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EMPLOYMENT LAW BULLETIN

SEPTEMBER 2019

Welcome to the September edition of our employment law bulletin.

In this edition, we look at the detail of an ongoing government consultation designed to find ways to tackle the high rate of long-term sickness absence in the UK workforce. Wrigleys is asking employers to feed into our response to this consultation through an online survey. The consultation closes on 7 October 2019.

We cover the recent Law Society guidance for workers on non-disclosure or confidentiality agreements which comes after recent concerns that workers are being discouraged from reporting harassment and discrimination.

We also report on three recent decisions in the Employment Appeal Tribunal. The judgment in ***Upton-Hansen Architects Ltd v Gyftaki*** provides guidance to employers defending constructive dismissal claims. The case of ***Okwu v Rise Community Action*** is a reminder that a disclosure which is partly self-interested might still qualify for whistle-blowing protection. ***Community Based Care Health Ltd v Narayan*** concerned a GP who set up a personal service company to receive her pay but was found to be a worker rather than self-employed.

And in our Question of the Month for September, we consider when a former employee will be able to insist that their photograph be removed from the employer's website or marketing material.

Forthcoming events:

- **Wrigleys Annual Charity Governance 2019**
  10 October 2019, Hilton City, Leeds
  For more information or to book
- **SAVE THE DATE - Northern Education Conference 2019**
  27th November 2019, Principal York, York
  For more information or to book
- **Employment Breakfast Briefing: What's new in employment law?**
  3rd December 2019, Radisson Blu, Leeds
  For more information or to book

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

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Wherever you see the BAILII logo simply click on it to view more detail about a case

Health is everyone's business

Proposals to reduce ill health-related job loss

With an estimated cost to the UK economy of £77.5 billion per annum in lost productivity and an annual bill of £554 per employee most employers would welcome ways in which to reduce the massive overheads attributed to sickness absence.

The employment team at Wrigleys is asking employers to feed into a government consultation designed to find ways to tackle the high rate of long-term sickness absence in the UK workforce. A link to the government consultation paper is here and you can have your say here.

The consultation paper explores the scope for employers to do more to support employees to stay in, and return to, work and what the government can do to increase support for employers.

The paper covers three main areas:

Proposed changes to help people with health conditions remain in work and reducing the barriers people face to return to work

Proposed changes to relevant legal frameworks.

This considers:

- a right to request workplace modifications on health grounds not covered by the duty to make reasonable adjustments under the Equality Act 2010
- encouraging employers to take steps to support a sick employee to return to work before they can be fairly dismissed on ill health grounds
- reform of statutory sick pay (SSP) to better capture flexible working and those who fall below the current Lower Earnings Limit
- a day one written statement of basic working conditions for employees and workers, including details of eligibility for sick leave and pay
- support for smaller employers via a proposed rebate of SSP

Proposals to improve access to high quality cost-effective occupational health services.

This considers:

- improving smaller employers' access to OH services by reducing costs and increasing the number of doctors and nurses working in OH
- building on current quality standards and quality marks to raise the overall quality of OH service provision.

Once you have had your say Wrigleys will collate your answers into a formal response to the government. The survey is anonymous so please let us know if you would like a copy of the final response by emailing the team on events@wrigleys.co.uk

The Law Society has published guidance to workers on non-disclosure agreements (NDAs)

The guidance is designed to clarify key aspects of NDAs and signposts where to get advice from.

The government fed back on its consultation on NDAs, the highlights of which we covered as part of an article in August. Part of this feedback included the intention to provide guidance for legal professionals who draft settlement agreements.

Separately, The Law Society has produced a simple two-page 'what you need to know' document which is addressed directly to workers.

What does it say?

Using simple terms, the Society's document aims to de-mystify NDAs for workers who have been asked to enter into them by an employer. It sets out the ways in which one may be entered into, such as via a contract of employment or a settlement agreement and encourages workers who are asked to sign up to one to find an independent solicitor for advice. It also suggests that if a worker has already signed up to terms but is unhappy with any NDA, then they should speak to a solicitor to see what options they have.

Perhaps the key message in the document is that workers should make sure that the confidentiality terms work for them as well as the employer. In this sense, the document seeks to empower workers to negotiate and not to just accept the terms an employer sets out if the worker has an issue with them.

The government's consultation showed that there were widespread concerns that NDAs were used in ways to obscure or discourage an individual's rights. The Law Society has dedicated a section of its document to make clear what the limits of an NDA are and that NDAs entered into under pressure may not be enforceable.

Comment

This document does not tell employees or employers anything new. However, it does add to the pool of available material [published by official sources (i.e. the government or sector regulators)] which help to clarify and simplify the issue of NDAs.

This information is clearly designed to help level the playing field between individuals and organisations and to empower individuals by making it clear that they have rights in regard to NDAs and access to resources which can help them navigate the issue. Of course, the practical reality for many remains whether they genuinely have any choice in whether or not to accept the NDA.

Does an employer have to assert a specific fair reason for dismissal to defend a constructive dismissal claim?

EAT reminds employers and their advisers to be specific.

If an employee resigns and subsequently claims constructive unfair dismissal (by claiming an employer's action caused a fundamental breach to the employment contract), the employer and their advisors need to think carefully about how they defend the claim.

The employer's response to such claims may be a simple 'two line' defence: first by saying that there was no actual dismissal and secondly, if the tribunal find that there was a dismissal, then alternatively the dismissal was for a fair reason (i.e. one of disciplinary, capability or performance, redundancy or 'some other substantial reason').

But what happens to claims if the second line of defence is not specific about which ground the employer is relying on for dismissal? Will it still be valid?

Case details: *Upton-Hansen Architects Ltd v Gyftaki*

Ms Gyftaki gave short notice to her employer of the need to take additional holiday to attend to family matters. She had already used all of her holiday entitlement. The night before Ms Gyftaki was due to travel, her employers ('UHA') formally denied her request. Ms Gyftaki decided to go anyway and said she would take the time as unpaid leave.

On her return, Ms Gyftaki was suspended and investigated for taking unauthorised holiday. UHA told her that they would also be investigating issues relating to her previous holiday absence.

Before any disciplinary meetings took place Ms Gyftaki resigned and brought a claim for constructive dismissal on the grounds that the act of suspending her and of introducing issues in relation to her previous holiday amounted to fundamental breaches of the implied term of mutual trust and confidence.

At tribunal, UHA's defence was that its actions did not amount to a fundamental breach of contract. They claimed they had good reasons for suspending Ms Gyftaki in that they feared she would act unprofessionally and create an awkward office environment whilst investigations and disciplinary processes were underway and that issues concerning the previous holiday were relevant to the matter at hand.

The tribunal agreed with Ms Gyftaki that she had been constructively unfairly dismissed and subsequently awarded unfair and wrongful dismissal damages. UHA appealed on a number of grounds, including that the tribunal had wrongly applied the tests used to determine the reason for dismissal and whether it was fair.

EAT's decision

The EAT upheld the tribunal's findings of unfair dismissal.

UHA argued that the tribunal had not properly considered if the dismissal was for a fair reason (i.e. the 'second line' of defence) and, in particular, referred to a paragraph in its defence pleadings which stated that:

Save as expressly admitted, all the Claimant's claims are denied in their entirety.

The EAT stressed that in constructive dismissal cases the onus is on the employer to establish in the alternative what its specific fair reason for dismissal was. The EAT held that the generic denial referred to above plainly did not do this, nor did the grounds of defence submitted by UHA make clear exactly on what potentially fair ground it was taking action against Ms Gyftaki (i.e. disciplinary, capability and so on).

Comment

This case serves as a reminder to employers and their advisers that they must be specific when outlining a defence to a constructive dismissal claim.

It can be difficult for employers to properly apply the two-line defence, especially if the claimant's initial grounds are themselves vague. However, employers can request further and better particulars of a claim before formulating a full and specific defence.

Was disclosure in the public interest when made in defence of concerns about poor performance?

EAT rules that a partly self-interested disclosure could still pass the public interest test

Workers are protected from detrimental treatment as a result of making a protected disclosure (or 'whistleblowing'). For a worker to be protected as a whistleblower, they must make a qualifying disclosure to a prescribed recipient. This includes making a disclosure to an employer.

The worker must reasonably believe that some form of offence, wrongdoing or breach of a legal obligation is being, has been, or is likely to be committed and that the disclosure is made in the public interest.

The 'public interest' test was inserted into the whistleblowing legislation following the determination by case law that workers could whistle-blow as a result of an employer's breach of the terms and conditions of employment, even if there was no wider 'public interest' in the disclosure. We have looked at how the courts and tribunals have considered what could be in the 'public interest' in a past article.

Case law has determined that workers will not be protected if the disclosure they rely on is found to be wholly in their own self-interest. However, to what extent is the disclosure made in the public interest if it is also made in the self-interest of the worker?

Case details: ***Okwu v Rise Community Action***

Ms Okwu was employed by RCA to support domestic violence and female genital mutilation victims. Her probation period was extended following a review which revealed some performance concerns. Ms Okwu then wrote a letter to RCA complaining about some of her terms and conditions of work, including that she had to share a mobile phone with colleagues to deal with clients and that there was a lack of secure file storage. She stated that due to the sensitive nature of her work the latter two points were in breach of the Data Protection Act 1998.

RCA dismissed Ms Okwu, citing poor performance which RCA said was compounded by her letter, which it said demonstrated Ms Okwu's 'contempt for the charity'.

Ms Okwu brought an automatically unfair dismissal claim arguing that she had been dismissed because she had made a protected disclosure. At first instance, the employment tribunal dismissed the claim on the basis that her letter was not a qualifying disclosure because it concerned 'personal contractual matters' relating 'to her and nobody else' which she had raised in defence of her alleged poor performance. As a result, the tribunal held that Ms Okwu's letter did not meet the public interest test requirement.

EAT's decision

The EAT held that the tribunal had misapplied the public interest test in regard to the issues raised about the shared mobile phone and file storage. Even if these issues were raised in defence of Ms Okwu's performance, it did not mean she could not reasonably believe them to

be in the public interest.

The EAT referred to prior case law which had established that public interest need not be the only motivation in making the disclosure, and the EAT felt it was hard to see how the matters raised by Ms Okwu would not, in her reasonable belief, be in the public interest. The question was remitted to a tribunal for consideration.

Comment

This case is a useful reminder to employers that tribunals and courts will consider the public interest element of disclosures made as part of a wider act of self-interest. On the face of it, this makes sense as otherwise a worker would have to act entirely selflessly to be afforded protection by the whistleblowing provisions. Although the judgment of the EAT is not definitive on the quantitative or qualitative requirements, it seems to reinforce the view that there need only be limited public interest in a disclosure for whistleblowing protection to apply.

Employers should bear in mind that the presence of self-interest in apparently tactical disclosures in response to any disciplinary procedure or capability allegations will not necessarily mean a disclosure is not protected as whistleblowing.

This case does not suggest that an employer cannot proceed with disciplinary action, or dismissal, following a protected disclosure. However, care must be taken to manage the disclosure correctly and to avoid that disclosure being seen to be part of the reason for that action or dismissal.

If you would like to discuss any aspect of this article further, please contact Michael Crowther or any other member of the Employment team on 0113 244 6100.

Can someone who is paid through their own limited company be a worker or employee?

EAT agrees that out of hours GP paid through her own company was a worker

Professionals and consultants may at times provide their services through an intermediary, such as their own "personal services company". Although such an arrangement might be labelled "self-employment" or a "contract for services", it is possible that it will be found to be employment for tax purposes.

Tax rules covering such "off payroll" working, known as the IR35 rules, mean that individuals who would have been an employee for tax purposes if they were providing their services directly to the client, pay broadly the same tax and National Insurance contributions as employees. HMRC has created a useful online tool for checking employment status for tax.

As a separate issue, employment tribunals may also examine the legal status of such arrangements when individuals bring claims, such as for holiday pay, National Minimum Wage, unfair dismissal or discrimination. Readers should be aware that someone can be treated by HMRC as self-employed for tax purposes but be found by an employment tribunal to be an employee or worker. The following key issues are considered by tribunals when determining the employment status of the claimant.

Employee status

An employee has an ongoing right to expect to be provided with work and an ongoing obligation to accept work (this is known as "mutuality of obligation"). Employment is also marked by a high level of control over how and when the employee performs the work and a high level of integration into the employer organisation (for example the individual regularly represents the employer, appears to be part of the business and must comply with their rules and procedures).

Along with the rights of workers set out below, employee rights include the right not to be unfairly dismissed (subject to qualifying length of service), statutory minimum notice and statutory redundancy pay.

Worker status

A worker has a contract to perform the service personally and there is no client/contractor relationship. A worker will usually be distinguished from an employee because there are no guaranteed hours of work and the worker can turn down work when it is offered (there is no ongoing mutuality of obligation).

Workers' rights include statutory minimum paid holiday, statutory sick pay (if eligible), National Minimum Wage and protection against discrimination. A worker is treated in the same way as an employee for tax purposes.

Self-employment

A truly self-employed person is in business on their own account and markets their services "to the whole world". They are not required to provide personal service. In other words, they have the freedom to send someone else to perform the work when they are unable or unwilling to do so. A self-employed person will usually have the power to negotiate their own terms and takes a financial risk in the arrangement, for example not getting paid if the work is not satisfactory.

Case details: *Community Based Care Health Ltd v Narayan*

Dr Narayan worked for 11 years as an out of hours GP provided by Community Based Care Health Ltd (CBCH). She also performed services as a locum GP through an agency. Dr Narayan, following the advice of her accountant, set up a company through which she processed her pay. She did not tell CBCH about the existence of the company or submit invoices, but she passed on her company bank account details to CBCH. After some conduct concerns, CBCH wrote to Dr Narayan and told her she would no longer be offered work. Dr Narayan brought claims in the employment tribunal including unfair dismissal, wrongful dismissal, unlawful deductions from wages (for holiday pay), breach of contract and race and sex discrimination.

The employment tribunal found that Dr Narayan was not an employee because there was no "mutuality of obligation". In other words, there was no obligation on CBCH to provide work and no obligation on the doctor to accept work even though she carried out the same regular shifts over a very long period. Dr Narayan could (and did at times) turn work down when she was unwilling or unable to carry it out. For example, she was able to take holidays whenever she chose.

However, the employment tribunal found that Dr Narayan was a worker. This was on the basis that: she was required to provide personal service; CBCH was not a client of Dr Narayan or her company; and that there was a considerable degree of control by and integration into CBCH. In practice, Dr Narayan would ask one of her fellow out of hours GPs if they could cover a shift,

but the replacement would be arranged and paid for by CBCH. This was not a case where a substitute could be sent to perform the work with no control by CBCH over who was chosen (which would be more likely to indicate a self-employment arrangement).

On appeal, the EAT agreed. It disagreed with the respondent's argument that Dr Narayan could not be a worker because her company was receiving her remuneration, unbeknown to CBCH. It held that the contract was between CBCH and Dr Narayan as an individual. This was because the party contracting with CBCH to perform the out of hours service had to be a qualified and approved GP and a company could not fulfil this requirement.

The EAT determined that the tribunal was right to distinguish the case of Suhail v Herts Urgent Care UKEAT/0416/11 in which a doctor was found to be self-employed. The EAT made clear that Dr Suhail marketed his services to any provider of medical services which would provide him with work. On the other hand, Dr Narayan worked only for CBCH and the locum agency.

The risks of mislabelling an employment arrangement

Organisations entering into contracts for services with "self-employed" consultants should be aware of the risk that the relationship will be found to be mislabelled. HMRC / the tax tribunal may determine that tax arrears, penalties and interest are due if the arrangement is found to be one of employment. HMRC can investigate tax arrears going back a number of years. The number of years depends on whether HMRC consider the non-payment to have been an innocent mistake (up to 4 years), careless (up to 6 years) or a deliberate evasion (up to 20 years). Penalties of up to 100% of arrears can be charged. Penalties for a failure to notify will be higher than those where voluntary disclosure occurs.

Individuals who bring successful employment tribunal claims may be awarded underpayments, such as those due for holiday pay or NMW and may in some cases be found to have been unfairly dismissed or discriminated against. Unfair dismissal compensation is capped at the lesser of one year's gross salary or £86,444 in addition to the basic award which is equivalent to statutory redundancy pay. Discrimination claims are uncapped and assessed on the basis of financial loss and injury to feelings.

Employers should take legal and accountancy advice when engaging with a "self-employed" individual who is paid directly or through their own limited company.

Question of the month: can a former employee stop their image being used for marketing purposes?

How does this request sit within the GDPR framework?

Is a photograph personal data?

If an individual employee can be identified directly from an image or from the image in conjunction with other readily available information on, for example, an employer's website, then the image will be personal data and processing of the image by the employer will be governed by the GDPR.

If the employee is identifiable in the photograph, information related to the employee's health, disability or race could be communicated by it. If so, this will be special category personal data under the GDPR.

On what basis was the personal data processed?

The GDPR requires employers to have a lawful basis on which to process their employees' data: (1) consent of the employee; (2) for the performance of a contract; (3) so that the employer can comply with legal obligations; (4) there are vital interests of a life or death nature; (5) the processing is in the public interest; or (6) there is a weighed and balanced legitimate interest in the data being processed.

Consent

An employee may be happy to provide consent to their employer using their image, but employers need to bear in mind that, under GDPR, consent must be freely given (i.e. not coerced) and the employee can withdraw consent at any time.

Because consent can be withdrawn so easily, it is wise for employers to consider alternative grounds on which they can take and use the image at the outset. This may include the performance of an employment contract or to meet the legitimate business interests of the employer. It is important to note that an employer cannot retrospectively change the legal basis for processing data. Employers should inform employees at the time their image is taken what the image will be used for and on what basis it will be processed.

If an employer relies solely on an employee's consent and that consent is withdrawn, then the image should be removed as soon as reasonably possible.

Contract

The employment contract may include provision for use of the employee's image, but this will need to include post-employment use if it is to assist in this situation.

Some employer's may make use of a separate, stand alone contract for which a separate payment may have been made.

However, it is rare in practice for employers to have expressly covered this issue and some other lawful basis will need to be established.

What is the legitimate interest case for using an employee's image?

The legitimate interest case will depend on a number of factors, including how the employer uses the image of the ex-employee. For instance, ex-employees may appear on hard copy or digital marketing materials and may appear on their own or as part of a group.

Assuming that this basis was in place at the start, what is important from the GDPR viewpoint is that the employer has weighed and balanced its own legitimate interests against the ex-employee's interests when deciding whether to comply with the request.

The balancing exercise

Employers should undertake a balancing exercise and record how their decision was made. For example, the factors could be:

- how important is keeping the image to the employer?
- how important is deleting the image to the former employee?

- was the employee told at the time the photo was taken that their image might be retained after their employment ended?
- how easy is it for the employer to delete the image and is there a cost involved?

How easy it is to delete an image will depend on the circumstances. For instance, it is likely much easier to remove individual headshot photos from a company website than to replace an image on a printed brochure.

Taking the example of a company website with a headshot of a former employee, it would be likely that the employee's interests would outweigh those of the employer when taking the above factors into account. The same is likely to be true of any team or group photo used on a company website as this would be relatively easy to replace with an up-to-date image for most employers.

Compare this with similar images on paper brochures or advertisements. If those items have already been handed out to clients or prospective clients it is unlikely to be reasonable to recall/ replace these. If there is a stack of such brochures waiting to be used in the office, an employer will have to consider how easy and costly it is to replace them.

Replacing paper brochures, for example, is more likely to be necessary if the former employee was not told their image would be retained and has recently left their job at a company with an established reputation to a new business in the same or a similar sector. In such a case, the former employee is likely to have a good reason to want their image and name association with a former employer removed.

Wrigleys' Comment

Ultimately, the employer is going to have to come to a decision as to whether or not they will comply with a request to remove an image of an ex-employee from its website and any promotional or marketing material.

The key factor for an employer to bear in mind is that they undertake and evidence a process as set out above and communicate this to the former employee when explaining the decision.

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

www.wrigleys.co.uk