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EMPLOYMENT LAW BULLETIN

SEPTEMBER 2020

Welcome to the Wrigleys Employment Law Bulletin, September 2020.

Last week Chancellor of the Exchequer Rishi Sunak announced a new scheme aimed at helping employers to retain workers in "viable" jobs over the next six months. In our first article we look at what we know so far about the Job Support Scheme and consider the implications of the scheme for employers contemplating redundancies.

The Coronavirus Job Retention Scheme has, of course, another month to run and HMRC are currently reported to be investigating 27,000 potentially fraudulent claims under the scheme. We look at the enforcement action likely to be taken by HMRC and the steps for employers who wish to report inaccurate claims.

We report on the Court of Appeal's decision in ***Robinson v Department for Work and Pensions*** which clarifies the interaction between claims for a failure to make reasonable adjustments for a disabled employee and for discrimination arising from disability. In this case the employer's mishandled attempts to put reasonable adjustments in place was not discrimination arising from her disability.

In the interesting case of ***Sullivan v Bury Street Capital Ltd***, the EAT considered whether a claimant's paranoid delusions had a long term substantial adverse effect on his ability to carry out day to day activities and so qualified as a disability under the Equality Act 2010.

The EAT's decision in the case of ***K v L*** highlights the importance of setting out disciplinary allegations clearly when inviting an employee to a disciplinary hearing. This case also sheds useful light on when an employee can be fairly dismissed for conduct which might damage the employer's reputation.

And in our question of the month for September, we consider how employers should handle flexible working requests to work remotely in the current crisis.

We hope to see you at one of our upcoming webinars. Our next webinar on 6 October is on the subject of "Equality in the workplace - atypical working, zero hours and ethical issues". Please see the links below for details on how to book and how to access our recorded webinars.

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:

- **6 October 2020, Webinar**
  Employment law update series
  Equality in the workplace - atypical working, zero hours and ethical issues
  Click here for more information or to book

- **15 October 2020, Webinar**
  Wrigleys' 29th Annual Charity Governance Seminar
  'Serious incidents': what, why, and when to report
  Click here for more information or to book

- **22 October 2020, Webinar**
  Wrigleys' 29th Annual Charity Governance Seminar
  Is your cat causing a breach of the GDPR? Data protection in the age of remote working
  Click here or more information or to book

- **5 November 2020, Webinar**
  Wrigleys' 29th Annual Charity Governance Seminar
  Not business as usual: operating your organisation in an uncertain, post Covid world
  Ciick here for more information or to book

- **12 November 2020, Webinar**
  Wrigleys' 29th Annual Charity Governance Seminar
  Post-Covid – protecting your contracts
  Click here for more information or to book

- **19 November 2020, Webinar**
  Wrigleys' 29th Annual Charity Governance Seminar
  Recruiting and retaining good trustees: harnessing opportunities and meeting the challenges presented by the pandemic
  Click here for more information or to book

- **26 November 2020, Webinar**
  Wrigleys' 29th Annual Charity Governance Seminar
  Round-up, good news and things you might have missed
  Click here for more information or to book

Recorded webinars:

- **Employment law update series: Flexible working: Part I - building a balanced society**
  16 June 2020, Webinar
  Click here for more information or to view webinar

- **Employment law update series: Flexible working: Part II - re-organising and flexible working**
  7 July 2020, Webinar
  Click here for more information or to view webinar

- **Charities & social economy webinar series : Restructuring your organisation from the inside out**
  22 July 2020, Webinar
  Click here for more information or to view webinar

- **Employment law update series: Equality in the workplace - transgender discrimination**
  4 August 2020, Webinar
  Click here for more information or to view webinar

- **Employment law update series: Equality in the workplace - Equality in the workplace - disability and reasonable adjustments**
  1 September 2020, Webinar
  Click here for more information or to view webinar

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The new Job Support Scheme: what is it and will it be enough?

Employers must fund at least 55% of normal wages if claiming under the new scheme.

With the "cliff edge" of the close of the Coronavirus Job Retention Scheme (CJRS) fast-approaching, the Chancellor's announcement on 24 September 2020 of a new scheme to subsidise short-time working will come as a relief to many. However, it is predictably much less generous than the CJRS and it may not be enough to avoid significant redundancies in the coming months. In this article we look at the initial guidance provided by the Government on the new Job Support Scheme (JSS) and consider the impact it may have on employers' plans.

The JSS will subsidise employment costs where organisations are functioning at a lower level of demand because of the impact of Covid-19. Its intention is to support "viable" jobs by keeping employees attached to their employers over the Winter.

How will the new Job Support Scheme work?

After some initial confusion, the Government has now issued a fairly clear Job Support Scheme Factsheet. This provides some detail on how the JSS will work. Detailed guidance is expected in the next few weeks.

The key points are as follows:

- The employee must work at least 33% of their normal (pre-furlough) hours and the employer will pay the employee full pay for these hours;
- The remaining unworked hours are then split three ways:
    - 1/3 of these unworked hours are unpaid;
    - 1/3 of these unworked hours are paid by the employer at the normal rate;
    - 1/3* of these unworked hours are funded through the JSS.
- The employee will receive at least 77%* of normal pay from the employer;
- *These figures are subject to a cap of £697.92 on the Government contribution;
- The employer's contribution to the employee's salary will be at least 55% of normal pay;
- Employers must also pay employer National Insurance Contributions and pension contributions;
- Each short time working arrangement must be at least 7 days and employer can move employees on and off the JSS subject to this minimum period.

The JSS will begin on 1 November 2020 and will run until 30 April 2021. After the first three months of the JSS, the Government will review and may increase the minimum level of working hours required to qualify for the grant.

Which employees can be claimed for under the Job Support Scheme?

Further detail is awaited on specific eligibility requirements. However, the factsheet published to date confirms that employers will only be able to apply for grants in respect of staff who are on payroll on or before 23 September 2020 (meaning that a Real Time Information submission to HMRC notifying payment to the employee must have been made on or before that date).

Importantly, there is no requirement for the employer to have applied for grants under the CJRS in respect of any employee.

Employers cannot put an employee on notice of redundancy or make them redundant during the period within which they are claiming a JSS grant for that employee. However, the guidance published to date implies that employers can make some employees redundant while receiving

grants in respect of other non-redundant employees.

Which employers can use the Job Support Scheme?

Large businesses will have to meet a financial assessment test which measures the impact of Covid-19 on turnover before being able to make applications under the JSS. Small and medium-sized enterprises (SMEs) are not required to meet such criteria. (An SME is likely to be defined as an organisation which meets two out of the following three criteria: turnover of less than £25m, fewer than 250 employees, and gross assets of less than £12.5m.)

The Government has expressed an "expectation" that companies will not make capital distributions such as paying dividends to shareholders while they are benefiting from the JSS.

Key steps for employers

As with furlough under the CJRS, normal employment law principles apply to the change of contractual terms. Employers and employees will therefore need to agree in advance to the change in working hours and pay. Employers should therefore consult with employees, come to an agreement, and set out in writing the agreement which is reached with the employee. Where trade unions are recognised, employers should ensure that relevant recognition agreement procedures are followed in collectively agreeing the changes to terms. The Factsheet states that HMRC may request a copy of the documentation setting out agreed changes.

HMRC have been taking steps against employers who improperly claimed support (whether by error or fraudulently) under the CJRS (see our latest article on furlough fraud here). Employers are put on notice that fraudulent claims under the JSS will also lead to enforcement action. The Government has already flagged its intention that employees will receive direct notification of the employer's JSS claim from HMRC, possibly to encourage employees to report employers who are misusing the scheme.

Will the Job Support Scheme be enough?

This will be the key question for many employers who will need now to calculate whether they can afford to keep an employee working reduced hours while funding more than 55% of their employment costs. In many cases, it may make financial sense to make some employees redundant while asking others to continue working full time, or to work reduced hours supported by the JSS.

Commentary suggests that the Government intends for JSS to dovetail with the Job Retention Bonus to provide additional financial support. Our earlier article "How can employers ensure they qualify for the £1,000 Job Retention Bonus?" is available on our website (here). It should be noted that employers will not qualify for the bonus in respect of an employee who earns on average less than £520 a month between 1 November 2020 and 31 January 2021. We await confirmation of whether this minimum will include the element of pay supported by the Government under the JSS.

Some employers will of course consider the broader impact of losing or retaining employees in this calculation. The Government's hope seems to be that the value of having skilled and experienced staff ready to "hit the ground running" as soon as restrictions have lifted will tip the balance in favour of retention and away from redundancy.

An alternative to redundancy?

Employers who are now considering redundancy or already consulting on redundancy should not ignore the announcement of this new scheme. Employers have a duty to consider alternatives to redundancy throughout the process. Where employees are already on notice of

redundancy, employers should assess the feasibility of using the JSS to reduce the number of those affected by redundancy. Even where dismissal has already taken place and the employee has appealed against that decision, the employer should give serious thought to whether the JSS changes the redundancy situation.

Unfortunately, it may be that the JSS will not be enough to change redundancy decisions, but employers should now revise their business case to incorporate an assessment of the projected impact of JSS funding. This will help employers to make informed decisions about any redundancy dismissals and will be a key document in defending any future unfair dismissal claims.

Furlough Fraud: Update

Government minister says HMRC is working on planning assumption of 5-10% error and fraud rate.

In July we wrote an article, 'Furlough Fraud', about mis-use of the Coronavirus Job Retention Scheme (the 'Scheme') with reports that some employers were claiming funding whilst their employees continued to work for them, potentially in contravention of Scheme rules.

On 7 September, HMRC's permanent secretary told the Public Accounts Committee that HMRC was looking into 27,000 'high risk' cases where serious errors in claims or fraud had potentially occurred. The permanent secretary has also stated that HMRC are working on an assumption of a combined 5-10% error and fraud rate for Scheme payments, which at 7 September put the estimated cost of overpayment and fraudulent claims at up to £3.5bn.

HMRC has begun writing to selected organisations where it has suspicions that too much money has been claimed through the Scheme and this does not appear to be as a result of legitimate mistakes. July saw the first arrests in connection with alleged furlough fraud.

The Scheme has now begun to wind down, with the levels of support available to employers continuing to decrease ahead of the Scheme's closure on 31 October (see our article 'Furlough scheme changes include 10 June cut-off date for staff who have not yet been furloughed' here). Whilst calls have been made for the Scheme to be continued, there are no signs that the government intends to do this at present.

Once the Scheme comes to an end HMRC may be able to direct more resources to auditing claims. Priority will likely be given to finding and prosecuting employers who have intentionally defrauded the Scheme, while employers who have over-claimed due to genuine mistakes will be asked to repay any overpayment)with potential interest and fines being applied. If employers are concerned that they might have over-claimed on furlough funding, they should consider using HMRC's 'amnesty' and repay funding accordingly.

The 'amnesty' requires employers to notify HMRC that they have received an overpayment from the Scheme by the end whichever is the latest of:

- 90 days after the date the funding was received
- 90 days after the employer's circumstances changed resulting in the employer no longer being entitled to keep the grant, or
- 20 October 2020.

Overpayments received from the Scheme must be repaid within 12 months from the end of the employer's accounting period, or 31 January 2022 if the receiver was a sole trader or a partner.

Reasonable adjustments and discrimination arising from a disability

Case helpfully clarifies an important aspect of the interaction between reasonable adjustments and s.15 discrimination claims.

An employer is at risk of discriminating against an employee if they treat the employee unfavourably because of something that arises in consequence of the employee's disability and the employer cannot show that the treatment of the employee is a proportionate means of achieving a legitimate aim (s.15 Equality Act 2020 ('EqA')).

An example would be where an employee suffers from a disability which results in a higher number of days of absence and the employee is then selected for redundancy because the scoring matrix took account of attendance records and did not discount days of absence with a clear link to the employee's disability.

Case law on this topic has provided a two-stage test for tribunals to determine if the employer has discriminated against an employee in breach of s.15 EqA:

- did the employee's disability cause, have the consequence of, or result in 'something'; and
- if so, did the employer treat the employee unfavourably because of that 'something'?

A recent case considered whether an employer struggling to put reasonable adjustments in place resulted in the employer discriminating against the employee for the purposes of s.15 EqA and highlighted the distinction between an employee being treated unfavourably in consequence of something arising from a disability as opposed to being treated unfavourably 'because of' their disability.

Case: ***Robinson v Department for Work and Pensions***

Mrs Robinson worked as an admin officer for DWP when she suffered a serious migraine that led to her developing blurred vision. This substantially affected Mrs Robinson's ability to undertake day-to-day activities and made it impossible for her to use some key software at work as doing so led to her suffering migraines.

DWP's workplace adjustment team recommended that Mrs Robinson receive certain magnification modifications to her computer that would enable her to do her job without triggering migraines. However, there were problems making the necessary adjustments and once complete Mrs Robinson still found that she developed migraines.

A further risk assessment was carried out and more adjustments made, but ultimately it was determined that no adjustments would allow Mrs Robinson to operate the key software without suffering migraines. In the meantime, Mrs Robinson raised grievances about the way DWP had responded to her needs.

Mrs Robinson's grievance was part-upheld on the basis that significant mistakes had been made by DWP when implementing the adjustments, which led to delays and caused her stress. The grievance report concluded that, as a result, DWP had failed to protect Mrs Robinson from stress which affected her health and wellbeing. Mrs Robinson subsequently brought claims for discrimination arising from a disability under s.15 EqA and for a failure to make reasonable adjustments under s.20 EqA.

The tribunal dismissed the reasonable adjustments claim on the basis that DWP had taken all the steps it could to make reasonable adjustments by adapting Mrs Robinson's equipment and continuing to try to resolve any issues. The fact that there was ultimately no adjustment

available that would allow Mrs Robinson to undertake her original job without suffering migraines also meant that the duty did not apply. The tribunal upheld the s.15 discrimination claim on the basis that Mrs Robinson's grievance outcome effectively amounted to an admission that DWP had treated her unfavourably by stating that DWP had failed in its duty of care to protect Mrs Robinson from stress due to the delays in making the reasonable adjustments.

On appeal, the EAT noted that mishandling the implementation of recommended adjustments could (in principle) be contrary to s.15 EqA (e.g. if an employer refused to implement them, delayed in doing so or made the individual pay for them), but the main issue was whether DWPs' 'treatment' of Mrs Robinson was 'motivated' by the consequences of her disability.

In this respect the EAT held that the tribunal had not established sufficient facts to allow it to conclude that DWP's failure to implement reasonable adjustments, and Mrs Robinson's subsequent suffering, was motivated by the consequences of Mrs Robinson's disability. The EAT upheld DWP's appeal.

Mrs Robinson appealed to the Court of Appeal. In reviewing the EAT's decision the Court of Appeal drew attention to the wording in s.15 EqA which states that the unfavourable treatment must occur 'because of something arising' out of the individual's disability. It was not therefore enough for a claimant to show that they suffered unfavourable treatment as a simple consequence of the fact that they were disabled. A claimant must rather show the employee's unfavourable treatment by the employer was motivated by the 'something' arising from their disability. Although the employer in this case had conceded that its mishandling of the adjustment process had caused the employee stress, that did not mean that the mishandling of the process was 'motivated by' the claimant's stress, or anything else arising from her disability.

On this basis, the CoA upheld the EAT's decision and Mrs Robinson's appeal was dismissed.

Comment

Given the current circumstances it will be reassuring for employers to know that mishandling of genuine attempts to make reasonable adjustments will not, in and of itself, be a breach of s15 EqA.

However, such claims are still possible, as highlighted by the EAT, if the mishandling itself is in some way connected to the disability (for example, if it was motivated by the disability). As with all discrimination matters, this should encourage employers to ensure proper processes and procedures are followed to demonstrate that there are no discriminatory reasons for action taken or inaction.

Employers can defend a claim under section 15 if the unfavourable treatment is a proportionate means of achieving a legitimate aim. Employers are unlikely to be able to run this defence if they do not have (or take reasonable steps to find out) full information about the employee's condition from medical professionals and/or occupational health advisers before taking a step which could disadvantage the employee.

Paranoid delusions found not to be a disability for the purposes of the Equality Act 2010

Particular adverse effects of delusions on the individual were not 'long-term'.

Section 6 of the Equality Act 2010 ('EqA') sets out that a person has a disability if a physical or mental impairment has a 'substantial long-term adverse effect' on the person's ability to carry out day-to-day activities. Whilst it is a relatively low-bar for an individual to show a condition

had a 'substantial' and 'adverse' effect on day-to-day activities, they still need to show that the condition was, or was likely to be, 'long-term' in that it has lasted 12 months or more, or it is likely to do so (e.g. where the impairment will remain for the rest of that person's life).

It is a defence to disability discrimination claims and to claims for a failure to make reasonable adjustments for an employer to show that they did not know or could not reasonably be expected to know of the disability.

A recent Employment Appeal Tribunal (EAT) case considered whether a tribunal was right to conclude that an employee who suffered delusions was not disabled for the purposes of EqA.

Case: ***Sullivan v Bury Street Capital Ltd***

Mr Sullivan joined BSCL in 2008 and from the outset had a relaxed attitude to observing office hours and documenting activities. Although his employer repeatedly raised issues with his working hours and lack of recording activity, no formal action was taken against him.

In early 2013 Mr Sullivan had a short relationship with a Ukrainian woman, after which he began to believe he was being stalked by a group of Russians. Mr Sullivan believed this group had access to his devices and work calendar and as a result he refrained from using his phone and did not use his calendar so as to make it more difficult for his movements to be tracked.

At the time Mr Sullivan's behaviour becoming erratic at work and amongst other things he lost sleep, his personal hygiene deteriorated and he withdrew from contacts and friends. His attendance at work was also affected. BSCL's CEO became aware of Mr Sullivan's beliefs in the Summer of 2013 and commented at the time that he was 'in a bad place psychologically and physically' and that he was 'shaking and sweating' and that his beliefs amounted to 'extreme paranoia'.

However, Mr Sullivan's condition appeared to ease in the Autumn of 2013 such that he was able to accompany the CEO on a business trip abroad. In early 2014 Mr Sullivan consulted with doctors and psychologists, who noted at the time that his condition was improving as he appeared well groomed, was engaging with friends and used the telephone, although he still reported that he believed he was being followed by Russians. Mr Sullivan did not express anything about his continued belief of being followed to his employer.

By August 2017 BSCL's CEO was on the verge of dismissing Mr Sullivan for his attitude at work and approach to timekeeping. In September 2017, the CEO met Mr Sullivan for a review and to set out how his remuneration would be structured, but the next day Mr Sullivan emailed to say he was not well and then later reported that he had been told by a doctor to not go to work for the next four weeks. In response, the CEO invited Mr Sullivan to a meeting to discuss if they should part ways. Mr Sullivan did not attend, and the CEO emailed to give him three months' notice of his dismissal, citing Mr Sullivan's attitude toward timekeeping, lack of communication, unauthorised absences, and lack of record-keeping.

Mr Sullivan brought claims for unfair dismissal, discrimination arising from a disability, indirect disability and failure to make reasonable adjustments claims.

Tribunal decision

The tribunal determined that Mr Sullivan had a mental impairment which had a substantial adverse effect on his ability to carry out day to day activities of sleeping and social interaction as of May 2013. However, it was found that the substantial adverse effect ceased after a few months.

Although it accepted that Mr Sullivan's delusion continued throughout the relevant time period, the tribunal found that this did not have a substantial adverse impact on his ability to carry out day-to-day activities between late 2013 and the summer of 2017.

In addition, whilst the tribunal accepted that another substantial adverse effect arose at the latest in July 2017, it found that it was not likely that this would continue for at least 12 months as the previous episode in 2013 had lasted approximately five months. The tribunal differentiated between the two episodes based on their surrounding circumstances and triggers, finding that Mr Sullivan's episode in 2017 was linked to the stress of the review and remuneration proposals made by the CEO to Mr Sullivan, which was not going to continue indefinitely and the condition would likely ease once the matter was resolved.

Finally, the tribunal determined that even if it had found that Mr Sullivan had a long-term disability, BSCL did not have actual or constructive knowledge of it in 2017, and so it could not have discriminated against him or failed to make a reasonable adjustment.

Employment Appeal Tribunal

The EAT upheld the tribunal's decision, noting that the tribunal was entitled to find that Mr Sullivan's delusions did not have a substantial adverse effect between the two episodes identified in 2013 and 2017. In addition, the tribunal was entitled to find that the issues with Mr Sullivan's attendance and attitude at work between 2014 and 2017 were not linked to his delusions as these behaviours pre-dated his delusions. This, coupled with the fact that Mr Sullivan did not make his employer aware of continuing delusions so as to draw a link between them were key factors in the tribunal's reasoning being upheld.

The EAT found that the tribunal was entitled to find that the reoccurrence of Mr Sullivan's delusions did not qualify as a 'long-term' disability because the tribunal had considered the specific circumstances around each event. Based on the evidence available at the time in 2013 it could not be said, in the tribunal's view, that the delusions were likely to recur. The episode in 2017 was set apart because this was triggered by the one-off remuneration discussions which, when considered in the wider context, could also not be said to show Mr Sullivan's delusions were likely to recur.

Agreeing with the tribunal's finding that BSCL did not have actual or constructive knowledge of Mr Sullivan's disability, the EAT found that the tribunal was entitled to factor in Mr Sullivan's colleague's evidence when reaching this conclusion. In this case BSCL was a small company and this colleague, who sat close by, had not noticed the effects Mr Sullivan claimed his delusions had on his personal appearance, hygiene and sleep. Therefore, this evidence could be relied on to conclude BSCL did not have actual or constructive knowledge of Mr Sullivan's continued delusions.

Wrigleys' conclusion

This case provides a reminder that claimants have to show all of the key elements of the definition of disability applied at the same time and, in particular, that the substantial adverse effect either was, or was likely to be, long-lasting. In Mr Sullivan's case the tribunal concluded there was insufficient evidence to show that the substantial adverse effects of Mr Sullivan's delusions were long-term.

In particular, the view that BSCL could not be considered to view the delusions as likely to recur, and thus be long-lasting, is useful as it demonstrates that the likelihood of long-term effects must be clear at the particular time, not in retrospect.

This case is also useful because it shows that where a claimant links a purported disability to the effect it has on their work, witness evidence from colleagues may be used to refute such

claims which will be useful to prevent an employee establishing they had a disability and/or that the employer had knowledge of the disability.

Teacher was unfairly dismissed after decision not to prosecute for criminal charges

Unfair to dismiss for reputational damage when this was not put to the teacher as a formal allegation.

On the principles of natural justice, an employee facing disciplinary action should be able to understand the precise allegations against them so that they can meaningfully put their case in their own defence. The Acas Code of Practice on Disciplinary and Grievance Procedures (which employers must take into account) also requires that the employee has sufficient information about the alleged misconduct to prepare to answer the case against them. It is therefore vital that all allegations are set out in the letter inviting the employee to the disciplinary hearing.

A recent case in the EAT in Scotland has highlighted the importance of this simple principle even in very difficult cases.

Case: *K v L*

A school teacher was charged by the police with possession of indecent images of children but the Procurator Fiscal (the Scottish equivalent of the Crown Prosecution Service) decided not to prosecute.

After learning of the charge and subsequent decision not to prosecute, the employer began a disciplinary process. The invitation to the disciplinary hearing described the complaint against the teacher as being 'due to you being involved in a police investigation into illegal material of indecent child images on a computer found within your home and the relevance of this to your employment as a teacher.'

The teacher denied responsibility for downloading the images that were found. The teacher lived with their son and explained that their son and many of their son's friends had access to this computer.

The school ultimately decided to dismiss the teacher and gave several grounds for doing so, including:

- The teacher had been charged by the police with an offence of indecent child images being found on a computer in their home;
- Although the decision had been not to prosecute, the prosecutors advised that there was an obligation on them to keep cases under review and they reserved the right to prosecute the case against the teacher at a future date;
- The teacher admitted to the disciplinary panel that a computer located in their household contained indecent images of children;
- The employer was unable to exclude the possibility that the teacher was responsible for the indecent images being downloaded;
- There was a risk to the employer local authority's reputation if it continued to employ the teacher and a future prosecution or similar action were to occur; and
- There had been an irretrievable breakdown of trust and confidence between the teacher and the employer.

The teacher brought a claim for unfair dismissal which was dismissed by an employment tribunal.

The teacher appealed to the EAT.

The appeal

The EAT agreed with the teacher that the dismissal was unfair.

Unclear allegations

The EAT commented that it was against natural justice to state a ground of dismissal in the dismissal letter that had not been clearly set out in the invitation to the disciplinary meeting. Although reputational issues had been raised by the school's investigation report and had been touched on briefly during the disciplinary hearing, they were not put formally to the employee and the employee had not commented on them at the hearing. The EAT made clear that any allegations must be clearly expressed so that an employee can adequately prepare themselves to answer the case. The EAT disagreed with the tribunal's view that it was sufficient grounds for dismissal to rely on an issue identified in an investigatory report that was not addressed in the disciplinary allegations.

Finding guilt on the balance of probabilities

The EAT also agreed with the teacher that the dismissal on conduct grounds was unfair as it was not based on a finding of misconduct on the balance of probabilities. The decision maker had dismissed the teacher partly on the basis that, although there was not enough evidence to prove who had downloaded the images, the possibility that the teacher had done so could not be excluded. The EAT made clear that this was the wrong standard of proof. In disciplinary procedures, as in civil proceedings, allegations will be proven if they are more likely than not to be true. In other words, there is more than a 50% chance that the alleged conduct occurred. Here, the school had wrongly decided to dismiss because there remained a possibility (however small) that the teacher had downloaded the images.

Relying on reputational damage

The EAT drew comparison between this case and that of *Leach v Office of Communications [2012]*. In *Leach* the employer had been warned by the police that the employee had engaged in paedophile activity in Cambodia. The employer fairly dismissed the employee because of the risk to its reputation in continuing to employ him. However, in *Leach* the employer had access to information from the police which indicated it was more likely than not that the conduct had taken place and the employee had attempted to conceal the matter from his employer. There was also significant interest from the national press about the case.

In contrast, in this case, the school had not found evidence to establish that the conduct was more likely than not to have occurred and had no evidence to suggest reputational damage was likely. When dropping a prosecution, the Procurator Fiscal commonly reserves the right to prosecute should further information come to light. This was no indication that such a future prosecution would happen and damage the employer's reputation.

Wrigleys' comment

Disciplinary cases involving criminal allegations can be extremely difficult for employers to deal with. Please see further information on handling such cases particularly in a school context in our previous article: "Dealing with school employees who are being investigated by the police" (link here). We have also looked at the interaction between internal and external investigations in a recent case report: "When disciplinary and criminal proceedings interact" (link here).

The employer in this case might have been able fairly to dismiss on the basis of reputational damage to the organisation if it had properly put this point to the employee and considered the likelihood of reputational damage based on the facts of the case. This would depend however on whether

there was found to be a real risk of the matter becoming public knowledge and actual harm to the employer's reputation as a consequence.

How should we deal with flexible working requests to work remotely?

Key considerations for employers dealing with requests to work differently in the context of the ongoing Covid-19 pandemic.

At the time of writing, the UK has seen a recent steep increase in Covid-19 infections and projections of increased hospital admissions and deaths do not make comforting reading. As a consequence, the Government has now changed tack and reverted to its previous message that those who can work from home, should work from home.

One longer term impact of the pandemic is very likely to be increased employee expectation that they will be able to work flexibly, including working from home or from other locations. A survey of employees undertaken by work-life balance charity Working Families in June this year found that 90% of employees wanted their employers to continue flexible working practices following the pandemic.

In this article, we look at key considerations for employers as they deal with requests to work remotely in the context Covid-19.

Readers may be interested in our two webinars on the subject of flexible working recorded in June and July this year. You can register to hear the recordings of these on demand at https://www.wrigleys.co.uk/events/recorded-webinars/.

Who is eligible to bring a statutory flexible working request?

All employees with at least 26 weeks' service for their employer have a statutory right to request flexible working. There is no longer any requirement to have childcare responsibilities to make such a request. Indeed, the employee does not have to explain their reasons for the request, although many will include such details to support their case. Even before the pandemic, we saw a trend of employees seeking to reduce or compress their hours and/or to work from home via statutory flexible working requests in order to provide the flexibility to pursue their own business, hobbies or studies.

Although last December may now seem like a very long time ago, the new Conservative Government then announced its intention, subject to consultation, to make flexible working the default position unless an employer has a good reason not to offer this. Of course due to the current crisis, it may be some time before this Government consultation takes place and legislation is brought forward to make this a reality. In the meantime, however, many employers are already working on this principle, as evidenced by Working Families' research for its family friendly employers benchmark. Working Families found that 52% of employers surveyed analyse all jobs to determine the potential for flexibility before advertising vacancies.

How should flexible working requests be handled?

Employers must handle statutory flexible working requests reasonably. This includes taking into account the statutory Acas Code of Practice on dealing with such requests.

Where employers cannot agree to the request, they should consider whether there is a compromise arrangement which can be agreed. For example, it may not be possible to allow an employee to work remotely full time but it may be possible to agree to remote working for some of the time if

they can attend the work place on some days in the week or month.

Decisions on statutory flexible working requests must be made within three months, although employers and employees can agree to extend this period between them, for example to allow time to trial the changes. Employers should allow employees a right of appeal.

Employers should be aware that employees who have brought statutory flexible working requests are protected from detriment and dismissal because they have done so.

Can a request to work remotely be a statutory flexible working request?

The short answer to this is, yes. Employers sometimes assume that a flexible working request will always be a request to reduce working hours. This is not the case. Employees can request to change their place of work and pattern of hours while maintaining the same number of contractual hours.

It is also perfectly possible for employees to request additional hours in a flexible working request. Indeed, with the removal of commuting time and the possible time efficiencies of replacing face to face with remote meetings and events, there may be a significant number of staff who now feel able to increase their hours if they are permitted to work from home.

Will requests to work remotely be harder to refuse following the pandemic?

Flexible working requests can only be refused on the basis of one or more of eight statutory business reasons. For example, employers can refuse on the basis that the change will impact negatively on the organisation's ability to meet customer demand, or that work (such as face to face work) cannot be reorganised among other employees. In relying on these business reasons, employers should not make assumptions about a negative impact they perceive remote working will have on service users, customers, clients, other employees or on productivity. Ideally, employers should have evidence to support their decisions and should use a trial period to test out an arrangement where that evidence does not exist.

Over the last few months, many employers have effectively been conducting a prolonged trial period of remote working for some roles. Where these temporary working practices have been successful, it will certainly be more difficult for employers to refuse requests to continue to work remotely. Anecdotally, employers have reported sustained and, in some cases, increased productivity from those working from home. However, this will not always be the case. Evidence of operational and technological problems, customer complaints, line management issues and poor performance or productivity gathered over recent months could of course support a decision to refuse a permanent change to remote working.

How should we deal with requests to work remotely where there may be redundancies?

Many employers will now be faced with very difficult decisions where the prospect of another six months of Covid-19 restrictions may lead to a redundancy situation due to a reduction or cessation of some types of work requiring physical attendance at a workplace. Carrying out a fair redundancy process includes a duty on the employer to look for alternatives to redundancy and ways to mitigate its effect. This should include serious consideration of suggestions from employees to consider options for remote working, including the possibility of changing the nature of the service offered by the organisation to one which can be delivered remotely.

Where employees bring formal requests for remote working in the context of or as an alternative to a redundancy, it will still be important for the employer to follow a reasonable flexible working request process and to ensure that any decision to refuse is supported by well-evidenced business reasons.

If we agree to a request to work remotely, will it be a permanent change?

If employers agree to a statutory flexible working request, this will be a permanent change to the employment contract. It is therefore important to clarify the changes which are agreed in writing and to ask the employee to sign this document to evidence that agreement.

Where a trial period is undertaken, it is important that the terms of this temporary arrangement are set out in writing. Employers should state that contractual terms will revert to normal following the trial, subject to review and the final decision of the employer.

Employees only have the right to make one statutory flexible working request in any 12 month period. If employees made a statutory request at the start of lockdown in March, they will need to wait until next March to bring a further request under the statutory scheme.

Do we need to respond in the same way to an informal or non-statutory request?

Any members of staff can of course make an informal request to work flexibly at any time, but the employer is not required to follow the statutory process in that case. An informal request or a request from a member of staff who is not eligible under the statutory scheme does not entail the same process. However, employers should be mindful that they must still respond reasonably to such requests and on the basis of sound business reasons. Employers could otherwise risk discrimination, Part Time Workers Regulations or constructive dismissal claims.

Many employers channel all flexible working requests, statutory or otherwise, through the same internal process. This has the advantage of dealing with requests consistently and providing a paper-trail to evidence decision-making.

Taking a proactive approach and dealing with multiple requests

Acas recommends that each request is dealt with in the order it is received. However, an agreement to one request will inevitably impact on the ability of an employer to agree future requests. In anticipation of receiving a number of requests in the coming months, employers would be well advised to carry out a proactive review of the impact of remote working in different roles on a more permanent basis, including an analysis of the impact of a combination of remote and non-remote working. Carrying out staff surveys will also enable employers to take an overview of the likely level of demand for more flexible and remote working options.

While it is useful for employers to be proactive in assessing impact and setting policy on remote working, it will always be necessary to look at each individual request on its own merits and to ensure that any refusal is based on one or more of the statutory reasons, supported by evidence. Employers who implement a blanket policy of refusing certain types of request (such as for remote working) risk claims including indirect discrimination and for a failure to make reasonable adjustments for disabled employees. For more information, please see our previous article “In a world of change equality law still applies” on the interaction between Covid-19 and potential discrimination claims which is available here.

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