WRIGLEYS
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EMPLOYMENT LAW BULLETIN

MAY 2022

Welcome to Wrigleys' Employment Law Bulletin, May 2022.

As we approach the Queen's platinum jubilee celebrations, we open this month's bulletin with a review of the Queen's speech, delivered by the Prince of Wales on 10 May. We highlight the relevant points for employers, and the notable absences as we continue to await the long-promised Employment Bill.

We are seeing an increasing number of queries from clients concerning long term sickness absence connected to "long Covid". We consider the latest statistics on the impact of long Covid on sufferers and whether it could qualify as a disability for the purposes of the Equality Act 2010.

Following Wrigleys' contribution to a recent Government consultation, we report on Government proposals to ban exclusivity clauses where workers earn below the Lower Earnings Limit. This would extend the current protections for zero hours workers to those with guaranteed hours who earn less than £123 per week (at current rates).

We also report on the recent Employment Appeal Tribunal decision in *Rodgers v Leeds Laser Cutting Ltd* which considered whether an employee was automatically unfairly dismissed when he refused to return to work during the first Covid lockdown because of his fears about the virus.

We are delighted to invite our readers to 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 are privileged to be joined by inspirational external speakers **Sophia Moreau**, **Lauren Chiren** and **Robin White**. The day includes 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 very much look forward to welcoming you to our conference!

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

Keynote speaker: *Sophia Moreau, Head of Advocacy and Communications | Multi-Award Winning Campaigner | Diversity, Equity and Inclusion Consultant/Trainer*

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 team*

Click here for more information or to book

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

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Queen's speech and employment law 2022

Article published on 16 May 2022

We set out the key takeaways for employers from this year's Queen's speech.

There were relatively few items mentioned in this year's Queen's speech of specific relevance to employers. We consider the key takeaways and impacts of this below.

No Employment Bill

In the Queen's Speech delivered in December 2019 the then recently elected Conservative government led by Boris Johnson announced it would introduce a new Employment Bill designed to bring together a number of changes to UK employment law. Among the proposed issues the Bill was expected to address were:

- The creation of a single enforcement body designed to make enforcing employment rights easier (as opposed to the current multi-departmental approach via HMRC, the HSE, Local Authorities, etc.)
- The right to request more predictable working hours
- Making flexible working the default
- Giving unpaid carers the right to a week's leave
- Introducing leave for neonatal care
- Extending redundancy protection for employees absent due to maternity or pregnancy
- To ensure tips go to workers in full

A lot has happened since the Employment Bill. In March 2021 the Government confirmed the Bill would not be brought forward during that Parliament and that it would be introduced 'when Parliamentary time allows'. Into 2022, there was an expectation that, with the country now moving past the coronavirus pandemic, the Employment Bill may make a reappearance in this year's Queen Speech, but it has not. It is therefore not clear if the Bill is on legislative agenda for this Parliament.

New legislation for seafarers

In the wake of the actions by P&O ferries, which saw the company make mass redundancies and bring in replacements on much cheaper hourly rates, the Government has announced plans to introduce the Harbours (Seafarers' Remuneration) Bill.

The Bill is designed to protect seafarers working on vessels which regularly visit UK ports by giving the port authorities the right to refuse access to ferry services if the staff of that vessel are not paid the equivalent of the National Minimum Wage. However, the British Ports Association has already raised questions about the effectiveness of these proposals which would make port authorities responsible for enforcing the NMW.

New initiatives to encourage employee training

The Government has stated its aim to encourage the private sector to invest in employee training schemes, including apprenticeships. The plan is to do this by looking at the current tax system, including the apprenticeship levy, and consider whether there is sufficient incentive for employers to invest in high-quality employee training.

Conclusion

It is not yet clear why the Government have once again omitted the Employment Bill from this year's Queen's Speech. It is worth noting that some of the proposals for the Employment Bill originate in the Good Work Plan, which was published in 2018 and was designed to address key

concerns and gaps in the law which had arisen as more and more people work in the 'gig economy'.

A central recommendation by the Good Work Plan was the need to create a single enforcement body in place of the wide array of government departments and agencies who each regulated specific parts of the employment market. It may be that the Government is struggling with the complexity of such a task, which would pull together the enforcement powers and duties of, among others, HMRC, the Health and Safety Executive and the Pensions Regulator and is working on how to do this before announcing plans to proceed.

However, many of the other proposals on extending rights and protections would appear more straightforward to legislate and yet they are not mentioned at all. It is also worth considering whether the Government thinks there continues to be a need to legislate on workplace flexibility as employers and their staff have put much of this into practice during the pandemic.

Although not mentioned in the Queen's Speech 2022, it appears that the main employment law development to look out for in 2022 remains the anticipated publishing of the Statutory Code of Practice on dismissal and re-engagement, designed to 'prevent unscrupulous employers using fire and rehire tactics'.

ONS statistics indicate some cases of "long Covid" will be a disability

Article published on 17 May 2022

ONS estimates that "long Covid" symptoms have adversely affected the day-to-day activities of 1.2 million people in the UK.

We are seeing an increasing number of queries from clients seeking advice on managing employees who are impacted by long Covid. In some cases, these employees are back at work but finding that their on-going health problems are leading to performance or capability issues. In other cases, employees have had long periods of sickness absence or repeated phased returns which unfortunately have not been successful.

On 6 May, the Office for National Statistics (ONS) published data which provide useful insight into the likelihood that long Covid could be found to be a disability for the purposes of the Equality Act 2010. (See Prevalence of ongoing symptoms following coronavirus (COVID-19) infection in the UK: 6 May 2022 for more details.)

Key findings from the ONS survey indicate that around 1.8 million people in the UK are experiencing self-reported long Covid symptoms, that is symptoms lasting for more than four weeks. Of people with self-reported long Covid, 44% had or suspected they had Covid at least one year previously and 13% at least two years previously.

The ONS estimates that 1.2 million people in the UK have had long Covid symptoms which adversely affected their day-to-day activities (67% of those with self-reported long Covid), and 346,000 (19%) have had symptoms which "limited a lot" their ability to undertake day-to-day activities. Fatigue and shortness of breath are the two most commonly reported continuing symptoms, with a significant proportion also reporting difficulty in concentrating.

Some social groups appear to be impacted more than others, with the highest levels of self-reported long Covid in those aged 35 to 49, women, those living in deprived areas, those with other health conditions, and those working in social care, education and health care.

Is long Covid a disability? Well it depends…

The Equality Act defines a disability as a physical or mental impairment which has a substantial and long-term adverse effect on someone's ability to carry out normal day-to-day activities. "Substantial" means that the adverse impact on ability is more than minor or trivial. "Long-term" means the adverse impact has lasted or is likely to last for 12 months.

The statistics above suggest that in some cases, the adverse impact of long Covid on an individual will be both substantial and long-term enough to meet this definition.

The Equality and Human Rights Commission (EHRC) has recently clarified its position on whether long Covid could constitute a disability under the Equality Act. In a statement published on 9 May, the EHRC commented as follows:

"Given that 'long Covid' is not among the conditions listed in the Equality Act as ones which are automatically a disability, such as cancer, HIV and multiple sclerosis, we cannot say that all cases of 'long Covid' will fall under the definition of disability in the Equality Act.

"This does not affect whether 'long Covid' might amount to a disability for any particular individual – it will do so if it has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. This will be determined by the employment tribunal or court considering any claim of disability discrimination.

"To support workers affected by 'long Covid' and avoid the risk of inadvertent discrimination, we would recommend that employers continue to follow existing guidance when considering reasonable adjustments for disabled people and access to flexible working, based on the circumstances of individual cases."

Interestingly, this clarification followed some controversy around a tweet put out by the EHRC on 7 May which stated that the EHRC did not recommend long Covid be treated as a disability "without case law or scientific consensus" on the condition. It may be that this was referring to whether long Covid should be a "deemed disability" under the Equality Act – in other words automatically to qualify as a disability. However, commentators rightly pointed out that the question of whether a particular condition will be found to be a disability requires an examination of the impact of the condition on the individual concerned and does not require a diagnosis or scientific consensus.

You may be interested in our previous article from June 2021 which reported on TUC calls for long Covid to be recognised as a disability: Is long Covid protected as a disability under the equality act? (available on our website).

Key action for employers

We recommend that employers first gather what evidence they can about the health of an employee suffering from long Covid. They should seek the views of an occupational health practitioner and/or a report from a GP or other clinician where possible (with the employee's consent), as well as discussing the matter with the employee.

Employers should directly ask the relevant medical professionals for their views on whether the employee has a mental and/or physical impairment which has a substantial and long-term adverse impact on their ability to carry out normal day-to-day activities. This will help to inform the employer's view on whether the employee is likely to have a disability and whether the duty to make reasonable adjustments and other Equality Act protections will apply.

As we set out above, the adverse impact will be "long-term" if it has lasted or is likely to last for 12 months. Where an employee has not yet had long Covid symptoms for 12 months, it is important to consider, and to directly ask medical professionals, whether the symptoms are likely to last that long.

If in doubt, best practice for employers is to do what they reasonably can to facilitate the employee's return to work, including considering flexible working options. However, in some cases the adjustments requested may not be reasonable for the employer to undertake, or may not lead to a successful return to the workplace.

Long-term sickness or health-related capability issues can be very complex for managers and HR professionals. We always recommend taking legal advice at an early stage in order to mitigate the risks of complaints and claims. To find out more, you can register to access the recording of our recent **Employment Brunch Briefing webinar on managing long-term sickness absence** here.

Extension on the ban on exclusivity clauses announced

Article published on 24 May 2022

Move follows consultation which ran between December 2020 and February 2021.

Wrigleys, together with clients and delegates at a previous Wrigleys Breakfast Briefing, contributed to the government's consultation about whether it should introduce further measures designed to help those on insecure incomes. Below, we recap why additional action was being considered and highlight the key changes being implemented.

What are exclusivity clauses and why were some forms of them banned?

The concept behind exclusivity clauses is simple: if you as an employer wish to engage an employee then you should have the option, if you so choose, to prevent that employee from working for others. There are many good reasons for this, from a need to ensure employees receive adequate rest under the Working Time Regulations to wanting to know that your employee is available and focussed entirely on your business and is not distracted by the business interests of others.

Where an employee works full-time this arrangement appears fair, but what if the employee works fixed part-time hours? On the face of it, if you do not need a full-time employee then it appears reasonable to allow that employee to find employment elsewhere during those hours they are not employed by you.

Where this concept starts to get into difficulty is where it meets the modern 'gig' or flexible economy. What if, as an employer, your needs for staff rise and fall through the year, the month, or even the week? Keeping staff employed full-time may mean a significant wage burden even when the business is quiet. Having fixed hours part-time staff may mean you don't have the staff on hand to deal with surges in demand from clients, which may harm the performance of your business or organisation.

Enter the "zero hour" worker, who contracts with you to work as many or as few hours as you need them to through the week and has no guaranteed hours. The arrangement appears ideal for employers with fluctuating business needs as it aligns the cost of labour with demand and can suit those employees who are looking to earn some money by fitting work around other commitments such as family or studying. However, the employer may find that the employee isn't available when called on where, for example, they have a shift with another employer.

To ensure availability as and when needed, an employer might consider including an exclusivity clause in the contract. The employee still has no guarantee of work or any income, and is contractually prohibited from finding work or pay elsewhere.

Exclusivity clauses were banned for workers on zero hours contracts in 2015 on the basis it was demonstrably unfair, but the ban did not end zero hours working arrangements.

In December 2020 the government opened a consultation on extending the ban on exclusivity clauses to those below the Lower Earnings Limit (currently £123 a week) ('LEL'), meaning those on a low number of minimum hours gain additional protection.

Outcomes of the consultation

The government's full response can be read online, but some highlights are:

- An estimated 1.5 million workers receive less than the LEL in their main job and these same workers are significantly more likely to want to undertake additional work
- Around half of all respondents suggested the LEL was a suitable threshold, though a significant proportion of respondents advocated for a general ban on exclusivity clauses via unenforceability unless an employer could show they had a legitimate business reason for enforcing it
- Alternatives to the LEL suggested by respondents included a ban on exclusivity clauses in contracts where the worker had fewer than 37.5 hours of work a week or they earned less than the National Living Wage
- The government has prioritised supporting those in insecure employment and recognised that some employers have legitimate business interests to protect via exclusivity clauses (such as trade secrets and confidentiality)
- The government's own cost assessments suggest that using the LEL as the threshold means costs for employers will be kept to a minimum
- The government expects employers to see some positive developments from the ban by freeing up workers to provide their time and labour to those struggling to fill positions
- As well as extending the ban to those earning below the LEL, the legislation introducing the ban will purportedly extend protections against unfair dismissal and the right not to suffer a detriment for failing to comply with an exclusivity clause

Comment

The government's response to the consultation states that legislation for these reforms will be placed before Parliament in 2022.

For the time being at least there appears to be little appetite to remove exclusivity clauses in employment contracts for those in more secure and higher-paid employment. The suggestion is that the ban is seen as a way to help those in insecure and low paid work rather than to push for innovations in the ways employers and employees' contract with one another.

The announcement of the extension of the ban on exclusivity clauses may prove timely, with recent reports that there are currently more job vacancies than the number of people unemployed in the UK. It may be that those workers and employees freed up by the incoming extension on the exclusivity ban may help to plug that gap, whilst creating opportunities for workers to earn more.

However, concerns about abuse of zero hours contracts remain. This can only be further exacerbated as the costs of living crisis continues.

Was an employee automatically unfairly dismissed for refusing to work during Covid-19 lockdown?

Article published on 25 May 2022

EAT: employee did not reasonably believe in serious and imminent danger at work and so was not automatically unfairly dismissed.

The pandemic has led to a number of employment tribunal cases which consider whether

an employer dismissed or disadvantaged an employee because they refused to return to the workplace due to their fears about Covid-19.

A key question for the tribunal in these cases is whether the employee left or refused to return to the workplace in circumstances of danger which they reasonably believed to be serious and imminent.

The Employment Appeal Tribunal (EAT) has this month issued a judgment which provides further insight into how this question should be approached by tribunals in the context of the Covid-19 pandemic.

For details of the employment tribunal decision in this case, please see our article of April 2021: Was an employee automatically unfairly dismissed for refusing to attend work due to the covid-19 pandemic? (available on our website.)

Other previous articles available on our website which may be of interest on this topic include:

Employee who refused to visit manager's property during lockdown was automatically unfairly dismissed on health and safety grounds (September 2021)

Refusing to work because of fears about Covid-19 - section 44 of the Employment Rights Act (January 2021)

Are workers protected after refusing to work because of health and safety fears? (November 2020)

Case: *Rodgers v Leeds Laser Cutting Ltd*

When the first Covid-19 lockdown began, Leeds Laser Cutting Ltd informed employees that the business would remain open and that safety measures would be put in place. The employer commissioned a professional risk assessment of the workplace and followed its recommendations, including wiping down surfaces, social distancing and staggering start, break and finish times for employees. The premises were a large warehouse-like space and there were only five employees.

Mr Rodgers left work on 27 March 2020 and did not return. He told his employer that he felt he had to stay off work until the lockdown was over, referring to his child who was at high risk due to suffering with sickle cell anaemia. Mr Rodgers acquired a self-isolation certificate from NHS 111 which covered the period from 28 March to 3 April 2020.

There was no further communication between the parties until a month later when Mr Rodgers' employment was terminated.

Mr Rodgers subsequently brought a claim for automatic unfair dismissal under s.100(1)(d) Employment Rights Act 1996 (ERA). He argued that the reason for his dismissal was that he left or refused to return to work due to circumstances of danger in the workplace which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert.

The tribunal dismissed the claim. It concluded that Mr Rodgers' decision to remain off work was not directly linked to a risk to health and safety within the workplace, rather his concerns were about the virus generally in society. It found that it was not objectively reasonable for Mr Rodgers to believe there were circumstances of danger at work which were serious and imminent. It also found that Mr Rodgers could have acted to avert the dangers by following workplace guidance.

On appeal, the EAT upheld the decision of the employment tribunal.

Does the danger actually have to exist?

The EAT first considered whether there is a "gateway requirement" in section 100(1)(d) ERA claims that the circumstances of danger must actually exist. His Honour Judge James Tayler expressed his view that this would be a surprising conclusion.

HHJ Tayler used the helpful analogy of employees who left a workplace because they saw a green gas escaping and were later dismissed for doing so. Here, it was likely to be reasonable for the employees to believe there was a serious and imminent danger. If the green gas was later found to pose no danger to health, was it right that the employees would have no protection under section 100 ERA? However the EAT did not have to decide this point as the tribunal had already decided that the Covid-19 pandemic did in fact create circumstances of danger.

Did Mr Rodgers reasonably believe that the danger was serious and imminent?

The EAT agreed with the tribunal that the claim did not require the danger to arise from the workplace itself. It also agreed that there was no need for any harm that might be caused by the circumstances of danger to occur at the claimant's place of work, or to the employee or fellow employees.

HHJ Tayler accepted that an employee could reasonably believe that there is a serious and imminent circumstance of danger that exists outside the place of work that could prevent them from returning to it, and that such circumstances could be protected under section 100(1)(d) ERA.

In this case the claimant had genuine concerns about the pandemic, and particularly about the safety of his children. But that did not mean that he necessarily had a genuine belief that there were serious and imminent circumstances of danger at work or elsewhere that prevented him from returning to work.

The EAT held that the tribunal was right to find that Mr Rodgers did not hold a reasonable belief in serious and imminent circumstances of danger at work. It pointed to facts found by the tribunal including: the provision of masks by the employer; that the claimant had not asked for a mask; the substantial size of the workplace and its low occupancy; that the claimant could usually maintain social distancing at work; that he did not say he would not be returning on his last day at work; that he had driven his friend to hospital during his self-isolation period; and that he had worked in a pub during the pandemic.

Could the employee have averted any danger?

The EAT held that the tribunal had been entitled to find that the claimant could reasonably have taken steps to avert the danger by wearing a mask, socially distancing, and by sanitising and washing his hands.

Therefore, even if Mr Rodgers had been found to have a reasonable belief in the danger posed by his workplace or returning to it, his claim would not have succeeded.

Key learning points

This case suggests that the Covid-19 pandemic, and other similar largescale public health risks will be "circumstances of danger" which could give rise to protection for staff who are dismissed or disadvantaged because of steps they take to avoid the danger. However, in order to be protected the individual must reasonably believe in dangers in the workplace itself or dangers outside the workplace that could prevent them returning to it. General fears about safety in society will not be sufficient.

The comments of HHJ Tayler suggest that future case law may confirm that employees will be

protected even where it later becomes clear that there was in fact no danger to health and safety. As long as the employee's belief in the danger at the time is found to be reasonable, this judgment suggests they will be protected.

Mr Rodgers was not assisted by the fact that he had not raised specific concerns about workplace safety and that his actions outside of work (such as breaking self-isolation rules and working elsewhere during the pandemic) undermined his evidence that he subjectively believed in the danger posed by Covid-19 at work.

This case shows that employers will be in a stronger position to defend a claim where they have in place a thorough risk assessment, where they communicate to staff the risk mitigation measures within it, and can evidence steps taken to implement and reinforce those measures.

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