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EMPLOYMENT LAW BULLETIN

JULY 2022

Welcome to Wrigleys' Employment Law Bulletin, July 2022.

Our next free virtual **Employment Law Brunch Briefing** takes place on **Tuesday 2 August**. This session will provide an update on the law on holiday leave and pay and will look in detail at the very recent decision of the Supreme Court in ***Harpur Trust v Brazel***. This decision has significant holiday pay implications for employers who engage workers on ongoing contracts but where there are some non-worked weeks each year. Please click on the link below to book your place or register to access the recording.

In this month's bulletin, we consider two interesting employment tribunal decisions in the context of discrimination law. The first, ***Mellor v The AFG Academies Trust***, considers the rights of staff who are breast-feeding. The second, ***Burke v Turning Point Scotland***, considers the circumstances in which "long Covid" will be found to be a disability under the Equality Act 2010. Although these cases do not set a legal precedent, they provide helpful guidance for employers.

We also report on the case of ***Mackereth v DWP*** in which the EAT confirmed that a doctor's lack of belief in "transgenderism" was protected but found that he had not been discriminated against.

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:

2 August 2022

Wrigleys' Employment Brunch Briefing

Holiday leave and pay – an employment law update

Speaker: Alacoque Marvin, solicitor at Wrigleys Solicitors

Click here for more information or to book

13 October 2022 - SAVE THE DATE

Wrigleys' 31st Annual Charity Governance Seminar

Speakers: Keynote speakers to be announced including various speakers from our Wrigleys charities team

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

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Lack of facilities for expressing breastmilk found to be sex harassment, but not direct or indirect discrimination

Article published on 14 July 2022

Tribunal decision appears to highlight lack of legal recourse for women in these circumstances.

As the flexibility of UK workplaces continues to evolve, one of the issues at the forefront of flexible and family-friendly work is how parents juggle working with childcare. A wide range of family-friendly rights have come into force over the years, from maternity, paternity, adoption and shared parental rights, to compassionate leave and bereavement leave and pay.

Another by-product of the coronavirus pandemic has also seen parents juggling childcare and work responsibilities more directly. During the pandemic it was difficult for parents of young children to send them to school or nursery with one side-effect being that some parents had to find ways to manage childcare within the normal working day.

This issue reached Parliament with MPs being reported in the press seeking to take their children into House of Commons debates.

Naturally, employers must consider just how flexible they are willing and able to be regarding work-life and family balance and how this interacts with aspects of employment and discrimination law. A recent Employment Tribunal case considered how the act of breastfeeding and expressing breastmilk at work interacted with claims of sex harassment and direct and indirect sex discrimination.

For these purposes, it is useful to note that s.13 of the Equality Act 2010 explicitly states that it is direct sex discrimination to treat a woman less favourably because she is breastfeeding, though this is specifically stated not to apply to discrimination at work.

Currently there is no statutory right to the provision of facilities for breastfeeding or expressing milk at work. Health and Safety Executive Guidance does, however, recommend that employers provide a private, clean environment other than toilets for expressing milk and a fridge for storing it. The Equality and Human Rights Commission's Employment Statutory Code of Practice also provides guidance around those breastfeeding at work and that employers have a duty under health and safety provisions to provide suitable workplace rest facilities for women at work, who are breastfeeding mothers, to use (see para 8.45).

Case: ***Ms T Mellor v The AFG Academies Trust [2022]***

M was a teacher at the Trust. Whilst on maternity leave M contacted the school to advise that she would need a room on her return to work to express breastmilk for her child. M further reminded the Trust and the Trust's HR team of this need when she confirmed her return to work and again on her return from maternity leave.

However, these requests were not followed and instead the Trust permitted M's partner to bring her baby into the school for her to breastfeed. M subsequently requested that she was provided with a room to feed her child and, later, once again requested a room to express breastmilk.

When no room was provided, M expressed milk in either the school toilets or her car. M had a 25 minute lunch break and expressing took 20 minutes, meaning she was forced to eat her lunch whilst expressing.

M brought claims of direct and indirect sex discrimination and sex harassment against the Trust.

The Tribunal upheld the sex harassment claim but dismissed the claims for direct and indirect discrimination.

In reaching its decision the Tribunal concluded that a narrow interpretation of s.13 Equality Act 2010 was required, and that it was the clear intention of Parliament that employers should be able to prevent breastfeeding at work because of the potential risks of taking a child into the workplace. On the other hand, the Tribunal recognised that Parliament wished to protect the rights of breastfeeding women when accessing premises or services.

On indirect discrimination the Tribunal concluded that the Trust had a provision criterion or practice (PCP) of not providing suitable facilities for women to express milk. However, applying the reasoning of Baroness Hale in the (then) House of Lords case of *Rutherford v Secretary of State for Trade and Industry (No 2) [2019]* that 'indirect discrimination cannot be shown by bringing into the equation people who have no interest in the advantage of disadvantage in question', the Tribunal concluded that as the act of expressing breastmilk did not affect men, this meant no comparative disadvantage arose for the purposes of indirect discrimination.

On direct discrimination, M sought to rely on the hypothetical comparator of a man with diabetes requiring a similar private space to inject and store insulin at work. Although the Tribunal found that M was put at a disadvantage compared to the hypothetical comparator, it found the reason for the less favourable treatment was in fact the school's administrative incompetence and not M's sex. On that basis her direct discrimination claim was not upheld.

On sex harassment, the Tribunal held that M had, in effect, been forced to express in the toilets or her car, with the latter creating a risk she would be seen by pupils and others. The Tribunal found this to be unwanted conduct which had the effect of creating a degrading or humiliating environment for M. It found that this conduct was related to M's sex as the need for privacy from the intimate nature of the activity arose because M was a woman.

Comment

Whilst the Tribunal's narrow application of s.13 Equality Act 2010 reaffirms the disapplication of direct discrimination for breastfeeding women whilst at work (i.e. when the child is present), the defeat of the wider direct discrimination claim because of the school's own administrative incompetence has drawn criticism from legal commentators. This is chiefly on the basis that it appears to ignore that the situation would only happen to a woman and the fact the Trust admitted it likely would have provided suitable facilities to the hypothetical diabetic M put forward as a comparator.

This case has also highlighted the impact of Baroness Hale's comments in *Rutherford* have on cases such as these. The effect appears to be that where an employer has a blanket ban on something which limits the pool in such a way that only one group is disadvantaged, then there is no indirect discrimination because the group(s) who are unaffected have no interest in that disadvantage. This appears to be a twisting of the intention of indirect discrimination protections.

Even though M won her sex harassment claim, the protection afforded to breastfeeding or expressing women at work is still slim because a lack of facilities may not always give rise to a degrading or humiliating environment.

Claimant with long covid found to be disabled for purposes of the Equality Act 2010

Article published on 19 July 2022

Tribunal decision confirms that symptoms of long covid are capable of meeting the definition of disability.

As my colleague Alacoque Marvin commented in her May article ONS statistics indicate some cases of "long Covid" will be a disability, employers are increasingly seeing staff self-report long Covid symptoms and we commented on the likelihood that long covid would be found to be a disability under the Equality Act 2010.

The definition of disability is set out at section 6 of the Equality Act:

(1) A person (P) has a disability if:

a. P has a physical or mental impairment, and
b. The impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.

"Substantial" means 'more than minor or trivial' and the effect of an impairment is "long-term" if it "*has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected*".

The medical understanding of this issue continues to develop, with those suffering effects after 12 weeks since contracting covid sometimes being referred to as suffering from 'post-covid-19 syndrome'. Nonetheless, long covid is increasingly recognised as being an umbrella term for several symptoms including coughing, cognitive impairment, fatigue, breathlessness, anxiety and low mood.

The issue has started to appear as part of Employment Tribunal proceedings where claimants are seeking to bring claims of disability discrimination on the basis of suffering long covid symptoms.

Case: ***Mr T Burke -v- Turning Point Scotland (2022)***

Mr Burke had worked for TPS as a caretaker/ security guard for nearly twenty years when he returned a positive covid test in November 2020. Mr Burke became absent from work and never returned before his employment was terminated by TPS in August 2021.

The symptoms were reportedly very mild at first, but developed into severe headaches and fatigue. Mr Burke reported finding it difficult to carry out simple activities, like taking a shower and dressing or household activities like cooking, ironing and shopping without needing to rest.

Subsequently, Mr Burke did not attend social events such as his uncle's funeral or Christmas celebrations which was reportedly 'very out of character for him.' Mr Burke also found his symptoms of fatigue and exhaustion unpredictable in that they seemed to improve and then suddenly would come back.

Mr Burke secured fit notes for his absences which noted that he was fatigued. In June 2021 Mr Burke's sick pay ceased and following a consultation and capability process, Mr Burke's employment was terminated in August 2021. On dismissal, TPS advised it could not keep Mr Burke's position open due to its limited resources as a charitable organisation and the "*uncertainty around a potential return to work date*". Mr Burke was dismissed on ill health grounds.

Mr Burke subsequently brought claims against TPS for unfair dismissal and discrimination on the

grounds of disability, amongst others. Due to the defence presented by TPS the Tribunal held a hearing to determine whether or not Mr Burke was disabled for the purposes of the Equality Act 2010 at the relevant time.

When considering the point, the Tribunal judge found that:

- Mr Burke's symptoms met the definition of a physical impairment;
- The impairment had an adverse effect on Mr Burke's ability to carry our normal day to day activities; and
- The effect was substantial and long-term

Therefore the Tribunal found Mr Burke's symptoms met the definition of disability.

In reaching this conclusion the following evidence was particularly key to the findings:

- The witness evidence of Mr Burke and his daughter on the substantial adverse effect of long covid on the claimant was credible;
- The nature of Mr Burke's symptoms and conditions meant it was difficult to predict how long the effect would last, but as both TPS and Mr Burke explained that they did not know when his symptoms would abate, then at the time his employment was terminated it 'could well' have lasted until the end of November 2021 and thus would have met the definition of 'long term'.

Comment

The key takeaway confirmed in this case is that, as has been long suspected, whether or not long covid is a disability will depend on the effect of the symptoms on the individual. As a first instance tribunal decision the outcome of this case is not binding on any other courts or tribunals. However, it does serve as a practical example of an Employment Tribunal applying the definition of 'disability' to the symptoms of someone who contracted covid and subsequently experienced protracted symptoms that have an effect on their ability to carry out day to day activities.

The case only reports on the finding of disability and it remains to be determined whether Mr Burke's substantive claims (for unfair dismissal and discrimination) will succeed. Employers should ensure that they follow and can evidence that they have followed a fair procedure and that any action taken in regard to discipline or dismissal of employee reporting 'long covid' was necessary and proportionate in the circumstances. Likewise, when dealing with employees with potential disabilities, employers should look at making reasonable adjustments, including adjustments to the sickness and disciplinary or capability processes.

When making this judgment, employers will need to continue to consider both the needs of their organisation and the discriminatory impact on the individual. Where a decision is made to dismiss following long term absence, the reasons for that decision should be carefully documented and, as always, we would recommend that employers take specialist employment advice if they are faced with this kind of situation to best manage and assess the risks.

Lack of belief in "transgenderism" is protected but doctor was not discriminated against

Article published on 20 July 2022

Policy on use of service users' preferred pronouns was a proportionate means of achieving a legitimate aim.

In October 2019, we reported on the Employment Tribunal's decision in the case of Dr Mackereth, a doctor engaged through a contractor, Advanced Personnel Management Group (UK) Limited (APM), to work as a health and disability assessor for the Department for Work and Pensions (DWP). See our article, Doctor who refused to use pronoun chosen by transgender patients was not discriminated against (available on our website). The EAT has now published its decision on Dr Mackereth's appeal.

Dr Mackereth is a Christian who believes that God created only males and females and that a person cannot choose their gender. During his induction he made clear that he would not refer to transgender people by their preferred pronoun as was required by a DWP policy. Alternative roles and procedures were explored which would not require Dr Mackereth to work with transgender people, but these were not found to be feasible. Dr Mackereth decided he could not work under the DWP policy and APM confirmed that he would not be able to work in the role.

Dr Mackereth brought claims for harassment, direct discrimination and indirect discrimination against both the DWP and APM.

The tribunal decision

The tribunal dismissed all the doctor's claims. It held that Dr Mackereth's beliefs were not worthy of respect in a democratic society, not compatible with human dignity and conflicted with the fundamental rights of transgender individuals, and that they were not therefore protected under the Equality Act 2010.

The tribunal also found that, had the doctor's beliefs been protected, the DWP would have been able to defend the indirect discrimination claim as the policy was a proportionate means of achieving a legitimate aim. This was because the harm to vulnerable service users of accepting Dr Mackereth's stance would have outweighed the discriminatory impact on the claimant.

The EAT decision: *Mackereth v DWP*

Dr Mackereth's belief is protected

The EAT overturned the tribunal's decision that Dr Mackereth's Christian belief or his lack of belief in "transgenderism" were not protected.

The EAT noted that the tribunal had come to its decision before the judgment of the EAT in *Forstater v CGD Europe and others* (see our article on this decision: Claimant's gender critical belief is protected under the Equality Act on our website). The EAT stated that the tribunal had imposed too high a threshold when considering whether the belief was worthy of respect in a democratic society, compatible with human dignity and did not conflict with the fundamental rights of others. It noted that the *Forstater* decision made clear that minority beliefs should be protected, even where those beliefs might offend or shock others. It agreed that a belief will meet the threshold for protection if it does not destroy the rights of others.

Dr Mackereth was not discriminated against

However, the EAT went on to agree with the tribunal that Dr Mackereth had not been discriminated against on the basis of his belief or lack of belief.

On the direct discrimination claim, the EAT held that the tribunal had been entitled to draw a distinction between Dr Mackereth's beliefs and the way he wished to manifest those beliefs. It found that any health and disability assessor who refused to use service users' preferred pronouns would have been treated the same way, regardless of their beliefs.

On the indirect discrimination claim, the EAT held that the tribunal had properly weighed the discriminatory impact on Dr Mackereth against the impacts on vulnerable service users of not insisting that he follow the policy. It noted that the tribunal had considered whether less discriminatory alternatives would be feasible, such as triaging transgender people to ensure they were not seen by Dr Mackereth. However, it decided that the tribunal was entitled to find that the particular sensitivities for transgender people accessing the service meant these alternatives would in themselves cause offence.

Comment

This case reflects the current case law on so-called "gender-critical" beliefs. Dr Mackereth has expressed his intention to appeal. We are still awaiting the decision of the employment tribunal in *Forstater* as to whether the claimant was discriminated against on the basis of her protected belief.

Employers should continue to take what steps they reasonably can to prevent workplace discrimination and harassment. This will include putting in place clear and well-communicated codes of conduct, policies, and statements of organisational values, organising induction and regular update training on equality and diversity, and taking robust action to deal with breaches of such codes and policies.

A key learning point from this case is the importance of being able to justify policies and practices which put groups sharing a protected characteristic at a disadvantage. This means being clear about the aims of the policy and explaining how it meets the needs of the organisation, commissioners / stakeholders, service users and customers. It also means thinking through policies to ensure that they do not go further than is necessary to meet those aims. When an employee raises concerns about a policy or way of working, employers should consider whether there are alternative approaches which would avoid the discriminatory impact on the employee. Documenting these thought-processes and considerations at the time will assist employers where employees go on to bring discrimination claims.

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

www.wrigleys.co.uk

Wrigleys Solicitors LLP, 19 Cookridge Street, Leeds LS2 3AG. Telephone 0113 244 6100 Fax 0113 244 6101