EMPLOYMENT NEWS HEADLINES JULY-AUG 2020 ISSUE 28

LATEST COVID-19 STATUTORY SICK PAY CHANGES

In Issue 25 of Maxlaw Global news we reported on changes to the Statutory Sick Pay (SSP) regulations in response to the escalating situation with the Covid-19 pandemic. In Issue 27, some months later, we reported on the ability for households to come into contact as social "support bubbles" with a slight easing of the total lockdown of earlier months.

The Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) (No. 2) Regulations 2020 (SSP Regs) have now extended the cover, as of 6 July 2020, so that claims can be made where:

- A person self-isolating due to possible Covid-19 symptoms in a "support bubble" with a linked or extended household will be entitled to claim SSP, a departure from the original 'the same household' requirement;
- a health agency, such as the Department of Health, issues a notice for a vulnerable worker to shield due to health risk, that person will be able to claim SSP for the new period of shielding. The same agency does retain the right, as before, to issue notices to end shielding or re-issue fresh shielding notices where appropriate;
- a worker has been notified via 'track and trace' that they have had contact with someone with the Covid-19 virus and must self-isolate.

This SSP entitlement will *not* apply to those entering or returning to the UK after travelling where they are required to self-quarantine for 14 days depending on where they have travelled from; (see Government site www.gov.uk/foreign-travel-advice for this changing list of countries). This is presumably on the basis that those individuals chose to travel to or from a high-risk country when they need not have. The Government advice is against "all but essential" international travel.

Employers are also reminded that they should retain full and detailed SSP records for a period of three years for inspection by Her Majesty's Revenue & Customs (HMRC) for any sickness payments made under the SSP Regs.

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CAN A DISMISSAL WITHOUT A PROCEDURE EVER BE FAIR? - GALLACHER V ABELLIO SCOTRAIL LIMITED (EAT)

This is a highly unusual case on the facts and not one to be relied on by employers as a matter of course but is worthy of note. The general position under the Employment Rights Act 1996 (ERA), is for a dismissal to be fair in must be (i) for a permitted reason under the ERA; (ii) it must follow a fair process. The employer must behave within a "band of reasonable responses" in carrying out the dismissal.

The case of *Gallacher v Abellio Scotrail* applied none of those tests and yet both at first instance and on appeal the dismissal was found to be fair. It is worth highlighting the unique facts of this case.

The Claimant, a senior employee in the role of Head of Customer Experience, worked for Abellio Scotrail since 2007. Initially, the Claimant's relationship with her own manager was good but following a change of role and over the years it deteriorated when in 2014 the Claimant was not given a pay increase and over differences on recruitment decisions. Following this, the Claimant was quite open about her dislike of her manager including openly expressing to other employees, her unhappiness in her role, the fact that she was looking for an alternate role and that she placed very little value on her manager's instructions or views.

By 2017 the business was financially struggling and the relationship between the Claimant and her manager had completely broken down beyond repair which the Claimant acknowledged. However, prior to this, she also made it clear that she was unwilling and uninterested in taking steps to repair or fix it. Scotrail took the highly risky step of terminating Gallacher's employment without warning at an appraisal meeting on the grounds of a breakdown in trust and confidence without following a proper procedure or providing a right of appeal. Gallacher brought a claim for unfair dismissal, amongst other things, including citing Abellio's failure to offer mediation.

Given the Claimant had been very vocal and open over an extended period about her lack of interest in salvaging the relationship, the Courts found that in this unique case, the termination was fair. Forcing the employer to follow a process would have been a futile exercise for something that was beyond repair. Mediation, although could have been offered, would not have worked in this case. It found there had been an irretrievable breakdown in the relationship.

Employers should appreciate that this is an extremely rare finding by the Courts and the threshold for terminating fairly on these grounds is very high. The attitude of and unwillingness to cooperate by a relatively senior employee at a critical time for the business were important factors in this case. In general, all avenues, including mediation, should always be explored if there is any opportunity to repair relations between employees before moving to termination.

BENEFICIAL CHANGES VOID UNDER TUPE – FERGUSON V ASTREA ASSET MANAGEMENT LIMITED (EAT)

The case of *Ferguson v Astrea Asset Management Limited* is helpful as a reminder of the purpose and application of the EU Acquired Rights Directive and the UK adoption of those rights under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). Under Regulation 4 of TUPE

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any variation to a transferring employee's contract terms where the sole or principle reason for the variation is the transfer itself will be void.

In the case of *Ferguson,* the Courts considered whether this was relevant for detrimental variations only or beneficial variations as well. The case related to directors of an asset management company who it was accepted would be transferring to a new employer under TUPE. Before the transfer date the directors varied the terms of their existing contracts providing themselves with generous bonus terms and exit pay provisions. On transfer, the new employer terminated the directors' employment for gross misconduct and argued that the terms of their contracts were void.

The directors brought claims asserting that under TUPE the regulation only related to detrimental changes to contract terms. The Employment Tribunal disagreed at first instance and the Employment Appeal Tribunal has confirmed that the principle applies to *any* variation if the sole or principle reason is the transfer itself. The EAT went on to state the purpose of the directive was to safeguard the existing rights of the transferring employee not to improve them. In this case, the transferring directors had abused the principle of the directive.

This is useful clarity for employers and is consistent with TUPE language. In practice, this is unlikely to cause any issues for incoming employers looking to harmonise employment terms for transferring employees with its existing staff where organisational, technical and economic reasons entailing changes to the workforce will often be the key motivators rather than the transfer itself.

#BLACK LIVES MATTERS MOVEMENT AND UNCONSCIOUS BIAS

There has been a huge amount of print columns and a swath of social media footage and debate triggered by the recent murder of black Americans in the US and the global #blacklivesmatter movement that followed.

Whilst there is legislation in place to combat racism in the workplace in many countries from "affirmative" action programmes in the US where special measures are permitted to support members of a disadvantaged group to overcome that disadvantage or obstacle, to 'positive action' in the UK. This is where preferential treatment is given to a member of a disadvantaged or underrepresented group to address inequality. In Europe the *Race Equality Directive 2000* supports this concept and in the UK ss158 and 159 of the *Equality Act 2010* provides that race or other protected characteristic can be considered where the employer

- "*reasonably thinks that it is necessary to tackle under-representation, they can take action that has the aim of overcoming or minimising the disadvantage, meeting differing needs, or enabling or encouraging participation of under-represented groups"* and;
- "*where an employer does not have a policy of treating persons who share a protected characteristic more favourably in connection with recruitment or promotion than a person who does not share it but where A is as qualified as B to be recruited or promoted*, *and where that action is proportionate".*

Note, both sections require any positive action to be "proportionate" and it should be applied after careful consideration of the context for the role and its requirements.

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Employers should also consider unconscious bias when making decisions on recruitment and promotion. In the current climate that recent events have triggered on the world conscience, it is worth employers now reviewing or considering for the first-time workplace practices such as:

- Unconscious bias training for managers and recruiters;
- Regular discrimination training for direct and indirection discriminatory behaviours;
- Revisiting documents such as Job advertisements, job descriptions, CV requirements, workplace policies and eliminating any discriminatory or unconsciously bias language from such documents;
- Interviewing techniques, practices, requirements and limitations;
- Support networks to combat exclusivity and promote diversity; and
- Monitoring the enforcement and impact that new or revised measures are having on encouraging and attracting the best talent regardless of race or any other protected characteristic.

GOVERNMENT SEEKS VIEWS ON WORKPLACE MEASURES FOR SURVIVORS OF DOMESTIC ABUSE

The Government has launched a consultation on measures that can be taken in the workplace that could support and assist survivors of domestic abuse. Issues for consideration include:

- Arrangements for flexible working;
- Unplanned leave and how best to use existing leaves;
- Payment of salary or wages into a different or new bank account; and
- Introduction of emergency salary payments in cases of real financial hardship.

The submission deadline is 9th September 2020. The link can be found here:

https://www.gov.uk/government/news/government-to-review-support-in-the-workplace-for-survivors-of-domestic-abuse

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