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EMPLOYMENT LAW BULLETIN

APRIL 2021

Welcome to the Wrigleys Employment Law Bulletin, April 2021.

The Government's staged plan to lift Covid-19 restrictions has now moved to step 2, meaning that non-essential retail, personal care businesses, public buildings, most outdoor attractions and hospitality, and indoor leisure facilities such as gyms can reopen. In our first article this month, we consider the implications for employers who may be encouraging more staff to return to the workplace, and for those working with clinically extremely vulnerable staff.

We report on the long-awaited decision of the Supreme Court in ***Tomlinson-Blake v Royal Mencap Society*** which confirms that employers do not have to include all of the hours of a sleep-in shift when calculating whether workers are being paid the National Minimum Wage.

Following the Supreme Court's decision in February that Uber drivers are workers, we consider the Court of Appeal's decision in ***Addison Lee Ltd v Lange & others*** to refuse the Respondent permission to appeal the EAT's conclusion that Addison Lee drivers are workers.

We are now beginning to see tribunal cases brought last year in the context of the Covid-19 pandemic. We look at the interesting employment tribunal decision in ***Rodgers v Leeds Laser Cutting Ltd*** which considers whether an employee was automatically unfairly dismissed because he refused to attend work because of fears about contracting Covid-19. We also cover the Isle of Man Employment and Equality Tribunal case of ***William John Pye v Douglas Borough Council*** which considered whether an employer had made unlawful deductions from wages when its employee was unpaid during a period of being stranded abroad and unable to work because of Covid travel restrictions.

Our annual **Employment Law Conference** takes place on **10 June 2021**. A virtual, day-long conference, it will be on the theme of **leading in challenging times** and will be a great opportunity to think imaginatively about new ways of working and to learn from the practicalities of leading and managing hybrid teams through the challenges of Covid-19. Please see the link below for booking details. We look forward to seeing you there!

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

Forthcoming webinars:

Wrigleys' Annual Employment Law Conference for Charities

Leading in challenging times

10 June 2021 | 10:00 - 16:15

Full day virtual conference

Key note speaker: *Susanne Jacobs, founder and director at The Seven*
Guest speakers: *Nicky Jolley, Managing Director & Rebecca Armstrong, Organisational & Development Manager at HR2day*

Click here for more information or to book

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

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

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Return to Work Guidance - Is it time to return to the workplace?

Article published on 15 April 2021

As the country emerges from lockdown, what do employers need to know about the rules on working from home?

From 29 March 2021, there is no longer a legal requirement to work from home, though employers will need to carefully consider the situation before allowing staff to return to their usual workplace. From 1 April 2021, the shielding programme was paused, meaning employers should prepare for clinically extremely vulnerable employees' return to the workplace, if it is safe for them to do so. We consider below the nuances in the latest government guidance on working during the pandemic.

What does the lifting of the legal requirement to work from home mean?

Between 6 January and 29 March 2021, individuals were only permitted to attend work where it was "reasonably necessary…for the purposes of work". This has now changed, as the previous order to 'stay at home' unless you have a reasonable excuse has been lifted.

Although attending the workplace is no longer a breach of the law, government guidance states that individuals should continue to work from home "if you can". The guidance highlights people who work in critical national infrastructure, essential public services and essential retail (such as supermarkets and pharmacies) as examples of people who should travel to their workplace if they cannot work from home. However, it is clear that individuals do not need to be classed as a critical worker to go to work if they cannot work from home. The guidance encourages employers to take every possible step to facilitate employees' working from home, including providing suitable IT and equipment to enable remote working.

Unfortunately, the guidance does not clarify what is meant by "work from home if you can". Previous versions of government guidance have stated that everyone who can work "effectively" from home should do so, which some interpreted to mean that people could attend their workplace if, for example, they worked more efficiently there compared with at home, perhaps due to not having adequate facilities at home, or due to distractions.

Because the new guidance omits the word "effectively", it seems to suggest that those who can work from home should do so, even if this is less efficient than working from the workplace. If that is the case , someone who came to work because, for them, it was more efficient, even when they were capable of working from home, might appear to be in breach of the guidance.

What should employers consider before allowing staff to return to the workplace?

Employers will need to be mindful of the health and safety and reputational risks of allowing employees to return to the workplace if this is done in breach of guidance. For example, employers will still need to be sure that there is a rigorous health and safety assessment for Covid in their workplaces and that all reasonable mitigation efforts have been made to limit these risks for staff if they return to work.

Employers have a duty of care to staff and are required to provide a safe work environment. They should also consider any employees who indicate that working from home is having a detrimental impact on their mental health. This may necessitate allowing an employee to work in the office, even where others are refused permission. Employers will need to carefully consider each request to be physically present at work on a case by case basis and keep a record of the decision made and why.

Can staff be forced to return to the office?

As a general rule of thumb, employers need to think carefully before issuing any compulsory instructions to staff to return to the workplace. This will be particularly so if employees are able to work from home. Not only may forcing staff back to the workplace be a breach of government guidance, but it may undermine employee relations and give rise to employment claims including whistleblowing and claims relating to health and safety..

Things to be mindful of when staff return to work

Whilst all staff can now lawfully attend the workplace, there are still strict restrictions on what employees can do when they get there. For example, employees are prohibited from participating in a gathering of two or more people from different households, unless the gathering is "reasonably necessary for work purposes". Therefore, purely social gatherings of colleagues will be prohibited by law, including team lunches and after-work drinks.

Employers will also need to consider whether it is necessary for work purposes for employees to meet each other and/or with clients or other third parties in the course of their duties. For example, it is not clear if employers would need to show that a particular meeting or event could not have taken place remotely, or whether the test is met simply by showing a sufficient business reason for a meeting. It is important to note that breaching restrictions on gatherings is a criminal offence, and therefore employers may want to err on the side of caution and take a conservative approach when assessing whether a meeting or event is necessary for work purposes.

Clinically extremely vulnerable members of staff

Up until 1 April 2021 government guidance provided that if an individual has been identified as clinically extremely vulnerable, they were strongly advised to work from home because of the risk of exposure to the virus. At this point, if a clinically extremely vulnerable person could not work from home, they were advised not to attend work and to speak to their employer about taking on an alternative role or change of working patterns on a temporary basis to enable them to work from home where possible.

Due to shielding, if arrangements could not be made for the clinically extremely vulnerable to work from home, the employer may have been able to furlough the employee or the individual may be eligible for statutory sick pay (SSP) or employment support allowance (ESA) using their formal shielding letter as evidence to support their eligibility.

On 1 April 2021 the shielding programme was paused and therefore SSP and ESA stopped being available to the clinically extremely vulnerable because of shielding, only being available if the individual is not fit for work.

Government guidance to those shielding is similar to the guidance for everyone else, in that they should continue to work from home where possible, but if they cannot work from home, they can (as opposed to should) now attend the workplace, with employers making every reasonable effort to enable clinically extremely vulnerable employees to work from home.

If they have not already done so, employers should discuss as soon as possible their plans with clinically extremely vulnerable employees about their return to work. If a vulnerable employee cannot work from home, they should only be permitted to return to the workplace where it is safe for them to do so. For this to happen, employers will need to put extra measures in place to keep clinically extremely vulnerable employees safe at work, which may include offering them, on a temporary basis, a safer alternative role or adjusted working patterns.

Where it remains unsafe for a clinically extremely vulnerable employee to return to the workplace, despite extra measures put in place to protect them, it may be possible for the employer to

furlough the individual under the Coronavirus Job Retention Scheme which has now been extended until 30 September 2021. However, employers need to be wary that putting staff on furlough may raise discrimination risks if the only reason they are placed on furlough is due to the risk to their health.

Supreme Court rules that sleep-in hours should not be counted for National Minimum Wage purposes

Article published on 26 April 2021

Workers who are permitted to sleep during the shift are not performing "time work" or "salaried hours work"

The long-awaited decision of the Supreme Court on the question of sleep-in shifts has now been issued. It confirms the decision of the Court of Appeal in 2018 that employers do not have to include all of the hours of a sleep-in shift when calculating whether workers are being paid the National Minimum Wage or National Living Wage (NMW).

The NMW rules on sleep-in shifts

The starting point is that a worker is entitled to be paid the NMW, taking into account time when they are actually working, or when they are available and required to be available at or near a place of work for the purposes of working.

But there are exceptions to this rule. A worker who is "available" for work rather than working will not have the time taken into account if they are at home or provided with facilities to sleep during that time. In that case, only time when the worker is "awake for the purposes of working" will be counted, in other words when they are actually required to respond to a call or intervene to assist a client.

Case details: ***Tomlinson-Blake v Royal Mencap Society***

Mrs Tomlinson-Blake was employed by Mencap as a care worker supporting two people with learning disabilities living in the community. As well as her day shifts, she took some sleep-in shifts, for which she was paid a fixed allowance. She had her own bedroom in the house and was permitted to sleep during the night.

The employment contract required Mrs Tomlinson-Blake to remain in the house and to intervene to support the clients when necessary during the night. This happened only rarely (six times in 16 months). She received additional pay for time spent assisting her clients during these shifts.

Mrs Tomlinson-Blake brought a claim alleging that she had not been paid the NMW when taking into account time spent on sleep-in shifts. An employment tribunal upheld her claim, following previous case law in finding that she was actually working throughout each sleep-in shift and not merely available for work. This was on the basis that Mencap had regulatory and contractual obligations for a care worker to be in the house at all times and that Mrs Tomlinson-Blake was obliged to remain in the house and to listen out in case she was required to intervene. In other words, it was part of her work simply to be there. The EAT agreed.

The Court of Appeal did not agree. In what was an unexpected judgment at the time, Lord Justice Underhill held that Mrs Tomlinson-Blake was "available for work" during her sleep-in shift, rather than actually working. Therefore only the time when she was required to be awake for the purposes of working counted for NMW purposes.

Lord Justice Underhill stated that an arrangement where "the essence of the arrangement is that

the worker is expected to sleep" falls squarely under the exception set out in the NMW Regulations, that is when a worker is available to work but provided with facilities to sleep. He did not agree with the EAT that Mrs Tomlinson-Blake was actually working simply by being present on the premises.

The Supreme Court decision

The Supreme Court has now agreed with the Court of Appeal that sleep-in hours do not have to be counted, either in the case of "time work" (where workers are paid by reference to the number of hours they work) or "salaried hours work" (where workers are paid a set salary per annum). If the worker is *permitted* to sleep during those hours, they will not be counted when calculating whether the NMW is being paid. Only time during which the worker is awake for the purposes of working (responding to calls for assistance) must be counted.

Lady Arden noted that the Low Pay Commission's (LPC) 1998 recommendations, which were taken into account by the Court of Appeal, could be presumed to have been implemented in the NMW Regulations 1999. This was because the Government was bound to implement them unless it provided reasons to Parliament for not doing so, which it did not do. The LPC recommendations were that workers who were required to be on-call and sleep on their employer's premises (such as those working in residential homes) should not have the sleep-in hours counted for NMW purposes and that employers should agree an allowance for such work. Lady Arden comments in her judgment that the LPC "did not contemplate that a person in the position of a sleeper-in could be said to be actually working if he was permitted to sleep".

Lady Arden made clear that: "If the employer has given the worker the hours in question as time to sleep and the only requirement on the worker is to respond to emergency calls, the worker's time in those hours is not included in the NMW calculation for time work unless the worker actually answers an emergency call. In that event the time he spends answering the call is included…It follows that, however many times the sleep-in worker is (contrary to expectation) woken to answer emergency calls, the whole of his shift is not included for NMW purposes. Only the period for which he is actually awake for the purposes of working is included."

Comment

This decision has been long-awaited and brings to an end a period of uncertainty and the risk of claims for very large pay-outs for historic arrears relating to sleep-ins, particularly for care sector employers.

Of course, many such employers changed the way sleep-ins were paid to comply with previous case law decisions, amended HMRC guidance and the HMRC Social Care Compliance Scheme which followed those decisions.

Mencap, in its response to the judgment published on its website, has called for care workers to be paid more, stated its intention to continue paying top ups for sleep-in shifts, and for local authorities to fund these in their contracts.

Employers using sleep-in arrangements may now seek to change the way they are paid to reflect the decision of the Supreme Court. The pay structure for workers sleeping-in will depend on the wording of the contract in each case and will not simply change because of this ruling. Any changes to contractual arrangements must be agreed with the employee, or, where relevant, through collective agreement with trade unions. Employers seeking to impose such changes without employee agreement should be aware of the risks of unfair dismissal and unlawful deduction from wages claims which could follow. Having a sound and well-evidenced business reason for the change, which is clearly communicated to employees and their representatives and meaningfully consulted on, will reduce the risks and assist employers in defending claims if they are brought. It will not be enough to cite the Supreme Court's decision in this case as the reason for the change.

Addison Lee drivers confirmed as workers

Article published on 20 April 2021

Court of Appeal denies Addison Lee appeal following the Supreme Court's decision in Uber v Aslam.

In our 2018 article, *Private hire drivers were workers and were entitled to the national minimum wage* we covered an employment tribunal decision that drivers for Addison Lee, who were nominally self-employed, were in fact workers and the time during which they logged on to their employer's system was working time. Addison Lee appealed the employment tribunal's decision to the EAT, where they lost and then appealed once again to the Court of Appeal.

This case was part of a number of worker status cases progressing through the employment tribunals and court system. Many of them featured app-based businesses facing challenges from the riders and drivers who provided their services to clients, who claimed they were not independent contractors as set out in their contracts, but rather workers who were entitled to paid holiday and the national minimum wage.

The Addison Lee Court of Appeal case was delayed to allow the Supreme Court to decide Uber BV and others v Aslam and others, seen as the leading case in this series. The Supreme Court delivered the Uber decision earlier this year, which we looked at in our recent article, *Supreme Court confirms that the Uber drivers are workers after denying appeal*.

Case details: ***Addison Lee v Lange [2021]***

The claimants were private hire drivers. They brought claims for national minimum wage and holiday pay, both of which require worker status.

An employment tribunal found that the written contracts did not reflect the reality of the working relationship between the parties, which stated that the drivers were not obliged to work for Addison Lee and Addison Lee was not obliged to provide them with work. The tribunal found there was an overarching contract due to the economic reality of the relationship. In particular, the fact that the drivers rented their vehicle from Addison Lee meant they did not have the freedom to not work for the company.

The tribunal highlighted that the drivers had to use a device called an XDA through which the drivers accessed work. If a driver were logged in and did not accept a job that was provided to them through the XDA they had to have a good reason for refusing it. If a job controller from Addison Lee felt that the reason wasn't good enough, the matter could be referred to a supervisor and disciplinary sanctions might follow.

The tribunal also determined that there was considerable control of the drivers by Addison Lee. This included induction and training, a requirement of drivers to abide by the company's code of conduct and potential sanctions for insubordination. Addison Lee argued that the drivers entered contracts with each client via their app as independent contractors, but the tribunal found that the drivers had no knowledge or control over the fare, which was agreed between the customer and Addison Lee. The tribunal concluded that there was no contract between driver and the passengers and the relationship between the driver and Addison Lee was not that of contractor and client due to the level of control Addison Lee exercised over them.

The employment tribunal concluded that the Addison Lee drivers were workers, entitled to national minimum wage and holiday pay.

On appeal, the EAT held that the employment tribunal was entitled to reach the decision it had, and that the tribunal was able to disregard the terms of the contract between Addison Lee and its drivers if it found on inspection the reality of the relationship was different to that presented in the

contract.

Finally, following the Supreme Court Uber decision, the Court of Appeal denied Addison Lee the right to appeal and thereby confirmed that the drivers were workers.

Wrigleys' comment

This case mirrors the outcome of the *Uber* decision because of how closely the two platforms operate their services and engage their drivers. However, this does not mean that every taxi or delivery service operated via an app has seen its drivers or riders granted worker status and the associated rights. For example, the decision of the Central Arbitration Committee (CAC) in the case of the Independent Workers Union of Great Britain against Deliveroo, found that Deliveroo riders were not workers.

The Deliveroo decision was distinguished on the basis that the CAC found that Deliveroo riders had a genuine right to substitute another rider in their place when a job was offered, which was a key factor in deciding whether the riders were independent contractors. As set out above, the lack of genuine independence was something the tribunals and courts made an effort to highlight when considering the relationship between Addison Lee or Uber and their drivers.

The decisions in these cases further highlight that the worker status of individuals who engage with businesses via an app platform will ultimately be determined by scrutiny of the day-to-day reality of that relationship and the degree to which the individuals are free to pick and choose their jobs. In this sense, the modern working practices of engaging via an app platform have been brought into line with long-established legal principles on this issue.

Was an employee automatically unfairly dismissed for refusing to attend work due to the Covid-19 pandemic?

Article published on 27 April 2021

Tribunal considers application of workplace protection in cases of 'serious and imminent danger'.

As staff begin to return to the workplace, employers will be hoping to avoid confrontations around health and safety issues as a result of lingering worries about Covid-19. Where staff refuse to attend work or take other actions to avoid a perceived safety risk, it is important for employers to be aware of the possibility of claims under sections 44 and 100 of the Employment Rights Act 1996 (ERA 1996).

Section 44 broadly protects staff from detrimental action by their employer if they refuse to attend work because they believe they, or someone else, is in serious and imminent danger that they could not reasonably have averted.

Section 100 provides routes for workers to claim automatic unfair dismissal if they can show that they were dismissed for a prohibited reason. Chief among these is that the worker was dismissed for leaving (or proposing to leave) work when they reasonably believed there was serious and imminent danger that could not be averted (s.100(1)(d)) or where they took (or proposed to take) 'appropriate' steps to protect themselves or others when they believed they were in serious or imminent danger (s.100(1)(e)).

For more information on the effect and application of these provisions, see our earlier article Refusing to work because of fears about Covid-19 – section 44 of the Employment Rights Act.

These provisions are particularly pertinent in the context of the pandemic, but it has been difficult for employment lawyers to comment on how they would be applied to the pandemic in practice as

there is little case law to interpret them. Perhaps inevitably, some tribunal decisions on this topic are starting to come through, including a recent case focussed on s.100.

Case: ***Mr Rodgers v Leeds Laser Cutting Limited [2021]***

Mr Rodgers began working for LLCL in the Summer of 2019. LLCL's business operated out of 'a large warehouse-type space' where typically five people worked in this space at any one time.

On 23 March 2020 when the first lockdown began, LLCL communicated with staff confirming the business would remain open, asking staff to work as normal and that the company would be putting measures in place to allow it to operate as normal. LLCL subsequently followed a number a recommendations which derived from a professional risk-assessment of the workplace, including wiping down surfaces, social distancing and staggering start, break and finish times for staff to reduce mingling.

Mr Rodgers left work on 27 March 2020 and did not return. In a text message exchange a few days later with a manager at LLCL, he explained he had to stay off work until the lockdown eased. He referred to the fact he had a child who was at high risk due to suffering with sickle cell anaemia and that he had a baby who was only a few months old and therefore didn't know if the child had underlying health issues.

There was no further communication between the parties until a month later, when Mr Rodgers contacted LLCL stating that he had been told he was sacked for self-isolating and asking for stated reasons and documents, including his P45. This ultimately led to Mr Rodgers's employment being terminated.

Mr Rodgers subsequently brought a claim for automatic unfair dismissal under s.100(1)(d) and (e) ERA 1996 on the basis 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 and which he did for the protection of others (i.e. his family).

Considering the facts of the case in the context of these provisions, the Tribunal found that Mr Rodgers had not raised serious concerns about his safety at work with LLCL whilst he was at work and that there was no evidence LLCL had threatened Mr Rodgers with termination due to self-isolating and refusing to attend for work.

The Tribunal found on the facts a number of points which undermined Mr Rodgers's claims under sections 100(1)(d) and (e). For instance, it concluded that Mr Rodgers's 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 and that in his communications with LLCL he did not cite his working conditions as the reason for him not returning to work.

In addition, the Tribunal concluded that whilst Mr Rodgers genuinely believed there were circumstances of serious and imminent danger at work, it was not objectively reasonable to hold this view due to the measures put in place by LLCL in the warehouse, and that Mr Rodgers could have acted to avert the dangers by following the workplace guidance.

For these reasons the tribunal found that Mr Rodgers did not meet the requirements of s.100(1)(d) and (e), did not benefit from its protection and subsequently his claims for automatic unfair dismissal were dismissed.

Comment

It remains to be seen if this decision will be appealed, but for now this first-instance decision provides some useful insight into how courts and tribunals will approach the issue of s.100 ERA

1996 in the context of the pandemic.

It is easy to sympathise with Mr Rodgers's situation. In March and April 2020 the virus was still a largely unknown entity with the government and public still unsure precisely how it spread and what made individuals particularly vulnerable to its most serious effects. In this context, given his concerns about his family's health, it is easy to see why Mr Rodgers may have felt staying away from work was in his family's best interests.

However, as noted by the tribunal, Mr Rodgers's concerns were not limited to his workplace but extended more generally to society. This, together with evidence showing his employer took action to follow government workplace guidance and the fact that Mr Rodgers could not clearly establish that the reason for his dismissal was his exercise of precautions under sections 100(1)(d) and (e), ultimately led his claim to fail.

Mr Rodgers was relying on a claim of automatic unfair dismissal because he did not have two years' service to bring an 'ordinary' claim. If he had enough service to claim ordinary unfair dismissal, LLCL's actions and inactions (including the lack of communication following Mr Rodgers's last day at work) may well have led to a decision that he was unfairly dismissed on the grounds of procedural failures. In addition, it is not clear at all if deciding to dismiss someone because they refuse to return to work due to fears around Covid-19 would fall within the band of reasonable responses in an ordinary unfair dismissal situation.

It is also worth noting that the employer in this case did not have to contend with discrimination claims under the Equality Act 2010. Mr Rodgers did not claim to be discriminated against but his is clearly a case where the disability of others played a factor. If employers face a similar situation, they will need to be mindful of potential discrimination (and discrimination by association) claims where someone refuses to return to work on health and safety grounds linked to the Coronavirus.

Employee stranded in Cyprus due to Covid-19 wins unlawful deductions claim against employer

Article published on 16 April 2021

This case highlights the issue of stranded workers still being "ready and willing" to work.

tCovid-19 has led to some unique situations which have tested employer-employee relationships. One such scenario is where employees are unable to work even when they are ready and willing to do so. This is important because if an employer does not have a contractual right to deduct pay and there is still work to be done, the common law position is that a worker is entitled to be paid if they are ready, willing and able to do the work they are contracted for. If a worker is unable to work for a reason beyond their control, they will still be entitled to pay.

A decision of the Isle of Man Employment and Equality Tribunal (EET) has given an interesting insight into the scenario where an employee is stranded abroad because of the pandemic.

Case: ***William John Pye v Douglas Borough Council [2021]***

Mr Pye was an employee of DBC, who flew to Cyprus just before lockdown there and in the Isle of Man. This resulted in Mr Pye being stuck in Cyprus for 14 weeks. Before he travelled, there was no warning from either the Manx or the Cypriot governments that borders may close, nor did DBC advise Mr Pye not to travel.

When he realised he was stuck in Cyprus, Mr Pye spoke with his line manager to inform him of the situation and he remained in regular touch with his line manager whilst he was stranded. As Mr Pye suffered from asthma and took medication for his condition the manager informed him of the

Manx government's advice on self-isolation for those classed as "vulnerable". Mr Pye consequently contacted his GP and was issued with two fit notes which were then presented to DBC.

DBC paid Mr Pye sick pay, which amounted to his full pay. However, on review DBC decided that the fit notes were "insufficient" and "unacceptable" and, on this basis, held that Mr Pye was not entitled to sick pay under his contract. DBC therefore stopped paying Mr Pye and sought to recover the payments already made.

The EET was not impressed by DBC's sudden change of attitude towards Mr Pye's sickness absence and noted the subsequent hardships this caused him. Mr Pye was awarded the sums unlawfully deducted by DBC, which was equal to his full pay for the period he was stuck in Cyprus, and was also awarded four weeks' compensatory pay, which was the maximum allowed. The EET expressed dissatisfaction with DBC's conduct and an apparent lack of internal communication between DBC's HR team and line managers.

When considering the issue of sick pay, the EET noted that Mr Pye had been signed off because he was at risk from Covid and had received valid fit notes from his GP. However, even if Mr Pye had not been classified as vulnerable and signed off sick, the EET considered there may still have been an argument as to whether he was "ready, willing and able" to work, with the EET indicating that he likely would have been considered "ready and willing" to work, but prevented by third parties (namely the Cypriot and Manx governments) from being able to do so. Therefore, DBC would not have been able to stop paying him.

This argument appears to be somewhat moot as Mr Pye would not have been asked to work even if he had been on the Isle of Man, because he was a manual worker and could not work from home.

Comment

Although the legal system on the Isle of Man is outside of the jurisdiction of England and Wales, this case gives a useful indication of how an employment tribunal on the mainland may view an employer's actions in similar circumstances were a case like this to come before them.

Employers cannot foresee all eventualities, and a case like this highlights the wisdom of employers having contractual terms which allow them to lay off an employee who is unable to work and/ or which grants an employer the right to withhold pay if they are unable to work.

In this case, Mr Pye had a sick note and a contractual right to sick pay. It is inadvisable to challenge the validity of a GP's fit note and withhold sick pay unless there is independent evidence which undermines the stated reasons given in the fit note or there is reason to believe the fit note is fake.

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