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| Catherine Turner | Good morning everyone. My name’s Catherine Turner and I’m a Senior Associate in BCLP’s Employment and Labor Group. Welcome to today’s COVID-19 in 19 UK Employment Law Teleconference. Today’s topic is Personal Injury – returning to the office after lockdown.  We know that many UK employers have been focusing on making their workplaces COVID-19 secure, and last week the UK government announced that from the first of August, it will be moving the emphasis away from stating that where if possible people should work remotely to let the employers consider whether employees could return to COVID-19 secure workplaces. I’m delighted today to welcome Andrew Watson, a specialist employment and personal injury barrister at 12 King’s Bench Walk, and today we’re gonna talk about personal injury and related employment law risks that we suggest that UK employers consider as they look at getting the staff back into the workplace.  So the first topic we wanted to cover very briefly is the crossover between employment law and personal injury. A personal injury claim may form part of an employment [*inaudible*] claim, not as a stand-alone claims that is part of the assessment of damages in a successful discrimination claim. If it’s established that the discrimination that has caused the injury then compensation for personal injury falls from this and with it happen to establish if the injury was foreseeable, instead of bringing the claim in employment [*inaudible*], it often to individuals to bring the claim in High Court or County Court and the claim would typically be for negligence and that where the [*inaudible*] duty of care which has been breached and for which the damage is foreseeable. The personal injury complained of tends to be [*inaudible*] being it’s related to psychological injury rather a physical injury, and if an individual brings their personal injury claim in the employment [*inaudible*] you know, then they will be stopped from bringing the claim in High Court or County Court.  Over the past year, we’ve seen an increase in the number of individuals bringing employment [*inaudible*] claims and threatening in correspondence or in [*inaudible*] actions to bring a stand-alone personal injury claim in a separate court and we expect that this approach will continue and that the number of PI claims are likely to increase off the back of health and safety concerns released to return to a workplace that may not be COVID-19 secure.  So I mentioned a few moments ago a duty of care. As we know, employers have a duty of care towards the workers and this is particular at the forefront given the decisions employers need to take about when to return to the office, who should return and how this is arranged and generally, we’re seeing employers looking to implement a phase return to the workplace so they understand [*inaudible*] that the maximum capacity of individuals in the office at any one time will be considered [*inaudible*] and in terms of who should be returned to the office, employers are generally considering the travel arrangements of its workers and currently we’re not seeing a requirement to force the employees to return which means employees who are clinically extremely vulnerable and clinically vulnerable are likely to continue to work from home for the time being. Now my first question for you, Andrew, please, is what proper steps can an employer take to ensure that it’s meeting its duty of care towards it employees and how risky is opening up the office to all employees returning? |
| Andrew Watson | Thank you, Catherine. The employer’s duty of care and negligence is, of course, to take reasonable steps to safeguard the health and safety of employees, and this is going to be informed by the various regulations passed under the Health and Safety at Work Act of 1974, such as, for example, the Workplace Health Safety and Welfare Regulations and the Personal Protective Equipment Regulations. What the duty of care requires in practice depends entirely on the context and important to factor is the employer’s state of knowledge. With Coronavirus, our understanding is developing on almost a daily basis and this is reflected in the detailed guidance produced by the government and the health and safety executive. The best advice is that if employers can show that they have complied with this guidance, and if they continue to comply with it as it is updated, then this is most likely going to be sufficient to show that they have discharged their duty of care. The most relevant guidance document for offices is called *Working Safely During COVID-19 in Offices and Contact Centers*, but this does not mean that if you do not comply with all of the guidance, you will necessarily be found in breach of your duty of care. If you decide you have to depart from the guidance in order to keep your business running, I’d suggest that you seek specialist advice, consult with your staff, and then clearly record your reasons for doing so if you decide to do so.  In terms of the risk of reopening the office to all employees, this depends entirely on whether it can be done safely. If you cannot get all employees back in the office whilst observing the core parts of the guidance, and in reality it’s quite risky to press ahead. The key points to bear in mind, however, in terms of liability is that you will not be found to be liable just because you breached your duty of care. The employee also has to show that it is more likely than not that this breach has caused the injury – in this case, the infection. In my view, in isolated cases of infection of an office worker, this is going to be very difficult. It will be easier if there is a cluster of infections from the same office to prove causation. |
| Catherine Turner | Thanks, Andrew, and the causation point – very interesting, as is the cluster of infections point. I think this neatly brings us on to risk assessments. So we know that a number of employers have already carried out their risk assessments for later return to the office and as well as identifying the rest employers need to ensure taking the necessary steps to address those risks that they’ve identified and revisit the assessments as needed, and it would be helpful to understand, Andrew, from a PI perspective, what a good risk assessment looks like and what’s the biggest mistake that employers tend to make with these. |
| Andrew Watson | I’ll start with the second part of that question if I may. In my experience of litigating this area, the biggest mistake that employers tends to make is to think of a risk assessment as being just a tick box paperwork exercise that gets in the way of doing the job. Just to give one example of that, I [*inaudible*] advising a company at the moment that has put together a detailed plan for reopening but hasn’t yet finished their risk assessment, and this is completely the wrong way around. I think it’s important to understand that what a risk assessment is actually about is helping you to think through what you need to do to keep your employees and visitors safe. A good risk assessment will clearly set out for each area or activity the potential hazards, who might be harmed, the risk of harm, and what can be done either to remove the hazard or control the risks so that harm is unlikely. A good risk assessment involves a thoughtful appraisal of all of these matters by competent people, and the best risk assessments are produced through consultation with employees which helps to ensure that everything is covered and then slightly outside the scope of this talk, but of course, under health and safety legislation, there’s a duty to consult employees on health and safety matters. And finally, a good risk assessment is actually a document that is used by the employer to guide working practices and the training of employees, and it’s kept up-to-date regularly. So don’t just fill it out and leave it in a drawer.  In terms of how you actually do a risk assessment to return to work at this time, the guidance document that I’ve already referred to called *Working Safely During COVID-19 in Offices and Contact Centers*, has a very helpful section on assessing the risks from returning to work. I think the best advice I can give in this short presentation is to use that document as the starting point of your risk assessment process. |
| Catherine Turner | Thank you for that, Andrew. The next topic that we wanted to look at is testing and two specific questions: Can employers impose testing and does testing help to reduce any personal injury exposure? The testing continues to receive a lot of media attention and the effectiveness of testing has been called into question and the general feel is that most employers are not currently implementing testing of its staff and we anticipate that this is an area that we’ll be developing further in line with what will be the state of the pandemic.  Now an interesting question that’s come up recently from an employment law perspective is the extent to which an employer can enforce testing of its workers and the current tests for COVID-19 are temperature checks, testing to determine if workers currently have the virus and antibody testing, which looks at whether individuals have had the COVID-19. But given that testing is generally [*inaudible*] during some cases it involves a throat and nose swab or a blood sample, an employer would need to ensure that it has the consent of the employee before it goes ahead.  Now there are also a number of data protection points that employers will need to be familiar with before testing, which are outside the scope of the section that’s definitely worth flagging. So testing [*inaudible*] the risk assessment that employers carry out and it’s unlikely to be a one-off exercise if it’s to have any effectiveness. So, I suppose the question that flows from that is that if an employee refuses the testing or an employer decides they’re gonna put some testing in place and an employee says no, can an employer dismiss fairly? Can it dismiss the employee because of that? And I said that the answer is “possibly,” because it depends on the results of the risk assessment, how reasonable it is under the circumstances for a particular employer to record testing. But I think given the current state of the pandemic and the views on the effectiveness of testing, it best feeds, it certainly feels really risky to take that step.  So what is the PI lawyer’s view on testing? Does it help limit the PI exposure and does it matter what testing an employer chooses? |
| Andrew Watson | This is a very interesting question and the issue, of course, in terms of whether it limits exposure to a personal injury claim is going to be whether it’s necessary to test employees in order to discharge the duty of care. Obviously, there won’t be any judicial guidance on this for a while, but a very important factor is the government, the guidance on *Working Safely During COVID-19 in Offices and Contact Centers*, which I’ve already mentioned a couple of times, does not suggest that it’s necessary for employers to administer the tests themselves, whether these are temperature tests or otherwise. However, what the guidance does say in relation to testing is that employers should insist the government’s own test and trace service, in particular by keeping good records and staff shift patterns for 21 days. This strongly suggests to me that a court would be slow to find that an employer is in breach of its duty of care, but not administering its own tests at least where the employee works in an office environment.  Of course, an employer will not be penalized for going above and beyond what is necessary to discharge its duty of care. There may be difficulties then in disciplining an employee who refuses to take a test, which the government guide doesn’t advocates. And, of course, the other side of this is that testing may give right to its own problems if it involves breaching social distancing guidelines. So any testing process adopted does need to be separately risk assessed to ensure that it can be done safely. |
| Catherine Turner | Thanks, Andrew. I think it’s one that people will be keeping an eye on as things progress over the next couple of months. If we could touch briefly on workplace assessments now. We’re all familiar with what workplace assessments to ensure that workers are right there up in the office, and from a legal perspective, workers are still at risk of posture-based injuries while working from home and some [*inaudible*] even more so because it could be that they’re the less likely to have the right setup and it would be very interesting to hear what you’re seeing in terms of workplace assessments for those working from home. So do you get a sense that employers are doing what they need to in terms of workplace assessment and do you have any, I quote, helpful do’s and don’ts for employers [*inaudible*]? |
| Andrew Watson | I think the important thing to note from the outset is that the legal obligations of employers to do workstation assessments are the same whether the employee works at home or in the office. I’ve not seen any cases yet in my own practice, but I do get a sense that perhaps little employers are appreciating this. In practical terms a short period of working at home at a sub-optimal workstation is unlikely to cause any injury. For this reason the HSC advises it is not a necessary thing to do a full assessment while working at home it’s temporary. I think that is mostly likely right. The thought period, the HSC does advise that employees should be encouraged to complete their own basic assessment of working at home and they produce a checklist for this. Which you can find online. In my view, a shorter period of working at home means a few weeks verses a few months beyond this I think assessment by the employer is going to be necessary. In terms of what employers should and shouldn’t do in relations to home work stations I know of four things they should do. First, they should give employees some good guidance on achieving the best possible work stations at home. They should ensure that any employees who need specialist display screen equipment given it or allow to take it at home from the office they already have it. They should stay in touch with employees encourage them to look forward to any posture-related or strain injury when they first appear, and then to take adequate steps when arranging then formula assessment to minimize any risk of infection spreading. And at the same time employers should not simply leave the employee to get on with it and they shouldn’t be ignoring any complaints from the employee about poor economics at home. |
| Catherine Turner | I think we have time for one more question Andrew, got a couple more minutes and I think it will be helpful if we touch on travel. So factor [*inaudible*] assessment will [*inaudible*] be the level of travel secondly public transport the workers need to undertake either to get in to the office or it’s part of the job, and they say they are some employment law issue that employers need to bare the main [*inaudible*] potential discrimination of [*inaudible*] classes of employees, so those that have a disability or those who have caring responsibilities and those employees who may doesn’t believe that travel is going to [*inaudible*] as eminent danger from health and safety perspective and we talked about these previous teleconferences but focusing specifically on PI issue, how do you limit any PI exposure when it comes to employees who need to travel because of their job? |
| Andrew Watson | I think there’s a distinction here between traveling for a job and traveling to and from a job. In terms of traveling for a job the employees due to apply and the greatest risk would be I think from using public transport so, employers should do evert thing they reasonably can to avoid this. If that is not possible they should provide appropriate PP and cleaning products as well as training on safety methods traveling. I think that this may also rise when multiple employees are traveling in the same vehicle and from the work that traveling employees have to do when that get to where they’re going. So again employers should insure that in these situations sufficient PP and cleaning products are available to employees and that they are given appropriate training on safe methods of working including social distancing and then in term of traveling to and from a job the employers the employer’s duty of care is likely only to rise if there aren’t obvious potential dangers arising from the journey. Seems to me that if this is going to apply a tool here, it’s like any to apply to employees who must travel on public transport to and from work. In that situation, the employer should do everything to avoid this and if that’s not possible, they should again ensure that appropriate PPE and cleaning products and training on safe methods of traveling are provided and just one final point of course where there are employees who are particularly vulnerable or at risk. That’s going to a relevant thing from a pass injury prospective not only for traveling but of course for returning to work in general and will have to be dealt with and all the risk assessments that we had just described about. |
| Catherine Turner | Thank you very much Andrew and thank you for joining me today to discuss these key issues. I’m afraid that’s all we have time for and thanks to all of you for joining us today. I hope you found this as helpful as I did and for more information about today’s topic you can contact Andrew at 12PPW@core.uk and you can contact me Catherine Turner at BCLPlaw.com. Where you’ll also find our BCLP Corona Virus resources pages. So just a reminder that we are hosting a regular [*inaudible*] of this call \_\_\_ related to COVID 19 topics and we hope you will join us for future sessions. Thank you, stay safe and enjoy the rest of your day. |
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