SOLICITORS
Magrath Sheldrick

EMPLOYMENT

SEPTEMBER 2021

THINGS YOU MAY HAVE MISSED THIS SUMMER

HEALTH AND SAFETY CONSIDERATIONS IN A POST COVID 19 WORLD

CAN AN EMPLOYER PROHIBIT AN EMPLOYEE FROM ENTERING THE WORKPLACE WITHOUT BEING VACCINATED?

A ROUND UP OF RECENT UPDATES IN DISCRIMINATION LAW

GENDER CRITICAL BELIEFS CAN BE PROTECTED BY THE EQUALITY ACT

IN THIS ISSUE

HEALTH AND SAFETY

Health and safety used to be a minority sport but it's now on everyone's radar. It's not just that all businesses have suddenly had to engage with reams of government guidance on everything from ensuring a COVID-secure workplace to home risk assessments, it's also that the more obscure provisions of the Employment Rights Act 1996 are coming out of the woodwork.

An employee who is dismissed for leaving or staying away from their workplace may have a claim that their dismissal was automatically unfairly under section 100(1)(d) of the Employment Rights Act 1996 ("ERA"). In the past 18 or so months, Tribunals have found in favour of and against employees relying on this hitherto under-used provision of the law.

RODGERS V LEEDS LASER CUTTING LIMITED

The Employment Tribunal found that an employee was not automatically unfairly dismissed when he decided to stay away from work during the first national lockdown because of a generalised fear that his vulnerable children would contract COVID 19 from him if he was at his workplace. Something more than a fear of the national situation would have been required to protect this individual, something particular to his work or workplace, or indeed his own vulnerabilities. As it was, he worked in a large warehouse-type space with typically only five or so other colleagues and his employer had taken measures to limit the risk of exposure to COVID 19.

This approach has been endorsed by another Tribunal in two cases where the employee claimed automatic unfair dismissal because of health and safety concerns: it's not enough for the employee to establish that there is a risk - they must be able to show that the risk is serious and imminent despite anything they and their employers can do to reduce it. Consultation and following the COVID-secure measures will be key for employers, especially if there is a clinically vulnerable relative in the picture.

It is not difficult to imagine how such scenarios might play out in the context of staff returning to offices or other workplaces. There is scope for plenty of friction between those charged with implementing the guidelines and those on the receiving end of them. The focus of the dispute might even be 'under-zealousness' or a difference of opinion about whether the person is correctly laying down the guidelines.

- making clear to the workforce who has been charged with carrying out health and safety duties;
- if there is to be a disruption to business as usual as a result of any health and safety issues, explaining this to staff;
- expressing support for health and safety initiatives and the people conducting them;
- providing a mechanism for staff to express concerns and for those concerns to be addressed; and
- intervening, should that become necessary, at an early stage, to avoid a breakdown in relationships.

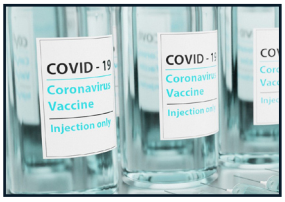
VACCINATION STATUS

Employees may have particular concerns about returning to work beside other staff who have not been fully vaccinated against COVID 19. In response, can an employer impose a policy which prevents non-vaccinated staff from entering the workplace or restricts their duties?

Probably not, such a policy may result in claims for discrimination and even constructive dismissal. Employers should be wary of taking any steps based solely on vaccination status without thorough consultation with the employee(s) in question.

Employers should also be wary of unnecessarily collecting data about vaccination status as this could breach data protection laws. An employer wanting to gather vaccination data will have to have clear grounds for processing this kind of data which fall within Article 6 and Article 9 of the UK GDPR.

However, processing (in the legal sense) may not be needed. As the necessity for showing COVID 19 Passes to access places increases, it is likely that it now is acceptable for employers to ask employees to provide some form of vaccination proof. The Information Commissioner's Office has said that conducting a visual check of COVID 19 passes (either a hard-copy documents or a pass held on a digital device) would not constitute 'processing' under the UK GDPR as long as no records are kept.



The exception to the above, is in relation to care home staff who will (as of 11 November 2021) be legally required to be fully vaccinated against COVID 19, unless they have a medical exemption.

EMPLOYMENT STATUS

Employment status has been a hot topic in recent years as the gig economy expands and in light of the Taylor review of modern working practices. The final instalment in the Uber and others v Aslam and others litigation was passed down by the Supreme Court earlier this year and along with other recent cases it is now clear that businesses who have not done so already should carry out an audit of their staff to understand whether any contractors are in fact "workers", meaning that they are entitled to paid holiday and other rights.

FORSTATER V CGD EUROPE

There have been a number of recent decisions which have affirmed the rights of transgender members of staff, in particular their right to equal treatment and protection from discrimination. The recent case of Forstater v CGD Europe may, on first glance, appear to buck this trend but employers and employees alike should treat the outcome of the case with caution.

Ms Forstater holds gender critical beliefs, including the belief that sex is immutable and not to be conflated with gender identity. She was forthcoming with these beliefs engaging in debates with colleagues at work, some of whom found her comments offensive and complained. Ms Forstater issued proceedings against CGD when, following these complaints, it failed to offer her further work.

The Employment Tribunal sought to determine as a preliminary issue whether Ms Fostater's beliefs were protected beliefs under section 10 of the Equality Act 2010. If not, her claims would fail and could not be taken further. Amongst other matters, the Employment Tribunal had to determine whether Ms Forstater's beliefs were worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others. Employment Judge Tayler drew a distinction between a belief (which may be protected) and the manifestation of that belief, which may be offensive and harassing to others (for example, even if a belief similar to Ms Forstater's were protected, misgendering a person as a result of that belief may well amount to harassment) before concluding that Ms Forstater's beliefs were not compatible with human dignity and the fundamental rights of others. He found that her beliefs were not worthy of respect in a democratic society.

The case was appealed and the Employment Appeal Tribunal (EAT) reached a different conclusion, finding that only beliefs akin to Nazism or totalitarianism should be deemed unworthy of respect in a democratic society. The EAT drew a distinction between these kinds of beliefs and those of Ms Forstater which, though offensive to some, were worthy of respect in a democratic society and thus capable of protected under section 10 of the Equality Act 2010.

The EAT's decision is not license to misgender individuals with impunity. An individual with a protected belief may still commit acts of discrimination or harassment and it is important to place this case in its proper context. The Employment Tribunal has simply found that the belief that sex is immutable may be protected. By no means does this mean that it will be protected nor does it mean that Ms Forstater has won her case.

The EAT's decision is somewhat out of kilter with recent decisions of the Employment Tribunals, for example in Taylor v Jaguar Land Rover where an award of £180,000 for aggravated damages was made following an agreement between the parties. The modern world of work increasingly focusses on diversity and inclusion and with this comes the uncomfortable balancing act between the sometimes opposing rights and beliefs of differing groups.

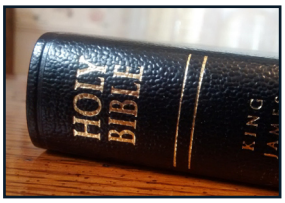
As well as having the necessary policies and procedures in place, employers should take active steps to ensure regular training takes places and policy breaches are enforced. Communication channels should be kept open so that anyone with concerns has a safe space to discuss their point of view.

DISCRIMINATION ROUND UP

- women who have the menopause may see the protection offered to them strengthened after Caroline Nokes MP (who is currently chairing an inquiry into menopause discrimination) stated that a change to legislation was not to be "ruled out". Employers who fail to take action to protect menopausal workers risk losing talent and affecting productivity and having a menopause policy may help to set expectations and reassure workers.

- **disability discrimination**: one of the largest Employment Tribunal awards for disability discrimination was made earlier this year totalling some £2.5 million. The employee had amassed particularly long service and was 60 years old at the time of his dismissal meaning that the Tribunal compensated him for career-ending loss. Whilst well in excess of an average tribunal award this case highlights the dangers of getting things wrong particularly if there is a risk that an employee may never work again as a result of discrimination.

- **religious discrimination**: the Court of Justice of the European Union found that a policy banning all signs of political, philosophical or religious belief was not directly discriminatory if the rule is applied to all staff in a general and undifferentiated way. Having said that, such a ban may still be indirectly discriminatory so employers should proceed with caution in this area and avoid such bans unless they can establish that the ban is a proportionate means of achieving a legitimate aim (which will be a challenge for many organisations).



- **direct sex discrimination**: a recent case from the Supreme Court contained an emphatic judgment which restored the previously understood position on where the burden of proof lies in discrimination claims. The decision has confirmed that the Claimant bears the initial burden of proof and must establish a prima facie case, that is they must show facts from which discrimination can be inferred.

- **indirect sex discrimination**: a recent EAT case confirmed what we already knew – that there is a "childcare disparity" when a female employee could not accommodate shift patterns at the weekend because of her childcare responsibilities.

FURLOUGH SCHEME

A reminder that from the 1 August 2021 until the end of the Scheme (currently 30 September 2021), the government grant will reduce further to 60% or £1,875 per month. As all furloughed employees must receive a minimum of 80% of their salary or £2,500 whichever is the higher, employers will be required to contribute the additional 20% (up to £625).

RIGHT TO WORK CHECKS

The ability to carry out COVID 19 "adjusted" right to work checks will end on 5 April 2022. From this date employers need to ensure they carry out the appropriate online or manual check.

DATA PROTECTION

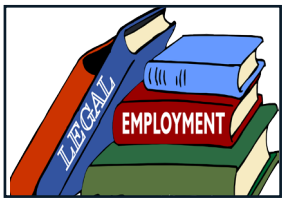
The position with regards to data protection, as with many other things changed after we left the EU. The EU has now approved adequacy decisions as regards the transfer of data from the EU to the UK which should allow for the transfer of data for the next four years. The 'adequacy' requirements will continue to be met as long as the UK is deemed to have an 'essentially equivalent' level of data protection to the EU.

The position is easier as regards the transfer of data from the UK: the UK has guaranteed adequacy for EEA countries but not for third countries. For transfers to third counties adequate safeguards must be provided and data subjects must be given enforceable and effective legal remedies. Some third countries have been given a finding of adequacy by the UK and therefore do not require any other authorisation.

GENDER PAY GAP REPORTING

The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 require all organisations with 250 or more staff to publish the difference between male and female pay at different levels of seniority within their organisation. The deadline for employers to file their 2020/2021 reports was extended as a result of the pandemic and the information now needs to be provided on or before 5 October 2021.

NEW EMPLOYMENT LEGISLATION ON THE HORIZON



- Employers operating a defined benefit pension scheme (schemes where the employee is promised a certain "salary" on retirement), need to be aware of changes coming into force this Autumn which impose criminal offences and civil penalties for a range of new offences. These offences apply to anyone involved with a pension scheme including directors, trustees, lenders, investors, sellers, purchasers and advisers. The sanctions include up to seven years imprisonment as well as fines of up to £1 million. There are also extended information-gathering powers for the Pensions Regulator (including wide powers to issue contribution notices), including a broad power to require attendance for interview, and to permit inspection of premises.

- A new Investment Firms Prudential Regime (IFPR) is expected to come into force on 1 January 2022. Although we have yet to see draft legislation, changes will mean that there will be a single prudential regime for all FCA regulated investment firms. The aim of the IFPR is to simplify and streamline the prudential requirements. There will also be a new remuneration code. We will provide a more detailed review as and when further information becomes available.

- Over the summer the government published its response to the 2019 consultation on workplace sexual harassment. As a result we are expecting to see the introduction of a new duty for employers to prevent sexual harassment and third-party harassment in the workplace. The government is also due to look at the possibility of extending the time limit for all claims under the Equality Act 2010.

For further information on any of the topics discussed in this briefing or wider employment or data protection issues please contact:

Adele Martins (Partner) adele.martins@magrath.co.uk
Nichola Gallen-Friend (Partner) nichola.gallen-friend@magrath.co.uk
Maria Krishnan(Senior Associate) maria.krishnan@magrath.co.uk

SOLICITORS

Magrath Sheldrick

Magrath Sheldrick LLP

Magrath Sheldrick LLP is one of the UK's most successful immigration practices, providing UK, US and global immigration solutions to some of the world's leading business organisations and private individuals.

Recognised as a top-tier law firm by the principal legal directories, the firm specialises in all aspects of global mobility and investor migration.

Write to employment@magrath.co.uk for further information or phone us on 020 7317 6723.