WRIGLEYS
SOLICITORS

EMPLOYMENT LAW BULLETIN

MAY 2020

Welcome to the Wrigleys Employment Law Bulletin, May 2020.

The implications of coronavirus on the economy, organisations and the workforce continue to present very difficult issues for employers. In this edition we take a look at the recently updated Coronavirus Job Retention Scheme Direction from the treasury to HMRC and clarify what employers need to do when agreeing furlough terms with staff.

We explore the interaction between well-established employment law and the novel circumstances employers and employees now find themselves in. We assess the risks of unlawful deduction from wages claims where employees are paid less than full pay in the current crisis. We also focus on the particular risks of discrimination in employment as employers make decisions about who to furlough and which staff might be at risk of redundancy.

Decisions continue to emerge, though slowly, from the courts and tribunals, most of which are now holding remote hearings. We examine the decision of the EAT in the interesting case of ***Ferguson and others v Astrea*** which provides a useful reminder on the risks of changing terms in the context of a TUPE transfer.

We also report the important decision of the Supreme Court in ***WM Morrison Supermarkets plc v Various Claimants*** on whether an employer could be vicariously liable for an employee's data breach when it was deliberately intended to harm the employer.

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

Forthcoming webinar series:

This year our annual employment law update for charities will take the form of a series of webinars on flexibility and equality in the workplace to be held over the summer months. To start the series our employment team, together with Jane Van Zyl, CEO of the national charity Working Families will be presenting a two part webinar starting on 16 June 2020 with Part one: Building a balanced society with Jane Van Zyl and panellists followed on 7 July 2020 by Part 2: Restructuring and flexible working with Sue King and Alacoque Marvin. In both webinars we will explore the new opportunities in working arrangements brought about by COVID-19 pandemic and consider the legal implications of changes to the way we work.

- **Part I : Building a Balanced Society**
  16 June 2020, Webinar
  For more information or to book

- **Part II : Re-organising and flexible working**
  7 July 2020, Webinar
  For more information or to book

- **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

Working Families is running a survey for parents and carers as part of its #flextheUK campaign taking place on 19 June. The campaign aims to make flexible working the rule, not the exception as Working Families believe a "flexibility-by-default" culture would help millions of parents/carers who struggle to balance work and caring responsibilities.

We include the link here should you or your employees wish to participate in the survey.

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

Contents

Government publishes new Covid-19 Job Retention Scheme Directions

Important considerations for employers who have decided to furlough staff

Five weeks after the online portal opened for applications under the Coronavirus Job Retention Scheme (the Scheme) two thirds of UK businesses have used the scheme and by 3 May HMRC reported a total of 6.3m jobs had been temporarily laid off by 800,000 companies, with claims amounting to £8bn. Recently published ONS statistics indicate that the sectors with the highest proportion of furloughed workers are the accommodation and food service industry (at 80%) and the art, entertainment and recreation industry (at 68%).

The publication of government guidance relating to the Scheme had slowed down in pace however on 20 May HM Treasury published new Directions. In this article we consider whether the new Directions affect the arrangements you have in place for furloughed staff and set out some important considerations for employers who have made the decision to furlough some or all of their staff.

Do employers need to obtain the written agreement of employees to be furloughed?

There has been some confusion about exactly what needs to be documented to evidence the decision to furlough employees.

The HMRC guidance and the Directions were, on the face of it, contradictory on what is required. The most recent HMRC guidance states:

"To be eligible for the grant employers must confirm in writing to their employee confirming that they have been furloughed. If this is done in a way that is consistent with employment law, that consent is valid for the purposes of claiming through the scheme. Collective agreement reached between an employer and a trade union is also acceptable for the purpose of such a claim. There needs to be a written record, but the employee does not have to provide a written response. A record of this communication must be kept for five years."

On the other hand, the original Direction stated that an employee will only be furloughed if they have been instructed by the employer to cease all work in relation to their employment and if "the employer and employee have agreed in writing (which may be in an electronic form such as an email) that the employee will cease all work in relation to their employment".

This discrepancy has been rectified in the updated Direction which is more specific about the arrangements to be put in place when an employee ceases work and is furloughed. Both employee and employer must agree the employee will cease all work and the agreement between them must set out the main terms upon which the employee will cease all work. These may, for example, include a reduction in pay and other benefits, the length of the furlough leave period and any other conditions the employer may wish to put in place. The agreement must form part of the employee's contract of employment (as a variation to the contract) and it must be confirmed in writing by the employer. The Directions no longer state or imply the agreement must be signed by the employee.

This means employers who did not obtain a written confirmation of agreement from their employee when furloughing them will not be disqualified from claiming under the Scheme providing they fulfil all other requirements. However, in circumstances where employers are reducing the salary of their employees by 20% (or more for higher paid staff) they are advised to obtain written consent from the employee to the reduction in salary otherwise they may risk claims for unlawful deduction from wages or breach of contract. See our previous article on the risks of these claims here.

Due to the various versions of the guidance which came out before the original Direction, there is the potential for employers who furloughed workers shortly after the Scheme was announced to have simply instructed employees not to work and for there to be no record of the agreement between employer and employee. In some cases, employers with layoff clauses in their employment contracts may have relied on these to impose furlough and have no written record of the instruction to the employee to cease work, or any agreement between them that the employee will be furloughed.

Regardless of the earlier contradiction between the guidance and the Direction and in light of the new Direction, it is advisable for employers to document the agreement with the employee that they will cease work and be on furlough leave, even if this is set down in writing retrospectively. Documentary evidence of the agreement between employer and employee should then be securely kept for five years in case it is requested by HMRC in a future audit.

What needs to be set out in a furlough agreement?

The employer should set out the business reasons for the decision to put the employee on furlough, for example the reduction in work due to the government's stay at home orders. It is advisable to state that the agreement is subject to the rules of the Scheme and the employer's eligibility for a grant under the scheme in relation to the employee.

Although we know that the Scheme will be in place at least until 31 July and in a phased form thereafter, employers are unlikely to know precisely how long the furlough leave will last. That said, it is a good idea for employers to state that the leave lasts for at least three weeks (which is the minimum required furlough period). The employer should make clear that the furlough period will continue (subject to the continuation of the Scheme) until the employer provides notice to the employee that the furlough leave is ending. Employers who are utilising a rotation of furloughed/non- furloughed staff should clearly set out these rota periods.

The agreement should make clear that the employer has instructed the employee not to do any work for the employer whilst furlough leave continues. It should state the percentage of pay which the employee will receive and how pay will be calculated (where there are variable hours). The agreement should make clear how other contractual benefits will be impacted by furlough, including pension contributions, and can include any requirements for taking holiday during furlough.

Do employers need to consult with staff about furlough?

It is of course good practice for employers to engage with staff as much as possible before taking the step to place them on furlough leave. Employees who are given enough information to understand the financial and operational context of the decision to furlough are much less likely to raise concerns, grievances or claims about the decision in future. Where time and circumstances allow, employers should hold discussions with individual employees in which they can ask questions, raise concerns and suggest alternatives to furlough.

Where there are recognised trade unions or other staff forums in place, the employer should engage with them to discuss the need for furlough and how this will impact on staff and the organisation as a whole. It is possible that collective agreements are in place which require the employer to consult with the trade union about any change to pay and conditions. In that case, the employer should do what it reasonably can to follow the normal consultation process, adapting processes so that meetings can take place remotely and assisting representatives as far as possible to provide information to and take feedback from staff via secure and reliable means of communication.

If an employee objects to being furloughed, employers have the option of dismissing and re-engaging the employee on new terms including furlough leave and the reduction in pay;

or considering whether they have a genuine redundancy situation and dismissing on those grounds. In the circumstances most employees have accepted the furlough arrangement, which is fortunate as any dismissal, particularly where a fair process was not followed, is a much riskier route to take and may leave the employer at risk of unfair dismissal claims. If the objection applied to 20 or more employees, this would also trigger collective redundancy consultation requirements (see below).

If the employer is contemplating 20 or more redundancies* at one workplace within a 90 day period, it should comply with its collective redundancy consultation obligations and ensure that consultation with representatives commences in time. Where there are between 20 and 99 potential redundancies, consultation should start at least 30 days before the first dismissal. Where there are 100 or more potential redundancies, consultation should start at least 45 days before the first dismissal. Employers in these circumstances must also send form HR1 to the Secretary of State.

* It is important to note that the number of "redundancies" for collective consultation purposes includes any employees who do not agree with changes to their terms and who are therefore dismissed, even if they are re-engaged on new terms.

Employers should plan for consultation processes, particularly collective consultation, to take longer than they usually would. They can prepare for such processes by gathering relevant contact details for staff and putting the necessary technology in place so that remote communication can be made. Where plans could impact on 20 or more employees and trade unions are not recognised, employers should consider facilitating the election of employee representatives with a remit for consulting on changes to terms or redundancies ahead of time.

Even though the current restrictions may make it difficult to use the usual modes of consultation, it is important for employers to do what they can to keep communication channels open and to use remote means to consult as meaningfully as possible. It is important to remember that, should claims be brought in the employment tribunal, employers will be expected to do what they reasonably can to consult with staff before making changes to terms and taking dismissal decisions.

Fraudulent furlough claims

HMRC has confirmed that it has received hundreds of reports that employers have been making fraudulent claims under the furlough scheme, for example making claims for employees who are continuing to work and may not even know the claims have been made. The whistleblowing charity, Protect, has seen an increase in calls to its helpline from employees concerned about such misuse of the scheme. They report that employees have been furloughed but asked to "volunteer" for their employer at the same time. In some cases, employees who have protested have subsequently been made redundant. This may give rise to whistleblowing and unfair dismissal claims.

These risks highlight the importance of clearly documenting the decision to furlough and instructing staff and managers on what they can and cannot do during furlough. It is very important that organisations make clear to staff that, at least until the scheme changes on 31 July, furloughed workers cannot carry out any work for the employer. They are able to carry out training during furlough but cannot perform services or generate revenue for the employer organisation. Furloughed workers can volunteer for other organisations, but not where these are part of the employer's group. Please see our previous articles on the detail of the furlough scheme at https://www.wrigleys.co.uk/news/covid-19/.

Unlawful deductions from wages claims and the furlough scheme

Employers face potential exposure to claims where furlough results in a reduction in pay.

Many employers and employees alike breathed a sigh of relief when the government's Coronavirus Job Retention Scheme (the 'Scheme') was announced in March. However, due to a combination of the novel nature of the Scheme, the lack of detail in terms of how it works and the speed at which it was introduced, it is unsurprising that in the ensuing confusion employers have been left open to potential liabilities.

This article looks at the possible risk of unlawful deductions from wages claims when furloughing employees.

What is an unlawful deduction from wages claim?

If an employer reduces the pay of an employee without either the prior agreement of that employee or an explicit statutory provision allowing that reduction, the employee can bring a claim under the Employment Rights Act 1996 ('ERA'96') for the value of the deduction in pay and may, in certain cases, also recover losses linked to that deduction (e.g. overdraft or bank fees). Both employees and workers (referred to collectively as 'employees' in this article) can bring such claims.

In order for an employee to agree to a deduction, ERA'96 specifically states that they must have 'previously signified in writing' their agreement or consent. It would therefore be a contravention of this provision if the employer:

- did not get the agreement of the employee before reducing their wages;

- did get the employee's agreement to reduce wages, but this was not given in writing; or

- retroactively got the written agreement of the employee to a pay reduction.

It is common for contracts to provide for lawful deductions – they are a regular feature in notice terms and may be generally included to say that if the contract is terminated the worker or employee agrees that the employer can deduct from their final pay packet any sums that are outstanding (e.g. outstanding season ticket loans or amounts relating to the overtaking of holiday entitlement).

How does this affect furlough and the Scheme?

To date, nothing in the legislation relevant to the creation and operation of the Scheme gives an employer the authority to arbitrarily alter an employee's terms of pay whilst they are furloughed. This means that if an employer wants to reduce the pay of an employee whilst they are furloughed they must get the employee's agreement to do so in advance.

Additionally, the HMRC Guidance states that the employer needs to obtain the agreement of an employee they wish to place on furlough in order that the employer can then claim funds from the Scheme in respect of that employee's wages. This is distinct and separate from the need to obtain the agreement of the employee to reduce their wages whilst they are furloughed.

There is a concern that, in the face of the sudden emergence of this crisis and nuances such as this within the Scheme, some employers have interpreted the Scheme Guidance as treating an employee's agreement to go on furlough as being one and the same to agreeing to go on furlough at reduced pay. As a result, it is possible that employers have not properly obtained

the agreement of furloughed employees and/or potentially misrepresented how the Scheme works to those employees.

It is important for employers to bear in mind that:

- there is no right to furlough;

- a furloughed employee retains all of their contractual entitlements, including to be paid their usual salary, save only that the employee is not required to actually do any work; and

- subject to the Scheme rules, an employer is entitled to claim a government grant to cover a proportion of wages (at present up to 80%) of eligible employees. That does not mean the government pays anyone's wages which remain the responsibility and liability of the employer.

Another area in which an employer might come unstuck is where they have obtained the prior agreement of individual employees to a reduction but they have failed to agree that reduction in line with a collective agreement with a recognised union.

An agreement in writing in advance is the key

Employers who have clearly explained to employees that they need their prior written agreement to:

1. go on furlough; and
2. whilst on furlough, reduce their wages (for example to match the funding available to the employer through the Scheme in regard to their employment)

are at reduced risk of unlawful deductions from wages claims from employees they have furloughed.

That is not to mean that a lengthy legal document is required to evidence prior agreement, nor that there is any requirement for the employee to take independent legal advice before any agreement is effective. An email exchange will be sufficient for the employee to signify their prior agreement, provided that there is clarity in terms of what is being agreed; i.e. is it furlough or is it furlough with reduced pay?

At the time of writing, we have had confirmation that the Scheme continue until the end of October, though it is not clear what, if any, changes will be made to its operation during this extension. The extension does allow an employer to repair any procedural errors, for example by re-furloughing an employee once the minimum three week furlough period has expired, but in doing so employers need to make sure that the requisite prior agreement for any reduction is in place. That won't protect an employer from claims for unlawful deductions already made, but it will help mitigate against the risk of further claims.

Unlawful deductions claims can be brought whilst the employee is still employed or after they have been dismissed. Such claims must be brought within three months after the last deduction took place, but they can be 'chained' together if there is a series of deductions for up to a maximum of two years. If an employer reinstates full normal pay once furlough has ended then that will fix the timeline for a claim. However, if reduced pay continues once lockdown is lifted then the deductions are continuing and the time limit for bringing a claim also continues.

One of the particular features of the unlawful deduction rules is that where an unlawful deduction claim is successfully made then the employer cannot then recover the monies in any other way, e.g. through a court claim for monies due.

Employers facing an unlawful deduction claim may be best served by avoiding the costs of tribunal claims and agreeing to repay the difference between the employee's normal pay and what the employee received while they were furloughed. However, much greater liabilities are possible if an employer has unlawfully deducted pay from senior executives or managers where the reduction to £2,500 a month while on furlough is well under 80% of their normal wages.

In a world of change, equality law still applies

How can employers avoid discrimination during the Covid-19 crisis?

These are very difficult times for employers. Every day brings new dilemmas and novel solutions born out of necessity. Which staff should we furlough? Who should we ask to come in to work? What if they have health concerns or caring responsibilities? What if they are pregnant or on maternity leave? Is it fair for us to expect so much of some staff and to furlough others? Whose pay should we be topping up while on furlough? Will staff be redundant if they can't attend work once the furlough scheme ends?

We look in this article at some of the discrimination risks for employers as they make decisions which will impact on their staff. The Equality and Human Rights Commission (EHRC) has recently published useful general guidance for employers during Covid-19 which covers some of these risks and provides advice on avoiding the pitfalls.

What kinds of decisions could be discriminatory?

Any decision-making about contractual terms, working conditions or arrangements could potentially lead to discrimination claims. Decisions which are partly based on considerations such as a disability, maternity, pregnancy or association with a disabled person could lead employees to argue that they have been less favourably treated because of a protected characteristic (direct discrimination). For example, a decision not to allow a woman to return from maternity leave unless she agrees to be furloughed on 80% of pay or a decision to make an employee with a long-term serious lung condition redundant because they are refusing to attend work.

Policies or practices which apply across the board might be argued to put some groups of employees at a disadvantage because of a shared protected characteristic (indirect discrimination). This might apply, for example, where all employees are expected to work from home between 9am and 5pm and if they cannot (for example because of childcare responsibilities) they will be furloughed on 80% of pay. Statistically, women are more likely to bear the brunt of childcare and so such a policy is likely to put women generally, and could put a female employee in particular, at a disadvantage. On the other hand, a policy which requires all employees who do not have a primary caring role to attend work could be argued to put men at a disadvantage as it disproportionately impacts on men and puts them at higher risk of being infected.

Press reports and death rate statistics appear to show that people from a BAME background are more likely to die after catching Covid-19. This gives rise to the possibility that a blanket policy requiring all staff to attend work could put BAME employees at higher risk and so disproportionately disadvantage them when compared to their white colleagues.

Does Covid-19 mean we can justify discriminatory treatment?

Some kinds of discrimination cannot be justified. For example, direct discrimination on the grounds of race, disability, pregnancy/maternity or sex.

Some kinds of discriminatory treatment can be justified in some circumstances; for example, treatment which is directly based on someone's age or based on something arising from a disability (such as sickness absence or being extremely vulnerable to the virus). Indirect discrimination, where a policy applies to everyone but impacts more on protected groups, can also potentially be justified.

Employers should think through whether such decisions can be justified rather than simply assuming that the virus will provide sufficient reason. For example, imagine an employer is proposing that employees who are over 55 years of age should be barred from returning to work while younger colleagues are expected to return. Both groups could argue that they were being less favourably treated because of their age. In order to justify this decision, the employer would need to show that it was a proportionate means of achieving a legitimate aim. The legitimate aims might be to ensure an on-going service to customers and a safe system of work. The question of whether this approach is proportionate would be informed by NHS and Government advice on the varying levels of risk of the virus based on age. It would also include a consideration of the business needs and resources of the employer organisation, and the likely impact on individual employees. It is possible that the choice of 55 years of age as the cut-off point would not be proportionate. It might be more proportionate to raise the age limit, or to consider the individual health circumstances of individual employees and take decisions on a case by case basis.

Employers should ensure that they document their rationale for any such decisions at the time. This will provide useful evidence should a claim later be brought to the employment tribunal.

Should we furlough our pregnant staff for their own safety?

The EHRC has published specific guidance on pregnancy and maternity during Covid-19.

The guidance on dealing with pregnant employees provides helpful clarification on the question of whether employers should furlough employees who are pregnant in order to protect them from the risks of attending work. The duty on the employer has not changed. Employers must still carry out a risk assessment for all pregnant workers and new mothers. The risk assessment must take into account the job they do, any pre-existing health conditions, the risks of travelling to work and the current social distancing guidance on minimising contact and maintaining a 2m distance from other people. If the assessment identifies risks which are unacceptable, the employer must change working conditions to mitigate the risk or offer the employee a suitable alternative role on not substantially less favourable terms. For example, this might include arranging working from home or offering a role which has restricted contact with others. If this is not possible, the employee should be suspended on full pay. Employers who furlough pregnant employees on 80% of pay because of the health and safety risk could face a direct discrimination claim. If employers do take the decision to furlough pregnant employees, they should top up their pay to 100% to avoid this risk.

Redundancy and maternity leave

The EHRC guidance also reminds employers of their duty to offer an employee who is selected for redundancy while on statutory maternity leave any suitable alternative role in priority to other employees.

If an employee has been furloughed because of maternity leave and is then selected for redundancy because she has been on furlough, there is a risk of a sex discrimination claim. If the employee is dismissed for maternity related reasons and is not offered a suitable alternative role, where one exists, there is a further risk of a claim for automatic unfair dismissal.

Employees who are on shared parental leave and adoption leave when selected for redundancy are protected in a similar way.

Involve employees in decision making

Consulting with colleagues and their representatives before bringing in new policies and practices will help employers to deal with any concerns in advance and to make sensible adjustments to plans following feedback. Your employees' feedback and questions can also be invaluable in spotting operational difficulties in what is being proposed and in ensuring that your message is clear and comprehensive.

It is particularly important to ensure that your communications and consultations on key changes are reaching all employees no matter what their circumstances. Are you sure that your employees on furlough, maternity or other family leave, or on sick leave are being kept "in the loop"? Send out test communications to ensure you can reach all employees and make clear to employees on various types of leave that they should regularly check their email / the intranet or similar forums for new messages.

Frequent communication, transparency and genuine two-way consultation with staff, even where the message will sometimes be difficult to hear, can help to maintain trust and to reduce the risk of conflict, grievances and claims in these testing times.

When will changes to terms because of a TUPE transfer be void?

The key risks of changing terms on a TUPE transfer – even when they are beneficial to the employee.

The purpose of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and the European Directive which it implements is to protect the terms of employment of employees who transfer from one employer to another when a business or part of a business transfers.

A key provision of TUPE is therefore that any changes to an employee's contract will be void if the sole or principal reason for the change is the TUPE transfer. This means there is a risk that changes to terms which are made before or after a TUPE transfer might be challenged by employees in a court or tribunal and that transferee employers might not be able to enforce the new terms, even if they have been agreed with the transferred employees.

When can changes to terms be made in the context of a TUPE transfer?

There are some circumstances where changes to terms which happen in the context of a TUPE transfer will not be void. These include:

- The reason for the change is an "economic, technical or organisational reason entailing changes in the workforce" (an ETO reason). This only applies when the variation is made because there is a change in the numbers, place of work or functions of the workforce, and when the employer and employee agree to the change. In practice, this exception does not often apply.

- The employment contract permits the employer to make the change. For example, there is a clause in the contract which allows the employer to move the employee to a different workplace.

- The contractual term which is changing is incorporated from a collective agreement and the change takes effect more than one year after the transfer. This will only apply if the terms, when considered together, are no less favourable to the employee than the former terms.

- In some cases where the outgoing employer is insolvent.

A change to terms will also not be void where it is made for a reason other than the transfer. For example, if market conditions lead to a reduction in pay, or if hours are reduced because of a drop in demand from a key client.

Key risks on changing terms following a TUPE transfer

Employers who are planning changes to terms in the context of a TUPE transfer should take legal advice on the risks. Case law suggests that there may be no safe time period after transfer date when a transferee can make changes, if those changes are because of the transfer and an exception does not apply. The question is whether the transfer was the reason for the change, no matter when the change occurred. This is why the harmonisation of employee terms following a TUPE transfer is always risky. The reason for levelling up the terms of existing and transferred employees will usually be the transfer, and there is unlikely to be an ETO reason, so the changes will very likely be void.

Employees whose terms have been changed may bring claims for breach of contract or for unlawful deductions from wages. They can wait to accrue losses (underpaid wages) before doing so, meaning there could be a considerable time of uncertainty for the employer. Breach of contract claims can be brought within 6 years of the breach. Claims for unlawful deductions from wages can be brought within 3 months of the last of a series of deductions. Where pay has been reduced, the three month window for a claim reopens after each pay date. However, regulations brought into force in 2015 impose a two-year backstop period on unlawful deductions from wages claims relating to contractual pay and benefits.

Case law shows that, where a variation is found to be void and the new employer has entered into a valid contractual agreement for changed terms, employees can cherry pick the most favourable terms from those in place before and after the change.

Can changes be made to terms if they are wholly beneficial?

BEIS Guidance states that changes to terms which are entirely beneficial from the perspective of the employee are not prevented by TUPE. It may be difficult to imagine circumstances where a beneficial change to terms is challenged. However, a recent case has explored just this scenario and clarified that all changes to terms which are by reason of the transfer and do not fall into an exception will be void, whether they are beneficial or otherwise. While the circumstances of this case are quite unusual, it provides a helpful reminder of the risks of changing terms because of a transfer.

Case details: *Ferguson and others v Astrea*

An estate management company (Lancer) carried out estate management for owners of a considerable property portfolio in London. Lancer had no other clients. The property owners gave 12 months' notice to terminate the contract and appointed a new estate management company (Astrea). It was accepted that this would be a TUPE transfer.

The CEO of Lancer tried unsuccessfully to persuade the property owners to extend the contract or to buy out the business. The CEO then hatched a plan along with other directors/employees of the company to improve their contractual terms, believing that Astrea would be bound by these terms following the transfer. These improvements included a 15% salary increase, guaranteed bonuses of 50% of salary (in the region of £500,000), generous termination payments and extended notice periods. There was also an agreement between the colleagues that their terms would revert to the former terms if their employment did not transfer to Astrea. The TUPE transfer took place on the change of contractors. Astrea dismissed the CEO and his

colleagues shortly after the transfer for gross misconduct relating to the new contractual terms, obstructive behaviour prior to the transfer and contemptuous / racist language towards the owners. They brought claims against Astrea for unfair dismissal and contractual termination payments as well as a claim relating to Astrea's failure to provide information to Lancer about any proposed TUPE measures.

The employment tribunal found that some of the improvements to terms were made by Lancer solely by reason of the transfer (in particular the bonuses and termination payments). It found that these changes had no legitimate commercial purpose but were designed to compensate the claimants as owners of the company for the loss of the contract, trying to gain an undue advantage through TUPE protections. It found that these new terms were void on this basis and stated that the claimant's attempt to vary their own terms before the transfer was an abuse of EU law. The tribunal considered that the 15% increase in salary, on the other hand, was not void as it was in line with market conditions and was not by reason of the transfer.

Although the tribunal found that the CEO had been unfairly dismissed, it reduced compensation by 100% because of contributory fault (including his actions in hatching the change of terms plan and lack of cooperation prior to the transfer) and because the CEO could have been fairly dismissed three weeks after the transfer in any event.

Interestingly, the tribunal awarded the claimants 3 weeks' pay each for the failure of Astrea to provide information to Lancer as required under Regulation 13(4) of TUPE. As the tribunal considered that there was tactical delay in providing information on both sides, it did not make a higher award (the maximum for a failure to inform and consult is 13 weeks' pay).

On appeal, the EAT agreed with the tribunal's decision that the terms were void and made clear that TUPE makes void all contractual variations made because of a transfer (unless an exception applies) whether or not they are to the employee's benefit. It also agreed with the award of 3 weeks' pay to each claimant. The EAT remitted the question of whether the CEO's conduct had "caused or contributed to" his dismissal to the same tribunal but agreed that his compensation could be reduced on the basis that he would in any event have been dismissed fairly some three weeks after the transfer.

Other considerations for transferor employers considering a change to terms

It is important to note that it is not only the TUPE rules which might limit the changes an outgoing employer can make to its employees' terms.

In the context of a service provision change, where the client has decided to bring in a new contractor, it is common for the existing contract between the client and the outgoing employer to include restrictions on making changes to terms in the notice period, or in the last few months of the contract. In some cases, changes to employment terms may be possible under the contract if the prior consent of the client is obtained. There may also be restrictions on dismissals or recruitment in the period before the transfer.

Similarly, where a business or property sale effects a TUPE transfer, the transfer agreement may include warranties, undertakings or indemnities which limit the seller's ability to change employment terms pre-transfer.

Outgoing employers should take legal advice on any contractual obligations they may be under as the contract comes to an end or the sale takes place. Contractual claims arising from such changes to terms, where they are beneficial to the employees, are much more likely to come from the commissioning client or buyer than from employees..

Employer not vicariously liable for the vengeful act of an employee

The Supreme Court has final say on long-running series of cases caused by an intentional data leak.

Cases concerning an employer's liability for the actions of their staff often cause concern, particularly where the law is seen to be 'extended' by the courts to hold an employer liable. In such cases the primary concern is whether the wrongful actions of an employee can be fairly and properly considered as being done in the ordinary course of employment. If so, the employer may be liable.

The problem is that the application of this reasoning is highly fact-specific, meaning that cases which sound very similar to one another can be decided quite differently.

In October 2018 we considered the Court of Appeal's decision in the Morrisons Supermarkets Plc v Various Claimants case. In its decision, the Court of Appeal held that there was sufficient connection between the job and actions of a Morrison's employee to make Morrisons liable for the employee's act of leaking personal data of Morrisons employees on to the internet. Morrisons appealed the decision and we now have a useful Supreme Court decision on this issue making clear that Morrisons was not liable for the employee's deliberate data breach.

Case details: *WM Morrison Supermarkets plc v Various Claimants*

Mr Skelton, an employee of Morrisons, was tasked with providing personal employee information to an external auditor. He did this, but also secretly made a copy of the data which he later posted to a website. He then also sent copies of the data to newspapers, posing as a concerned member of the public. It appears Mr Skelton had been motivated to do this as an act of vengeance against his employer after he received a verbal warning for a minor disciplinary matter.

When Morrisons was made aware of the breach it acted to protect its employees' identities and information. Not long after, Mr Skelton was arrested and ultimately he received a prison sentence for his actions. Several thousand Morrisons employees whose data had been leaked sued Morrisons for damages on the basis that the supermarket was liable for the actions of Mr Skelton.

The High Court and Court of Appeal found in the employees' favour on the basis that Mr Skelton's actions were within the course of his employment. This in part had been decided on the basis that, in the view of the courts, there was a clear causal link between what he had been asked to do by his employer and the information being leaked. The courts also found that Mr Skelton's motivation to harm his employer was irrelevant, in part because of the decision of the Supreme Court in *Mohamud v Wm Morrison Supermarkets plc* which suggested that the motivation of the employee was irrelevant.

The Supreme Court's decision

In its decision, the Supreme Court outlined that the lower courts had misapplied the tests for vicarious liability through a narrow interpretation of the Supreme Court's decision in the case of *Mohamud*. In particular, the Supreme Court was keen to draw attention to case law that had differentiated between employees who had acted in the course of their duties to their employer, thus making the employer liable, and cases where employees had been found to have gone off 'on a frolic of their own', where the employer was not liable.

One example was the case of *Mohamud* itself, where a petrol station attendant attacked a customer after ordering the customer not to return to the petrol station. In that case, the Supreme Court had found the employer liable because the assault was used to underline to the customer that they should not return to the petrol station. In short, the assault was directly related to the employee's duties and his place of work and the employer was liable for the assault.

As a result, in *Mohamud* the Court had determined that the employee's motivations were irrelevant because the vicarious liability test had already been met. Mistakenly, the lower courts had taken this to be a more general rule, which the Supreme Court found not to be the case.

The Supreme Court also referred to the case of Bellman v Northampton Recruitment Limited, a case in which the managing director of a company assaulted a subordinate at a work function after a disagreement arose about the MD's decision to recruit a particular employee. In this case the employer was found to be liable because the MD was making a show of his authority over colleagues, which he then underlined by carrying out the assault.

In contrast, the Supreme Court referred to a British Virgin Islands case in which a police officer left his post and injured a third party after firing his service revolver when he found his partner with another man. In this case, the officer's employer was not found liable for the injury caused because the officer had 'embarked … on a personal vendetta of his own'.

The Supreme Court noted that motivation was an important factor in determining whether an employee was acting to further his employer's business or to his own personal ends. It concluded that it was clear that when Mr Skelton leaked the personal data of employees he was acting on 'a frolic of his own', motivated by vengeance against his employer for having verbally disciplined him previously.

For this reason, Morrisons was not liable for Mr Skelton's actions.

Comment

The decision of the Supreme Court in this case will provide some relief to employers who were concerned by the decisions of the High Court and Court of Appeal.

Had the previous decisions stood, employers would have been left facing a much broader potential liability for employee actions than before. That was, as long as a third party could show that there was a causal link between harm or damage to them and the job the employee was employed to do, employers were at risk of being found liable for the harm or damage caused, no matter what the motive of the employee.

In this case, that causal link was provided by Morrisons asking Mr Skelton to provide the employee data to a third party auditor and then giving him access to that data, which he misused. The Supreme Court has identified that this alone is not enough to make an employer liable for the subsequent actions of the employee.

However, as always with vicarious liability cases, the warning that these cases are highly fact sensitive remains.

If you would like to contact us please email
alacoque.marvin@wrigleys.co.uk

www.wrigleys.co.uk

Wrigleys Solicitors LLP, 19 Cookridge Street, Leeds LS2 3AG. Telephone 0113 244 6100 Fax 0113 244 6101