Employment law dispatches

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Willans LLP | solicitors

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Welcome

We hope you have had a restful summer.

This month marks the end of 'furlough', now an all-too-familiar term which we have come to know well during the pandemic. In our latest issue we discuss what this means as well as take a look at several other recent employment law cases which we think you'll find of particular interest.

We have announced our latest series of webinars and hope you can join us on 6 October. Read on for more detail.

As always, if you need us, get in touch - we'd be delighted to support.

Legislation update with Matthew Clayton

Hope on the horizon for the end of furlough

Matthew Clayton
Partner, head of employment law & business immigration

The number of notified collective redundancies is currently at a seven-year low, according to data published recently by the Insolvency Service. The continued decline in these numbers suggests that redundancy and unemployment levels may well not be as high as many had anticipated when the Coronavirus Job Retention Scheme (CJRS) finally ends on 30 September 2021.

Indeed many employers are reporting having to continue to deal with staff shortages, with the lack of qualified HGV drivers having been prominent in the national press.

June 2020 saw the highest number of notified collective redundancies (155,576) since the beginning of the COVID-19 pandemic. That had dropped to 31,946 by January 2021, and to 12,687 by August 2021 – down more than 90% since last year's peak.

The latest CJRS statistics show that there were 1.9 million furloughed workers on 30 June 2021.

It is tempting to hope that this data suggests that when the CJRS ends on 30 September 2021, many of those currently furloughed may not actually be facing unemployment, since the collective consultation process would have needed to start by 1 September at the latest, if redundancies were to take effect immediately on the end of the CJRS.

Of course this does not rule out the possibility that some employers would start the consultation process later, with a view to the redundancies taking effect some time after 30 September. It also does not take into account the possibility of a large number of smaller-scale redundancy exercises taking place, where collective consultation for a minimum of 30 days is not required by law and hence not reported in the figures.

We must also remember that a lack of collective redundancies does not automatically mean a healthy employment market. Many of those currently furloughed will be coming back to low-paid and/or insecure jobs in the hospitality industry, and others will be working in temporary roles having previously been made redundant from more permanent employment during the pandemic.

So whilst there is reason to be cautiously optimistic, we should remember that these are difficult times for many employees and employers. ■

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Flexible working requests

As we went to press, the UK Government announced a consultation on plans to give all employees the right to request flexible working from day one, not just after six months of employment. It seems employers would still be able legally to turn down requests on the same basis as currently (albeit within a shorter timescale). However, that will undoubtedly be more difficult to do in practice, now that home working and hybrid working have proved so successful and popular.

It remains to be seen whether this proposed change will make a difference, or whether it is happening in practice already. The Trades Union Congress (TUC) comments that staff should just be given the legal right to work flexibly, without any right of refusal on the part of the employer.

We will be discussing this and other developments in our employment law update webinar on 6 October – see below for more details. ■

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Case law watch with Hayley Ainsworth & Jenny Hawrot

Detriment in whistleblowing cases: causation is key

In *Watson v Hilary Meredith Solicitors* the Employment Appeal Tribunal (EAT) found that a whistleblower's behaviour after he had blown the whistle, as distinct from the act of whistleblowing itself, was the cause of his dismissal, meaning it was not automatically unfair.

Mr Watson, the company's new CEO, discovered financial irregularities and made a protected disclosure under whistleblowing legislation. Subsequently, he resigned at a board meeting, leading to two further directors resigning. The firm's owner tried to persuade him to return to work to help the business resolve the financial issues but when Mr Watson refused, he was dismissed.

Mr Watson claimed automatic unfair dismissal, stating that his dismissal was due to his whistleblowing. The firm argued that his dismissal had come about because he had not stood by the firm to solve its issues.

It was found that Mr Watson's dismissal had not been "materially influenced" by his disclosures. He had acted in a destabilising way by resigning immediately and by doing so in a board meeting. Mr Watson refused to help solve the financial issues, which was a breach of his director's duties and of his service agreement.

What should I do?

To constitute automatically unfair dismissal, the whistleblower must be subjected to detriment because of the disclosure itself, not some other action or event. You should be mindful of your actions towards a whistleblower following a disclosure but may still take action as a consequence of unrelated poor conduct. ■

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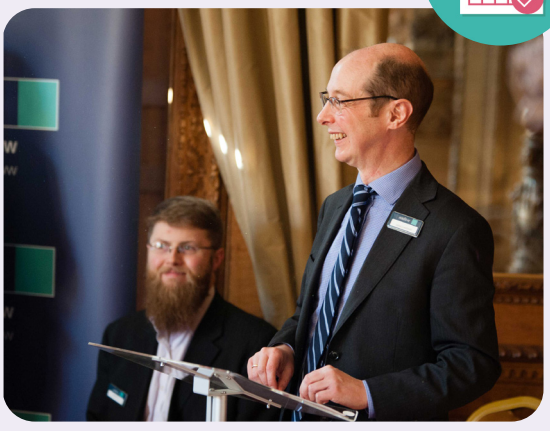
Solicitor

Don't miss: Upcoming free events

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

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

Book your ticket(s) by visiting our website's events page: willans.co.uk/events



What is a "reasonable" adjustment in disability discrimination?

In *Martin v Swansea,* a tribunal claim was brought by a claimant who stated her dismissal under the employer's absence management policy was discriminatory.

The employee was absent for several long periods due to stress-related ill health and under the employer's absence management policy was dismissed. The claimant argued that the policy was a "PCP", a provision criterion or practice which placed her, as a disabled employee, at a substantial disadvantage compared to non-disabled employees, depending on how it was applied.

On appeal, it was found that the application of the absence policy put the claimant at a greater risk of dismissal due to her absences. Though the policy had many discretions in it for disabled employees, these discretions might not be exercised in her favour. So, it did put her at a substantial disadvantage and the caveats did not negate this. However, the employer had undertaken reasonable adjustments, such as redeploying the claimant with protected pay, and support in applications for other roles. These were found to be sufficient to alleviate any disadvantage, and as such the discrimination claim was dismissed.

What should I do?

This case raises questions about what constitutes a reasonable adjustment and reminds us that employee requests may not always be considered reasonable. Adjustments should be made on a case-by-case basis and taking into account the specific circumstances of the employee and employer. Flexibility and co-operation are key in these scenarios. ■

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Pay protection for disabled employees

Jenny Hawrot
Senior associate, solicitor

Employers are required to make reasonable adjustments for disabled employees, but does this extend to protecting their pay if they are unable to undertake the same role? The Employment Appeal Tribunal recently answered this question in *Aleem v E-Act Academy.*

Ms Aleem was a science teacher who was classed as disabled due to her mental ill health. This disability meant that she was no longer able to undertake her teaching role. As a reasonable adjustment, Ms Aleem changed roles to become a cover supervisor, which was more junior and at a lower salary than her teaching role.

The employer protected Ms Aleem's pay for the first 3 months, to accommodate her probationary period, but after that, her salary was reduced to reflect the more junior nature of her new role.

Ms Aleem brought a claim against her employer, arguing that it was a reasonable adjustment to pay her higher teacher salary, in the new, more junior role. The EAT held it would not be a reasonable adjustment to protect pay whilst doing a more junior role, and that it would not be reasonable to continue the higher rate of pay.

What should I do?

The onus on employers to make reasonable adjustments is very high, and usually, they will be expected to do everything possible to accommodate any recommended reasonable adjustments.

That said, the purpose of reasonable adjustments is to make changes to accommodate disabled employees, to enable them to undertake their role, and not to treat them as a 'charity case'.

Reasonable adjustments should not put disabled employees at an advantage and therefore there is no requirement to pay them more in a role than you would for any non-disabled employee. ■

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Knowledge of disability

During his employment, Mr Seccombe had a breakdown as the result of a traumatic event and took some time off work. He returned to work, without issues, and as a result his employer presumed that there were no ongoing medical problems. Furthermore, he did not disclose any disability or ongoing ill health to his employer.

Mr Seccombe was later dismissed on the grounds of poor performance and brought a claim for disability discrimination. A tribunal found there was no medical evidence to support his claims that he was disabled, and that the employer did not and could not know that he was disabled.

The EAT agreed, and went further to comment that, in the absence of any medical evidence, an employer cannot be expected to know that an employee is disabled, unless the employee makes it clear to them that they satisfy the legal definition of disability. Therefore, what the employee says to the employer about their alleged disability is very important, and unless they make it clear that they have a long term impairment that has an adverse effect on their ability to undertake day-to-day activities, the employer cannot be deemed to know about the disability. *(Seccombe v Reed).*

What should I do?

This case is fairly unusual in that the employee did not report any ongoing health issues to his employer, prior to his termination. Whilst this case does clarify that employers cannot be liable for disability discrimination if they are unaware that the employee is disabled, it does not mean that employers can simply turn a blind eye to evidence in front of them. Had the employee reported ongoing health issues, or had further time off due to ill health, then the employer would probably have been deemed to have knowledge of the disability. Therefore any health issues raised by an employee should be properly taken note of. ■

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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.

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