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EMPLOYMENT LAW BULLETIN

SEPTEMBER 2021

Welcome to the Wrigleys Employment Law Bulletin, September 2021.

The success of the UK vaccination programme has led to some new questions for employers, but the answer to these is largely based on long-standing employment law principles. We hope you can join us for our next free Employment Brunch Briefing on 5 October which considers whether employers can make decisions about their staff based on vaccination status. Please see the Events page on our website or click the link below for more detail.

In our first article this month we consider whether staff have the right to take paid time off to have the Covid vaccination.

Employment tribunals continue to consider employment disputes which arose at the beginning of the Covid pandemic. We cover a recent judgment which considered whether a dismissal because of a refusal to go to the house of a self-isolating colleague was automatically unfair because it was on health and safety grounds. We also consider a tribunal judgment on whether a pregnant worker was discriminated against when she was not allowed in to work for health and safety reasons in the first months of the pandemic. Although they do not set a precedent, these judgments provide a useful insight into how tribunals will approach Covid-related decisions by employers.

The EAT judgment in ***Kong v Gulf International Bank (UK) Ltd*** provides helpful insight into the circumstances when the motivation of someone other than the dismissal decision maker will be attributed to the employer in whistleblowing claims. It is also helpful in showing how the tribunals should approach cases where the reason for dismissal was not the whistleblowing concerns themselves but the employee's poor communication skills in raising them.

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

Can we make decisions about staff based on vaccination status?

5 October 2021 | 10:00 - 11:15

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

Click here for more information or to book

Wrigleys' 30th Annual Charity Governance Seminar

14 October 2021 | 09:30 - 16:15

Key note Speakers: *Debra Allcock Tyler, chief executive of Directory of Social Change & Lizzy Carlyle, head of environmental practices at the National Trust.*

Speakers: *Joanna Pittman, partner at Sayer Vincent & Jane Marriott, trust director at Harewood House Trust. Plus various speakers from our Wrigleys Charity and Social Economy Team*

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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Do staff have the right to paid time off for vaccinations?

Article published on 23 September 2021

Workers have limited rights to request paid leave.

As of 12 September 2021 89.2% of the UK's population aged 18 or over had had at least the first dose of an authorised vaccine, with that number dropping to 82.5% for those aged 18 or over with two doses of vaccine. This means that there is still a significant portion of the UK working population who have either not been vaccinated or not yet received both doses, whether through vaccine hesitancy, medical exemption, or otherwise.

As of 11 November 2021 the only group of workers who must be vaccinated to perform their jobs (or have a medical exemption) are those working in CQC registered care homes. The government is currently consulting on making vaccines mandatory for all frontline health and care staff. Currently, government guidance for employers on working safely during coronavirus only goes so far as to encourage the wearing of masks, washing hands regularly and the use of outdoor and well ventilated spaces, where available, but does not suggest encouraging staff to get vaccinated. Many employers are however taking steps to encourage and enable staff vaccination as part of their Covid risk mitigation measures and in line with Public Health England guidance for employers on Covid vaccination.

Workers and employees do not have a specific right under statute to take paid time off for medical appointments (unless the worker is pregnant and attending antenatal appointments). In some cases, there may be a contractual right to take time off for such appointments but often this will be left to the discretion of the employer – there is no specific statutory right to this.

However, it is important to note that whilst there is no obligation to pay staff to attend medical appointments during work hours, employers should think carefully before taking disciplinary action against staff members for doing so, particularly as this may have discrimination claim implications. Employers should also bear in mind that paid time to attend medical appointments may be a reasonable adjustment for the purposes of the Equality Act 2010 where individuals have or are likely to have a disability for the purposes of the Act.

What does this mean for employers?

ACAS guidance suggest that employers should support staff to get the vaccine once it is offered to them. However, a recent ACAS study found that 25% of British employers have not been giving staff paid time off for covid vaccinations and that the same percentage had not been paying staff sick pay for staff who were off work due to vaccine side effects.

Ultimately, it is for employers to decide if they will pay staff for time they take off to get vaccinated and for any associated time off needed due to side-effects to pass and for employers to determine whether more staff being vaccinated is beneficial for their staff when factored into workplace risk assessments.

Employee who refused to visit manager's property during lockdown was automatically unfairly dismissed on health and safety grounds

Article published on 17 September 2021

Tribunal decision offers useful insight into how employers may have been exposed to claims during the pandemic.

The sudden onset of the Covid-19 pandemic in March 2020 led to a variety of responses from employees and employers. These circumstances created unique problems and new potential liabilities. Indeed one aspect of this, covered in our article from January 2021: 'Refusing to work because of fears about Covid-19 – section 44 of the Employment Rights Act', was that employers faced claims under sections 44 and 100 of the Employment Rights Act 1996 (ERA) if employees refused to work, or left work, as a result of holding a reasonable belief that there was a perceived serious and imminent danger in the workplace caused by Covid-19.

This potential risk was compounded by the fact that there was very little case law on these provisions meaning employers and their advisers were left with little guidance as to how these provisions would be interpreted in the context of the Covid-19 pandemic.

A recent tribunal decision has provided some useful indicators to these points.

Case: ***Ham -v- Esl Bbsw Ltd [2021]***

Mr Ham started employment for Esl, a cleaning company, in November 2019 as an area supervisor. He had a six-month probationary period. On 16 March and 23 March 2020 the Prime Minister addressed the UK and stated, respectively, that all non-essential contact and travel should cease, that a national lockdown would come into force, and that all those not required to do otherwise should 'stay at home'. The lockdown became legally enforceable on 26 March.

On 30 March 2020 Mr Ham's supervisor contacted him via telephone to ask him to pick up cleaning equipment Esl had at a client's premises and bring it to her house for storage. The supervisor was isolating at home as both she and her child had symptoms of Covid-19. The precise details of these calls would be disputed, but Mr Ham claimed that he queried if this was a good idea given the recently announced travel restrictions and the supervisor's self-isolation as he was concerned about his health and the health of his family if he carried out these instructions.

The precise events are not clear, but it seems that as part of this exchange Mr Ham was told he was dismissed for failing to carry out a reasonable management instruction and for an inappropriate attitude on the phone.

Mr Ham appealed his dismissal, but the decision was upheld by the Esl's CEO. Mr Ham subsequently brought claims for automatic unfair dismissal on health and safety grounds, contrary to s.100(1)(c) and/ or (e) ERA, which provides that if an employee can show that the reason or principal reason for their dismissal was that:

- being an employee at a place where there was no safety representative or committee, he brought to his employer's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety; or
- in circumstances of danger which he reasonably believed to be serious and imminent, he took or proposed to take appropriate steps to protect himself or others from the danger,

then they are automatically unfairly dismissed.

Esl sought to defend the claim by denying that Mr Ham had raised any concerns about the potential risks of attending his supervisor's house, rather that he had simply not wanted to go to the client's premises to collect the equipment and that he had been unpleasant to his supervisor on the phone.

The Tribunal upheld Mr Ham's claims based on the evidence presented, finding that Mr Ham's witness evidence was more consistent and reliable than that provided by his supervisor and the CEO of Esl. Based on this, the Tribunal found that his concern was with attending the supervisor's house due to concerns about Covid-19 and that he was dismissed wholly or principally for this reason.

Wrigleys comment

When potential claims under s.100 ERA were identified, employment law commentators queried whether employers were most at risk at the start of the pandemic rather than in the months (and years) following the initial outbreak, when more was known about the virus and various protections and mitigations were put in place. This was touched on in the Tribunal's decision at para 9.4, where it considers it 'inconceivable' that an employee in Mr Ham's position at that time would not be raising concerns he reasonably believed were harmful or potentially harmful to his health and safety, or that he was not seeking to take appropriate steps to protect himself from a danger he believed to be serious and imminent.

In addition, it highlights the potential liabilities employers face in such cases because, if proven, dismissal on these grounds is automatically unfair meaning employees do not need two years' service as in standard unfair dismissal claims. Mr Ham had been employed for five months when he was dismissed and was awarded more than £16,000 in compensation by the Tribunal.

Pregnant worker was not treated unfavourably when she was sent home at the start of the Covid-19 pandemic

Article published on 28 September 2021

Tribunal decision will provide comfort for employers who sent pregnant staff home for health and safety reasons.

A steady run of cases is now emerging from the employment tribunals where the key events took place at the start of the Covid-19 pandemic. A recent decision has been highlighted for its consideration of pregnancy and maternity discrimination where an employer sent a pregnant employee home whilst grappling with the onset of the pandemic.

As a quick reminder, under the Equality Act 2010, a person (A) directly discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. Pregnancy and maternity are relevant protected characteristics for these purposes.

Case: ***Prosser -v- Community Gateway Association Ltd [2021]***

On 13 March 2020 Miss Prosser informed her line manager that she was pregnant and on 17 March she was sent home on the basis she was considered clinically vulnerable because of her pregnancy, in line with then government Covid-19 guidance.

Miss Prosser asked to return to work in May 2020 and CGA undertook a risk assessment. The assessment concluded Miss Prosser could undertake day shift work provided Perspex screens were fitted between work desks. However, due to various issues, the fitting of the screens was delayed until August despite CGA's attempts to get the screens fitted sooner.

On 30 June Miss Prosser raised a grievance claiming she had suffered pregnancy discrimination because of the failure to allow her to return to work. This was not upheld.

Miss Prosser returned to work in August after the Perspex screens were fitted. Miss Prosser appealed her grievance outcome, but this was not upheld. She then submitted a claim to the Tribunal in September alleging CGA had discriminated against her whilst she was pregnant by sending her home and delaying her return to work.

The Tribunal took time in its judgment to set out the chain of events which occurred around the time Miss Prosser was sent home and her return to work. On the facts, the Tribunal found that a series of related delays and mistakes which took place during this time contributed to Miss Prosser's perception that she had been treated less favourably by CGA because of her pregnancy when she was sent home and unable to return to work.

However, the Tribunal concluded that whilst Miss Prosser was sent home due to being classed as vulnerable, this was not unfavourable treatment as it had been appropriately informed by the requirements of the government's own public health advice and guidance at the time. In addition, the subsequent delays to Miss Prosser's return and being told she could not return until adequate social distancing measures were in place were held not to be unfavourable treatment – rather they were a positive step taken to protect her in line with relevant legislation.

Wrigleys comment

On reading the decision there is a degree of sympathy to be had for CGA. Due to a series of unfortunate and untimely mistakes and problems, some of which were not in CGA's control, Miss Prosser was led to believe that CGA was treating her less favourably than other staff as a result of her pregnancy.

Although Tribunal decisions do not set precedents, this decision will provide some comfort for employers trying to manage the uncertainties of responding to the pandemic and dealing with vulnerable employees who themselves were no doubt anxious about being sent home and may have not been able to return to their roles for some time as understanding of the virus grew and appropriate workplace adjustments were made.

Dismissal was not because of whistleblowing but because of poor interpersonal skills

Article published on 24 September 2021

Dismissal was unfair but decision-maker was not motivated by protected disclosures.

If an employee is dismissed because they have made a protected disclosure (or "blown the whistle"), this will be automatically unfair. There is no financial cap on compensation where a dismissal is found to be because of a protected disclosure, and there is no requirement for the employee to have two years' service. Where financial losses are likely to be above the current cap of £89,493 or one year's gross pay, a finding of automatic unfair dismissal for whistleblowing can therefore be particularly costly for employers.

For further information on when a disclosure will be protected, see the following article from 2019, which is available from our website: Was disclosure in the public interest when made in defence of concerns about poor performance?.

In addition, both employees and workers are protected from suffering detriment because they have blown the whistle. In our 2018 article, Can an individual be personally liable for dismissing someone because of whistleblowing? we covered the risk of personal liability for individual

managers where they subject a member of staff to detriment or dismiss them because of a protected disclosure.

Can someone be fairly dismissed because of the way they raise their whistleblowing concerns?

In tribunal, the first step is for the claimant to show evidence to suggest, in the absence of another explanation, that they have been dismissed for the sole or principal reason that they blew the whistle. This is called having a "prima facie" case. The burden then shifts to the employer to show that the sole or principal reason for dismissal was a potentially fair reason and not the protected disclosure.

Tribunals have often considered cases where an employee has raised their concerns in an unacceptable way. The question in these cases is whether the employee has been dismissed because of the protected disclosure (which would be automatically unfair) or whether they have been dismissed for misconduct (which would be potentially fair).

Case law in this area is very fact sensitive because the tribunal has to consider what is in the mind of the person making the decision to dismiss and whether they were motivated by the protected disclosures, or by other factors, such as the claimant's unacceptable mode of communication, breakdown in working relationships, or breach of workplace rules.

Can the motivation of another person be attributed to the dismissal decision-maker?

In the case of *Royal Mail Group Ltd v Jhuti*, the Supreme Court made clear that there could be some limited circumstances where the motives of another person in the employer organisation can be attributed to the person making the decision to dismiss. This will happen: "if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason".

We consider this case further in our 2020 article: Unfair dismissal: whose reason is it anyway? (available from our website).

A recent case in the EAT has explored further when the motivations of another person influenced by claimant's protected disclosures will be attributed to the employer. It also sheds more light on when the manner of raising concerns rather than the concerns themselves will be found to be the principal reason for dismissal.

Case details: *Kong v Gulf International Bank (UK) Ltd*

Ms Kong was employed by GIB as Head of Financial Audit. In a draft audit report, Ms Kong raised concerns that a legal agreement GIB was proposing to use in relation to a particular financial product was not suitable for use with non-bank investors. It was not disputed that the claimant had raised protected disclosures when expressing her concerns about this agreement.

The Head of Legal, who was responsible for the legal agreement, disagreed with the claimant's concerns. She entered the claimant's office without knocking and a heated discussion took place. She later gave her version of events to the Head of HR and others, saying she had been upset by the way in which the claimant had questioned her professional integrity and legal awareness, and could not see how she could continue working with the claimant. The Head of HR and CEO considered that the claimant should be dismissed. The Group Chief Auditor (who line managed the claimant) agreed and the claimant was then summarily dismissed.

The claimant brought claims to an employment tribunal for unfair dismissal and for detrimental treatment and automatic unfair dismissal for having made protected disclosures.

The tribunal decided that the conduct of the Head of Legal was detrimental treatment because of the claimant's protected disclosures. However, that claim was brought out of time and so did not succeed.

The tribunal found that those actually making the dismissal decision were not motivated by the claimant's protected disclosures, but by their view of her conduct, in particular her poor interpersonal skills and communication with colleagues. The complaint of automatic unfair dismissal for having made protected disclosures was therefore unsuccessful. However, the claimant was found to have been ordinarily unfairly dismissed because the dismissal by reason of conduct was not fair in all the circumstances.

The claimant appealed against the failure of the automatic unfair dismissal claim.

The EAT agreed with the tribunal that the claimant had not been dismissed because of her protected disclosures. It agreed that the decision-makers had been motivated principally by the way the claimant raised her concerns. That is, the decision-makers considered that the mannerof the claimant's questioning of the Head of Legal's legal awareness and professional integrity was unacceptable conduct and warranted summary dismissal.

The EAT was clear that this was not a case, such as *Jhuti*, where someone in the hierarchy above the claimant had invented a reason for dismissal as a response to their protected disclosures, and this invented reason had been taken up unwittingly by the dismissing officer. Here, the Head of Legal was not in fact in the hierarchy above the claimant (she was more senior but was not in the claimant's reporting line). Also, the Head of Legal could not be said to have invented a reason for dismissal and misled the decision-makers. She was found to have over-exaggerated the extent to which the claimant had questioned her professional integrity, but this was not in the same order as the invention envisaged by the Supreme Court in *Jhuti*.

Wrigleys comment

Employers should be aware of the additional risks associated with whistleblowing claims. These include additional financial risks where a dismissal is found to be by reason of protected disclosures, particularly where an employee might claim significant losses relating to pensions, bonuses, or career-loss earnings.

It is important to ensure that the reason or reasons for dismissal are well evidenced and documented, including any issues which have arisen previously, as this will assist an employer in showing that the reason for dismissal was not an unlawful reason.

Cases where an employee has breached workplace rules in the way they raise protected disclosures will need very careful handling to minimise the risks to the employer. It is important to note that a tribunal may decide that the real reason for dismissal was the disclosures themselves, no matter how inappropriate the claimant's conduct.

As occurred in this case, even though an employer may be able to defend an automatic unfair dismissal claim, a claimant may still be found to be ordinarily unfairly dismissed if the potentially fair reason for dismissal is not sufficient to justify dismissing in all the circumstances of the case. Following a fair process which complies with the employer's own policies and (for conduct dismissals) with the Acas Code of Practice on Disciplinary and Grievance Procedures is vital to lower the risk of successful claims.

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