EMPLOYMENT NEWS HEADLINES SEPT-OCT 2019 ISSUE 23

COVERT RECORDINGS IN THE WORKPLACE – PHOENIX HOUSE LTD V STOCKMAN (EAT)

Modern technological advances mean that secret recordings in the workplace are now quicker and easier than ever to carry out. What does this mean for employers and employees in the use of them particularly in disciplinary action and any subsequent claims?

The EAT has provided some useful guidance on this in *Phoenix House Ltd v Stockman*. Ms Stockman, a finance executive, was dismissed following a grievance hearing and the breakdown in relations with her line manager, the Director of Finance. During this process, Ms Stockman had covertly recorded an internal meeting between herself and Human Resources. She later used this as evidence in her unfair dismissal claim against Phoenix House. Ms Stockman was successful at first instance in her claims for unfair dismissal, victimisation and whistleblowing against Phoenix House. The employer claimed that the compensation awarded should be reduced to zero as had it known that she had covertly recorded a meeting, they would have dismissed her for gross misconduct. The Employment Tribunal, awarded a 10% reduction in her compensatory award for Ms Stockman's conduct but did not find that she had acted in such a way as to *entrap* her employer but because she was flustered and confused.

Phoenix House appealed. The Employment Appeal Tribunal, dismissing the appeal, highlighted the following:

- Covert recordings in the workplace will not always amount to gross misconduct or necessarily undermine trust and confidence;
- Recordings will be admissible as evidence depending on the nature of the claim(s);
- Employers should be clear in staff handbooks and policies that covert recording are considered gross misconduct if they have concerns about the use of covert recordings and wish to use disciplinary sanctions. That said, any breach should not result in automatic termination without a consideration of the reasons for and intentions of the employee. There must be consideration of whether it is a manipulative employee trying to entrap the employer in order use the recording against it or a vulnerable or flustered employee simply protecting his or her position (as was found to be the case in *Phoenix House v Stockman*);
- It is good practice at the start of any meetings to clearly communicate that recordings of any kind are not permitted and to ask the employee if he or she is using a device – this will assist the employer in any subsequent abuse and action it may be required to take.

In some instances, it may make sense for both parties to have a recorded meeting, in this case, the parameters should be agreed in advance and copies of the same recording should be retained by both parties. A written summary is also advisable.

MENOPAUSE AND DISCRIMINATION – WHERE IS THE LINE?

The Office of National Statistics estimates that there are over 5 million women in the UK workforce of which a large percentage are experiencing menopausal transition or peri-menopausal symptoms. This topic is gaining greater recognition due to the impact of the symptoms on a woman's ability to work and greater discussion around how employers need to take account of accommodating a natural stage of life that can adversely impact a large proportion of a very valuable workforce.

Symptoms can include, heavy and prolonged bleeding, memory loss, loss of concentration, hot flashes, sweats, anxiety, depression and extreme emotional mood swings. Sometimes such symptoms are ignored or misinterpreted by employers as a drop in performance or poor conduct when it could, in fact, be caused by menopausal changes.

A Scottish first instance case, *Davies v Scottish Court and Tribunal* found that Ms Davies, a court officer, was unfairly dismissed for gross misconduct relating to her disability when she was unable to remember whether she had added cystitis medication to a water jug she was using which two males had subsequently drank from. Ms Davies had alerted them to the possibility she had used the jug for her medication and a full health and safety investigation followed but she was dismissed anyway.

Although, menopausal symptoms are not a protected characteristic per se, it is possible for them to fall into a disability under the Equality Act 2010 definition where the symptoms cause "*a substantial and long-term adverse effect on normal day-to-day activities".*

It is always advisable for employers to delve deeper into the causes of an employee's behaviour or drop in performance. A short-cut to disciplinary sanctions could be tantamount to sex discrimination. The case of *Merchant v BT Plc* highlighted this where the manager's decision to dismiss an employee following a final warning knowing she was suffering from menopausal symptoms was found to be unfair and direct sex discrimination. The courts found the male manager would not have failed to carry out appropriate medical investigations for non-female related issues but had failed to in this case.

These cases and recent public discussion on the topic of menopause and the workplace has raised awareness and employers are now taking this issue seriously, specific areas of review include:

- Creating support and wellbeing networks, groups and help lines for affected employees;
- Introducing manager training to increase awareness and knowledge of handling sensitive situations;
- Introducing flexibility in work patterns for women to manage their symptoms and encouraging open dialogue on the oftentimes debilitating symptoms;
- Seeking professional guidance from health & safety on facilities and changes that need to be made to support this group in their work environments.

HOLIDAY CARRY-OVER AND SICK LEAVE (ADVOCATE-GENERAL OPINION)

The Advocate General (AG) has provided his opinion following a claim by Finnish Trade Unions seeking clarity on whether any enhanced holiday leave granted by member states under national laws or collective agreements over the four weeks' provided under the EU Directive, should be included for the purpose of carry-over of accrued holiday when an employee is off on long-term sick leave.

The AG has opined that provided that holiday leave granted is not inconsistent with or impacted by the leave granted under the Directive, member states may set their own rules concerning any enhanced leave, carry over and expiry of such leave. This is consistent with previous UK tribunal rulings

in relation to the enhanced 1.6 weeks' of leave available under the Working Time Regulations 1998 for which employer need not permit carry over.

ALL PARTY PARLIAMENTARY GROUP (APPG) AND CHANGES IN WHISTLEBLOWING LAW – A SUMMARY

The Public Interest Disclosure Act (PIDA) was introduced in the UK in 1998 and designed to provide protection for individuals, who "blew the whistle" on the wrong doing of their employers. Following a number of scandals and public interest cases, the PIDA has undergone several reviews, the APPG launched in Summer 2018 following the Gosport Hospital scandal has produced its findings. Its report recommends changes in the following areas:

- To simplify the PIDA so it is not overly cumbersome and legalistic and to cover not only workers and employees (who are currently covered) but also members of the public (currently not covered) with a clear definition of "whistle-blower" and what is meant by "whistleblowing";
- Protections are currently retrospective after the detriment is already suffered by the whistle-blower, the recommendation is for all organisations to introduce internal and external processes and mechanisms to ensure protections are in place to ensure detriment is not suffered;
- Knowledge of the protections provided by the PIDA is limited or non-existent to the public, the recommendation is to establish an Independent Office for the Whistle-blower which would oversee reporting mechanisms, enforce protections and administer meaningful penalties to organisations found to be guilty of wrongdoing;
- Access to justice for 'whistle-blowers' can be daunting and costly, the recommendation is to remove barriers to access including availability of legal aid, protection against cost awards and a prohibition of the use of NDAs in whistleblowing cases which employees are often asked to sign by employers;
- A review of compensation awards in whistleblowing cases, research data indicates that current claims costs can far exceed average awards.

Although these are only recommendations, there is more work to do and the APPG will be producing further reports as this becomes a hotly debate area for legislative change. For now, employers should start to review their current policy and processes in readiness for what may arise out of the APPG's work.

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