Employment law dispatches

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Welcome

As restrictions ease and life returns to somewhat normal, questions are beginning to arise about what the working world will look like going forward. With the announcement of a government consultation on flexible working to come later this year, a government spokesperson has stated that flexible working may be the default for employers unless there is are good reasons not to.

It looks like flexible working is here to stay, bringing with it a raft of opportunities and concerns that employers should be alive to. While homeworking has been heralded for increasing productivity and allowing a better work-life balance for employees, others are wary of the blurred lines between home and work impacting employee wellbeing. There is also a risk that flexible working policies can prejudice those responsible for childcare, and that the benefits of flexible working will only be extended those in office-based jobs if it fails to include flexi-time, part-time working and job share opportunities. Whatever the outcome, it seems certain that change is on the horizon for the way in which we work.

This month we are delighted to welcome our new team member Hayley Ainsworth, who has written a longer article on this subject for our website, which can be accessed here.

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Case law watch

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Disability discrimination: What is meant by 'long term'?

Jenny Hawrot
Senior associate

For an individual to be classed as 'disabled' for the purposed of the Equality Act 2010, they must suffer from an impairment that has a 'long term' substantial adverse effect on their ability to undertake day to day activities.

It has been established that 'long term' means that it is likely to last, or has lasted more than 12 months, but the case of *All Answers Ltd v. W and Another* has provided more clarification on this point.

The claimants in this matter alleged that they had suffered disability discrimination on 21 and 22 August 2018. The employer argued that their impairment was not likely to last 12 months at the time of the alleged discriminatory acts in August 2018.

Initially, the tribunal and EAT found in favour or the employee, confirming that the employees were disabled; however, they relied on evidence established after the alleged discriminatory acts in August 2018. The case was appealed and progressed to the Court of Appeal, who found in favour of the employer. The court confirmed that the question is whether an impairment has lasted or is likely to last 12 months at the time of the alleged discriminatory acts. Only the facts and circumstances existing at the date of the alleged discrimination should be considered.

What should I do?

This case is good news for employers. It clarifies that if an employee does not fulfil the criteria of 'disability' until after the alleged discrimination, there will be no discrimination.

That said, this is a technical area of law so if you are concerned that an employee may be disabled, you should seek advice. ■

Shared parental pay

Shared parental leave (SPL) hasn't proved to be very popular since it was introduced, with take-up being extremely low. Nonetheless, it has provided us with some interesting discrimination case law for us to consider.

In *Price v Powys County Council*, Mr Price took SPL, and received pay equal to statutory maternity pay only. However, the council paid employees on adoption leave full pay. Mr Price bought a sex discrimination claim against the council, comparing himself to a female colleague on adoption leave, receiving full pay.

The Employment Appeal Tribunal found that Mr Price couldn't compare himself to a female colleague on adoption leave. The reason for this is that the purpose of adoption leave is fundamentally different from that of SPL.

The purpose of SPL is to provide childcare, whereas the purpose of adoption leave goes beyond simply providing childcare, e.g. attending contact appointments. There were therefore material differences in the circumstances between Mr Price and the comparator, and so the claim could not succeed.

What should I do?

This is the second case to confirm that SPL pay cannot be compared to other types of parental leave (i.e. maternity and adoption leave). It is therefore clear that employers do not need to offer equivalent enhanced pay for SPL as they may do for maternity or adoption leave pay, and employees will have no discrimination complaint.

You may however question whether it is appropriate to have a policy which discourages fathers from taking on childcare responsibilities, since this is one of the key structural barriers to closing the gender pay gap. ■

"... employers do not need to offer equivalent enhanced pay for SPL as they may do for maternity or adoption leave pay.."

No surprises in employment status decision

In an unsurprising turn of events, the Court of Appeal has held that Addison Lee drivers are 'workers' rather than 'self-employed'.

In the case of *Addison Lee v. Lang*, the Court of Appeal followed the recent (and very well covered) Supreme Court decision in the *Uber* case.

Due to the 'master and servant' nature of the working relationship, it is clear that the drivers were not self-employed, but rather, workers.

What should I do?

This case is no surprise and the advice still remains that it is the reality of the working relationship in practice that matters, not what the contract says. If a business has control over the individual, and there is a master and servant style relationship, they are likely to be a worker or an employee, rather than self-employed.

This is particularly important since the introduction of IR35. ■

Don't miss: Upcoming events

Join our employment law team for a clear overview of current issues, with plenty of practical tips to take away.

- Seminar | **October employment law update** | Wednesday 6 October 2021
- Webinar | **Restrictive covenants: Drafting and enforcement** Tuesday 16 November 2021

Register your interest by emailing events@willans.co.uk or subscribe here to receive more details in due course.

Compulsory vaccinations

'No jab no job', and whether such policy would be lawful, has been a source of much debate in recent times.

We don't have any employment case law on the subject; however, the European Court of Human Rights has considered whether penalising individuals for refusing a vaccine is lawful, in a general sense, in the case of *Vavrika v Czech Republic*.

The Czech Republic penalised parents for refusing to comply with its statutory requirement for children to be vaccinated against nine diseases.

The individuals claimed that this compulsory vaccination policy was a breach of the European Convention on Human Rights, including Article 8 - the right to respect for private and family life.

The court found that the compulsory vaccination policy did interfere with rights under Article 8, however the interference was justified. This is because the policy had the legitimate aim of protecting against serious disease. It protects those being vaccinated, and also those who cannot be vaccinated for health reasons.

Furthermore, the policy was proportionate as the fines for non-compliance were not excessive. It was therefore a lawful policy, on this basis.

Since this case, the Government has announced that employers are able to insist on care workers being vaccinated, which suggests that 'no jab no job' could, in certain circumstances, be a legitimate policy in future.

What should I do?

Recent discussions on compulsory vaccination have raised concerns that it may breach human rights, however this case has suggested that human rights issues may not stand in the way of requiring employees to be vaccinated.

That said, this ruling and the government's recent announcement is not a green light for all employers to require employees to be vaccinated. There are many more obstacles that could stand in the way – for example, potential religious discrimination.

Furthermore, as we are no longer a member of the EU, this case is not technically binding. It's also worth noting that this case is very fact specific (e.g. concerns well established vaccinations and low-level fines) so it will depend on individual circumstances. As such, this case should be taken as guidance and approached with caution.

This same applies to the Government's announcement on requiring care workers to be vaccinated. By definition, care workers generally care for very vulnerable individuals, meaning that the need to protect those vulnerable individuals from the risks of COVID-19, by ensuring that care workers are vaccinated, will likely outweigh the individual rights of those who choose not to have the vaccine.

It is therefore likely that if employers want to insist on the employees being vaccinated, they must have a genuine and legitimate reason to justify the requirement, in spite of the rights of those individuals who do not want the vaccine. ■

Holiday pay may not accrue for agency workers on furlough

Hayley Ainsworth
Solicitor

As more COVID-19 related issues reach employment tribunals, two different cases have addressed whether agency workers furloughed under the Coronavirus Job Retention Scheme ('CJRS') are entitled to receive accrued holiday pay.

In *Healy v Start People,* the tribunal considered the impact of furlough on the terms of a worker's contract governing holiday pay. Miss Healy, a temporary worker, had been working with an end client when she was furloughed between March and July 2020, and made a claim for accrued holiday pay for this period.

Start People claimed that it had relied on government guidance in not paying holiday pay, stating that Healy's contract provided that she was not entitled to holiday pay between assignments. The tribunal, however, found that because Healy's assignment for the end client had not finished when she was furloughed, her entitlement to holiday pay was maintained.

> "The key to determining whether or not holiday pay accrues for agency workers is whether or not the worker was on assignment when they were furloughed..."

However, in a case, one month later, *Perkins v The Best Connection Group Ltd*, the tribunal found that a 'contract-for-services' worker did not accrue holiday on furlough.

Mr Perkins, an agency worker who carried out assignments for the flexible workforce supplier, The Best Connection Group, was furloughed from May to July 2020. He brought a claim for lost wages and accrued holiday pay for this period.

The tribunal found that while furloughed, Mr Perkins was not a 'worker' for the purposes of the Working Time Regulations 1998, and therefore could not accrue holiday pay. The decision was made because Mr Perkins' contract was found to only exist while on assignment with a client, not between assignments, and he was not on an assignment when he was furloughed.

Therefore, these cases suggest that whether an agency worker is entitled to holiday pay during furlough will turn on the facts of their engagement, and their status when furlough commenced.

What should I do?

The key to determining whether or not holiday pay accrues for agency workers is whether or not the worker was on assignment when they were furloughed. If they were on assignment, holiday will accrue. If they are between assignments, it will not.

However, it should be noted that these are only first instance decisions, so are not technically binding and may be subject to appeal. ■

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Disability discrimination – substantial adverse impact

As noted on page 1 in the case of *All Answers Ltd*, the definition of disability is a condition that has a 'long term substantial adverse effect on a person's ability to undertake day to day activities'. The case of *Elliot v Dorset County Council* considered the definition of 'substantial'.

The Equality Act 2010 states that 'substantial' means 'more than minor or trivial' however, the Equality Act guidance states that substantial means 'a limitation going beyond the normal differences in ability which may exist among people'. There is therefore a conflict between the two, which has resulted in an inconsistent approach.

However, the EAT has now ruled that the statutory definition prevails over any guidance. Therefore, if the adverse effect has a more than minor or trivial effect on the ability of a person to carry out day to day activities, the definition will be met. The EAT also confirmed that a tribunal should only consider the guidance in if the statutory definition fails to provide a conclusive answer.

In this case a comparison must be drawn between the individual in question and people who are broadly similar to the claimant, other than not having the alleged disability.

What should I do?

The statutory definition of 'more than minor or trivial' is a fairly low hurdle to overcome, and as such, it will encompass more individuals within the definition of 'disabled'. You should therefore be mindful of this fact when dealing with employees who suffer with long term impairments. ■

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

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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.

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