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Insights

UK HR TWO MINUTE MONTHLY: COVID-19 AUTOMATIC UNFAIR DISMISSAL, RE-ENGAGEMENT ORDERS, DIRECT SEX DISCRIMINATION AND HYBRID WORKING

May 24, 2021

SUMMARY

Our May 2021 update considers key employment law developments from April. It includes recent cases on automatic unfair dismissal in the context of serious and imminent danger arising out of COVID-19; when it is appropriate for a Tribunal to order re-engagement of dismissed employees; the correct comparator of a male employee on shared parental leave and hybrid working. We also outline other points of note, including the extension of the furlough scheme and the Employment Tribunal road map.

Employees can claim automatic unfair dismissal where refuse to return to work in belief that workplace puts them or others in danger due to COVID-19

Mr Rodgers was employed by Leeds Laser Cutting Limited and was dismissed with less than two years' continuous service. Prior to his dismissal, Mr Rodgers had worked with a colleague who had been sent home because he was displaying COVID-19 symptoms. Mr Rodgers then developed a cough and shortly thereafter texted his employer to confirm he had no alternative but to stay off work until the lockdown had eased to avoid infecting his children. Mr Rodgers lived with his two young children, one of whom had sickle-cell anaemia. Mr Rodgers did not mention that he was staying off work because of his COVID infected colleague or his working conditions either in this text or in any communication with his employer. Mr Rodgers was dismissed about one month later.

Mr Rodgers claimed automatic unfair dismissal relying on the health and safety provisions in section 100(1) (d) and (e) of the Employment Rights Act 1996 ("**ERA 1996**"). He argued he had been dismissed because he refused to return to work or alternatively because he took appropriate steps to protect himself or others from danger having reasonably believed there to be a serious and imminent danger which he could not reasonably have expected to avoid. The serious and imminent danger related to COVID-19.

The Tribunal found for the employer, concluding that Mr Rodgers' decision to stay off work was not directly linked to his working conditions, and that Mr Rodgers' concerns about the virus were general concerns not directly attributable to the workplace. In reaching this conclusion the Tribunal considered that Mr Rodgers had not raised any meaningful concerns with his employer which put them on notice he believed there to be circumstances of imminent danger in the workplace. The Tribunal found that there had been conversations with staff in relation to safety measures to protect against COVID-19, including conversations about social distancing and handwashing, and that it was possible to social distance at work (this was a large workplace with a small number of employees). Mr Rodgers admitted that it was "not hard" to socially distance at work and accepted that there were reminders given about handwashing.

Given Mr Rodgers' knowledge and the facilities available, the Tribunal found that Mr Rodgers did not believe that there were circumstances of serious and imminent danger within the workplace. The fact that Mr Rodgers drove a friend to hospital when Mr Rodgers was self-isolating was relevant to the Tribunal's consideration of his belief. The Tribunal found that, considering the events as known at the time, any belief of serious and imminent danger was not objectively reasonable given the ability to socially distance and the measures that were in place. Further, the Tribunal found that Mr Rodgers could reasonably have been expected to avoid any dangers by following the guidance at that time, i.e. socially distancing, using personal protective equipment and regularly washing his hands.

Why this matters

Although Mr Rodgers was almost entirely unsuccessful in his claim, the Tribunal did confirm that the automatic unfair dismissal provisions at section 100(1) (d) and (e) ERA 1996 can be used to bring claims in circumstances arising from COVID-19. Cases will be fact specific as to whether the individual reasonably believed (both a subjective and objective belief) that there was a serious and imminent danger in the workplace but Mr Rodgers lost on the facts, not on the law, and this case serves as a warning to employers.

Employers can mitigate the risk of a successful section 100(1) claim by complying with any relevant government and Health and Safety Executive guidance, and by seeking to ensure that the guidance is complied with in practice and any breaches addressed. Employers should consider requests by employees to stop performing specific tasks where there is a risk to health and safety. While Mr Rodgers did not make such a request in this case, the Tribunal stated that Mr Rodgers could have reasonably refused to carry out certain tasks. The Tribunal also confirmed that the fact COVID-19 poses a "serious and imminent threat" to public health (as described in the Regulations) does not of itself satisfy section 100(1) (d) and (e) ERA 1996. To hold otherwise would mean that any employee could refuse to work on this basis alone and be protected.

Rodgers v Leeds Laser Cutting Ltd

Re-engagement not appropriate where employer genuinely and rationally believes employee cannot fulfil role or there has been a breakdown in trust and confidence

Mr Kelly, a Group Marketing Director, was dismissed and subsequently brought a claim for unfair dismissal and age discrimination seeking re-instatement (into the same job) or re-engagement (into a comparable job). The employer accepted that it had unfairly dismissed Mr Kelly as it had not followed a fair process prior to dismissal. The Tribunal found that Mr Kelly was unfairly dismissed but that the dismissal was not because of his age. The Tribunal ordered that Mr Kelly be re-engaged in the vacant role of Commercial Director, China.

The Employment Appeal Tribunal ("**EAT**") allowed an appeal against the order for re-engagement. The EAT held that re-engagement would not be practicable if the employer genuinely and rationally believed that the employee would not be capable of fulfilling the role the employer wanted him to perform or that the employee's conduct had led to a breakdown in trust and confidence.

The EAT found it was not open to the Tribunal to order re-engagement as that was inconsistent with the facts determined at the liability hearing. The Tribunal found the employer had genuinely believed Mr Kelly was not capable of fulfilling the role it wanted him to perform and that that was a rationale view. The EAT also concluded that the Tribunal had erred in ordering re-engagement to perform the role of Commercial Director, China as the Tribunal had found that an essential requirement of the post was the ability to speak, write and read Mandarin, which Mr Kelly could not do.

The EAT held that the Tribunal had also erred in deciding that it would be practicable for Mr Kelly to work with the employer in future, by substituting its view for that of the employer as to Mr Kelly's capability, and as to whether the employer had in fact lost trust in Mr Kelly. The loss of trust was due to secret recordings of meetings made by Mr Kelly which became known after the dismissal.

Mr Kelly appealed to the Court of Appeal. The Court of Appeal dismissed the appeal, agreeing with the EAT that in considering whether it is practicable to order re-engagement, the employer's lack of belief in an employee's ability to perform the role to the requisite standards, provided that belief is genuine and based on rational grounds, can make it impracticable for the employee to be re-engaged.

The Court of Appeal also held that it may not be practicable for employees to be re-engaged in cases where an employer believes that the conduct of an employee led to a breakdown in trust and confidence between the employer and employee (even if the conduct did not contribute to the dismissal) provided that the belief is genuine and rational. The Court of Appeal stated that if the conduct was minor or insignificant or happened a long time ago, then this may suggest the belief is not genuine or based on rational grounds.

Why this matters

Re-engagement is not common in practice and will not be appropriate in many cases given the inevitable breakdown in the relationship between the parties. Facts which come to light after the dismissal may be relevant to the test of whether re-engagement is appropriate.

This case is a helpful reminder of the factors that need to be taken into account in considering the appropriateness of re-engagement and the importance of the Tribunal not substituting its view for that of the employer. It is also a useful reminder that dismissing senior employees without a process will make the dismissal procedurally unfair.

Kelly v PGA European Tour

No direct sex discrimination where male employee is paid less under shared parental leave than female employee taking adoption leave

Mr Price brought a claim for direct sex discrimination relying on two comparators, a female worker on maternity leave in receipt of maternity pay and a female worker on adoption leave in receipt of adoption pay. The employer's policy on shared parental leave ("**SPL**") provided for those taking SPL to receive pay equivalent to statutory maternity pay, whereas those on maternity leave and adoption leave were entitled to enhanced pay.

The Tribunal dismissed the claim following the Court of Appeal decision in Capita Customer Management Ltd v Ali, concluding that there were material differences between the schemes for maternity leave, adoption leave and SPL so as to make Mr Price's choice of comparators inappropriate, i.e. there were material differences in the circumstances of Mr Price and those of his comparators.

Mr Price appealed to the EAT but only in respect of the comparator on adoption leave. The EAT dismissed the appeal finding that there was no direct sex discrimination and concluded that the correct comparator would be a female employee on SPL.

The EAT agreed that the purpose of adoption leave was not simply to facilitate childcare and that there were material differences between Mr Price and his comparator. The EAT found that while health and safety of both child and adopter is not the main reason for conferring adoption leave, it does form part of the reason. Further, adoption can start before a child is placed with the adopter to enable the adoptive parents to prepare themselves and their environment for placement. The EAT made the point that the purpose of SPL includes facilitation of childcare, but it is also about choice. The choice made at the outset of adoption placement as to which parent will be the main adopter is different to the choice made by the main adopter at a later stage whether to curtail adoption leave to enable their partner to take SPL.

While the EAT found that the Tribunal had erred in relying on compulsion as a differentiating factor between SPL and adoption leave (there being no compulsion in adoption leave), the following

factors relied on did give rise to relevant and significant differences between SPL and adoption leave: adoption leave could commence before a child's placement whereas SPL could not; adoption leave is an immediate entitlement upon placement whereas SPL is not; SPL can only be taken with the partner's agreement to give up adoption leave; and SPL must be taken within 52 weeks of the placement and within that period can be "dipped in and out".

Why this matters

This is not a surprising decision given the Court of Appeal's previous decision in Ali. Employers can take some comfort that case law seems to be fairly settled now in this area and that employers offering enhanced pay for parental leave outside of the SPL framework are unlikely to be unlawfully discriminating on the grounds of sex by not offering the same enhanced pay under SPL.

Price v Powys County Council

Report on Hybrid Working by the House of Lords Select Committee on COVID-19

On 21 April 2021, the House of Lords Select Committee on COVID-19 published a report on hybrid working called, "*Beyond Digital: Planning for a Hybrid World*".

The report looks at the impact of digital acceleration on the long-term aspects of life known to have the biggest impact on our wellbeing, including physical and mental health, and quality of work. Some of the risks identified by the report include people feeling constantly monitored at work, working longer hours, being unable to switch off, maintaining a separation between work and home and the jobs lost to automation with no plan to provide skills and training to those affected to move into new jobs.

The retail sector is given as an example where there has been nearly 180,000 jobs lost in 2020 and with estimated job losses of up to 200,000 in 2021. The report recognises that some individuals could be relocated from front to back of house, e.g. packing and delivery, and that change might also significantly change the gender profile of jobs towards more male employment.

According to the report the ONS estimates that, of the 1.5 million people in England in jobs most vulnerable to automation, 70% are carried out by women, and workers aged 55 to 64 are more than twice as likely to be at risk as those in their 30s.

The report calls for action by the government, including significant action to tackle future increases in unemployment and consultation on strengthening employment rights to ensure that it is suitable for the digital age including the right to "switch-off" and the use of workplace monitoring and surveillance.

Beyond Digital: Planning for a Hybrid World

Round up of other developments

Extension of furlough scheme/regulations on calculating a week's pay: On 15 April 2021, HM Treasury extended the furlough scheme to 30 September 2021. The grant from HMRC will reduce from 80% of salary (capped at £2,500 a month) to:

- 70% (capped at £2,187.50 a month) on 1 July 2021
- 60% (capped at £1,875 a month) on 1 August 2021,

with employers required to make up the difference to £2,500. New regulations also came into force on 30 April 2021 ensuring that the regulations on calculating a week's pay for furloughed employees for the purposes of statutory payments (so that it is calculated by reference to a furloughed employee's normal week's pay) will continue until 30 September 2021.

Employment Tribunal "road map": The Presidents of the Employment Tribunals in England and Wales and Scotland have published a new "road map" for employment tribunal proceedings in 2021/2022. The road map confirms that due to the backlog of cases, video hearings will remain essential for at least the next two years. Final hearings of short track claims (unpaid wages, notice, holiday pay, redundancy pay etc.) will default to video. Final hearings of unfair dismissal, discrimination and whistleblowing claims will vary with most parts of Britain returning to in-person hearings. However, in London, given the severity of the backlog, parties will see greater reliance on video.

BCLP has assembled a COVID-19 Employment & Labor taskforce to assist clients with employment law issues across various jurisdictions. You can contact the taskforce at: COVID-19HRLabour&EmploymentIssues@bclplaw.com

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