EMPLOYMENT NEWS HEADLINES MAY-JUN 2021 ISSUE 33

REQUESTING FLEXIBLE WORKING ARRANGEMENTS POST COVID-19 LOCKDOWN

With imminent plans to ease lockdown across the UK, employers are having to shift their focus on what that means in practice for their business after a long period where remote home working for traditionally office-based roles has become the 'norm'. Some large prominent employers such as international banks have expressed concerns about keeping this "temporary" situation forced by the global pandemic to become a permanent change, whereas, some large tech companies have either moved entirely to agile working or a hybrid arrangement as the new normal.

Much will depend on whether the role can truly be effective and optimally performed remotely long term or whether the requirement to be office or site based will be better. Either way, employers will need to give careful thought in order to balance the business needs against new workforce aspirations to retain the best talent, maintain or boost productivity and employee engagement.

The pandemic has shown, out of necessity if not desire, that with today's technological capabilities it is possible to perform most office-based roles remotely. Whilst for a large swathe of the UK workforce this has resulted in productivity and a better work-life balance with more time for family and other activities, for others, it has meant stress, anxiety, depression or isolation and the knock-on effect of this to more serious mental health and wellbeing issues.

The right to request flexible working has been available for many years to UK employees who have at least 26 weeks' continuous service and have a right to make a formal request to their employer to work in a certain way - be that reduced days, compressed hours, different hours or change in location between home and office. The employee can make an application once in any 12-month period and the employer is required to give the request reasonable and meaningful consideration and must respond to the employee in writing within 3 months of the request. The ACAS code see link: Acas Code of Practice on flexible working requests | Acas sets out the specific grounds on which an employer may refuse a request and whilst some of these such as "detrimental impact on quality and performance of work" have been widely used in the past, it may be more difficult post-pandemic, to rely on such grounds.

Apart from a careful and open-minded assessment of what is best for the business and its employees, employers should now, if they have not already done so, start reviewing and revisiting how:

- flexible working policies will work in the future;

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- to update and upgrade management training programmes on flexible working applications and managing remote working;
- new jobs will be advertised to attract and retain talent with a greater demand for a hybrid model of working;
- a refusal will be justified especially taking into consideration any disability discrimination angle where the flexible working may be a reasonable adjustment under the Equality Act 2010 or whether there is risk of direct or indirect sex discrimination due to a refusal.

THE 'SUBSTANTIAL ADVERSE EFFECT' IN DISABILITY CASES – ELLIOT V DORSET COUNTY COUNCIL (EAT)

The case of *Elliot v Dorset County Council* is an interesting case. Although it does not provide any new guidance it does remind employers where the focus should be when considering whether an employee is disabled for the purpose of the Equality Act 2010 definition of "substantial and long-term adverse effect on normal day-to-day activities".

Mr Elliot was disciplined by his employer for inaccurate recording of his working time. Mr Elliot claimed he only recorded time during core office hours when he may take breaks but he still worked his full hours and often more, later in the day. During the disciplinary, it was proposed that Mr Elliot be assessed for autistic behaviour patterns and he was subsequently formally diagnosed with Asperger's Syndrome. Mr Elliot was made voluntarily redundant before the disciplinary was completed or further investigation into his condition was carried out and Mr Elliot brought a claim for disability discrimination.

At first instance the ET found that Mr Elliot was not discriminated against as the impact on his day-to-day activities of his condition were not "substantial". The EAT disagreed. Upholding Mr Elliot's appeal, the EAT focused on the following:

- The threshold for whether the impact is "substantial" is low and anything that is more than 'minor or trivial' will be substantial;
- It was also important for the ET to focus on the *level of impairment* itself not whether the activity could be done which may be possible for a disabled person. The assessment should be on what can only be done with difficulty or not at all;
- How the person carries out an activity and any adjustments the person makes themselves to be able to carry it out does not mean it is not having a "substantial" impact for the purposes of the legal definition.

The EAT remitted the case back for further review. What this finding indicates is that employers and tribunals need to assess the complexities relating to the specific situation, including how the individual may adjust behaviours themselves in order to cope with the effect of a disability in order to make a correct assessment as to which side of the "substantially adverse effect" line it falls.

NO BACK HOLIDAY PAY IF UNPAID LEAVE TAKEN – SMITH V PIMLICO PLUMBING LIMITED (EAT)

Regular readers of Maxlaw Global employment news will recall two landmark cases relating to two different issues which we previously reported on. The first issue was the "worker" status of Pimlico

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Plumbers (Issue 16) who were found by the Supreme Court to be ‘workers’ not independent contractors and were, therefore, entitled to holiday pay. The second was a European Court of Justice ruling in *King v Sash Windows Workshop Limited* (Issue 13) who ruled that holiday can be carried over indefinitely and must be paid out on termination where a worker does not take holiday because he is deterred from doing so due to it being unpaid.

Mr Smith’s employment ended with Pimlico Plumbers in May 2011 and he brought a claim for unpaid holiday pay which he claimed he was due as a result of the Supreme Court ruling on his worker status. The Employment Tribunal rejected his claim at first instance because he was out of time in which to bring his claim, the three-month limitation period had long expired. Even if it had not expired, he would not be entitled to holiday pay as he had taken the time off albeit unpaid.

Mr Smith appealed. Upholding the ET’s finding, the EAT said that the ruling in *King v Sash Windows* could not be relied on, as that case related to the right to carry over holiday in instances where the worker did not take time off *because* it was unpaid and there would be financial loss as a result (the limitation period does not apply in this case). This was not the case here as Mr Smith had taken the time off and was not, therefore, due holiday pay for this time despite the Supreme Court finding that he was a worker.

ACAS PUBLISHES ‘LONG COVID’ GUIDANCE

With Covid-19 infection rates continuing to rise despite an extensive UK wide vaccination programme in recent months, ACAS has now published a “Long Covid” guide for employers. The guidance particularly looks at the issue of discrimination primarily, disability discrimination, but also touches on discrimination potentially on other protected grounds as well such as age, race and gender.

Whilst the guidance does not expressly state that anyone suffering from Long Covid will be disabled for the purposes of the Equality Act 2010, it leaves the question open. This is due to the symptoms of Long Covid varying so vastly in different people. The broad symptoms could be anything from extreme tiredness to blurred memory and poor concentration with physical and non-physical symptoms possible. The symptoms can be continuous for an extended period of several months or can be intermittent where a person can have a sporadic flare up of symptoms and then be relatively fine for a time.

This being the case, the guidance advises that whilst Long Covid may not be a disability, the normal good employment practices applied when dealing with long term sickness or intermittent illness should be applied for Long Covid sufferers as well. For example, employers should:

- Discuss the symptoms of Long Covid early with the employee and consider how it is affecting them specifically;
- Make reasonable adjustments to account for how the symptoms manifest (each case will be different and specific to the individual) and the effect this might have on the employee’s ability to perform their normal duties, for example, adjustments to working time, home working, redistribution or adjustments to work duties;
- Consider whether assessment, advice and support from Occupational Health would be appropriate.

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As knowledge and data about the immediate and long-term impact of Covid-19 is evolving daily, it would be a good idea for employers to consider training managers as the workforce returns to the office environment to ensure that symptoms and the challenges that they bring are recognised early and managed sensitively. The full guidance is available at the link below:

http://www.acas.org.uk/long-covid

For further information please contact Max Woodley at mwoodley@maxlawglobal.com

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