WRIGLEYS
SOLICITORS

EMPLOYMENT LAW BULLETIN

APRIL 2022

Welcome to Wrigleys' Employment Law Bulletin, April 2022.

We are busy planning for our annual **Employment Law Conference for Charities** which takes place on 16 June 2022. The theme for the day is **Inclusivity in Today's Working Environment**. This will be a whole day virtual conference and we will be delighted to welcome some brilliant, thought-provoking speakers. The final programme is soon to be announced and will include sessions on equality, diversity and inclusion, improving support for staff going through the menopause, the rights of trans staff, neurodiversity in the workplace, and recent developments in family friendly rights and policy. You can book your place by clicking on the link below. We look forward to welcoming you to our conference!

In our bulletin this month we consider some tricky and developing areas of law, policy and practice for employers.

In our first article, we cover the issues for employers who are considering whether to report to external agencies child protection or domestic abuse allegations against an employee.

With increasing numbers of staff likely to be needing time off in relation to fertility treatment, we consider the benefits of having a clear workplace policy for staff undergoing fertility treatment or assisted conception.

And in our final article, we examine two tricky areas of discrimination law where employees can be protected under the Equality Act 2010 without having the protected characteristic in question: discrimination by association and perception.

We are always interested in feedback or suggestions for topics that may be of interest to you, so please do get in touch.

– Alacoque Marvin, Editor **alacoque.marvin@wrigleys.co.uk**

Forthcoming webinars:

16 June 2022 - SAVE THE DATE

Wrigleys' Annual Employment Law Conference for Charities

Inclusivity in today's working environment

Confirmed guest speakers: *Robin White, barrister at Old Square Chambers & Lauren Chiren, CEO at Women of a Certain Stage. Plus various speakers from Wrigleys' employment and charities teams*

Click here for more information or to book

If you would like to catch up on previous recorded webinars, please follow this link.

Contents

Should employers report child protection concerns or allegations of domestic violence involving an employee?

Article published on 11 April 2022

Dealing with an employee who may be a perpetrator of violence or abuse.

Working from home on a more regular basis has meant that many of us know more about our colleagues' home lives than ever before. Much of this has been positive and enabled employers to empathise with the challenging family situations employees have encountered over the last two years. But it has perhaps also made more likely that allegations involving abuse of family members by an employee will come to the attention of an employer. What should an employer do when allegations of this kind arise?

Follow your organisation's safeguarding policies and any statutory guidance

Organisations that work with children and vulnerable people will have their own safeguarding policies and procedures based on statutory guidance, such as Working Together to Safeguard Children and Keeping Children Safe in Education. It is important that all colleagues are aware of the steps they should take when safeguarding concerns arise. In particular, they should know who to report their concerns to internally so that a referral decision can be made.

Follow any internal safeguarding policies and procedures, including considering whether the allegations meet the threshold for reporting a regulator, social services or the Local Authority Designated Officer.

Charities should also take advice on whether the circumstances might warrant a serious incident report to the Charity Commission.

Is there an immediate threat of harm?

If employers have serious concerns that the employee or another person is at risk of immediate harm, they should contact the police and/or another relevant agency, such as social services.

In most cases there is no legal duty to report to social services or the police

Even in regulated sectors such as education and adult social services, there is no positive legal duty to report concerns of abuse or criminal conduct, although organisations and the professionals working within them must have regard to the relevant statutory guidance.

The only exception to this is that those working in schools, healthcare and social care have a legal duty to report suspected cases of female genital mutilation.

Reporting "frivolous" allegations to the police can be a breach of trust and confidence

Case law indicates that an employer who refers "suspect" or "frivolous" allegations to the police could breach the implied term of mutual trust and confidence by doing so.

Police investigation and/or criminal proceedings are likely to cause serious damage to the reputation of an employee, particularly one working in a regulated sector. If the employee were to resign and bring a constructive dismissal claim, a tribunal might find that the employer had made the report without good reason and could feasibly award significant compensation if it determined that the employee's earning potential was permanently affected by reputational damage.

Employers should therefore very carefully consider whether the allegations are likely to amount to

criminal behaviour and whether there is good reason to report them to the police.

Advice for employers on domestic abuse

In June 2021, an updated Domestic abuse: a toolkit for employers was jointly published by Public Health England and Business in the Community (BITC).

This toolkit provides very useful guidance for employers on dealing with the difficult issue of suspected domestic abuse where it involves employees. As well as providing guidance for employers who believe their employees are victims of abuse, the toolkit also provides advice where employees are suspected perpetrators of abuse. For example, employers are encouraged to have a policy on domestic abuse which is actively promoted, to work alongside specialist agencies to reduce risk to family members and employees, and to be very careful about sharing information with the perpetrator where this may increase risk to others.

Should we commence a disciplinary investigation into the employee's private life?

In answering this question, employers will need to consider whether the allegations in question have an impact on the employee's role, the individuals they work with, or the employer's organisation (for example the employer's reputation or relationships with third parties).

If such an impact is likely, the employer should carry out an initial investigation. Where the police or another agency are involved, the employer should ask for relevant information which can be shared about the case, and seek their views on carrying out an internal process. In some cases, the police may ask the employer to delay any such process, or even not to raise the allegations with the employee, so as not to prejudice the police investigation.

The findings of an initial investigation may lead the employer to consider suspending the employee where there are unacceptable risks to colleagues, service users or other individuals, or to the integrity of the investigation, if the employee remains active in their role. However, this should be based on specific identified risks and should not be an automatic reaction. Alternatives to suspension should be explored, such as making temporary changes to the role or increasing supervision.

There may be cases where it is not necessary to commence an internal investigation and disciplinary process if the allegations have no impact on the employee's role or the employer organisation.

For further detail on dealing with cases where police investigations overlap with internal proceedings in a schools context, please see our previous article: Dealing with School Employees who are being Investigated by the Police (available from our website).

Dismissal for reputational damage arising from employee's private life

The case of *Q v Secretary of State for Justice* provides helpful guidance for employers undertaking disciplinary procedures linked to child abuse allegations.

In this case, it was alleged that a probation officer had put her own child at risk, and that she had failed to inform her employer of a child protection plan after receiving a disciplinary warning and being instructed to keep the employer up to date.

In this case, the employer's safeguarding obligations and the likelihood of damage to the employer's reputation, particularly with the local authority as its statutory safeguarding partner, were key to the EAT's decision that the dismissal was fair and that the employer's interference with the employee's right to a private life had been lawful.

For further detail, please see our article from February 2020: Was a Dismissal for Failing to Disclose the Employee's own Safeguarding risk to her Child Unfair and in Breach of Human Rights (available from our website).

Reporting following a disciplinary decision

Where a disciplinary process concludes that safeguarding or abuse allegations are more likely than not to be true, the employer may need to reconsider whether it should report the matter to an external agency.

For those working in regulated activity, such as education or care for vulnerable people, there is a statutory duty to refer the matter to the Disclosure and Barring Service (DBS) in some circumstances.

This duty arises where the employee has been dismissed or removed from regulated activity (or would have been if they had not resigned) and the employer believes that their conduct has endangered or is likely to endanger a child or a vulnerable adult; or that there is a risk of harm to a child or vulnerable adult; or that they have been cautioned or convicted of a relevant offence.

Someone who is subject to the duty to refer and fails to do so without reasonable justification commits a criminal offence and can face a fine of up to £5,000.

Organisations working in regulated activity can also make referrals to the DBS where the legal duty to do so does not arise, for example where there is insufficient evidence to lead to dismissal, but concerns persist. However, for the reasons set out above, employers should take legal advice before doing so as there are employment law risks in making a referral where there is no legal duty to do so.

Organisations should refer to DBS Guidance on Making Barring Referrals for more information.

Employers working in regulated sectors should also consider any separate obligations to refer cases to the relevant regulator.

Should employers have a policy for staff going through IVF and assisted conception?

Article published on 26 April 2022

With increasing infertility rates in the UK, is it time for better workplace support for staff undergoing fertility treatment?

It is estimated that infertility affects around 1 in 7 heterosexual couples and rates of infertility are reported to be increasing. The Human Fertilisation and Embryology Authority Fertility Treatment Trends report states that around 53,000 patients had in vitro fertilisation (IVF) or donor insemination (DI) treatment in 2019, the most common forms of treatment.

The findings of the Fertility Network UK Survey on the Impact of Fertility Problems show that 85% of respondents considered that their assisted conception or fertility treatment affected their work, 50% were concerned it would affect their career prospects, and 35% felt it did actually affect their career. And 58% reported that work impacted on their treatment, for example by not being able to attend appointments. On average, respondents to the survey took 8.74 days off work during each treatment cycle.

The results of the Government's 2021 Women's Health Strategy call for evidence show that many employers do not recognise infertility in the same way that they recognise other medical conditions

and that those going through treatment need more support in the workplace, for example policies to enable them to attend appointments while undergoing treatment.

The impacts of infertility and related medical intervention on employees are both physical and mental. There can also be financial pressures where staff are funding their own treatment. Many employees feel unable to discuss their situation with their employer, and the additional difficulties of going through treatment without having support from an employer or colleagues can lead to significant emotional and mental health issues.

Discrimination and fertility treatment

Being infertile or having difficulty conceiving is not a protected characteristic under the Equality Act 2010. However, it is possible that employers could face discrimination claims in connection with the way employees undergoing fertility treatment are managed.

Case law indicates that infertility in and of itself is not a disability under the Equality Act. This is because the condition is unlikely to have a long term substantial adverse impact on the individual's ability to carry out normal day to day activities. Employers should however be mindful that mental or physical health conditions which cause infertility or arise in connection with infertility or fertility treatment could be disabilities.

Women undergoing early-stage fertility treatment are not pregnant and so in law do not have the protected characteristic of pregnancy or maternity. There is no statutory right to have time off work for fertility treatment or any related sickness before pregnancy commences. Protection applies only from the point where a fertilised egg has been implanted. If the implantation fails, the protected period under the Equality Act ends two weeks after the pregnancy ends.

A woman may bring a successful claim for direct sex discrimination if she can show that she has been treated less favourably than a man in similar circumstances. For example, a woman who has been refused paid time off to attend fertility treatment appointments might succeed in a claim if a man who requested paid time off for an elective operation has been allowed or would have been allowed to take the time off.

Following a judgment of the European Court of Justice in 2008, women undergoing IVF treatment are specifically protected under sex discrimination law from the time of egg collection (known as follicular puncture) to the time the fertilised egg is implanted in the uterus. This means that a woman who is less favourably treated than a male comparator in this period could succeed in a direct sex discrimination claim.

There is also a risk of indirect sex discrimination claims where a provision, criterion or practice of the employer particularly disadvantages women undergoing fertility treatment or assisted conception. A claimant is likely to be able to show that women as a group are put at a particular disadvantage, given that such treatment is more likely to be invasive and require more time off work for women than would be the case for men undergoing fertility treatment.

Where employers offer paid time off for women going through fertility treatment, there may be a risk of sex discrimination claims from men who argue that they have been less favourably treated in similar circumstances. The Equality Act provides that "special treatment afforded to a woman in connection with pregnancy or childbirth" must be disregarded for the purposes of direct sex discrimination claims from men. This could apply where employers provide paid leave for women undergoing fertility treatment, but not for men supporting their partners in IVF or those undergoing other forms of treatment. However, the law in this area is untested and it is possible that it may not be found to apply to the period before pregnancy begins. In other words, there is a risk of direct sex discrimination claims from men if the comparator is a woman undergoing fertility treatment before pregnancy begins.

Employers should also be mindful of the rights of other staff with protected characteristics in connection with fertility treatment or assisted conception. For example, staff with the protected characteristic of gender reassignment, and lesbian and gay employees may also be pursuing fertility treatment or assisted conception, or supporting someone else through the process.

What are the benefits of having a workplace policy on IVF and assisted conception?

Having a specific policy which sets out the support your organisation offers to employees when they are undergoing fertility treatment or assisted conception will provide much needed clarity for employees who are considering or already undergoing treatment. Where a written policy is in place, employees are perhaps more likely to disclose their plans and concerns and it will be less likely that unexpected absences or performance issues connected to the treatment arise.

A clear and workable policy can assist line managers by providing an informed and consistent approach and a safe framework in which to discuss the employee's needs alongside the business needs of the organisation.

What could an IVF and assisted conception policy cover?

Employers may consider providing for the following in such a policy:

- Clarity on how medical appointments connected with fertility treatment or assisted conception will be treated;
- A number of days' paid leave per year for those undergoing fertility treatment or assisted conception;
- A number of days' paid time off per year to accompany an individual undergoing such treatment;
- Treating time off due to sickness caused by the side effects of such treatment as sickness absence in accordance with the employer's sickness absence policy;
- Recording sickness absence relating to such treatment separately from other sickness absence and disregarding it in any future employment-related decisions;
- Paid leave for those who have undergone a failed treatment cycle (where this is not treated as sickness absence);
- Paid leave following pregnancy loss after assisted conception (this may be part of a broader pregnancy loss policy);
- A designated member of staff to speak to in confidence about support at work; and
- Signposting staff to external sources of support and any relevant employee assistance or wellbeing service.

Further information for employers is available on the Acas website: Acas guidance for employers on IVF treatment and sources of support for employees can be found at https://www.nhs.uk/conditions/ivf/support/.

Discrimination by perception and association – what employers need to know

Article published on 29 April 2022

These lesser-known forms of discrimination may catch employers out.

By now, employers are likely to be well versed in the protections their employees have against discrimination, yet employers may still be caught out by the forms of direct discrimination which can arise even though the individual does not in fact have a particular protected characteristic - discrimination by perception or association.

Discrimination because of 'a' protected characteristic

Perhaps one of the reasons perceptive and associative discrimination goes under the radar is that, unlike the other forms of discrimination, it isn't spelled out in the Equality Act 2010. Instead, the protection is only hinted at by the way direct discrimination is defined as being because of 'a' protected characteristic, rather than because of 'his/her/their' protected characteristic.

Before the Equality Act 2010, a range of legislation was in place to protect people with different protected characteristics. In some cases, the legislation required the person subjected to discrimination themselves to have the protected characteristic being discriminated against. For example, the Sex Discrimination Act described discrimination in terms of being 'on the grounds of her sex' [emphasis added]. Whereas in other discrimination legislation, protections were worded more broadly.

However, with the decision of the European Court of Justice in *Coleman v Attridge Law and another [2008]* the ECJ confirmed it is not necessary for an employee to be disabled to bring a direct discrimination claim against their employer. Protection under the EU's Equal Treatment Framework Directive (2000), which underpinned the discrimination protection legislation in the UK at the time, could be based on a third party's disability. When the then Labour government moved ahead with plans to simplify the UK's disparate discrimination legislation into the Equality Act 2010, this decision was captured in the Act by defining direct discrimination at section 13 of the Act as being where someone discriminates against another 'because of a protected characteristic' [emphasis added].

What is perceptive discrimination?

Put simply, this is where a person (A) has a perception that another person (B) has a protected characteristic and A discriminates against B because of that perception.

It doesn't matter if A is in fact wrong about B having a protected characteristic. For example, A might discriminate against B because they believe they are homosexual or belong to a recognised ethnic or racial group, such as being Jewish, Sikh or Romani gypsy. Even if B does not, in fact, belong to those groups, they may have a direct discrimination claim.

Perceptive discrimination does have some difficult grey areas. For example, is it perceptive direct discrimination if A discriminates against B for a perception that B has a health condition where that health condition is not a disability?

Some clarity was provided in the decision in *Chief Constable of Norfolk v Coffey [2019]* where the Court of Appeal found that an employment tribunal was correct when it concluded that Mrs Coffey's application to transfer to the Norfolk Constabulary was refused because of a perception that Mrs Coffey was disabled, despite Mrs Coffey's contention that her condition did not meet the definition of disability under the Act. This case rested on the fact that Norfolk Constabulary perceived that Mrs Coffey's hearing loss would in future deteriorate and have a long term substantial adverse impact on her ability to carry out day to day activities (thus meeting the definition of a disability), even though it did not consider her to have a disability under the Equality Act. For more detail on this case, see our 2019 article 'Stereotypical assumptions about a health condition could be disability discrimination – even if the employee is not disabled'.

Cases like *Coffey* show that employers need to be alert to making ill-informed assumptions about the impact of certain conditions on their staff. For example, as more and more evidence continues to emerge of the neurodiversity of the population, it is important that employers do not make detrimental decisions about staff based on stereotypical views of what neurodiverse people can or cannot achieve.

Whether or not a member of staff has a condition qualifying as a disability under the Equality Act,

there is a risk of claims where decisions, such as not to recruit, not to promote, or to deny training opportunities, are because of a perception that the condition impacts, or will impact, on their ability to carry out certain activities.

What is discrimination by association?

Discrimination by association occurs where A discriminates against B because of a protected characteristic of a third party with whom B is associated. As noted above, the key recent case for associative discrimination in an employment context is Attridge Law v Coleman [2010] where the Employment Appeal Tribunal, following the decision of the ECJ, upheld a tribunal's decision that Mrs Coleman was discriminated against because of her son's disability. In that case, Mrs Coleman claimed unfair dismissal against Attridge Law following allegations from her employer that she was using her son's disability to manipulate requests for specific working hours.

A tricky grey area in associative discrimination is precisely how closely the connection between the person suffering the less favourable treatment and the third party with the protected characteristic needs to be for the protection to take effect. In *Coleman* the ECJ Advocate General's opinion was that the purpose of the EU Framework Directive underpinning the relevant discrimination law in the UK was to combat all forms of discrimination, including those third parties 'closely associated' with the protected group, even where that third party is not themselves a member of the group.

Unfortunately, the Supreme Court decided not to opine on this point when it delivered its decision on the case of *Lee v Ashers Baking Co Ltd [2018]* (the widely publicised 'support gay marriage' cake case) which contained elements of associative discrimination.

Whilst we know from *Coleman* that a relationship between a parent and child is close enough to meet the required threshold for close association, it remains unclear whether more distant relationships between the victim of discrimination and the third party could found an associative discrimination claim.

The Employment Appeal Tribunal in *Gan Menachem Hendon Ltd v De Groen [2018]* confirmed that associative discrimination claims cannot be based on the discriminator's own protected characteristic where the claimant does not have that characteristic. In this case, De Groen, a nursery teacher at an ultra-orthodox Jewish nursery, was found not to be able to claim she had suffered direct religion or belief discrimination when she was dismissed for cohabiting with a partner to whom she was not married and failing to lie about it when asked to by her employer.

Can you have *indirect* associative discrimination?

A line of case law has developed outlining protection against indirect associative discrimination, despite section 19 Equality Act 2010 clearly requiring the person suffering the detriment to have the protected characteristic. This follows the decision in *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia [2014]* where the ECJ held that a claimant can establish indirect discrimination claims if they do not themselves have the protected characteristic.

In effect, the decision in *CHEZ* demonstrated that the wording of s.19 Equality Act 2010 did not give effect to the definitions of indirect discrimination present in the Equal Treatment Directive 2006 and the Equal Treatment Framework Directive 2000, and since then UK courts and tribunals have been under a duty to give effect to the protection against indirect associate discrimination where it arises in indirect discrimination cases.

This background led to the decision in *Follows v Nationwide Building Society [2018]* where an employment tribunal found that Mrs Follows suffered less favourable treatment via her association with her disabled mother, who she cared for at home, when her employer failed to discuss alternatives to their requirement for her to spend more time in an office as part of a broader redundancy and reorganisation exercise.

Though employment tribunal decisions are not binding on other tribunals, the decision in this case suggests that indirect associative discrimination claims are possible and that cases concerning employees with care duties to close family members are one group who may call on the protection.

Comment

The risks of perceptive and associative discrimination should be kept in mind by employers when they are aware that a protected characteristic is, or might be, a factor in the relationship between them and their employee.

However, this area of law remains complex with considerable grey areas remaining in precisely how far the protections extend and in what circumstances they apply. For these reasons, employers would be well advised to seek specialist employment law advice before making decisions detrimental to an employee where the employer is understands either the employee or a third party associated with them possesses a protected characteristic.

If you would like to contact us please email
alacoque.marvin@wrigleys.co.uk

www.wrigleys.co.uk