EMPLOYMENT NEWS HEADLINES MAR-APR 2021 ISSUE 32

COVID-19 - THE LATEST FOR EMPLOYERS

In late March the UK Government published an update on the easing of the third national lockdown with the '*roadmap out of lockdown*' phased in four steps as follows:

- Stay at home order lifted as of 29 March 2021;
- Sector by sector reopening from 12 April 2021 with restrictions on indoor and outdoor numbers for hospitality, retail and beauty and leisure sectors;
- Indoor gatherings subject to a limit of six (6) confirmed as permissible from 17 May 2021. Outdoor gatherings and certain social events permissible up to a maximum of thirty (30);
- A full Government review of lifting the legal restrictions of lockdown is set for 21 June 2021.

For office workers this includes the lifting of the legal prohibition of working from the office. Although the recommendation is that workers should continue to work from home where possible, it is no longer an offence to return to the office where it is possible to work from home.

The latest guidance focuses on the issue where workers are struggling with the work from home environment due to cramped living conditions, shared spaces with pets, small children or other family members, mental and physical challenges of isolation or remote working. In these instances, it is possible for employers to permit a return to the office without repercussions. Any return must still observe new Covid secure measures such as social distancing, restriction on numbers in a group gathering, PPE and other sanitation measures (see Issue 25 for information) including employers' wider Health & Safety obligations under existing laws and new HSE guidance. Further details available here: https://www.gov.uk/government/news/prime-minister-sets-out-roadmap-to-cautiously-ease-lockdown-restrictions

Note: The adjusted right to work checks due to Covid-19 which have been in place since March 2020 will end on 16 May 2021 and employers will be required to revert to appropriate physical checks of original documents as of 17 May 2021. Retrospective checking will not be required. For further details go to: Coronavirus (COVID-19): right to work checks - GOV.UK (www.gov.uk)

FAILURE TO WEAR A FACEMASK CAN RESULT IN FAIR DISMISSAL – KUBILIUS V KENT FOODS LIMITED (ET)

In the first of two cases that have been considered by the Employment Tribunals since the global pandemic, the case of *Kubilius v Kent Foods Limited* relates to the wearing of facemasks in the

workplace or during working time and what employers can consider to be a disciplinary offence carrying a sanction up to and including dismissal.

Mr Kubilius, was a lorry driver for Kent Foods and primarily worked on moving goods to and from one of its major clients, Tate & Lyle (T&L). Following the escalation in the Covid-19 pandemic, T&L introduced a requirement for all personnel working or visiting its site to wear a facemask at all times. Mr Kubilius refused to wear a facemask because he argued that he was in the cab of his lorry. T&L requested that he wear his mask on a number of occasions, when Mr Kubilius refused, it banned him from its site.

Kent Foods carried out a full investigation into the situation. It also had a clear policy which required its employees to be respectful of its customers and comply with any PPE requests and health & safety obligations. As Mr Kubilius worked mainly on the T&L account, Kent Foods could not redeploy him elsewhere and he was summarily dismissed. Mr Kubilius brought a claim for unfair dismissal. On the facts, the Employment Tribunal found that he was fairly dismissed highlighting the following:

- The employer had carried out a thorough investigation on what it regarded as serious misconduct;
- There was a clear policy regarding the requirement to comply with PPE and other health & safety requirements of the employer and its customers which stated that a failure to would result in disciplinary action including dismissal;
- Mr Kubilius' failure to comply with T&L's request despite several attempts by it had the potential to seriously damage the business relationship with Kent Foods and the significant impact this could have on its business as one of its major clients;
- Mr Kubilius failed to understand the gravity of his actions and continued to deny he had done anything wrong and showed no remorse for the breach of his employer's health & safety requirements. It was reasonable for it to have concerns about whether Mr Kubilius could be trusted not to act the same way in the future.

Mr Kubilius was found to have been fairly dismissed in the circumstances. The Employment Tribunal did accept that in other circumstances a warning or final written warning may have been a sufficient sanction but in this case the dismissal was justified and 'within a reasonable range of responses' for the employer to take. It is interesting to note that whilst there were no absolute requirements under the UK Government's guidelines at the time of the incident to wear facemasks, some businesses including T&L in this case, had already made the decision to have PPE as a compulsory requirement in the workplace and it is important for this to be included in any policy communicated to the employees if it is to be relied on later for disciplinary action.

DISMISSAL FOR REFUSAL TO ATTEND WORKPLACE FOR ANY COVID-19 RELATED REASON NOT AUTOMATICALLY UNFAIR – RODGERS V LEEDS LASER CUTTING LIMITED (ET)

The case of *Rodgers v Leeds Laser Cutting Ltd* is an interesting case as it explores the Employment Rights Act 1996 (the Act) protections[1] in relation to Health & Safety risks and, this case considers it in the context of the new threat that Covid-19 has posed for employers.

[1] Ss.44 and 100 (1)(d) and (e) of the Employment Rights Act 1996

An employee may bring a claim for automatic unfair dismissal without the requisite two years qualifying service where he is dismissed because he leaves work or refuses to work because of a reasonable belief of a "serious and imminent" danger to health and safety and there is no way of averting that danger.

Mr Rodgers worked as a laser cutter for Leeds Laser Cutting with a small group of colleagues. Following the first Covid-19 national lockdown in March 2020, Mr Rodgers informed his employer that he would not be returning to work 'until the lockdown eased' in order to protect his vulnerable child who had sickle cell anaemia. A month or so later, Mr Rodgers was dismissed due to his absence and failure to work. He brought an automatic unfair dismissal claim under the Act. The ET based its decision on the following findings:

- Although Mr Rodgers had a genuine belief of a 'serious and imminent danger' this was *in general* due to the global pandemic and not specific to the workplace. He had not raised any specific health & safety concerns about workplace measures;
- The employer's workplace was a large warehouse space with a very small number of employees who could work comfortably with substantial distance from each other;
- The Government guidance on Covid-secure measures at the time had been implemented by the employer following a risk assessment including social distancing, hand sanitation, providing PPE and workspace cleaning;
- The ET found that Mr Rodgers had driven a friend to the hospital in contravention of isolation rules in place during the time he was refusing to return to work.

Dismissing his claim, the ET stated that whilst Mr Rodgers belief was genuine it could not be shown to be objectively reasonable. To accept his argument would entitle all employees and, more recently, workers to bring the same claim for no other reason than that a pandemic exists which is serious and imminent for all. The link between his belief and the specific situation in his workplace did not exist. Although this is a reassuring ruling for employers it is not binding as a first instance ruling on other courts. Nor does it rule out the possibility of a similar situation where steps taken by the claimant may be sufficient to argue the action was objectively reasonable. Employers should assess each situation on its own unique facts before moving to dismissal.

EQUAL PAY PRELIMINARY RULING – ASDA STORES LIMITED V BRIERLEY (SUPREME COURT)

We last reported on the case of *Asda Stores Limited v Brierley* in the Summer of 2016 (Maxlaw Global Employment newsletter - Issue 4) the case rages on. Regular readers may recall that the case relates to a class action of around 7000 (numbers have since multiplied to 30000+) female employees working in the retail business at the supermarket chain who claimed they were paid less than their predominately male colleagues based at the distribution centres. They claimed that their work was of "equal value" for which they were not receiving equal pay. The issue for consideration in 2016 was whether or not the Employment Tribunal was the appropriate forum for the class action to proceed rather than the High Court. Asda failed to successfully argue that the case should be heard in the High Court and it has remained in the Employment Tribunal.

The issue that the Supreme Court has now ruled on is whether the male employees at the distribution centre are appropriate comparators for the female employees in the retail business given that:

- They are not based at the same establishment or in the same geographical locations;
- They do not do the same work nor are they in reality ever likely to work at the others' location;
- The terms agreed were separate terms and conditions at the different locations.

Asda argued that the distribution centre employees were not the right comparators given the above. The Supreme Court has disagreed, clarifying that:

- It is possible to have comparators at different geographic locations with the same employer or associated employer (where the pay policy is determined by a single source e.g., the parent company);
- It did not matter in a hypothetical comparison situation if it was unfeasible in practice that one group of employees would ever work at the others' location;
- The Courts had previously found that the core terms were the same or substantially the same for both groups of employees and, therefore, the Supreme Court ruled they could be comparators. This would not be the case if the terms were fundamentally different, however, here there were 'common terms' that applied regardless of location.

With the correct comparators approved, the next issue for consideration will be was the retail work of the females of "equal value" to the work of the male distribution centre employees and, if so, can any unequal pay practice be justified as non-discriminatory. We will keep you posted as this complex case is likely to run on for some years yet.

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