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EMPLOYMENT LAW BULLETIN

AUGUST 2023

Welcome to Wrigleys' Employment Law Bulletin, August 2023.

The world of technology is moving at break-neck speed and the workplace is at the forefront of technological change. In our first article this month we take a look at a recent House of Commons Library briefing paper which focuses on the way Artificial Intelligence is being used in the field of employment.

Our case report this month considers the interesting case of *Pilkington UK Ltd v Jones* where an employer's assumptions about what an employee was doing on sick leave led to a disability discrimination claim.

Our Wrigleys' Essential Employment Guide this month covers key considerations when planning a redundancy process.

We hope you will be able to join us for our next free virtual **Employment Brunch Briefing** on **Tuesday 3 October** on the tricky subject of disciplinary processes which may involve disability issues. Please click the link below to reserve your place.

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

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House of Commons Library publishes paper on AI and employment law

Article published on 21 August 2023

Paper provides an overview of the issues around AI and employment in the UK.

On 11 August the House of Commons Library published its paper: Artificial Intelligence and employment law.

The paper looks at the different types of AI and their current applications, noting that it is not new technology. Rather, a lot of existing technology has some, even if limited, background or "smart" processing that can be described as AI or AI-supported. However, increased interest in AI reflects recent developments that have significantly advanced automatic decision making, mimicking the process of giving an opinion or making a judgment on any issue.

Whilst 'general AI' (that is, an artificial intelligence that can be applied across any discipline and demonstrate an ability to learn in a way comparable to a human) appears to still be some way off, the paper provides a handy introduction to the key areas in which AI already interacts with employment, including the implications and interactions with common law, equality law, privacy and data protection law, highlighting the use of algorithmic management tools in recruitment, monitoring and surveillance.

For example, algorithmic management is prevalent in the 'gig economy' and used in app-based services like Uber and Lyft to monitor and manage their workers. This impacts on many aspects of the workers' experience on the system, from allocating jobs to performance management and setting fares through to the feedback systems customers use to rate the drivers.

As referenced in the paper, a Department for Culture, Media and Sport report found that, as of January 2022, 68% of large companies and 15% of all UK businesses had adopted at least one form of AI and that a further 10% planned to adopt it. The main ways they had been used were through the use of spam filters, chat bots, facial recognition technology, voice assistants and personalised shopping.

According to data summarised in the paper, AI use was more prevalent in large companies, with the ICT, professional, scientific and technology sectors in particular leading the way in AI use. There are indications that employers see efficiency and cyber security as particular areas for future AI adoption.

The paper also provides an overview of the UK's proposed way forward on AI regulation and the potential problems with this. In a 2023 White Paper, the UK established the key principles of AI regulation in the UK as safety, transparency, fairness, accountability and contestability.

The UK Government is expected to publish a UK AI regulatory roadmap at any point between now and Autumn 2024, but it remains to be seen whether this will happen or otherwise be affected by a likely general election in 2024. As an indicator of current intentions, the government has broadly set out its plans to use existing regulators to oversee AI in the UK, with the government expected to take responsibility for central coordination between the regulators.

Comment

Some have highlighted that the current proposals are relaxed and hands-off.

Concerns have been expressed over the plan to use existing regulators, with commentators pointing out that there are hundreds of regulatory bodies in the UK to coordinate on what is a new

and potentially complex matter, with necessary funding so far lacking in current plans.

The European Commission on Human Rights has commented that current UK proposals provide insufficient safeguards against AI in respect of human rights. Other commentators have noted the UK's approach diverges significantly from the EU's impending AI Act which seeks to regulate the use and development of AI much more strictly, with clear parameters around what kinds of applications are permissible and not permissible. This could create problems for businesses operating across the UK/ EU.

On the other hand, some commentators have suggested the current approach signalled by the UK government is agile and pragmatic and more closely aligned with the present US approach, in that there is no clear guidance on AI application in the US so far.

2024 is therefore shaping up to be a significant year for AI development in the UK. At present, a general election is expected in 2024 and if Labour form the next UK government it seems the UK will move towards a more interventionalist approach on AI. This would appear to chime with Labour's signalled intent to reestablish closer links with the EU which may lead to closer regulatory alignment under the recent 'make Brexit work' mantra.

In the meantime, all employers will face a steep learning curve on the applications, limits and complications of AI as it is integrated into working practices. Even where employers themselves have not directly implemented AI, it seems likely they and their staff already do, or are likely to see, the indirect application of AI by service providers.

Thought around the impact of this integration on privacy, personal data and fundamental aspects of the employment relationship including recruitment and line management will be needed if employers are to make the most of AI and avoid the associated risks.

Wrongly held belief about performing physical activity while on sickness absence led to disability discrimination

Article published on 15 August 2023

EAT confirms employer's belief can be 'something arising in consequence of disability'.

Section 15 of the Equality Act 2010 (EQA) protects workers and employees against unfavourable treatment for 'something arising in consequence of' a disability, where the treatment cannot be justified as a proportionate means of achieving a legitimate aim.

A common example is when an employee is disciplined for taking sickness absence in breach of the employer's absence policy when the absence is disability-related and the disciplinary action cannot be justified.

When deciding whether an action is 'something arising from' a disability, the tribunal will first apply an objective test, considering what was the 'something' and whether this 'something' arose from a disability. It will then decide whether the less favourable treatment was as a consequence of the 'something', exploring the subjective state of mind of the decision-maker.

A recent case has considered whether an employer's wrongly held belief about an employee is capable of being 'something arising from' a disability.

Case: ***Pilkington UK Ltd v Jones [2023]***

Mr. Jones worked for PUL for many years. In 2018, he developed a painful shoulder condition due to damage from radiotherapy from which it was determined there was no prospect of recovery.

Mr Jones also suffered from anxiety and depression. PUL put Mr Jones on light duties but from November 2018 he was then signed off work on long-term sick leave. Following an occupational health referral it was determined Mr Jones would not be able to undertake manual work, but would be able to return to a non-manual role once the pain was under control.

In March 2019 PUL suspected Mr Jones was working for someone else and employed surveillance agents to film Mr Jones. The agents obtained footage of Mr Jones in the company of a friend, a farmer, in a van delivering products. In the footage, Mr Jones could be seen handling a small plastic bag with a retail sized bag of potatoes although the actual delivery work was carried out by the farmer.

In PUL's opinion, the recordings initially gave cause to suspect Mr Jones was working for someone else. During the disciplinary process, Mr Jones argued that he was accompanying his friend to improve his mental health. PUL concluded that Mr Jones had undertaken physical activity during sickness absence in breach of its sickness absence policy and dismissed him for gross misconduct.

In response, Mr. Jones brought a claim before the Employment Tribunal, alleging unfair dismissal, wrongful dismissal and discrimination arising from disability in breach of s.15 EQA. The Employment Tribunal upheld all of Mr Jones's claims.

The Employment Tribunal found that Mr Jones was disabled by reason of his depression and anxiety and it determined that the something arising under s.15 EQA was that PUL believed that Mr Jones had engaged in physical activity while off work sick and that his dismissal as a consequence of that belief amounted to unfavourable treatment.

In response to the Employment Tribunal's decision, PUL appealed on the basis that the Tribunal had erred in finding its belief amounted to 'something arising' in consequence of Mr Jones's disability having wrongly applied a subjective approach to an objective question.

The Employment Appeal Tribunal agreed with the findings of the Employment Tribunal. The EAT highlighted the correct test under s.15 EQA as set out above.

Noting that the case was unusual, the EAT recognised that the Tribunal had specifically rejected external factors put forward by Mr Jones, such as his sickness absence, to find it was PUL's belief that was the 'something arising'. The EAT commented that, although a belief is subjectively held, it can be objectively recognised. If the disability is known about by the employer, there can be an objective finding that a particular state of mind or belief arises from the disability.

The EAT also held that the Tribunal would have been entitled to find that the combination of the sickness absence of Mr Jones and the employer's belief that he was engaging in physical activity during that absence was the 'something' that arose from the disability and led to a decision to dismiss. That would satisfy the requirements of s.15 EQA and did not rely on PUL's state of mind as the 'something arising'.

Comment

This case is a reminder that employers need to exercise caution when managing situations involving employees with disabilities. Employers should avoid making assumptions about what an employee may or may not be doing whilst absent from work due to sickness and ensure that any decisions are based on substantial evidence. In this situation, PUL failed to consider the broader context of Mr Jones's absence, and jumped to conclusions about activities he was undertaking while sick, failing to explore the possibility that the activities in question were undertaken to improve his mental health.

That said, this is an unusual case with a confusing application of objectivity to an ostensibly subjective issue (belief). However, case law has indicated that incorrect beliefs about what a

disabled employee can and cannot do can also be something arising from a disability and lead to s.15 EQA claims. See our 2019 article 'Stereotypical assumptions about a health condition could be disability discrimination – even if the employee is not disabled' for more on this.

Wrigleys' Essential Employment Guide The Redundancy Process

Article published on 8 August 2023

A guide to redundancy: the foundations of a fair redundancy process.

Part 1 - The foundations of a fair redundancy process

In this series of articles for employers, we consider the key elements of a fair redundancy process and some of the pitfalls to avoid along the way.

In part one, we cover the foundations of a fair redundancy process, highlighting good practice for approaching a potential redundancy situation and key first steps.

What is redundancy?

As a first step when considering restructure or reorganisation impacting on staff, you should ask yourself whether the proposals might give rise to a redundancy situation.

Simply put there are three types of redundancy:

1. all or part of a business is closing down;
2. a particular workplace is closing down; and/or
3. the employer needs fewer employees to carry out work of a particular kind.

If one of more of these applies, the reason for any dismissals is likely to be redundancy and you should be aware of the rights and obligations which arise in a redundancy situation.

Business case

Having a sound business case underpinning proposed redundancies is essential. This means gaining a clear understanding of and documenting the context and key drivers behind the proposed redundancy. The situation may stem from a downturn of work, funding or contract loss. It may arise from changes in your regulatory, technical or market context. Your business case should also identify the financial, operational and organisational impacts of this broader context.

Where possible, your business case should set out the alternative ways of resolving these issues which have been considered before proposing redundancies and any action which has already been taken to improve the situation. This might include exploring new revenue streams, looking for non-staffing cost-savings and efficiencies, recruitment freezes, and review of the use of agency staff or outsourced contracts.

Being able to communicate the business reasons for proposed redundancies clearly and consistently to employees and their representatives a vital starting point. Sharing as much information as you can on the background to proposed redundancies will help to create solid foundations for your consultation and build trust with your staff and their representatives.

Your redundancy process plan

Good planning is essential to a well-run redundancy process. As part of this, you will need to work

out a realistic proposed timeframe for the process which takes into account your consultation obligations and works backwards from the date notice will have to be given for affected staff.

Planning for consultation – do your homework

Before you start planning your process, you should do your homework on what makes a fair process. Helpful general guidance is available from Acas, CIPD and on the gov.uk website. You should also consider taking legal advice in good time before you start. Waiting to take legal advice until later in the process can lead to difficult staff and trade union relationships, higher costs and greater risks of a claim.

And of course, don't overlook any policies or collective agreements which are relevant to your workforce. These may well include rights and obligations which go above and beyond statutory rights and require you to discuss the situation with trade unions.

Remember when planning your timeline that you will need to consult meaningfully with staff and in some cases with their representatives. That means consulting before decisions are finalised so that staff can influence both the process followed and your decision-making. Consultation is not just about when redundancies are to take effect or how much redundancy pay is on the table. It starts with explaining the need for change and sharing your proposals for identifying those at risk of redundancy, including the redundancy pool and selection process.

Collective redundancy consultation

If you have 20 or more potential dismissals within a 90 day period, you have a statutory obligation to consult with employee representatives, beginning consultation at least 30 days before the first dismissal takes effect. Where there are 99 or more potential dismissals, consultation must start at least 45 days before the first dismissal. Remember that these numbers will include any potential dismissals where you are offering re-engagement on new terms.

If you do not have a recognised trade union or relevant employee forum, you will need to factor in time for staff to nominate and elect representatives before you commence collective consultation.

Don't forget that where there may be 20 or more dismissals, you must send form HR1 to the Redundancy Payments Service which acts on behalf of the Secretary of State for Business and Trade. There is also statutory information which must be sent to representatives at the outset of the consultation.

You will need to consult with individuals who are at risk of redundancy in addition to collective consultation. A series of individual consultation meetings will need to take place before issuing notice of termination whether or not collective consultation is required.

Collective redundancy consultation requirements can be complex and you should seek legal advice if they might be engaged.

What is a fair redundancy process?

If collective redundancy consultation obligations do not apply, there is no statutory process or Code of Practice which must be followed. However, we can determine from unfair dismissal case law the key elements of a fair redundancy process. These are set out below. Please note that this is not a complete list of all required steps to ensure your process is fair, and advice should be taken on the details of each stage.

1. You should start by warning those involved of the possibility of redundancies, share the business case, and consult with affected staff or their representatives on the process you are planning to go through and the proposed timetable.

2. Taking into account feedback received, you should then make a reasonable decision on redundancy pools and ensure any selection criteria are fair and non-discriminatory.
3. You should select those at risk of redundancy from each pool applying the chosen selection criteria or process. Where there is a pool of one, or a whole team is at risk of redundancy, there will be no selection process.
4. You should write to those selected to inform them that they are at risk of redundancy.
5. You should consult individually with those selected for potential redundancy, including discussing how the result was arrived at. You should also consult with these staff on alternatives to redundancy, including alternative roles.
6. If an alternative role is available and the terms, capacity or place of work are different to the current role, there is a statutory right to a 4 week trial period.
7. If redundancy is confirmed, you should give notice of termination in writing.
8. You should give a right of appeal of any redundancy decision.

The right approach to redundancy consultation

Redundancy consultation is by its nature highly process driven and benefits from careful planning and forethought. Be aware however, that a tribunal considering an unfair dismissal claim will consider whether your process and dismissal decision fell within the "band of reasonable responses". Reasonableness means taking into account both the business reasons of your organisation and the particular circumstances of your staff. This means it is important not to let a pre-determined process and timetable drive your decision-making so that you rush decisions and lose sight of what is fair in all the circumstances.

It is helpful to keep in mind the following general points in your approach to redundancy to mitigate the risks of a claim:

- Be open-minded and prepared to adapt your process and your plans;
- Ensure that plans and proposals are marked "subject to consultation";
- As far as possible, be transparent and share relevant information early in the process;
- Seriously consider and respond to suggestions raised by staff or their representatives to avoid or reduce the impact of redundancies;

Keep a comprehensive paper trail: keep notes of meetings and set out all decisions and offers of alternative roles in writing.

See part two of the **Wrigleys' Essential Employment Guide** The Redundancy Process, which looks at pooling and selection for redundancy.

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