Employment law dispatches

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Willans LLP | solicitors

Matthew Clayton
Partner, head of employment law & business immigration

matthew.clayton@willans.co.uk

Welcome

Welcome back to *Employment Law Dispatches*!

We have had a break for a few months, during which time we have instead been issuing bulletins about employment law developments in connection with the COVID-19 pandemic. We hope you have found those informative and timely.

In this issue we return to look at some more general cases over the last few months concerning disability discrimination, gross misconduct dismissals, and post-termination restrictions, amongst other things.

At a glance

- Chancellor introduces Job Support Scheme as part of COVID winter plan updates
- New guidance for employees self-isolating
- Upcoming free webinars for 2020
- Protection for gender fluid and non-binary workers

Legislation update

with Matthew Clayton

Furlough fraud and 'nudge' letters

HM Revenue & Customs is now issuing 3,000 so-called 'nudge' letters per week, urging employers it believes may have claimed too much under the Coronavirus Job Retention Scheme (CJRS) to review their claims.

The letter says that HMRC understands that mistakes happen and "will not seek out innocent errors and small mistakes for compliance action". HMRC has forecasted that it will contact approximately 27,000 organisations in total, representing 2% of those claiming under the CJRS.

This move comes after reports of furlough fraud received by HMRC increased by 53% in a three-week period in July.

COVID-19: Statutory sick pay entitlement

On 26 August 2020 statutory sick pay entitlement was extended to employees who:

- have been notified in writing by a registered medical practitioner (or other person or body permitted to make the notification) that they are to undergo a surgical or other hospital procedure.
- have been advised to stay at home for a period of up to 14 days before their admission date to hospital for the operation; and
- stay at home in accordance with that advice.

The rules only apply to employees who are absent from work due to self-isolation. So any employee who can work from home while self-isolating before an operation will be paid in their normal way.

Chancellor introduces Job Support Scheme as part of COVID winter plan

To help steer businesses and employees through a tough winter and avoid the much-feared 'cliff-edge' as the furlough scheme comes to an end, Chancellor Rishi Sunak has introduced a range of business support measures.

The furlough scheme will reach an end on 31 October as expected, but the Job Support Scheme will step in to offer a helping hand for employers and employees. This scheme will run from 1 November to 30 April next year.

The aim of the scheme is to protect 'viable jobs'; enabling employers to keep staff in a job albeit for shorter hours, in the hope of reducing redundancies.

While larger businesses will only qualify for the scheme if they can show a reduction in turnover during the coronavirus crisis, all small and medium businesses will be eligible to benefit.

Employees will have to work at least a third of their usual hours (33%) to qualify. Employers will pay for the hours their employees have worked, an additional 1/3 of the remaining 'usual' hours that are not worked, with the Government putting in a further 1/3 of the hours not worked. A cap to the Government's support will apply, at £697.92 per month.

Importantly, the Job Support Scheme is open to all employees – not just those who were previously furloughed.

As a practical example, if an employee works 33% of their usual hours, they will receive 77% pay in total (the combined contribution from their employer and the Government).

So, what will the Job Support Scheme mean for you? Employers who were considering the prospect of making employees redundant due to reduced demand, will doubtless welcome the news of the scheme. However, while it may reduce the need for redundancies in some cases, it will not be able to help everyone; the scheme is only designed to maintain 'viable' jobs. Where employees can't work at least a third of their normal hours, redundancies may still be needed.

A sticking-point for some employers is that they will be paying for more work than they are receiving. For example, they will pay for 33% of normal hours but also for a third of time not worked. Time will tell if the Chancellor's measures will be enough to keep levels of employment as healthy as they can be over the winter.

Further guidance is expected over the coming week. A factsheet provided by the Government can be accessed here.

Practical, clear insights for the road ahead

New, free employment law webinars for 2020

Tues 20 October | Redundancy and the alternatives – snapshot for employers | 10.00-11.00am

As the furlough scheme draws to a close, our employment law experts are on hand to give an overview of the options on the table. We take a look at what redundancy is and when should you use it, alternatives such as flexible working and home working, the key steps and appeals. **Register now**

Thurs 12 November | Brexit and the end of free movement on 31 December 2020 | 10.00-11.00am

The UK has left the EU, and the transition period after Brexit soon comes to an end. What are the new rules from January 2021, and what can you do to prepare? We'll explore the legal framework, the key changes, and how you can deal with it in practice. **Register now**

Thurs 19 November | Flexible working – is your business ready? | 10.00-11.00am

With the seismic shift in the numbers of the UK workforce now working from home, we look at the different types of flexible working, how to deal with requests, explore what are 'reasonable adjustments', and discuss how businesses can accomodate flexible working. **Register now.**

Weds 25 November | Home working – what does it mean for employers? | 10.00-11.00am

Our employment lawyers answer your questions about the legal framework around homeworking, the special considerations you'll need to make as an employer, administrative changes, discrimination concerns and reasonable adjustments. **Register now.**

For more information and how to book, visit **willans.co.uk/events**, email **events@willans.co.uk**, or call 01242 514000.

New guidance for employees self-isolating after returning to UK

The government has published new guidance for employees required to self-isolate for 14 days after returning to the UK, following the recent expansion of travel quarantine requirements. The guidance states that, where possible, employees should work from home during their self-isolation period. If this is not possible, employees can agree with their employer to take leave to cover the period of self-isolation.

The guidance suggests that employers should think carefully before dismissing an employee because they cannot work due to imposed self-isolation. Dismissal should be treated as a last resort and employers should consider alternative arrangements first, such as agreeing with employees to take annual leave or unpaid leave.

The guidance states that employers who dismiss an employee because they have had to self-isolate following travel abroad may be liable for unfair dismissal, and emphasises that employment tribunals will consider all relevant facts surrounding a dismissal, including the public health guidance on COVID-19.

However, the guidance is silent as to whether employees required to self-isolate in these circumstances will be entitled to any pay (or statutory sick pay (SSP)) if they cannot work from home. The law is not clear on this point but, in our view, if the employee went on holiday knowing that they would have to self-isolate upon their return, and that they couldn't feasibly work from home, it would be very difficult for them to argue that they are entitled to be paid in full. The law is also not clear on whether SSP would be payable, although we think it is unlikely. ■

Jenny Hawrot
Senior associate

Case law watch

with Jenny Hawrot

jenny.hawrot@willans.co.uk

Disability discrimination

The Advocate General (AG) of the European Court of Justice (ECJ) has given an opinion on whether or not it is unlawful to discriminate against one group of disabled employees in comparison to other disabled employees.

Whilst the opinion is not binding, it is indicative and potentially opens up a new area of comparison in discrimination law, extending the scope of potential disability discrimination claims.

A hospital in Poland made contributions to a disability fund. The hospital would need to contribute less if it increased the number of disabled employees, and evidenced this by those disabled employees providing a 'disability certificate'.

The hospital offered £60 per month to each disabled employee who hadn't already provided a disability certificate, to do so. Disabled employees who had already provided the certificate were offered nothing; neither were non-disabled employees.

A disabled employee who did not get the allowance (because she had already provided a certificate) claimed discrimination. She failed in her claim under Polish law as the court held that she had not been treated less favourably than a non-disabled employee – they didn't get the payment either. This decision was appealed.

The AG's preliminary opinion is that the hospital did not directly discriminate against the disabled employee; however, the difference in treatment did amount to indirect discrimination.

The AG surmised that the differing treatment of situations within a protected characteristic (disability) group may constitute a breach of the principle of equal treatment, if:

(a) the employer treats individual members of that group differently on the basis of an apparently neutral criterion;

(b) that criterion is inextricably related to the protected characteristic (in this case, disability); and

(c) that criterion cannot be objectively justified by a legitimate aim and the means of achieving that aim are not appropriate and necessary. ■

Gender fluid and non-binary workers protected by discrimination law

In a landmark ruling, Birmingham Employment Tribunal has found that a gender fluid engineer who suffered abuse and harassment at work was protected by the Equality Act 2010.

In *Taylor v. Jaguar Land Rover,* the employee Rose Taylor, changed the way she presented in 2017, started to identify as gender fluid, and began wearing women's clothes in work. When she suffered insults and abusive jokes, and struggled with toilet arrangements in the workplace, management failed to support her. She resigned as a result and claimed she suffered harassment and direct discrimination because of gender reassignment and sexual orientation.

Jaguar Land Rover argued that being 'gender fluid or non-binary' did not fall within the definition of the protected characteristic of 'gender reassignment' under the Equality Act.

The judge ruled that it was "clear … that gender is a spectrum" and that it was "beyond any doubt" that being non-binary or gender fluid was covered by the protected characteristic of 'gender reassignment' under the Equality Act. Going further, the judge said gender reassignment "concerns a personal journey and moving a gender identity away from birth sex". ■

What should I do?

As this case was heard at an employment tribunal it does not technically establish a legal precedent, but it is bound to be influential in similar claims and the first step towards a future precedent.

Jaguar Land Rover could also appeal the decision, so it could be reversed, but employers should be mindful of this development until this happens. It also serves as a reminder that equality legislation is not set in stone, and is constantly developing.

Restrictive covenants and garden leave

Where an employee is placed on garden leave, the length of any post-termination restrictions in their contract of employment will often be offset by any time spent on garden leave, so that the restricted period (garden leave plus post-termination restriction) is not unreasonably long.

The case of *Square Global Limited v Leonard* questioned whether the absence of this type of garden leave 'set-off' clause would mean that a six-month non-compete post-termination restriction would be unenforceable.

The court found that the absence of any off-set provision did not make the six-month non-compete clause unreasonable. In the circumstances, a six-month non-compete restriction, plus the time spent on garden leave, did not amount to an unreasonable restriction on the employee. ■

What should I do?

This judgment should be followed with caution. The enforceability of post-termination restrictions are notoriously fact specific to the employee in question, their role and the potential risks to the business.

Whilst the court has provided welcome clarification that the absence of an off-set clause is not fatal to post termination restrictions, it will really depend on each individual case. As such, you should seek professional legal advice when drafting post termination restrictions.

Complete The Raikes Journal's Gloucestershire business survey - you could win a £100 hamper!

Tell **The Raikes Journal** how your business has fared to date through the pandemic - and you could win a £100 food hamper!

"*Where now for Gloucestershire? is* about looking at what the impact has been, trying to put an arm's length between that and where we are now, to look at what decisions have been made and where it might all lead" said editor Andrew Merrell.

"As we move into the final third of the year and draw a line under the summer this is about trying to capture a snap-shot in time of how the county's business community feels now."

The Raikes Journal, of which we are lead sponsor, will publish its findings on its website at the end of this month.

Complete the quick survey here.

theraikesjournal

Remedies and recommendations

If an employee is successful in a discrimination claim, a tribunal can made a formal recommendation under the Equality Act 2010, that "within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate."

In *Hill v Lloyds Bank*, the Employment Appeals Tribunal (EAT) indicated that an unprecedented recommendation could possibly be made.

Ms Hill said she was bullied and harassed at work by two colleagues, which she said resulted in her suffering with depression, causing her to be off work sick for some time, and amounted to a disability.

On return from sick leave she sought reassurance from Lloyds that she would not be required to work with the colleagues who bullied her. If this was not possible, she asked Lloyds to offer her an undertaking that it would pay her severance package equivalent to her enhanced redundancy payment. Lloyds did not do this and she brought a claim for disability discrimination based on a failure to make reasonable adjustments.

The tribunal and the EAT agreed with Ms Hill in that Lloyds had failed to make a reasonable adjustment in not giving the undertaking. The EAT also held that there was no reason, in principle, preventing the tribunal from making a recommendation requiring Lloyds to give such a written undertaking to the employer. This question was remitted to the original tribunal. ■

What should I do?

This judgment does appear to extend the scope of potential recommendations that an employment tribunal can make, ostensibly forcing employers to offer settlements to employees. However, it would be very dependent on the facts.

This case is also a reminder that you should carefully consider whether your practices place disabled employees at a substantial disadvantage, particularly when making decisions about disabled employees.

Summarily dismissing long-serving employees

In *East Coast Mainline Company Ltd v Cameron*, Mr Cameron had been employed for over 35 years in the role of shunter.

During a night-shift, he allowed a train to leave whilst a driver was standing between the trains. That driver was 'brushed' by the departing train and this was deemed to be a serious safety incident.

After an investigation it was found that Mr Cameron had not carried out adequate safety checks and summarily dismissed.

Mr Cameron brought discrimination, unfair dismissal and wrongful dismissal claims. The employment tribunal found that he had been wrongfully dismissed (i.e. he should have been given notice of termination of his employment) in view of his long service. The respondent appealed this decision.

On appeal, the Employment Appeals Tribunal (EAT) overturned the employment tribunal's decision, finding that length of service had no bearing in determining whether a dismissal had been wrongful.

The tribunal should ask "was the negligent dereliction of duty in this case so grave and weighty as to justify summary dismissal?" and any decision should be based on the facts of the case. ■

What should I do?

If you are considering a case of misconduct, and have decided that the employee is guilty of gross misconduct, don't automatically assume that dismissal would be a reasonable sanction (although it almost always will be).

There may be mitigating factors, such as whether the employee has a long unblemished record, and the consequences of dismissal for the employee. If you don't consider these factors, the employee could have an unfair dismissal claim (if they have two years' service or more).

However, according to this case, once you've decided that dismissal is appropriate and fair, the employee's length of service should have no bearing on whether they should receive notice pay or not (the question of wrongful dismissal) - if it is gross misconduct, then they are not entitled to notice pay.

It's a difficult distinction, but be careful not to muddy the waters.

TUPE and beneficial changes to terms and conditions

The Transfer of Undertakings (Protection of Employment) Regulations (TUPE) are designed to protect the terms and conditions of employment of employees transferring from one employer to another. Under TUPE, any contractual variations made because of the transfer will normally be void. But what if the changes are beneficial to the employee?

The claimants in *Ferguson and others v Astrea Asset Management* were directors of a company which lost a contract for services. This resulted in a 'service provision change' transfer of employment under TUPE.

Just before the TUPE transfer, the claimants varied their own employment contracts to give themselves generous guaranteed bonuses and termination payments. This meant that these new and enhanced terms of employment would transfer under TUPE and be protected.

When the new employer discovered that these beneficial changes were made shortly before the transfer, it refused to allow some employees to transfer, and dismissed the others for gross misconduct. The claimants brought claims for automatic unfair dismissal linked to TUPE, and also for contractual payment due under the recent changes to their contracts of employment.

The Employment Appeals Tribunal (EAT) held that, although the recent changes were beneficial to the claimants, they were void because they had been made by reason of the TUPE transfer. Therefore, the beneficial changes they made to their own contracts were void.

Even though their dismissal was deemed to be automatically unfair, this did not prevent the EAT from making a finding of contributory fault against the employees, because they were complicit in making the changes to their own contracts in breach of TUPE, and reducing their compensation to £0. ■

What should I do?

This case is a perfect example of natural justice in action. The claimants had deliberately made changes to their contract of employment, in breach of TUPE, with a view to benefit significantly. When this was discovered and their employment terminated as a result, they tried to seek compensation. In their decision, the EAT made it clear that employees (and employers) cannot and should not benefit from their own wrongdoing.

It is possible to make beneficial changes to the terms and conditions of transferring employees, however, this must be done through agreement with the employees. You should take advice before doing this.

More news on our website www.willans.co.uk

Contact

For advice on any of the issues covered in this bulletin or any other area of law, please contact these people in the first instance.

Employment law

Matthew Clayton
matthew.clayton@willans.co.uk

Charities & not-for-profit

Nigel Whittaker
nigel.whittaker@willans.co.uk

Litigation & dispute resolution

Paul Gordon
paul.gordon@willans.co.uk

Nick Cox
nick.cox@willans.co.uk

Property & construction

Nigel Whittaker
nigel.whittaker@willans.co.uk

Alasdair Garbutt
alasdair.garbutt@willans.co.uk

Wills, trusts & probate

Simon Cook
simon.cook@willans.co.uk

Divorce & family law

Sharon Giles
sharon.giles@willans.co.uk

Jonathan Eager
jonathan.eager@willans.co.uk

Agriculture & estates

Robin Beckley
robin.beckley@willans.co.uk

Corporate & commercial

Chris Wills
chris.wills@willans.co.uk

Paul Symes-Thompson
paul.symes-thompson@willans.co.uk

Residential property

Suzanne O'Riordan
suzanne.oriordan@willans.co.uk

Contact details

Willans LLP | solicitors, 28 Imperial Square, Cheltenham, Gloucestershire GL50 1RH
+44 (0)1242 514000 law@willans.co.uk www.willans.co.uk

Follow us at @WillansLLP