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EMPLOYMENT LAW BULLETIN

JUNE 2021

Welcome to the Wrigleys Employment Law Bulletin, June 2021.

Rather than a swift return to the old normal, it seems the focus for future months will be on organisations and individuals "learning to live with" Covid-19. In our first article this month we look at the findings of a recent TUC survey on the longer-term health impacts of Covid on the workforce and consider whether "long Covid" will be protected as a disability under the Equality Act 2010. The first week of June was Volunteering Week, and we took this opportunity to highlight updated Covid-related guidance for organisations working with volunteers.

In celebration of Employee Ownership day on 25 June, our Employee Ownership team have written a series of articles explaining the different forms and benefits of employee ownership for businesses. We include here their overview of employee ownership. Further information can be found on our website.

We cover this month the recent high profile EAT judgment in ***Forstater v CGD Europe and others*** which considered whether the claimant's "gender critical" belief that sex is immutable is a protected philosophical belief under the Equality Act.

We continue to see interesting cases emerging from the context of the early days of the pandemic. The recent employment tribunal case of ***Khatun v Winn Solicitors Limited*** highlights the need for a fair process when seeking to change an employee's contractual terms, even in extreme circumstances such as those of the first Covid lockdown.

This case is also interesting in the context of recent calls to ban so-called "fire and rehire" exercises to impose contractual changes. We hope you can join us for our up-coming Employment Brunch Briefing on 3 August 2021 where we consider this recent debate and the options and risks for employers seeking to change terms.

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:

Employment Brunch Briefing

Fire and re-hire: a legal necessity or an abuse of power?

3 August 2021 | 10:00 - 11:15

Speakers: *Alacoque Marvin and Michael Crowther, solicitors at Wrigleys Solicitors*

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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Is “long Covid” protected as a disability under the Equality Act?

Article published on 29 June 2021

TUC calls for long Covid to be a deemed disability and highlights the ongoing and potential future impact Covid may have on workforces.

On 20 June 2021 the TUC published a report into the impact of “long Covid” on working people. “Long Covid” is the name which has been adopted to describe the long-term post-viral symptoms of Covid.

Whilst long Covid is generally accepted to exist and is something employers need to keep in mind, there is still relatively little information about the impact this is having on sufferers’ experiences at work. Symptoms, summarised here on the NHS website, include fatigue, shortness of breath, chest pain, palpitations, problems with memory and concentration, depression, anxiety, and insomnia.

The TUC report

More than 3,500 workers responded to the TUC’s survey on the impact of long Covid on daily working lives. Over three-quarters of respondents to the survey defined themselves as key workers, with the majority of these working in education or health and social care.

95% of respondents said they had been left with ongoing symptoms from Covid, 29% experienced symptoms for more than a year, and 52% said they had experienced discrimination or disadvantage due to these symptoms.

Around 20% of respondents reported that their employer had questioned the impact on them of their symptoms, 13% had faced questions about whether they really had long Covid at all, and 5% reported that they had lost their jobs because of long Covid symptoms.

The report also highlights that long Covid symptoms are leading to a considerable amount of sick leave. 20% of respondents were on paid sick leave, with a small minority being on unpaid sick leave. 18% of respondents reported that the amount of sick leave they had taken triggered absence management procedures.

TUC Recommendations

In the report, the TUC calls on the Government to recognise long Covid as a disability under the Equality Act 2010. They also urge the Government to recognise long Covid as an occupational disease which would allow sufferers to claim Industrial Injuries Disablement Benefit.

The report recommends that employers record long Covid related absence separately from other sickness absences and make reasonable adjustments to help those suffering from long Covid to continue in work.

Is long Covid a disability?

A disability is defined in the Equality Act 2010 as a mental or physical impairment which has a long term substantial adverse impact on someone’s ability to carry out normal day to day activities. There is no need for a condition to be officially recognised or diagnosed for it to be found by a tribunal or court to be a disability. “Long term” means that the substantial adverse impact has lasted for 12 months, or is likely to last 12 months. In the case of some conditions and symptom-sets coming under the umbrella term of “long Covid”, it may well be that this definition is already met and that the sufferer could already be protected by the Equality Act. However, whether any

particular person suffering from long Covid symptoms is protected will depend on the specific impact on that person and would need to be considered on the facts on a case-by-case basis.

Some conditions are automatically deemed disabilities under the Equality Act, although these are limited to: blindness, sight impairment, severe disfigurement, cancer, HIV infection, and multiple sclerosis.

Action for employers

The impacts of Covid in the workplace will need to be continually monitored by employers. Long Covid began to grab headlines many months ago, and whilst the spotlight has rightly been on the immediate threat to life caused by the virus, we are starting to see the longer-term issues emerge.

Whilst long Covid itself is, in our opinion, unlikely to be added to the list of deemed disabilities, it is becoming increasingly clear that the lingering mental and physical impacts of Covid could be protected as disabilities under the Equality Act.

Employers should seek medical information from occupational health providers and/or the individual's GP or consultant to inform them as to whether that individual may be disabled under the Equality Act and to consider any reasonable adjustments which can assist them to remain in work. Reasonable adjustments are likely to include making changes to the role, hours of work, or working environment, and adjusting the trigger points for disciplinary action in any sickness absence management policy.

Where employers decide to take action to discipline or dismiss an employee because of long Covid related absence, it will be vital to ensure that the action taken is necessary and proportionate in the circumstances, taking into account the needs of the organisation and the discriminatory impact on the individual. And any such justification should be carefully documented, given the risk of claims.

We recommend that employers should seek legal advice before carrying through sickness absence management procedures or taking disciplinary action against an employee in these circumstances.

Volunteering Week – guidance on volunteering during the pandemic updated in England

Article published on 4 June 2021

Government updates guidance to reflect step 3 of the roadmap for easing restrictions.

Between 1 and 7 June every year, volunteers' week is a chance to recognise the fantastic contribution volunteers make to communities and to say thank you for that contribution. The event is supported and celebrated by charities and organisations small and large across the UK. For more information on volunteers' week and how to get involved, please see the Volunteering Week website here.

On 17 May 2021, the Department for Digital, Culture, Media and Sport (DCMS) updated its guidance for organisations and groups in England on how to safely and effectively involve volunteers during the Covid-19 pandemic. These changes reflected step 3 of the government's roadmap for easing lockdown restrictions across England.

The updated guidance recommends that people should continue to volunteer from home where this is possible but acknowledges that it is now possible for volunteers to help outside of their home if they do not need to self-isolate. In line with wider guidance to those who are clinically extremely vulnerable volunteering outside of the home is permitted but individuals are advised to take extra steps to keep themselves safe when doing so, including minimising social interaction

and the time they spend in places where they cannot maintain social distancing.

The full guidance is available on the DCMS website, here, but we set out below the main highlights of the guidance for charities and volunteer organisations:

- where groups are organised on a formal basis to provide mutual aid, therapy or any other form of support, those groups can now continue with up to 30 participants (increased from 15), where children under five accompanying a parent or guardian do not count to that limit. This rule on children under five also applies to anyone working or volunteering;
- as per step three of the roadmap, holiday accommodation is now permitted to reopen and the guidance on the use of this accommodation for those who need to stay for volunteering purposes has been deleted;
- certain businesses and venues must remain closed and there are still restrictions on specific activities which may involve volunteers. However:
  - volunteering which cannot be done from home can continue in a closed business or venue while it remains closed to the public; and
  - closed businesses or venues can be used, including by volunteers, for a number of specific purposes only (including for the provision of food banks or other support to the homeless or vulnerable);
- in addition:
  - if people need to travel to volunteer or while volunteering, they should follow the "safer travel guidance";
  - those wishing to travel into Scotland, Wales or Northern Ireland to volunteer must check that nation's restrictions before doing so; and
  - people can leave the UK to volunteer but only where it is not reasonably possible for them to do their role from within the UK;
- while volunteering, people can meet in groups of any size from different households, indoors or outdoors. Indoor venues should allow for social distancing to be maintained and have adequate ventilation. Volunteers can also meet in groups for activities necessary for their volunteering, including recruitment and training (but not as part of a social activity). However, these groups should carefully follow social distancing and Covid-secure guidance and observe the "hands, face, space" key behaviours;
- volunteers should not enter other people's homes unless absolutely necessary and should follow Covid-secure guidance; and
- employees furloughed through the Coronavirus Job Retention Scheme can, during the hours they are on furlough, volunteer for another employer or organisation, but are not permitted to volunteer for their own employer, or an organisation linked to, or associated, with it. It is important to note that charity partnerships and branches which do not have connected control with an employer are not classed as linked or associated for these purposes and so volunteering across these partnerships is permitted.

In addition to the above, the guidance reminds organisations and groups that they have a duty of care to volunteers to ensure, as far as reasonably practicable, that volunteers are not exposed to risks to health and safety. More information about insurance cover for volunteers and what type is needed depending on the activities carried out by an organisation are available on the National Council for Voluntary Organisations website.

What is employee ownership succession?

Article published on 21 June 2021

In this article we briefly cover the basics of employee ownership and what it could mean for the future of your business.

Employee ownership is exactly what it sounds like, though it can take a number of different forms.

It can be a way in which ownership of the company is put all, or partially, into the hands of the employees (either directly or indirectly) in order to enact retirement or succession planning. It can also be a way to set up a company with an engaged workforce from day one. Employees gain a say in the running of the business, though this is still left to management, and the increased levels of transparency about a company's affairs can lead to greater employee satisfaction.

Employee ownership is one of the fastest growing forms of business ownership in the UK and research suggests that employee-owned businesses have a tendency to be more resilient, competitive, profitable and sustainable. It can be a way of securing the long-term future of a business.

Employee-owned businesses tend to have more engaged and committed employees, as they are consulted more and have a greater vested interest in the success of the business and feel more like part of a wider team.

When considering employee ownership from a retirement or succession planning angle, it is key to realise that this is a way to preserve the culture and nature of the business and the team, which a sale to a competitor or third-party investor may not.

There are three main forms of employee ownership:

100% trust ownership;
direct ownership of shares by individual employees; or
a hybrid model which includes a trust and some individual share ownership.
Further details of the different options can be found in our article 'What structures are available for employee ownership?'

Claimant's "gender critical" belief is protected under the Equality Act

Article published on 30 June 2021

But EAT makes clear that misgendering may constitute discrimination or harassment.

Trans people are protected by the Equality Act. That at least is not in debate. There is however a fiercely-fought battle being waged on a perceived clash of the rights of trans and non-binary people and the rights of women. Society is moving in some areas towards the removal of distinctions based on sex assigned at birth and accepting that people who identify as a different gender or no fixed gender should be afforded rights, services, and equal treatment on the basis of self-identification. This has sparked concerns for those campaigning for the rights and protections of women that these changes undermine hard won protections and the integrity of "safe spaces" for women and girls.

The EAT now finds itself at the centre of this debate with its recent decision that a "gender critical" belief is protected under the Equality Act. The belief in question is, briefly put, that sex is immutable from the point of conception, that trans women are men and trans men are women.

Not all beliefs are protected under the Equality Act. A religious or philosophical belief is protected only if: it is genuinely held; it is a belief rather than an opinion or viewpoint; it relates to a weighty and substantial aspect of human life and behaviour; it is cogent, serious, cohesive, and important; it is worthy of respect in a democratic society; it is not incompatible with human dignity; and it does not conflict with the fundamental rights of others. A lack of belief can also be a protected characteristic.

In recent years, the courts have been asked to consider the boundaries of this protection,

particularly where there is an argument that a belief conflicts with the protected belief or fundamental rights of others. For further detail on such cases, please see the following articles which are available on our website:

- Bakery did not discriminate when refusing to bake a cake bearing a slogan in support of gay marriage
- Doctor who refused to use pronoun chosen by transgender patients was not discriminated against
- Ethical veganism is a philosophical belief subject to protection under the Equality Act 2010

Case details: ***Forstater v CGD Europe and others***

Maya Forstater was a researcher for and visiting fellow of CGD Europe, the European arm of the Center for Global Development, a US think tank. Ms Forstater has a significant social media presence and regularly tweets on issues connected to women's and trans rights, for example voicing her view that people should not be able to change their legal sex under the Gender Recognition Act 2004 (GRA) on the basis of self-identification and that she should not be compelled to refer to a trans woman as a woman. She worked under a series of consultancy agreements for CGD over a three year period, after which her contract was not renewed.

She brought discrimination claims against CGD, arguing that her contract had not been renewed and she had been discriminated against as a prospective job applicant of CGD on the basis of her belief / lack of belief and sex. A preliminary hearing was held to determine whether her "gender critical" belief was protected under the Equality Act. At first instance, an employment tribunal decided that her belief was not protected because it was not worthy of respect in a democratic society, was incompatible with human dignity, and conflicted with the fundamental rights of others. Our report of this decision can be found on our website: Employment tribunal: a philosophical belief that men and women cannot change their sex is not protected.

Ms Forstater appealed and the EAT has overturned that earlier tribunal decision. The EAT decided that the tribunal was wrong to consider whether the claimant's belief was valid (for example whether it was supported by current scientific thinking) and clarified that tribunals should not assess whether a particular belief has merit when deciding whether it is protected. The EAT also held that the tribunal was wrong to decide that her belief was not protected because of its "absolutist" nature, commenting that protections extend to rigidly held religious or philosophical beliefs.

The EAT noted that it had to interpret the Equality Act in line with the Human Rights Act and Article 17 of the European Convention on Human Rights when deciding whether a belief is worthy of respect in a democratic society. Article 17 prohibits the abuse of human rights law to engage in any activity aimed at the destruction of the rights and freedoms of others. The EAT noted that courts dealing with the fundamental rights of freedom of thought, conscience and religion, and freedom of expression must first assess whether the claimant falls outside the scope of protection because of Article 17.

In deciding that Ms Forstater's belief was protected, the EAT stated that it is "only those beliefs that would be an affront to Convention principles in a manner akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms, that should be capable of being not worthy of respect in a democratic society. Beliefs that are offensive, shocking or even disturbing to others, and which fall into the less grave forms of hate speech would not be excluded from the protection."

The EAT stated that the claimant's belief was widely shared in society and did not seek to destroy the rights of trans people. It also commented that under the common law, sex is treated as immutable and fixed at birth, despite the fact that people can legally change their sex by statute under the GRA.

What does this mean for employers?

Notably, the appeal judge included the following section in his judgment to clarify what this judgment does NOT mean for employers and individual rights.

a) This judgment does not mean that the EAT has expressed any view on the merits of either side of the transgender debate and nothing in it should be regarded as so doing.

b) This judgment does not mean that those with gender-critical beliefs can 'misgender' trans persons with impunity. The Claimant, like everyone else, will continue to be subject to the prohibitions on discrimination and harassment that apply to everyone else. Whether or not conduct in a given situation does amount to harassment or discrimination within the meaning of the Equality Act will be for a tribunal to determine in a given case.

c) This judgment does not mean that trans persons do not have the protections against discrimination and harassment conferred by the Equality Act. They do. Although the protected characteristic of gender reassignment under s.7, Equality Act would be likely to apply only to a proportion of trans persons, there are other protected characteristics that could potentially be relied upon in the face of such conduct.

d) This judgment does not mean that employers and service providers will not be able to provide a safe environment for trans persons. Employers would continue to be liable (subject to any defence under s.109(4), Equality Act) for acts of harassment and discrimination against trans persons committed in the course of employment.

The claimant's case has been remitted to a fresh employment tribunal to decide whether the claimant was discriminated against or harassed on the grounds on her belief. One key question for the tribunal will be whether the employer acted as it did because of Ms Forstater's belief or whether it had other reasons for not renewing her contract. This is likely to include an examination of whether CGD was motivated by the belief itself or consequences of the manifestation of that belief, including the potential damage to CGD's reputation because of the tone of the claimant's contributions to this public debate and their effect on others.

It remains of fundamental importance that employers take reasonable steps to prevent workplace discrimination and harassment of all kinds. 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.

Scenarios may sometimes arise where beliefs held by an employee create conflict or offence for another person. Having clear rules on workplace and social media interactions can provide a helpful boundary between holding a belief and expressing or manifesting that belief in a way which risks harassing or discriminating against others.

Solicitor unfairly dismissed for refusing to agree changes to her employment contract during the pandemic

Article published on 17 June 2021

Failure to explore negotiations with employee were key factor.

The Covid-19 pandemic has led to many employers having to make changes to employees' terms and conditions of employment in order to take advantage of the Coronavirus Job Retention Scheme (CJRS) and/or to enable them to survive the economic challenges of the pandemic.

As Wrigleys highlighted early on in the pandemic, initial confusion about the CJRS and what it did and did not allow employers to do meant there was a risk that employers exposed themselves to claims if they forced through contractual changes (see our article *Unlawful deductions from wages claims and the furlough scheme*, available from our website).

It is not possible to unilaterally vary an employment contract. In the absence of a contractual right to make changes, then changes can only be made by agreement between the parties. However, where employees do not agree, employers may try to force through changes unilaterally in breach of contract or choose to dismiss the employee with or without an offer of re-engagement on new terms. This is referred to as "fire and rehire".

If the employer has a sound business reason for requiring the change in terms, it may be able to establish 'some other substantial reason' (SOSR) as a potentially fair reason for dismissal. 'Reasonable' in this context does not mean that a Tribunal has to agree with the reason, rather the Tribunal must find that the reason for dismissal is something a reasonable employer would consider as reasonable.

Even where the employer has a fair reason, a dismissal for failure to agree to the new terms may still be unfair where the employer has not followed a fair procedure, including consulting with employees over the proposed change and considering any alternatives to dismissal. Immediate urgent business pressures will not change the need for a fair procedure, although it may justify the process being curtailed.

Case: *Khatun -v- Winn Solicitors Limited [2020]*

After seeing a downturn in work at the onset of the pandemic, Winn Solicitors decided to place around half of its staff on furlough. Miss Khatun was one of the solicitors who was selected to keep working and, following a discussion with her head of department, it was explained that everyone would need to agree variations to their contract which were non-negotiable.

Miss Khatun was then e-mailed the following day along with all the other staff at the firm with instructions to sign and return the new contract variation within 24 hours or face likely dismissal. The variation gave the firm the freedom to place the employee on furlough or to unilaterally reduce their hours/ pay by up to 20% on five days' notice. This power was stated to be effective until the start of October 2020, with the possibility of an extension by a further three months based on business need.

The following day Miss Khatun replied saying that she was unwilling to agree the variation as she was continuing to perform the job she had been contracted to do and that if she was to be furloughed or any other unexpected situation was to arise, she would consider a variation of her terms at that point. The firm's HR director replied urging her to sign the variation and then consider any changes at the point they were introduced. Miss Khatun declined. The head of department later reiterated the firm's position that the changes were non-negotiable and that she would be dismissed if she did not agree.

The chief operating officer then instructed the HR director to terminate Miss Khatun's employment immediately with no notice, pay in lieu or accrued holiday pay on the basis that she had been 'inflexible and clearly not someone interested in the firm or her colleagues'.

The firm later accepted that it had been in breach of contract and paid her notice pay and holiday pay, however Miss Khatun continued with a claim for unfair dismissal.

The Employment Tribunal accepted that the firm had 'sound, good business reasons' for implementing the variation to the contract. It had been reasonable and not premature for the firm to want to implement the measures that it did at the time that it did, given the effects of the pandemic on the business. The dismissal therefore met the test for an SOSR dismissal.

However, the Tribunal found that the firm had not acted reasonably in treating this reason as sufficient reason for dismissal in all the circumstances.

In particular, the Tribunal found that there had been no meaningful consultation with Miss Khatun, rather the meetings between her and her superiors were a one-sided conversation in which the terms of the variation were simply put to her and her reasonable alternative suggestions to this were dismissed out of hand.

The Tribunal was not convinced by the firm's argument that it simply did not have time to negotiate with over 300 members of staff. In fact, as all other staff had signed, the firm only had to engage in discussion with Miss Khatun. In addition, the Tribunal found that based on the evidence provided, the firm had not reasonably explored alternatives to dismissal. Rather, the directors of the firm decided that if Miss Khatun did not agree, they would proceed straight to dismissal without any process being applied. Finally, no right of appeal was offered, and the tribunal did not accept the argument that an appeal process would have been pointless. As the tribunal observed, both parties' attitudes may have been more amenable by the time of the appeal hearing, making a resolution possible.

In view of all these factors the dismissal did not fall within the band of reasonable responses of a reasonable employer, and was therefore unfair.

Wrigleys' comment

So-called "fire and rehire" tactics have been raised at the highest levels of government during the pandemic. Indeed, the practice has come under considerable scrutiny for its use at such a difficult time. Whilst there have been calls to outlaw or limit this practice, so far no firm steps to do so have been taken, though ACAS has just released a report on the practice.

During a parliamentary debate on the 27 April 2021, the relevant government minister had been very clear that fire and rehire practices are "completely unacceptable" and that the threat of dismissal should only ever be a last resort and not simply used as an opening gambit in a negotiation to alter terms.

At this time, the views the minister gave are not reflected in the law on unfair dismissal. Rather, the focus of the law on this topic is on the reasons for the proposed change and whether the employer was reasonable in all the circumstances to propose them, whether they explore alternatives and whether they consulted with employees to try and find a negotiated solution. Even where an employer threatens or warns that failure to accept terms may result in dismissal, this will not in of itself mean that a subsequent dismissal is unfair, even though there may be questions over whether this is a reasonable negotiation tactic because the balance of power (usually) lies with the employer.

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