EMPLOYMENT NEWS HEADLINES MAR-APR 2020 ISSUE 26

CORONAVIRUS (COVID-19) PANDEMIC- LATEST UPDATE FOR EMPLOYERS

Since the last Maxlaw Global employment news issue (Issue 25) much has changed. Following its publication, the UK Government announced a complete lockdown which is now into its third month. With the situation and information changing almost constantly day to day and hour to hour, below are some key highlights of recent developments.

- In mid-April the Government extended the Coronavirus Job Retention Scheme (CJRS) where employers have furloughed workers, which was originally intended to last for three months, for a further month to the end of June. On 12 May 2020 the Government announced a further extension to the CJRS until 31 October 2020;

- There will be some easing of the lockdown with effect from mid-May 2020, at the time of writing, this will be in phased timeframes and by sectors. New guidance for employers was published this week for workplace settings and steps that need to be taken by sector specific employers to ease the workforce back into the workplace. These can be found at https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19

- The Government has also announced that travellers entering the UK will be quarantined for 14 days with a few exceptions which will, no doubt, have a huge impact on the already crippled travel, hospitality and retail industries;

- The Government is committed to having virus testing available for as many people as possible and developments in contact tracing continues to be a focus with trials currently underway.

In general, the advice provided in our previous Issue 25 on risk assessments, sanitation and travel remains relevant as the lockdown eases. Employers should continue, where it is practicable, to have staff work from home. This is still the current advice. Where staff need to be in a place of work, a full risk assessment and measures using the new guidance found in the above link should be carried out and put in place, for example, travel arrangements and modes of transportation, social distancing in the workplace, sanitation and cleaning measures, the use of Personal Protective Equipment (PPE), health and safety assessments, measures for vulnerable or 'at risk' staff and visitors to work premises. Although not a legal requirement for now, employers with 50 or more employees will be expected to publish the risk assessment and the measures they have put in place to ensure protection of its

workforce in the workplace on its website. It would be wise for employers to take this very seriously, take their time and carry out a thorough and detailed exercise before implementing any change.

INVESTIGATIONS AND MOTIVATIONS – UDDIN V LONDON BOROUGH OF EALING (EAT)

Regular readers of Maxlaw Global Employment news will recall the case of *Jhuti v Royal Mail* (Issue 12) a Court of Appeal case which subsequently went to the Supreme Court. The issue relating to information being withheld in an investigation in that case has now been reconsidered in the current case (although the facts are entirely different). When establishing the fairness of a dismissal, it is important to consider whether:

(a) the knowledge of specific information by the investigating officer in a conduct disciplinary will be treated as information known to the employer itself;
(b) withholding that information from the decision-making officer responsible for the disciplinary is relevant not only to the *reason* for the dismissal but also the *reasonableness* of the decision to dismiss.

The case of *Uddin v London Borough of Ealing* relates to the termination of Mr Uddin on the grounds of gross misconduct following allegations of sexual assault on a colleague on a work placement after a night of drinking. The employer commenced an investigation into the allegations and it was understood at the time that the alleged victim had made a police complaint against Mr Uddin. The Police report formed part of the investigation data.

The alleged victim later withdrew the police complaint. This information was known by the investigating officer; however, it was withheld from the decision-making officer. The decision-making officer did take into consideration the police complaint as a factor in reaching the decision to dismiss for gross misconduct. Mr Uddin brought claims for unfair dismissal and wrongful termination. At first instance his claim was rejected by the Employment Tribunal who found the dismissal was fair. Mr Uddin appealed relying on the Supreme Court ruling in *Royal Mail v Jhuti*. The EAT overturning the ET's decision found:

- The investigating officer's failure to share the information on the victim's decision to withdraw the police complaint was relevant to the fairness of the decision;
- On the facts of this case, the knowledge that the investigating officer had could be attributed to knowledge by the employer. Especially as it was material in support of Mr Uddin's case. The standard required of the investigation was high given the allegations and likely consequence. The decision-making officer had considered the outdated information in reaching the decision and confirmed that had she known the police complaint had been withdrawn she would have explored the reason for this further before reaching a decision.

This case is another reminder that investigating officers should remain impartial and *not* influence the outcome of a disciplinary due to their own motivations and prejudices. They should present all the material facts and matters as they are to the disciplinary decision-making officer for a dismissal to be defensible as reasonable on the information available at the time the decision was made.

APPEAL TO SUPREME COURT REVERSES DECISION – WM MORRISON SUPERMARKETS PLC -V- VARIOUS CLAIMANTS (UPDATE)

In Issue 14 of Maxlaw Global employment news we reported on the case against Morrisons, the supermarket retailer, who was found to be vicariously liable for the malicious acts of its employee, a Mr Skelton, who publicly released confidential payroll and other personal data of some 100,000 employees in retaliation to disciplinary action on an entirely separate matter. He was later charged and imprisoned under a number of data privacy and misuse laws.

The employees bringing the action against Morrisons were successful at High Court and Court of Appeal, however, the decision has been overturned by the Supreme Court much to the relief of employers everywhere. In a unanimous ruling in April this year, the Court ruled:

- Despite the unbroken chain of causation, this was not sufficiently "closely connected" with his duties and Mr Skelton's actions did not form part of his normal "field of activities";
- Mr Skelton's motive *was* material to whether vicarious liability applied in this case;
- Although access to the personal data was provided in the ordinary course of employment Mr Skelton's actions could not be regarded as him acting in the ordinary course of employment to further his employer's business. Morrisons was, therefore, found not be vicariously liable for Mr Skelton's malicious actions.

SEXUAL HARASSMENT GUIDE PUBLISHED BY THE EQUALITY AND HUMAN RIGHTS COMMISSION (EHRC)

In light of the many recent high profile sexual harassment cases and the #MeToo movement, the EHRC has published a substantial and technical document which provides guidance to employers on better understanding the laws in this area, the extent and impact of harassment in the work environment and how to proactively manage or act to prevent this often complex and difficult issue.

The document is not legally binding, however, as a detailed, weighty and substantive guidance compared to anything available in the past, it is more than likely that it will be referred to often in legal proceedings relating to harassment cases and employment tribunals are likely to take the guidance into consideration in any deliberations.

Key highlights of this substantive document include:

- Review or creation of meaningful anti-harassment policies and guides which are wider reaching to include harassment on social media or certain out of work instances;
- Training for managers and other relevant groups on anti-harassment and victimisation policies;
- A health & safety style risk assessment, where relevant, in order to be pro-active in taking reasonable steps to prevent harassment occurring in the first place (currently employers do have a defence to liability under the Equality Act 2010 if they can show they took reasonable steps to prevent the alleged harassment);
- Consideration of third-party harassment, for example by the employers' clients, even though there is no statutory obligation at this time under current harassment law, the exposure remains under discrimination laws;

- Addressing power imbalances that often lead to harassment cases in the workplace;
- Clear guidance on reporting and investigation procedures and protocols including anonymous reporting by victims;
- Creating a central recording system for harassment claims which can be used to assess trends and exposure provided it is GDPR compliant; and
- Generally being proactive in understanding and assessing what is going on in the workplace in terms of harassment and behaviours that could lead to such claims, for example, the various reporting channels or regular staff surveys.

The full guide can be downloaded from here: https://equalityhumanrights.com/en/publication-download/sexual-harassment-and-harassment-work-technical-guidance

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Maxlaw Global
April/May, 2020