nightclubs as a contingency measure under the Autumn and Winter Plan 2021.

Burden on Claimant in Discrimination Cases

The Supreme Court clarified that the wording of section 136(2) of the Equality Act 201 does not substantively alter the burden of proof in discrimination claims. Dismissing the appeal, the Supreme Court confirmed in *Royal Mail Group Ltd v Efobi* [2021] UKSC 33 that the claimant has the burden of showing a prima facie case of discrimination.

Latest Gig Economy Case

In *Independent Workers Union of Great Britain v Central Arbitration Committee and another* [2021] EWCA Civ 952, the Court of Appeal unanimously held that Deliveroo riders do not fall within the scope of the trade union freedom right under Article 11 of the European Convention on Human Rights because they are not "in an employment relationship" with Deliveroo. The Central Arbitration Committee had been entitled to reach the conclusion it did given that Deliveroo riders are, genuinely, not under an obligation to provide their services personally and have a "virtually unlimited" right of substitution.

Dealing With Employees on Long Term Sickness Absence

In *Brightman v TIAA Limited* UKEAT0318/19, the EAT found that an employment tribunal had erred in law by failing to consider the claimant's challenge to her employer's justification defence in respect of her discrimination arising from disability claim. The case serves to remind that employers must tread carefully before dismissing, even where an employee has had multiple periods of prolonged absence. Medical evidence relied on should be current, and the employee's condition and prognosis at the time of dismissal considered.

Indirect Associative Discrimination

In *Follows v Nationwide Building Society* ET/2201937/18, an employment tribunal upheld a claim of indirect associative discrimination on the grounds of disability. The claimant was employed on a homeworking contract and Nationwide decided that the claimant and her peers could no longer work at home on a full time basis due to the need to provide effective on site supervision. The claimant's caring responsibilities for a family member meant that she was unable to work at the employer's premises, and she was dismissed in January 2018, allegedly by reason of redundancy. Applying the ECJ judgment of *Chez Razpredelenie Bulgaria* AD C-83/14, the tribunal held that the concept of associative discrimination could in principle be extended to indirect discrimination. It went on to uphold the claim of indirect disability discrimination, finding that the claimant was put at a substantial disadvantage by the requirement to be office-based, because of her mother's disability. Although pre-COVID the Tribunal's approach is interesting when considered in the context of changing an employee's place of work. Employers who are requiring employees to return to the office must do so in a non-discriminatory way and should consult with their employees before making a wholesale decision to return, for further information see our article '*Covid-19 Returning to the Office*'.

Furlough and Redundancy

Two tribunal cases have provided helpful guidance on making redundancies during the operation of the Coronavirus Job Retention Scheme (CJRS). In *Mhindurwa v Lovingangels Care Ltd* ET/3311636/2020, the tribunal held that an employee was unfairly dismissed when her employer refused to consider furlough and made her redundant. The employer could not explain why furlough was not considered or why it was not considered suitable. In the second case, *Handley v Tatenhill Aviation Ltd* ET/2603087/2020, an employee was held to have been fairly dismissed when, having initially been placed on furlough, he was made redundant because his employer needed to cut costs regardless of the existence of the CJRS. These cases are not binding, but suggest that

tribunals expect employers to be able to demonstrate that they have considered all options including furlough, when contemplating redundancies.

COVID-19 Tribunal Cases

In *Ham v Esl Bbsw Ltd* ET/1601260/2020, an employment tribunal held that an employee was unfairly dismissed for refusing to deliver equipment to his manager who, at the time, was self-isolating. The tribunal found that the employee raised legitimate health and safety concerns, which automatically rendered the employer's dismissal unfair contrary to section 100(1)(c) and (e) of the Employment Rights Act 1996.

Lack of Redundancy Dismissal Appeal

In *Gwynedd County Council v Barratt and another* [2021] EWCA Civ 1322, the Court of Appeal held that the absence of any appeal or review procedure does not of itself render a redundancy dismissal unfair. However, it is one of the factors to be considered when determining the overall fairness of the dismissal. The tribunal had been concerned not only with the lack of appeal but also of any opportunity for the employees to raise a grievance against the procedures adopted or be consulted about the dismissals. As such, the tribunal had applied a test of overall fairness and considered whether the employer's approach fell within the band of reasonable responses.

ACAS Guidance on Hybrid Working

As previously reported, following a survey demonstrating that over half of employers expect an increase in employee requests for flexible working, Acas has published guidance on hybrid working. The guidance includes tips for employers on how to consult with staff regarding introducing hybrid working, manage staff who are hybrid working, devise a hybrid working policy and handle requests from staff. https://www.acas.org.uk/hybrid-working

Expected changes

New Legal Duty on Employers to Prevent Sexual Harassment

We previously reported that the government had finally responded to the 2019 consultation on workplace sexual harassment and committed to introducing a legal duty for employers to prevent sexual harassment in the workplace, confirming a defence will be available if the employer has taken "all reasonable steps" to prevent the harassment taking place. Although no implementation timeframe has been given, the government has suggested that it will extend the time limit for bringing claims under the Equality Act 2010 and a new time limit of six months is likely.

Employment Bill

Last month, the government finally responded to a 2016 consultation on service charges, gratuities, tipping and cover charges with confirmation of its intention to legislate in this area in the forthcoming Employment Bill. The government also published a consultation document on making the right to request flexible working a "day one" right for employees, removing the existing requirement for 26 weeks' qualifying service, and a separate consultation response which confirmed that when parliamentary time allows, it will seek to provide a new statutory right of up to one week of unpaid carer's leave. It is expected that this will also be included in the Employment Bill, although there is no timescale for this as yet.

Health is Everyone's Business: Proposals to Reduce Ill Health-Related Job Loss

Another long-awaited joint response was also published by the Department for Work and Pensions and the Department of Health and Social Care to the 2019 consultation Health is everyone's business: proposals to reduce ill health-related job loss. The government has decided that now is not the right time to introduce changes to the statutory sick pay (SSP) system, rejecting proposed major reforms, including allowing for SSP to be paid on a pro rata basis during an employee's phased return to work after sickness absence, removing the concept of qualifying days and removing the lower earnings limit for eligibility. The government will also not take forward the proposal for a new right for non-disabled employees to request workplace modifications to assist in their return from sick leave. Commentators have said that this was a missed opportunity.

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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