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EMPLOYMENT LAW BULLETIN

JULY 2021

Welcome to the Wrigleys Employment Law Bulletin, July 2021.

This month has seen some rapid legislative change to bring in a requirement for most staff entering residential care homes to be double vaccinated against Coronavirus (unless there is a clinical reason not to have the vaccine). In our first article this month, we consider some of the employment law implications of this change which comes into force on 11 November 2021.

We also report on the Government's response to its recent consultation on sexual harassment in the workplace, including stated intentions to introduce a duty requiring employers to prevent sexual harassment, and to introduce legal protections from third-party harassment.

A recent appeal decision in the Scottish equivalent of the Court of Appeal provides interesting reading for employers dealing with disciplinary issues where employees are being investigated by the police. We report on the case of **L v K**, where dismissal followed a decision to drop the prosecution of a teacher charged with possessing indecent images of children.

In ***Dobson v North Cumbria Integrated Care NHS Foundation Trust***, the EAT considered whether a claimant bringing an indirect sex discrimination claim needed to bring evidence to show that women are subject to the "childcare disparity", or whether courts can accept without evidence that women as a group still bear a greater proportion of child-caring responsibilities.

We also feature the last in a series of articles from our Employee Ownership team, focusing on the ingredients for the long-term sustainability of an employee owned business.

I hope you can join us for the next in our series of free **Employment Law Brunch Briefings** which takes place at 10am on Tuesday 3 August. The subject is the topical issue of changing terms and conditions through dismissal and re-engagement on new terms, often referred to in the press as "**fire and re-hire**". This session will consider the risks of this approach, including those to reputation and workforce relations, discuss alternatives and ways to limit the legal risks. Please see the link below for more information and to book your place.

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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Regulations to make Coronavirus vaccination compulsory for most care home staff are signed into law

Article published on 30 July 2021

Vaccination requirement will apply to most people working in CQC regulated care homes from 11 November 2021.

On 22 July, the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021(the Regulations) were signed into law. In this article, we consider the new rules and some of the implications for registered care home employers impacted by them.

For consideration of the wider question of whether other employers can require staff to be vaccinated, please see our previous article: Can employers insist that employees are vaccinated against covid-19? (available from our website).

Under the Regulations, it will be a requirement for all Care Quality Commission (CQC) registered care home providers to ensure that no-one enters the care home unless they fall into one of a number of categories. These include:

- they can provide satisfactory evidence to the registered provider that:
  - they have received the complete course of an authorised Coronavirus vaccine; or
  - they should not be vaccinated with any authorised vaccine for clinical reasons;
- they are a member of the emergency services or it is reasonably necessary for them to provide emergency assistance in the home;
- it is reasonably necessary for them to provide urgent maintenance assistance in the home;
- they are visiting a service user who is dying; or
- they are providing comfort or support to a bereaved service user.

The restriction will apply to those employed by the registered provider but also to others entering the home, such as contractors and visiting medical professionals.

Care home service users themselves, and their friends and relatives who are visiting service users in the care home will not be subject to the restriction. It will also not apply to people under 18 years of age. However, the new rules will impact on volunteers visiting the home unless they fall into one of the categories above.

The Government consultation

This follows the Government's response to its recent consultation (link here) on whether vaccination should be a requirement for staff working in older age care homes. The consultation response shows that care home providers were mostly in favour of the initial proposals but that service users and relatives of service users were mostly opposed. Individuals working in adult social care were divided with just under half supporting the policy. Overall, 57% of respondents were not in favour of the proposals.

Despite these mixed views, the Government forged ahead with the proposals, broadening out the requirement to include all CQC regulated care homes and not just those caring for older age residents.

Medical exemptions to the vaccine requirement

Government guidance for the sector is expected soon. It is hoped that this will give care home providers more detail on the scope of "clinical reasons" for exemption and the process of implementation.

In its response to the consultation, the Government has suggested that medical exemptions will be fairly narrow, in line with current Public Health England guidance on clinical reasons not to have the vaccines (the "Green Book" link here).

The Government has specifically ruled out exemptions on the ground of religious belief, commenting that such an exemption would be "difficult to implement and prove and would likely significantly reduce the impact of the policy in achieving its aims of increasing levels of protection for both residents and staff".

What should care home employers do now?

Registered care home providers will already be considering the implications of this new requirement. The new CQC restriction is likely to require a change to contractual terms and so employers will need to commence consultation with trade unions (where relevant) and staff in good time before the rules come into force. Where staff are unlikely to have had the full course of vaccines or to be able to prove a clinical reason for not being vaccinated by 11 November, employers will need to consult with individuals and to consider carefully any redeployment options.

In some cases, there may be no alternative to dismissal, which may be by reason of "statutory restriction" or "some other substantial reason". Employers should ensure they take contractual and statutory notice requirements into account and consult with individuals *before* notice of termination is given, keeping a paper-trail of the consultation process and any offers of alternative roles.

Recruitment where the vaccination requirement applies

The restriction will of course impact on recruitment to roles within care homes. Organisations should take advice on Equality Act rules on job adverts and pre-employment health-related questions before planning recruitment processes.

Broadly, advertising a role including a vaccine requirement could be indirectly discriminatory and so any such requirement in an advertisement should be justified as a proportionate means of achieving a legitimate aim. It will be important to ensure that advertisements do not put someone off from applying for the role where they may have a medical exemption.

Asking about vaccine status as part of a recruitment process will be a health-related question. Generally, employers should not ask about vaccine status before a job offer has been made, although the offer can be conditional on the employee providing satisfactory evidence that they can comply with the restriction (for example that they have had a full course of an authorised vaccine or have a clinical reason not to have the vaccine). Such questions can however be asked before a job offer is made if this is necessary to establish "whether the candidate will be able to carry out a function that is intrinsic to the work concerned". This is likely to apply to roles within CQC regulated care homes.

Can employers process personal data about vaccine status?

The Regulations make clear that data protection obligations will continue to apply but state that registered care home providers may process evidence in relation to the restriction. Lawful bases for processing information about vaccine status, vaccine intentions and medical exemptions, which is special category personal data, are likely to be that the processing is "necessary to comply with a legal obligation to which the controller is subject", and that processing is "necessary for the purposes of performing or exercising obligations or rights which are imposed or conferred by law on the employer or employee in connection with employment". Consent is not likely to be an appropriate basis given that the information will be required to be collected as a CQC requirement.

Employers should consider whether their privacy notices require updating to include information about processing personal data relating to vaccination.

Employment law remains the same

It is important to note that the new requirement is a change to CQC regulation requirements and not a change to employment rights or law. Organisations must consider the risks of unfair dismissal, discrimination and other employment-related claims when planning their strategy for implementation. Because of the complexity of this area, we strongly recommend that employers subject to the new requirement seek specialist legal advice at an early stage.

Government responds to consultation on workplace sexual harassment

Article published on 30 July 2021

Response proposes introduction of new duty on employers to take 'all reasonable steps' to prevent sexual harassment.

In July 2019 the government launched its consultation into workplace sexual harassment, which ran until 2 October of the same year. The consultation was launched in the face of a series of claims and newspaper stories, including the #metoo movement, that shone a light on the prevalence of workplace sexual harassment, particularly impacting on women. In 2018 the Women and Equalities Select Committee undertook an inquiry into sexual harassment in the workplace.

As noted in the report, workplace sexual harassment has been prohibited by the Equality Act 2010 (the Act) and its predecessor legislation for decades, yet harassment and its effects continue. The consultation therefore sought to hear evidence on, amongst other things:

- introducing a mandatory duty on employers to protect workers from harassment and victimisation in the workplace
- how to strengthen and clarify the laws regarding third-party harassment
- whether interns were protected by the Act and whether the Act should be extended to cover volunteers
- extending employment tribunal time limits in the Act from three months

The response to the consultation, released on 21st July 2021, notes that many respondents gave positive feedback to the proposal to introduce a new duty on employers to prevent sexual harassment and a common view that employers would be motivated by this to enact changes. There was broad support for protections to cover interns and volunteers, though concerns were raised of the potential impact this could have on the third sector, particularly smaller charities, due to the administrative burden.

As a result, the government has announced its intention to introduce a duty requiring employers to prevent sexual harassment to make the workplace safer for everyone and explicit protections from third-party harassment will also be introduced.

On extending protection to volunteers and interns, the government concluded interns were already likely to be covered by protections under the Act but it would not extend the protection to volunteers as this could have 'undesirable consequences'.

Finally, the government said it would look at extending the time period for claims for workplace sexual harassment under the Act to six months.

A note on third party harassment

Protection against third party harassment was clearly set out at s.40 of the Act which created a 'three strikes' rule which said that if harassment had previously happened twice before and the employer knew about it but failed to take reasonable steps to prevent it from occurring again then the employer could be held liable, even if the harassment was not by the same third party or of the same nature in any of those three events of harassment.

However, in 2012 the government's response to consultation on repealing s.40 of the Act concluded that 'nothing in the consultation responses […] persuaded us that there is a case for retaining [s.40].' This conclusion was arrived at despite a clear majority of respondents to the consultation being against s.40's repeal.

With s.40 of the Act repealed a narrower avenue for third party harassment claims was left under s.26 of the Act. The Court of Appeal's decision in *Unite the Union v Nailard [2018]* suggested that an employer would only be liable under s.26 in exceptional circumstances where its employee was harassed by a third party and the employer's failure to protect them was motivated by the protected characteristic. In effect, the repeal of s.40 of the Act meant employers were very unlikely to be found liable for a third party harassing an employee.

Comment

We can expect legislation imposing a duty on employers to protect its employees from sexual harassment, including that from third parties, to be introduced when parliamentary time allows. It will be interesting to see how the government goes about reintroducing liability for the actions of third parties and whether this will follow the 'three strikes' rule, or some other test.

Reputational and safeguarding risks were "some other substantial reason" for teacher's dismissal

Article published on 23 July 2021

Decision that a teacher was unfairly dismissed when they were not prosecuted for criminal charges is overturned.

In September 2020 we posted an article about the Scottish EAT's decision that a teacher had been unfairly dismissed when he was not prosecuted for possession of indecent child images on a laptop taken from his home.

Our original article is available on our website, for further background - (*Teacher was unfairly dismissed after decision not to prosecute for criminal charges*).

In summary, the EAT's decision relied on three key factors:

- there had been procedural unfairness because the grounds of dismissal (reputational risk) were not set out in the letter inviting the teacher to the disciplinary hearing;
- in the EAT's view, the decision to dismiss was on the grounds of misconduct and the employer had failed to establish that it was more likely than not (i.e. more than 50% likely) that the teacher had downloaded the images (the teacher denied this and other parties had access to the computer); and
- the employer, the local authority, relied on potential reputational damage as the reason for dismissal, but had not assessed whether reputational risk was likely to have happened or to happen in the future on the balance of probabilities.

The decision was appealed to the Inner House of the Court of Session ('CoS') in Scotland

(equivalent to the Court of Appeal in England and Wales).

Case: ***L v K [2021]***

The CoS drew attention to the approach taken by the original tribunal. The teacher had brought a claim for unfair dismissal. Accordingly the tribunal had to address a two stage test; first whether the dismissal was for a potentially fair reason and, if so, secondly, whether the reason for the dismissal fell within the band of reasonable responses open to the local authority and was fair in all the circumstances.

The tribunal had been satisfied that the local authority had grounds to dismiss for 'some other substantial reason' ('SOSR'), and that this stated reason was genuine and substantial and therefore potentially fair. The tribunal then considered if dismissal for SOSR was within the band of reasonable responses open to the local authority given the facts. The tribunal concluded that it was, despite the teacher not being prosecuted, because he had not been exonerated and as such there was an unacceptable risk to children if he continued to work for the local authority. This also created a risk of reputational damage and a breakdown in trust and confidence in the teacher by the local authority.

Procedurally, the tribunal considered that these issues and the risk of dismissal had been clearly set out in the letter inviting the teacher to a disciplinary hearing. Reputational risk had been referred to in the investigation report which was available to the teacher before the disciplinary hearing took place although it had not been included as a specific allegation.

Reviewing the EAT's decision, the CoS highlighted that the EAT had erroneously based its decision on the concept that the teacher was dismissed for conduct/ misconduct when the tribunal had made clear the teacher was dismissed for SOSR. Dismissal for SOSR did not include nor require a belief that the teacher was responsible for, or involved in procuring, the images found on their computer.

The CoS confirmed that the tribunal applied the right test when it considered the dismissal for SOSR to be within the band of reasonable responses. Whilst other employers may not have dismissed this teacher in these circumstances, that did not mean the decision did not fall within the band of reasonable responses. The CoS pointed out that the EAT could only address errors of law and not fact. As the right law had been applied by the original tribunal it was irrelevant that the EAT came to a different conclusion.

Addressing the lack of mention of reputational risk and loss of trust and confidence in the disciplinary invitation letter, the CoS considered the tribunal was right to say that the contents of the letter to the teacher made clear the basis of the action being taken against him and that he may be dismissed. The final reason for dismissal was based on the elements identified in the letter and highlighted in the report provided to the teacher in advance of the disciplinary hearing.

Finally, the CoS concluded that there was ample evidence that supported the local authority's concern over reputational risk given the employer's duty to safeguard children in its care and the nature of the criminal proceedings, even if these did not result in a prosecution. The CoS commented that reputational risk in these circumstances was "self-evident and hardly required detailed elaboration, not least since it was ancillary to the child protection considerations".

For all of these reasons the CoS upheld the local authority's appeal and ordered that the tribunal's original decision to dismiss the unfair dismissal claim be restored.

Comment

Ultimately, the CoS upheld the original tribunal's decision because the tribunal was best placed to determine the facts and had not misapplied the relevant legal tests. Although the original tribunal

stressed that the decision was very difficult for the local authority, it was entitled to find that the decision to dismiss was one of a number of reasonable responses open to it in these specific circumstances, even if other employers would not have dismissed the teacher.

This case will again highlight to employers that among the key factors to achieving a fair dismissal are making the concerns, issues and consequences of disciplinary matters clear. It is best practice to ensure that the specific allegations and potential grounds for dismissal are clearly set out in a disciplinary invite letter so as to avoid the types of arguments the local authority saw in this case.

In addition, we would caution that employers not rely on reputational risk being 'self-evident' by a tribunal as it was in this case – each situation should be considered on the specific evidence and a conclusion should be drawn from this as to whether reputational risk is more likely than not to occur.

Indirect discrimination: no need to prove that women as a group are subject to the "childcare disparity"

Article published on 9 July 2021

Women are still more likely to have caring responsibilities despite increase in fathers caring for children.

Statistics show that fathers are spending increasing amounts of time caring for their children and it is now more common for fathers to seek flexible working and reduced hours because of caring responsibilities. (See the latest Working Families Modern Families Index for recent trends in the split of responsibilities between mothers and fathers.) Is it therefore still true to say that women as a group are more likely to be disproportionately disadvantaged by a requirement to work at certain times, for example at weekends or unsociable hours? For employment tribunals, this is a key question when considering indirect sex discrimination claims.

In order to prove indirect discrimination, the claimant has to show that a policy, criterion or practice (PCP) which applies to everyone puts a group of people who share their protected characteristic at a particular disadvantage. The claimant also needs to show that they have personally suffered this disadvantage. Usually, a claimant will be required to present evidence to show both the group and the individual disadvantage. For example, statistics showing that autistic people perform less well in psychometric testing on recruitment.

But this is not always required. Courts and tribunals must take "judicial notice" of matters which are "notorious" or "well-established". This means that they can accept an assertion from a party without the need for evidence to be presented on it. In past cases, tribunals and courts have made clear that it is well-established and patently obvious that women as a group continue to be more likely than men to take on the burden of childcare (the "childcare disparity") and so to be disadvantaged by a requirement to undertake certain working patterns.

In a recent case, the EAT reiterated that employment tribunals should continue to take judicial notice of the childcare disparity without evidence being presented to prove it.

Case details: ***Dobson v North Cumbria Integrated Care NHS Foundation Trust***

Mrs Dobson was employed as a community nurse for a NHS Foundation Trust. Her employer sought to bring in a requirement for all community nurses to work some weekends. Mrs Dobson did not agree, making clear that she had caring responsibilities for her disabled children and could not make alternative arrangements for their care.

The NHS Foundation Trust put Mrs Dobson on notice of termination of her existing contract and

offered her a new contract including the new requirement to work some weekends. Mrs Dobson did not accept the new terms and was dismissed. She brought claims for unfair dismissal and indirect sex discrimination to an employment tribunal.

Her indirect discrimination claim was brought on the basis that women in general are at a disadvantage when required to work certain working patterns because they are more likely to have childcare responsibilities; and that she was herself subject to this disadvantage.

The employment tribunal dismissed both claims. It stated that Mrs Dobson had brought no evidence to support the argument that the requirement put women at a particular disadvantage compared to men. The tribunal noted that other women in her team were able to meet the requirement.

The tribunal expressed the view that the claimant may have been disadvantaged by her responsibility for caring for her disabled children, but that this is not a protected characteristic. It commented that (unlike direct discrimination) there is no claim of indirect discrimination by association with disabled people.

Childcare disparity continues to exist despite societal changes

The EAT did not agree with the tribunal's judgment. It made clear that the tribunal should have taken judicial notice of the childcare disparity and that there was no need for evidence to be presented on this point. The appeal judge commented that "many societal norms and expectations change over time, and what may have been apt for judicial notice some years ago may not be so now. However, that does not apply to the childcare disparity. Whilst things might have progressed somewhat in that men do now bear a greater proportion of child caring responsibilities than they did decades ago, the position is still far from equal."

The EAT made clear that female claimants can only rely on the childcare disparity to show group disadvantage where it is relevant to the PCP; some working arrangements do not put women in general at a disadvantage because of childcare. It also made clear that claimants must actually plead the childcare disparity to put the tribunal and the respondent on notice of it, even though it is a matter of judicial notice.

The case has now been remitted to the tribunal to consider whether the requirement was justified when taking into account the needs of the employer and the impact on the claimant. It must also consider again whether the dismissal was unfair: if the tribunal finds that the requirement was indirectly discriminatory, it may also find that it was unfair to dismiss because of the refusal to accept the new terms.

Can a discriminatory requirement to work at weekends or unsociable hours be justified?

In some cases, yes.

In this case, the tribunal found that the requirement to work some weekends was justified as the employer was pursuing the legitimate aim of providing a safe and efficient service and the impact of the new working arrangements on the claimant's team was proportionate to that aim. The EAT made clear that the tribunal should consider the impact on all community nurses at the trust and not only the claimant's team. However, it is possible that, even after the tribunal takes into account the childcare disparity, it will not uphold Mrs Dobson's indirect discrimination claim.

Employers considering the imposition of working arrangements which may disadvantage a particular group should ensure that they have given careful thought to and documented the business reasons for those arrangements. These might include the needs of service users, customers and commissioners, as well as financial and operational pressures on the organisation. They should also consider the impact on employees with protected characteristics and ensure

that the requirements are necessary and proportionate to the aims of the organisation, including whether there are any other less discriminatory ways to achieve the same aim.

How does employee ownership safeguard the future of the business – is it sustainable?

Article published on 02 July 2021

A look at the key characteristics of a robust employee-owned business and how this should be managed for a successful future.

A move to employee ownership for a business is always focussed on the long-term success of the company and its continued improvement.

Employee-owned businesses, when structured and managed appropriately, are able to channel the energy, commitment and abilities of the employees into an improved culture where everyone in the business shares the "all in this together" mission and has everyone working towards a common purpose. This mission allows employee-owned businesses to weather difficult times more readily than other corporates.

Anecdotal evidence from the crisis caused by the Covid-19 pandemic have shown that employee-owned businesses were able to handle the downturn and challenges raised better than others and are heading into the recovery in stronger positions as a result.

Good governance of an employee-owned business is built upon proper communication, transparency, and planning, with all employees able to see and understand where the business is going and what the key challenges are. Use of employee councils and/or employee representatives in larger businesses allow additional avenues of ideas to be taken advantage of, further evidencing why the collaborative nature of an employee-owned business can have a positive impact.

The employee ownership trust can be the forum for considering not only the financial performance of the business as shareholders, but also employee engagement and whether directors are properly observing their s.172 Companies Act duty to have regard for the employees of the business.

When structured correctly the financial obligations relating to paying the outgoing owner for their shares do not impact heavily on the business, so sustainability is considered from day one. The process of moving to employee ownership involves taking advice not only from solicitors, but also the company's accountants to ensure that the financial plans are viable to support both payments to the former owners and the continuing success of the business.

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