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EMPLOYMENT LAW BULLETIN

JULY 2020

Welcome to the Wrigleys Employment Law Bulletin, July 2020.

As Covid-19 restrictions become more specific and nuanced, employers in all sectors are busy finding ways to function and, hopefully, thrive in the "new normal." The Government has announced a package of measures designed to incentivise employers to retain furloughed staff into next year and to maximise opportunities for young people to gain work experience and enter the jobs market. We take a look at some of the detail of this "Plan for Jobs". We also consider the ICO's guidance for organisations conducting Covid-19 testing on employees as part of their workplace risk mitigation and provide a useful reminder of an employer's obligations under data protection law when processing special category data such as information about an employee's health.

As the furlough scheme begins to taper from next month, we consider the risks for trustees, directors, managers and HR professionals who know about fraudulent furlough claims but do not report them.

We report on the EAT's recent decision in ***O'Sullivan v DSM Demolition Ltd*** which considered when work performed before a start date will or will not count towards continuity of service – a question which can sometimes be vital in establishing whether an employee can bring an unfair dismissal claim.

In ***Varnish v British Cycling***, the EAT determined that an athlete in receipt of direct grant funding was not an employee of British Cycling. We look at the EAT's helpful review in this case of the key indicators of employee status, as opposed to self-employed status.

Unfortunately, many employers will currently be planning for or carrying out redundancy exercises. In our question of the month for July, we examine whether employers should offer a right of appeal to employees who are dismissed by reason of redundancy.

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:

- **Equality in the workplace - transgender discrimination**
  4 August 2020, Webinar
  For more information or to book

- **Equality in the workplace - disability and reasonable adjustments**
  1 September 2020, Webinar
  For more information or to book

- **Equality in the workplace - atypical working, zero hours and ethical issues**
  6 October 2020, Webinar
  For more information or to book

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Government announces new Plan for Jobs in response to the Coronavirus crisis

Plans include a Job Retention Bonus for employers who keep on furloughed staff and opportunities for young people.

The Government has published its Plan for Jobs following Chancellor Rishi Sunak's announcement in parliament last week. Further detail of these plans is expected before the end of the July.

Job Retention Bonus

There have been reports of redundancy plans across a number of sectors in recent weeks, particularly in retail and airline businesses. Concerns have been expressed that such plans have been triggered by the gradual withdrawal of support for employment costs for furloughed staff which begins on 1 August (see our recent articles on upcoming changes to the Coronavirus Job Retention Scheme (CJRS) here and here).

Perhaps as an acknowledgement of the risk to jobs linked to the withdrawal of the CJRS, the Government proposes to introduce a Job Retention Bonus. The policy states that this will entail a one-off payment of £1,000 to employers in relation to each furloughed employee who remains continuously employed through to the end of January 2021. It will only apply in relation to those employees who earn a monthly average of more than the Lower Earnings Limit of £520 per month between November 2020 and January 2021. Bonus payments will be made in February 2021.

Kickstart Scheme

It is likely that young people will be particularly hard hit by the impact of Coronavirus on employment opportunities. This will in part be because of closures and reduced trading in industries which employ a disproportionately high number of younger workers, including hospitality, tourism and high street retail. Young people are also likely to be hampered in seeking work by their lack of work experience.

As part of its Plan for Jobs, the Government intends to introduce a £2 billion Kickstart Scheme to provide 6-month work placements for people aged 16 to 24 who are on Universal Credit and who are at risk of long-term unemployment. The scheme will provide funding to cover 25 hours a week at the National Minimum Wage hourly rate, along with National Insurance contributions and employer minimum automatic enrolment contributions.

Additional funding for traineeships and apprenticeships

The Plan for Jobs also sets out the Government's intention to provide additional funding for employers who engage with current schemes for traineeships, sector-based work academy placements and apprenticeships.

An additional £111 million will go towards funding traineeships in England. These are unpaid work placements for unemployed 16 to 24 years olds. They must include at least 100 hours of work experience and last for no more than 8 weeks. The trainee can receive help with English and maths during the placement. The Government will pay employers £1,000 per trainee taken on under this scheme. Traineeships are being extended to young people who have level 3 qualifications (such as A-levels, tech levels and level 3 NVQs).

The Plan for Jobs includes an additional £17 million in funding to increase the number of sector-based work academy placements. These are 6-week work experience placements which

include pre-employment training and a guaranteed job interview.

Under the new proposals for apprenticehsips, employers will receive an additional payment of £2,000 (for apprentices under 25) or £1,500 (for apprentices aged 25 or over) for each apprentice they hire between 1 August 2020 and 31 January 2021. The £2,000 payment will be in addition to the usual payment to employers of £1,000 for each apprentice who is aged 16 to 18 or who is aged under 25 and has an Education Health and Care Plan.

Green Jobs Challenge Fund

The Government also plans to invest up to £40 million to create and protect 5,000 "green jobs" in England through environmental charities and public authorities. These green jobs will involve improving the natural environment, including planting trees, restoring habitats, clearing waterways, and creating green space for people and wildlife.

Comment

Full detail of how the Job Retention Bonus will work has not yet been published. Questions remain as to whether the bonus will be paid to employers in relation to each current member of staff who has been furloughed for any length of time and at any point between the beginning of March and the end of October. It is also uncertain whether there will be any further criteria to be met, for example in relation to the continued employment of these employees. If employers wait to receive the bonus and can then proceed to redundancy dismissals, the unemployment crisis may simply be further postponed by this intervention. On the other hand, the requirement to pay full employment costs for all employees from November onwards may compel some employers to carry out redundancies despite the promised bonus. There has also been criticism from employers who have struggled through the crisis without furloughing staff, perhaps using cash reserves, and who will not be in receipt of similar support.

It is to be hoped that these investments and innovations increase the life chances of young people and avoid mass unemployment in the upcoming months. Clearly employers will need to see the detail of these schemes before being able to assess whether they will be relevant or helpful for their organisations in the current crisis and beyond.

As those employers will know who already engage apprentices, there are significant responsibilities and obligations for employers who offer such places to young people and they should not be undertaken lightly. Voluntary and third sector employers may, however, be able to gain much from these opportunities to engage with a younger demographic.

Considering data protection before testing employees for Covid-19

We consider the ICO's guidance for organisations conducting testing of employees and provide practical advice for complying with data protection law.

As an increasing number of employers return to face-to-face contact many will, as part of their risk assessment, carry out testing or undertake other health checks to discover whether their employees have symptoms of Covid-19. The Information Commissioner's Office ("**ICO**") has produced guidance to help organisations comply with data protection law when doing so.

Why is data protection law relevant?

Employers carrying out Covid-19 testing will process personal data in receiving employee test results and so must comply with their obligations under the General Data Protection Regulation ("**GDPR**") when doing so.

Personal information about an individual's health is 'special category' personal data. Special category personal data is given specific protection under the GDPR, which will be of particular relevance when processing information about whether an employee has symptoms of Covid-19.

What lawful bases and exemptions are applicable when processing personal data?

When processing special category personal data, an exemption to the general prohibition (under Article 9 of the GDPR) on processing such information must be identified, following which a lawful basis for processing the personal data must then be established (under Article 6 of the GDPR).

Exemption to the Article 9 prohibition on processing special category personal data

Exemptions under the GDPR (as supplemented by the UK's Data Protection Act 2018) permit the processing of special category personal data where the processing of the information is necessary for reasons of ensuring the health and safety of employees.

However, the information processed must be strictly necessary for the prevention, so excessive information shouldn't be taken. What is necessary will depend on the tasks being undertaken by your employees, relevant government guidance and the testing available.

For example, in some roles it may only be necessary to ask questions about general health, in others a temperature check may be required, others again may involve monitoring, some may need a more intrusive check of an employee's health.

Lawful basis under Article 6 of the GDPR

The lawful basis for processing testing information may well be in pursuance of a legitimate interest of the organisation (where the organisation is not a public authority) or carrying out a public task, but in each case a lawful basis analysis (including a legitimate interests assessment) should be undertaken to assess the basis on which the information is processed and any safeguards which would need to be in place. Again, the information processed should be limited to that which is necessary.

What about consent?

Consent is unlikely to be an appropriate exemption or lawful basis for processing personal data about employees, as the imbalance in power is unlikely to permit the freedom to give consent as outlined in the GDPR.

Before carrying out any testing

Employers should be open and honest with employees about the use of their health data and what decisions will be made with the information gained from Covid-19 testing.

Employees should be informed as to how their personal data is going to be processed in the course of testing. This might be done through an updated employee privacy notice or through a separate notice to employees specific to the testing regime.

Discussions with employees, and their representatives including unions, on the proposed use of personal data in the carrying out of testing is a good way of ensuring transparency in the use of personal data. This may be undertaken as a part of a data protection impact assessment.

Can we share results with our employees?

It is important to minimise the personal data being shared, particularly where in the case of

special category personal data.

In most cases, it will be entirely possible to reveal that someone in the workplace has contracted Covid-19 without revealing their identity (or information which would identify them), removing the need to share personal data with employees.

If, as a result of particular circumstances, it is not possible to share this information without revealing the individual's identity, this should be identified before testing takes place and employees notified accordingly. Completing a data protection impact assessment would help identify this issue in good time to ensure early notification to employees.

How can we ensure we protect the personal data from the test results?

At all times, employers must ensure that they properly assess the risks to, and implement appropriate security measures to protect, personal data.

Simple steps such as password protecting or restricting access to documents can be highly effective in protecting personal data. More advanced security measures could be appropriate and must be considered if so.

Furlough fraud

Complaints continue to be received by HMRC about possible furlough fraud by employers.

The government has gone to considerable lengths to support UK employers and employees during the coronavirus pandemic. A central feature of this support package has been the introduction of the Coronavirus Job Retention Scheme (the 'Scheme'). Wary of the potential for fraudulent claims, the Scheme requires employers and their employees to meet certain minimum eligibility criteria before a claim for funding can be made.

It is widely accepted that at some point in the future HMRC will conduct an audit exercise to verify the claims made by employers, but it seems that some employers are taking the risk of submitting fraudulent claims, perhaps on the basis that HMRC may struggle to accurately audit every single claim.

However complaints have arisen that furloughed employees, including those on reduced wages, are being required to continue working or to undertake work for associated employers. Protect, the whistleblowing charity (formerly known as Public Concern at Work) has reported an increase in calls to its whistleblowing helpline.

The government has announced plans to give employers a 30-day window of opportunity to confess to furlough fraud. HMRC is expected to gain powers to investigate furlough payments to ensure amounts claimed were accurate and that the money was used to pay furloughed employee costs. If funding has been overclaimed, employers have 30 days to notify HMRC, or 30 days from the date the new Finance Bill receives Royal Assent (which is expected in July 2020).

HMRC is also expected to be given powers to charge penalties to fraudulent employers who deliberately over-stated any funds claimed from the Scheme and/or who did not use the funding appropriately. This is expected to include the ability to pursue directors of insolvent companies for money.

A warning to professionals

Fraud is a serious offence which at its heart involves a dishonest act to obtain financial reward through false representation. Although employers may commit furlough fraud in such a way

as to prevent their HR department or individuals within a finance team being unaware of the practice, if professionals, either internal or external to the employer, become aware of or are suspicious of fraudulent practices and do nothing, they run the risk of becoming personally involved in the act and accountable for the fraudulent action.

Anyone who finds themselves in such a situation is advised to report their concerns internally with a line manager or supervisor and in accordance with any whistleblowing policy, or in its absence a grievance procedure. If this isn't felt to be effective then individuals should consider taking a look at HMRC's online reporting webpage. Protect can also provide advice (0203 117 2520). Concerns remain in relation to how effective employment claims may be in terms of protection for whistleblowers, particularly in view of the likelihood of losing your job, but this does need to be weighed against possible prosecution. Only recently whistleblower Amjad Rihan was awarded $10.8 m in damages against his former employer, Ernst and Young. However, such successes remain few and far between.

If company directors or trustees of an employer organisation fail to act on knowledge or suspicion of fraudulent claims, they are likely to be in breach of their duties to act in the best interests of the organisation and risk significant reputational risks (both organisational and personal). If the organisation is a charity, such issues are undoubtably reportable to the Charity Commission.

For more information about the application of whistleblowing protection to volunteers and trustees, please see our most recent article on the subject.

Does work undertaken before a "start date" count towards continuity of employment?

Recent case highlights the difference between working under a contract of employment and 'collateral work'.

Employees need two years' service to bring an unfair dismissal claim in most circumstances.

S.211(1)(a) of the Employment Rights Act 1996 provides that a period of continuous employment begins 'with the day on which the employee starts work'. Case law has subsequently established that this means work performed under a contract of employment.

It is not uncommon for employers and their former employees to dispute the employee's length of service, whether there was some form of working relationship between the parties prior to the start date stated in an employment contract or the termination date can be put back in some way. A recent Employment Appeal Tribunal case considers a situation where the employee claimed their employment began during a week in which they received cash-in-hand payment for attending a worksite on which their employer was performing work.

Case details: ***O'Sullivan v DSM Demolition Ltd [2020]***

DSM argued that the tribunal had no jurisdiction to hear Mr O'Sullivan's unfair dismissal claim because he had insufficient service to bring it.

Mr O'Sullivan relied on the fact that he had performed work at a site where DSM was carrying out work for a client in the week before his contractual start date. Mr O'Sullivan had been driven to the site by a member of DSM's staff and was paid £100 cash-in-hand by another member of DSM's staff for his work on the site that week.

At a preliminary hearing, the tribunal judge determined that the work carried out by Mr O'Sullivan had not been done under a contract of employment with DSM and that he had

worked that week as a subcontractor. The employment judge therefore found that Mr O'Sullivan did not have sufficient service to bring his claim. Mr O'Sullivan appealed.

Considering the appeal, the EAT made reference to the tribunal's consideration of *Koenig v Mind Gym Limited [2012]*. In *Koenig*, an employee had been asked to attend a meeting prior to their agreed start date as it would be useful for them to do so, but they were not obliged to attend the meeting nor were they paid for attending it. As a result, the EAT, when deciding on *Koenig*, differentiated between work performed under the contract of employment and work that was "collateral" to, but not performed under, the contract of employment. Collateral work does not count when calculating continuous service.

The EAT found that the tribunal had reasonable grounds on which to conclude Mr O'Sullivan's employment did not begin prior to the stated contract date. This was because the offer of work on the site the week previously was not obligatory and Mr O'Sullivan's actions at the time did not suggest he considered this work to be under his agreed contract of employment. This was evidenced by the fact he was only paid £100 for the week's work, that he was not included on the payroll run for the work on the site and had not, at any time, brought a complaint about or a claim for underpayment of wages. In addition, the tribunal had been entitled to consider Mr O'Sullivan to be a subcontractor on the basis that the £100 was paid cash in hand out of the pocket of a DSM employee and DSM's client was not charged for Mr O'Sullivan's work that week.

The appeal was dismissed.

Conclusion

This case provides useful guidance on the specific point of how to treat an employer's interaction with anyone who later becomes an employee under a direct contract of employment with them. In such cases the onus is placed on the employee to establish that their employment started at the earlier date.

In practical terms this can be very difficult, particularly if the employer's payroll systems showed that the employer treated them as employed from the date claimed by the employer and this was not challenged by the employee. Employees might explore if there is an "associated employer" relationship which can extend continuity of employment, but which the personal payment by a DSM employee did not satisfy here. .

This case also shows that it is possible for employers to invite new starters to engage in activities and even to perform work before a contract of employment begins without extending the employees' continuity of employment, although the risk of it doing so and in particular the likelihood of the ensuing argument on the point (which in this case went as far as the EAT) recommends care and caution.

A professional sports person paid by lottery grant and sponsorship was not an employee or worker

The way an athlete was funded meant that there was no employer-employee relationship

Employment status cases determining whether someone is a worker, employee or independent contractor are notoriously fact-specific.

A recent decision of the Employment Appeal Tribunal considered the circumstances of a British athlete and what the implications were of their funding and pay arrangements when determining employment status.

Case: ***Varnish v British Cycling [2020]***

Varnish's contract with British Cycling was not renewed in 2016, which British Cycling said was due to 'performance reasons'. When British Cycling failed to produce performance data to back up its stated reasons for not renewing the contract, Varnish brought claims for unfair dismissal and discrimination.

However, Varnish needed to establish an employment relationship with British Cycling to bring her claims, and an employment tribunal found that she did not meet this requirement. Varnish appealed the decision.

The EAT conducted a wide-ranging review of case law on employment status and made several important observations, as follows:

- For an employment or worker relationship to exist there must be "mutuality of obligation" between the employer and individual, meaning an obligation on the employer to provide work and an obligation on the individual to perform work
- When seeking to distinguish between employees and the self-employed, tribunals may apply the "dominant purpose test" which considers whether the dominant purpose of the contract is to provide personal service (suggesting the person is not self-employed)
- In situations where an individual has lesser bargaining power than an employer and the lack of ability to negotiate individual terms, this will normally point to the individual being an employee
- Tribunals and courts should then consider these factors as a whole before reaching a conclusion

In particular, the EAT found that the funding arrangements for Varnish in this circumstance were inconsistent with her being an employee or worker of British Cycling. In particular, the nature of grant funding from UK Sport and the National Lottery, and the lack of remuneration from British Cycling to Varnish, meant that there were no 'wages' being paid by British Cycling to Varnish, which in turn meant there was no employment relationship between them.

Comments

Because of the unique position of professional athletes, the application of this case is likely to be very limited. However, the decision is likely to be of interest to organisations where grant funding pays the wages of all or some of its staff, particularly if the grant funding is paid directly to the recipient by the funder and is not paid to the organisation to pay on to the staff member.

As in all employment status cases, employers also need to be aware that an individual who is nominally self-employed could be found to be an employee for tax or employment law purposes, which means that a tax and/or employment tribunal may come to different views when faced with the same, or very similar, scenario.

Question of the month: Do you need to offer an appeal in redundancy dismissal situations?

Although offering an appeal is recommended, there is no statutory right to one in redundancy situations.

The ACAS Code of Practice states that employers should provide an appeal process for individuals following a disciplinary and grievance procedure. However, this requirement does not apply to redundancy dismissal decisions. The ACAS Guide on redundancy states that it is good practice to offer an appeal to employees who are made redundant, but unlike the ACAS Codes of Practice, the ACAS Guide has no legal force. Therefore, while employers need to be

mindful of what their own policies and procedures say on the issue of redundancy (if anything) there is no legal obligation to offer an appeal to an employee who is made redundant.

Case law has confirmed that there is no obligation on an employer to provide an appeal in a redundancy scenario unless there are special circumstances, e.g. where a right is granted under contract, a local by-law or via an employer's policy (where a failure to comply may render the redundancy dismissal unfair).

One of the arguments for not granting a wide right to appeal against a redundancy decision is that, unlike in situations involving capacity and disciplinary issues, where reinstating the employee does not affect any others, if a decision to make someone redundant is overturned it is likely to have an impact on others. The counter point is that allowing a limited appeal to procedural issues gives employers an opportunity to fix procedural flaws in the process.

When considering fairness in redundancy procedures, the leading case of *Polkey v A E Dayton Services Ltd [1987]* provides that an employer will likely be acting unreasonably in dismissing an employee for redundancy unless it:

- Warns and consults employees or their representatives about the proposed redundancy;
- Adopts a fair basis on which to select for redundancy; and
- Searches for and, if it exists, considers suitable alternative employment.

Therefore if an employee is able, to challenge the above procedural aspects of the process then it presents an employer with the opportunity to correct the mistake and reduce the risks of a tribunal finding that a small procedural flaw makes the dismissal on the grounds of redundancy unfair.

Wrigleys' comment

Although we recommend that employers provide an appeal mechanism in redundancy scenarios, it is ultimately for individual employers to weigh up the pros and cons of this. In addition, and particularly if redundancy procedures are envisioned, employers should inspect their policies and procedures and check what their position is before considering any changes.

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