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STUDENTS' UNION BULLETIN

SUMMER 2021

Welcome to the summer edition of Wrigleys' students' union bulletin

Hello everyone,

Welcome to the summer newsletter from the students' union team at Wrigleys Solicitors, packed full of articles and webinars to keep you updated on legal issues affecting the sector.

As your sabbatical teams handover, the article about Kids Company acts as a timely reminder of the need to ensure your trustee boards receive sufficient training and are aware of their duties as charity trustees. And as the debate about the Freedom of Speech bill continues to rage, we ask whether this new legislation is really necessary. We've also included a link to our latest employment law updates, with advice about whether long Covid might be protected as a disability under the Equalities Act and an article about changing terms and conditions of an employment contract during the pandemic.

In other news, we were delighted to sponsor SU21 Digital recently. We delivered a webinar on sexual misconduct within students' unions, and thanks to all of you who attended. Well done to the SU Digital team for hosting such an engaging, informative event.

We also hosted a couple of our own webinars back in May, recordings of which are now available on our website (links below). We hope to repeat this in the future, so do let us know if there are any topics you would like us to cover.

Finally, we are looking forward to hosting our first ever SU round table event in August. This is aimed at senior managers within SUs, for an informal discussion about legal issues affecting the sector. The link to sign up is below and we hope to see you there.

Have a great summer and we'll be in touch again in the autumn term.

Wrigleys' SU team

Forthcoming webinars:

- **3 August 2021**
  Employment Brunch Briefing
  Fire and re-hire: a legal necessity or an abuse of power?
  Speakers: *Alacoque Marvin & Michael Crowther, solicitors at Wrigleys Solicitors*
  Click here for more information or to book

- **12 August 2021**
  Students' Unions Gathering
  Informal round table discussion for senior managers in students' unions
  Speakers: *Laura Moss, Nat Johnson, partners & Alacoque Marvin, solicitor at Wrigleys Solicitors*
  Click here for more information or to book

Recorded webinars

- **20 May 2021**
  Students' Unions Webinar
  Employment law update for students' union's
  Speakers: *Alacoque Marvin and Michel Crowther, solicitors at Wrigleys Solicitors*
  Click here to view

- **27 May 2021**
  Students' Unions Webinar
  Diversity and inclusion on students' union's boards
  Speakers: *Laura Moss, partner & Hayley Marsden solicitor at Wrigleys Solicitors, Osaro Otobo & Kathryn Sullivan, MiraGold*
  Click here to view

– Laura Moss, Editor **laura.moss@wrigleys.co.uk**

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Battle continues over free speech at universities

Article published on 29 March 2021

New proposed measures continue debate on free speech on university campuses.

The education secretary, Gavin Williamson, recently announced plans to introduce legislation enabling academics, students or visiting speakers who are no-platformed to sue universities for compensation, where they feel they have suffered because of infringements to their right of freedom of speech.

What new measures are proposed?

Williamson's proposals are part of a raft of new measures the government is seeking to introduce to fulfil its manifesto commitment to protect perceived threats to free speech and academic freedom in universities in England.

Further proposals include:

- appointing a 'free speech champion' to investigate potential infringements of free speech in higher education;

- making access to public funding contingent on universities adhering to a new free speech condition and giving the Office for Students, the higher education regulator in England, the power to impose fines in case of breaches;

- a new free speech duty applying directly to students' unions, requiring them to take steps to guarantee the right of free speech to their members and visiting speakers; and

- introducing a new statutory tort for breaches of the free speech duty, enabling academic staff or students who have been expelled, dismissed or demoted to seek redress through the courts.

The measures outlined above will impact all students' unions in England, if they successfully pass through parliament.

Are these measures really necessary?

Universities already have a legal obligation to take 'reasonably practicable' steps to ensure freedom of speech within the law for their members, students, employees and visiting speakers, under the Education Act 1986. As public bodies, they also have a duty to comply with Article 10 of the European Convention on Human Rights, which states that everyone has the right to freedom of expression. Useful guidance published by the Equalities and Human Rights Commission (EHRC) in February 2019 aimed to clarify the rules.

The legal framework to protect free speech on university campuses therefore already exists. Banning certain groups or individuals from campus could potentially infringe a university's duties to uphold freedom of expression on campus. If a student group blocks a particular speaker, their institution may therefore step in.

Although students' unions are not themselves subject to these duties, as independent charities, they are subject to other legal duties and responsibilities which concern free speech. Students' unions generally have charitable purposes framed around the advancement of education, and as charities must remain politically neutral. Encouraging debate and giving voice to a broad range of perspectives on topical issues is a core part of this. Banning certain speakers would potentially conflict with these duties.

However, student groups occasionally do use no-platforming and safe space policies as grounds to refuse invitations to speakers to their events. This is clearly permissible under the existing legal framework. These policies can play a key role in encouraging people to express views free from harassment and discrimination, fostering understanding and respect between the diverse communities co-existing on university campuses. Preventing certain speakers from having a platform may in some cases be necessary to uphold an SU's duty of care towards their student beneficiaries, especially where it may result in violence on campus. Any such decision would need to be weighed up against their duty to maintain their resources, particularly where it risks damage to their reputation.

In any event, in reality there have been relatively few instances of no-platforming. The Office for Students published a paper in September 2018 arguing that there is limited evidence of universities failing to confront these issues and that the majority of students engage respectfully in exercising their rights and determining what they deem acceptable. A report on free speech in universities by the parliamentary Joint Committee on Human Rights, published in March 2018, reached a similar conclusion.

Despite this, Williamson's new proposals build on the perception that there is a free speech 'crisis' at universities. However, the 'crisis' is more media hype than anything, and the need for new legislation is questionable. We await more details on the proposals to know how extensive they will actually be, and to assess the likely impact on the students' union sector.

Nonetheless, Williamson's intervention suggests this topic will remain controversial. Students' unions implementing a no-platform policy should therefore expect accusations of restricting free speech to continue, however unjustified these accusations may sometimes feel.

Contractual considerations for students' unions

Article published on 23 April 2021

Representatives will often find themselves faced with agreements or contracts to sign, including sponsorship, advertising, coaching or marketing.

It is important to be able to identify any potential areas of concern in these documents before entering into them.

Why would a students' union need external advice before entering into a contract with a third party?

In many cases a students' union may be presented with a contract from a third-party supplier, coach or service provider and be told that the document is in a standard form and is not open to negotiation. This can sometimes be true but is often a commercial tactic to avoid the need for negotiation and to ensure that the terms and conditions governing the contract will be those of the third party, and which are likely much more friendly to them than to the union.

It is important for union representative to recognise the situations in which those supplier friendly terms and conditions may not be suitable, so that a better position can be agreed between the parties to better protect the union. In some cases this can be handled internally but for contracts of a particular importance, or of a high value, it is advisable to take professional advice to ensure the union does not end up out of pocket or with liability for any contractor breaches.

Key terms and pitfalls

Key terms on which to be on the lookout, or pitfalls to avoid, include:

1. Who is the contract with? If the student union is unincorporated, the contract will have to be made with individual trustees of the union, as the union itself has no distinct legal personality. The 'party' clause will therefore need to include accurate details (including names and addresses) of all current trustees.
2. Entire agreement clauses – which can nullify any previous representations or commercial discussions (on both sides). These are often beneficial, as you have greater certainty over the terms of the arrangement as they are all set out in the actual contract, but it is then important to ensure that any key commercial terms that were finalised in the negotiations, either in person, over the phone or on email, are then actually included in the drafting.
3. The "battle of the forms" which is a colloquial term for the legal uncertainty relating to whose standard terms and conditions may be attached to the signed contract. Many contracts refer to a separate set of terms and conditions which are to apply, and whether these are accepted or replaced by a different set under a counteroffer can be a complicated area.
4. Limits on liability – supplier friendly contracts will often try to limit liability as far as possible, and to remove any indemnities under which the union could recover costs. Sometimes this will be commercially acceptable, but it is important to ensure that liability is duly apportioned so that the union could recover appropriately.
5. Assignability and/or transferability – contracts may include clauses allowing the supplier to sub-contract the services, or to assign/transfer the benefit of the contract to another party. Care should be taken here to allow the union a certain level of control over this process so that you are only having to deal with people or parties you know.
6. Data Protection/UK GDPR – as the contract will often involve services relating to students it is important that there are sufficient obligations placed on the supplier to deal with the personal data relating to students in compliance with all relevant data protection legislation and UK GDPR. This is not only to protect the students themselves, but also the union from any claims that they did not take sufficient action to ensure the safety and proper use of such data.
7. Execution blocks – It is important to make sure that the signing formalities are correct to ensure that the contract is binding and enforceable. If the student union is unincorporated, the general position is that all trustees will need to sign the contract. However, it is administratively easier if the trustees pass a resolution under s.333 of the Charities Act 2011 to authorise two trustees to sign on behalf of the rest of them. If the union has been incorporated as a company or CIO, it has a separate legal identity and authorised people may sign the contract on its behalf. However, care still needs to be taken, as it will not necessarily be the case that any member of staff is able to sign. In all cases, the union will need to check its governing document and the terms of any delegated authorities approved by the board to see what the exact requirements are.

Wrigleys have specialist commercial solicitors who work closely with a number of students' unions and would be very happy to advise on any contractual or commercial issues which a union may feel would benefit from professional review.

The Kids Company case: practical points for students' union trustees

Article published on 22 July 2021

What can charities learn from the high profile collapse of the Kids Company?

Few cases involving a charity have been as widely reported, not only by the charity sector press but also the wider media, as that involving the collapse of the well-known charity, Kids Company, in 2015, with its connections to high profile figures and organisations in the media and politics. The case impacts the whole of the charity sector, including students' unions (SUs).

Six years after the charity went into administration, the High Court issued its decision in February this year in response to the claim brought by the Official Receiver that the trustees and CEO of Kids

Company were unfit to be concerned in the management of a company and should be disqualified from being able to hold directorships. Mrs Justice Falk dismissed the allegations, finding that their conduct did not make them unfit to be involved with the management of a company. In the judgment, unfitness was defined as incompetence to a high degree, provided there is no allegation of dishonesty.

The case and 225-page judgment raised several practical learning points for how SU trustees can protect themselves, particularly given the high turnover on SU trustee boards due to the presence of sabbatical and student officers. Knowledge may not always be passed on to successor trustees and there may be a lack of corporate memory, which can lead to inefficiencies and reduced productivity on the board. This can be mitigated to some extent by having continuity amongst senior staff such as the Chief Executive Officer, but underlines the importance of good record keeping, sharing know-how with, and offering training to, incoming trustees so that corporate memory is not lost each summer when trustees change.

The charitable context

Kids Company, like many SUs, was a charitable company limited by guarantee. Its volunteer trustees were therefore both trustees for the purposes of charity law and company directors under company law. The court confirmed that trustees of charitable companies are subject to the same duties as directors of other types of companies, however the charitable context should not be disregarded, making a clear distinction between charitable and non-charitable companies. This means that a finding of unfitness in a commercial company director does not automatically lead to the same conclusion in a charitable company and this therefore potentially provides SU trustees with a greater degree of protection. However, in no way does this reduce the need for SU trustees to comply with their legal duties as charity trustees and (where applicable) as company directors. They must always be able to demonstrate that they acted in what they reasonably consider to be the best interests of the SU.

The role of the CEO

The judgment also analysed the role of the Kids Company CEO, Camila Batmangelidjh. Ms Batmangelidjh was not a trustee but she did attend trustee board meetings, made recommendations to the trustees and was critical to the functioning of Kids Company, entering transactions on its behalf. The Official Receiver alleged that this made her a de-facto director and contended she was on an equal footing with the trustees, making her susceptible to the allegation of being unfit to be concerned with the management of a company. An SU may well also have a CEO who wields significant influence and is at risk of becoming a de-facto director, particularly in the context of a frequently changing trustee board.

The court found that Ms Batmangelidjh did wield significant influence but was not part of the ultimate decision-making structure, providing reassurance to trustees of their power to delegate authority to executive management. SUs should therefore ensure that senior staff, even those that enjoy substantial delegated authority, are subject to the trustees' supervision. It is also a good idea for SUs to have a clear scheme of delegation, as well as decision making protocols that are regularly reviewed. At meetings, it is important to distinguish between those "present" i.e. the trustees at trustees' meetings, who have a vote at the meeting, and those "in attendance" e.g. non-trustee staff members and advisers, who do not have a vote. This should also be clearly minuted.

Decision making

Trustees must be aware of the need for clarity in decision making and for decisions to be justifiable and should ensure a record is kept of all decisions and reasons for them.

Kids Company kept thorough and comprehensive records, providing evidence going back years for when decisions were taken and why. This stood them in good stead when confronted by the Official

Receivers' allegations.

Further implications

The judgment suggests that in the event of an allegation, the conduct of the trustee, as much as their skills and experience will be considered by the court. The court also noted that charity trustees have a wide discretion in how to advance their charity's purposes but this requires balancing against the demands of an increasingly regulated sector. Furthermore, the court examined the actions of each individual trustee, not the collective group, emphasising that trustees have to take responsibility for their own actions and involvement. Where there are trustees who are regularly unable to attend trustees' meetings, it may be in everyone's best interests for them to step down to make way for someone who is able to attend more regularly.

Overall, the court emphasised that charity trusteeships remain very much in the public interest and in light of the above, SU trustees should be reassured that if they act honestly and in the best interests of the SU, their position will be upheld.

What action should you take in light of this judgment?

In our experience, SUs are generally excellent at providing trustees with regular training on their duties and responsibilities. Nonetheless, this case is a reminder that SUs should ensure that each new individual trustee, whether a sabbatical officer, student or external trustee, is made aware of the significance of the duties attached to their role and has an understanding of how these duties operate both in theory and practice. Charity trustees should also personally ensure they familiarise themselves with the extensive guidance the Charity Commission has published on trustee duties and responsibilities. Where significant or unusual decisions are being taken, it would be wise for trustees to consider whether professional advice is needed.

We can help with providing trustee training to your SU board. Please get in touch to discuss your requirements.

The impact of COVID-19 on university students

Article published on 16 July 2021

Have higher education courses during the pandemic offered students good value for money?

The COVID-19 pandemic has had a significant impact on the day to day lives of millions of people. This article seeks to address the somewhat unique position that university students have found themselves in during the pandemic and questions whether higher education courses during this time have been able to provide good value for money to students.

What is 'value for money'

In order to consider whether students have received value for money, we must first consider what this actually means for university students.

In a quantitative sense, 'good value' can be defined by statistics focusing on contact hours, entry tariffs, fees and 'graduate outcome' i.e. the statistical likelihood of graduates finding desirable jobs with good salaries.

The true meaning of 'value for money' is arguably much wider however and is largely driven by the student's expectation of university, the so called 'university experience', and how well an establishment can balance this with a student's academic needs.

Contact hours and online learning

Research suggests that throughout COVID, the majority of university students have had most of their learning away from the campus, this being either through self-study or virtual platforms with an online tutor or lecturer. This is perhaps unsurprising.

Whilst virtual life has become common place for most of us, according to the Student Covid Insights Survey (SCIS) conducted by the Office for National Statistics (ONS) covering a period between September and December 2020, 16% of students felt that they were unequipped to engage properly with online learning and half of students (prior to moving to fully online learning) reported that moving to fully online learning would have a negative impact on their academic experience.

At the time of the survey, 29% of students reported to be dissatisfied or very dissatisfied with their academic experience, two-thirds of these reported that this was because of the quality of learning and learning delivery. On the 17 June, the ONS published further figures from the SCIS data collected between May and June finding that 61% of students who were in higher education prior to COVID reported the lack of face-to-face learning had a major or moderate impact on the quality of their course.

That being said, out of those students whose course was heavily dependant on vocational learning, around 70% of students had received 10 or more hours at clinical or vocational settings in the seven days before completing the survey.

This does not sit well with the argument that higher education courses are continuing to provide value for money however evidently the majority of students remain satisfied with their course.

It should also be noted that the percentage of dissatisfied students is around 12% higher than the average percentage of dissatisfied students for the three years preceding the pandemic (around 17%), although statistically significant, this is perhaps less of a difference than one may expect given the devastating impacts of the pandemic, this goes to show that a lot of universities throughout the country have made successful efforts to accommodate their students in such a difficult time.

Tuition fees and entry requirements

When asked about their fees if all university teaching was online from January 2021, half of students in the most recent SCIS survey, reported that they would be likely or extremely likely to request a refund for part, or all of their fees.

Despite significant calls for university fees in the UK to be reduced as a result of COVID, Government guidance stipulates that no fee refund should be expected by students where adequate online learning on support is provided, but individual students should seek redress where they have particular concerns about their experience of their course.

Entry requirements are however predicted to deviate somewhat in order to increase accessibility for students following the pandemic in an effort from the universities to stabilise their finances and facilitate higher education for more students.

Although not directly impacting the value for money of university courses, decreased entry requirements would allow certain students a chance at higher education in an institution that they may not otherwise be admitted to, hopefully increasing their financial prospects following graduation.

The University Experience

A large part of the University Experience is the social aspect of student life, largely arising from

living away from home with other students and the increased independence that this offers.

During the pandemic many students have been forced into isolating in households that they are not fully comfortable in. Restaurants, bars, and the majority of other entertainment facilities have been closed meaning that 'student life' throughout the pandemic has been incredibly different to the norm.

This has of course impacted the quality of life of students, and in turn has affected the value for money of their university experience. When asked about how satisfied they were with their social experience as part of the late 2020 SCIS, over half of students reported to be dissatisfied, or very dissatisfied; the main reasons were: limited opportunities for social or recreational activity (86%), limited opportunities to meet other students (84%) and limited access to sports and fitness facilities (52%).

The most recent SCIS has shown that life satisfaction scores among students have improved, returning to the same levels seen in November 2020 (5.2 out of 10), having been significantly lower in both January (4.6) and February (4.9) 2021. These scores remain very low however and students' average ratings of life satisfaction remain significantly lower than the average ratings of the adult population in Great Britain.

Financial and other considerations

A key consideration when considering value for money is the financial circumstances of the student.

Many students rely on maintenance grants offered by the Government to fund their accommodation however these grants are often far from sufficient to cover living expenses and accommodation. Many students have lost jobs, internships, and placements as a result of the pandemic and, according to a survey published in June 2020 by the City of London University, 41% of the 1,200 students surveyed were worried that they would not be able to afford food and almost 35% of students reported high or very high, levels of food insecurity.

There are of course strong correlations between financial security, social wellbeing and mental health, a survey by WONKHE and Trendence found that in October 2020, compared with May 2019, the proportion of students who felt lonely daily or weekly is much larger (50% compared with 39%), and a larger proportion of students do not feel part of the university community (50% compared with 40%). Additionally, a survey of undergraduate students by the Higher Education Policy Institute (HEPI) has shown a majority of students reporting that their mental health worsened during the pandemic. This suggests that universities are not bringing the focus of combatting mental health into the teaching departments in a holistic way but leaving it to the overstretched and underresourced mental health support teams.

Clearly, students are not getting the most out of university, whilst financial and social struggles will impact the student's enjoyment of their time at university, such difficulties will inevitably also have an impact on the student's ability to learn.

Students' ability to complain

Should students feel that their experience has resulted in a significant disadvantage, they are able to raise their concern with the Office of the Independent Adjudicator for Higher Education (OIA). The OIA published a statement suggesting that a move to online delivery from face-to-face delivery is not valid grounds for a complaint so long as the provider has taken steps to mitigate the disruption of the change. Students should complain directly to the university in the first instance through their internal procedures before going to the OIA. Where a complaint is found to be justified, the OIA will make recommendations to the university to allow them to put things right and in some cases, this may include a partial refund of tuition fees.

The OIA and the Competition and Markets Authority (CMA) have both highlighted the fact that regardless of COVID and government restrictions, universities still have duties under consumer law and any disregard for the CMA's guidance or breach of consumer protection law will be enforceable. If the terms of the contract between the student and provider allow a wide discretion to vary the course or do not allow the student to terminate their obligations without penalty where they are adversely affected by a change, they are likely to be found unfair. This is something that will be determined on a case-by-case basis and will be very dependent on each individual institution's student contract.

The OIA will take these factors into consideration when investigating any complaint however, it has been made clear that the OIA's default view is that they feel the higher education sector has performed well given the unprecedented challenges they faced, and that students have not, on the whole, been disadvantaged by the adaptations made, a conclusion which is consistent with the published research.

Conclusion

The question of whether students have received good value for money is very much dependant on how we define 'value'. The published research suggests that although some students are unhappy with the current state of learning and some students are struggling with other aspects of living away from home, the majority feel as though their course has been satisfactory and are satisfied with the online experience.

Looking at value from a wider perspective, the question becomes more complex. Undoubtably students have not experienced the same 'university life' from a social point of view and the financial and social impacts of the pandemic have certainly negatively impacted the experience for many students.

Students themselves are divided on the matter, according to the Student Academic Experience Survey Report 2020 conducted by HEPI and Advance HE, the proportion of students who feel as though their current course offers good or very good value for money is very similar to those who feel their course offers poor or very poor value (39% compared to 31% respectively). It is interesting to note that these percentages seem quite similar to those in 2019 where 41% of students felt that their course achieved good value compared to 29% who did not. It is perhaps surprising that the contrast has not been greater and if students due truly believe that they have been at an unfair disadvantage, there are remedial options available to them as discussed above.

Is "long Covid" protected as a disability under the Equality Act?

Article published on 29 June 2021

TUC calls for long Covid to be a deemed disability and highlights the ongoing and potential future impact Covid may have on workforces.

On 20 June 2021 the TUC published a report into the impact of "long Covid" on working people. "Long Covid" is the name which has been adopted to describe the long-term post-viral symptoms of Covid.

Whilst long Covid is generally accepted to exist and is something employers need to keep in mind, there is still relatively little information about the impact this is having on sufferers' experiences at work. Symptoms, summarised here on the NHS website, include fatigue, shortness of breath, chest pain, palpitations, problems with memory and concentration, depression, anxiety, and insomnia.

The TUC report

More than 3,500 workers responded to the TUC's survey on the impact of long Covid on daily working lives. Over three-quarters of respondents to the survey defined themselves as key workers, with the majority of these working in education or health and social care.

95% of respondents said they had been left with ongoing symptoms from Covid, 29% experienced symptoms for more than a year, and 52% said they had experienced discrimination or disadvantage due to these symptoms.

Around 20% of respondents reported that their employer had questioned the impact on them of their symptoms, 13% had faced questions about whether they really had long Covid at all, and 5% reported that they had lost their jobs because of long Covid symptoms.

The report also highlights that long Covid symptoms are leading to a considerable amount of sick leave. 20% of respondents were on paid sick leave, with a small minority being on unpaid sick leave. 18% of respondents reported that the amount of sick leave they had taken triggered absence management procedures.

TUC Recommendations

In the report, the TUC calls on the Government to recognise long Covid as a disability under the Equality Act 2010. They also urge the Government to recognise long Covid as an occupational disease which would allow sufferers to claim Industrial Injuries Disablement Benefit.

The report recommends that employers record long Covid related absence separately from other sickness absences and make reasonable adjustments to help those suffering from long Covid to continue in work.

Is long Covid a disability?

A disability is defined in the Equality Act 2010 as a mental or physical impairment which has a long term substantial adverse impact on someone's ability to carry out normal day to day activities. There is no need for a condition to be officially recognised or diagnosed for it to be found by a tribunal or court to be a disability. "Long term" means that the substantial adverse impact has lasted for 12 months, or is likely to last 12 months. In the case of some conditions and symptom-sets coming under the umbrella term of "long Covid", it may well be that this definition is already met and that the sufferer could already be protected by the Equality Act. However, whether any particular person suffering from long Covid symptoms is protected will depend on the specific impact on that person and would need to be considered on the facts on a case-by-case basis.

Some conditions are automatically deemed disabilities under the Equality Act, although these are limited to: blindness, sight impairment, severe disfigurement, cancer, HIV infection, and multiple sclerosis.

Action for employers

The impacts of Covid in the workplace will need to be continually monitored by employers. Long Covid began to grab headlines many months ago, and whilst the spotlight has rightly been on the immediate threat to life caused by the virus, we are starting to see the longer-term issues emerge.

Whilst long Covid itself is, in our opinion, unlikely to be added to the list of deemed disabilities, it is becoming increasingly clear that the lingering mental and physical impacts of Covid could be protected as disabilities under the Equality Act.

Employers should seek medical information from occupational health providers and/or the

individual's GP or consultant to inform them as to whether that individual may be disabled under the Equality Act and to consider any reasonable adjustments which can assist them to remain in work. Reasonable adjustments are likely to include making changes to the role, hours of work, or working environment, and adjusting the trigger points for disciplinary action in any sickness absence management policy.

Where employers decide to take action to discipline or dismiss an employee because of long Covid related absence, it will be vital to ensure that the action taken is necessary and proportionate in the circumstances, taking into account the needs of the organisation and the discriminatory impact on the individual. And any such justification should be carefully documented, given the risk of claims.

We recommend that employers should seek legal advice before carrying through sickness absence management procedures or taking disciplinary action against an employee in these circumstances.

Solicitor unfairly dismissed for refusing to agree changes to her employment contract during the pandemic

Article published on 17 June 2021

Failure to explore negotiations with employee were key factor.

The Covid-19 pandemic has led to many employers having to make changes to employees' terms and conditions of employment in order to take advantage of the Coronavirus Job Retention Scheme (CJRS) and/or to enable them to survive the economic challenges of the pandemic.

As Wrigleys highlighted early on in the pandemic, initial confusion about the CJRS and what it did and did not allow employers to do meant there was a risk that employers exposed themselves to claims if they forced through contractual changes (see our article *Unlawful deductions from wages claims and the furlough scheme*, available from our website).

It is not possible to unilaterally vary an employment contract. In the absence of a contractual right to make changes, then changes can only be made by agreement between the parties. However, where employees do not agree, employers may try to force through changes unilaterally in breach of contract or choose to dismiss the employee with or without an offer of re-engagement on new terms. This is referred to as "fire and rehire".

If the employer has a sound business reason for requiring the change in terms, it may be able to establish 'some other substantial reason' (SOSR) as a potentially fair reason for dismissal. 'Reasonable' in this context does not mean that a Tribunal has to agree with the reason, rather the Tribunal must find that the reason for dismissal is something a reasonable employer would consider as reasonable.

Even where the employer has a fair reason, a dismissal for failure to agree to the new terms may still be unfair where the employer has not followed a fair procedure, including consulting with employees over the proposed change and considering any alternatives to dismissal. Immediate urgent business pressures will not change the need for a fair procedure, although it may justify the process being curtailed.

Case: ***Khatun -v- Winn Solicitors Limited [2020]***

After seeing a downturn in work at the onset of the pandemic, Winn Solicitors decided to place around half of its staff on furlough. Miss Khatun was one of the solicitors who was selected to keep working and, following a discussion with her head of department, it was explained that everyone would need to agree variations to their contract which were non-negotiable.

Miss Khatun was then e-mailed the following day along with all the other staff at the firm with instructions to sign and return the new contract variation within 24 hours or face likely dismissal. The variation gave the firm the freedom to place the employee on furlough or to unilaterally reduce their hours/ pay by up to 20% on five days' notice. This power was stated to be effective until the start of October 2020, with the possibility of an extension by a further three months based on business need.

The following day Miss Khatun replied saying that she was unwilling to agree the variation as she was continuing to perform the job she had been contracted to do and that if she was to be furloughed or any other unexpected situation was to arise, she would consider a variation of her terms at that point. The firm's HR director replied urging her to sign the variation and then consider any changes at the point they were introduced. Miss Khatun declined. The head of department later reiterated the firm's position that the changes were non-negotiable and that she would be dismissed if she did not agree.

The chief operating officer then instructed the HR director to terminate Miss Khatun's employment immediately with no notice, pay in lieu or accrued holiday pay on the basis that she had been 'inflexible and clearly not someone interested in the firm or her colleagues'.

The firm later accepted that it had been in breach of contract and paid her notice pay and holiday pay, however Miss Khatun continued with a claim for unfair dismissal.

The Employment Tribunal accepted that the firm had 'sound, good business reasons' for implementing the variation to the contract. It had been reasonable and not premature for the firm to want to implement the measures that it did at the time that it did, given the effects of the pandemic on the business. The dismissal therefore met the test for an SOSR dismissal.

However, the Tribunal found that the firm had not acted reasonably in treating this reason as sufficient reason for dismissal in all the circumstances.

In particular, the Tribunal found that there had been no meaningful consultation with Miss Khatun, rather the meetings between her and her superiors were a one-sided conversation in which the terms of the variation were simply put to her and her reasonable alternative suggestions to this were dismissed out of hand.

The Tribunal was not convinced by the firm's argument that it simply did not have time to negotiate with over 300 members of staff. In fact, as all other staff had signed, the firm only had to engage in discussion with Miss Khatun. In addition, the Tribunal found that based on the evidence provided, the firm had not reasonably explored alternatives to dismissal. Rather, the directors of the firm decided that if Miss Khatun did not agree, they would proceed straight to dismissal without any process being applied. Finally, no right of appeal was offered, and the tribunal did not accept the argument that an appeal process would have been pointless. As the tribunal observed, both parties' attitudes may have been more amenable by the time of the appeal hearing, making a resolution possible.

In view of all these factors the dismissal did not fall within the band of reasonable responses of a reasonable employer, and was therefore unfair.

Wrigleys' comment

So-called "fire and rehire" tactics have been raised at the highest levels of government during the pandemic. Indeed, the practice has come under considerable scrutiny for its use at such a difficult time. Whilst there have been calls to outlaw or limit this practice, so far no firm steps to do so have been taken, though ACAS has just released a report on the practice.

During a parliamentary debate on the 27 April 2021, the relevant government minister had

been very clear that fire and rehire practices are “completely unacceptable” and that the threat of dismissal should only ever be a last resort and not simply used as an opening gambit in a negotiation to alter terms.

At this time, the views the minister gave are not reflected in the law on unfair dismissal. Rather, the focus of the law on this topic is on the reasons for the proposed change and whether the employer was reasonable in all the circumstances to propose them, whether they explore alternatives and whether they consulted with employees to try and find a negotiated solution. Even where an employer threatens or warns that failure to accept terms may result in dismissal, this will not in of itself mean that a subsequent dismissal is unfair, even though there may be questions over whether this is a reasonable negotiation tactic because the balance of power (usually) lies with the employer.

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