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Discrimination and Bullying and Covid-19

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What does this talk cover?

- Discrimination update
- Monitoring of WFH employees
- Accommodating home schooling and childcare
- Cyberbullying
- The Rogue Manager - Vicarious Liability Issues
 - What conduct are Employers liable for?
 - Reasonable steps defence
- Return to work and mental health
- Return to work and discrimination
- Concluding tips and views

Discrimination Update: Comparators

Tabidi v BBC [2020] EWCA Civ 733

- Journalist rejected for new role brought claim of sex discrimination
- Issue of correct comparator
- Focus on the real issue i.e. whether the reason was gender which ET can consider first, not by reference to comparators
- Note also comments about applying 'second appeals' test to ET/EAT cases

Disability Discrimination Update

Tesco Stores v Tennant [2020] IRLR 363 EAT

- Meaning of disability and long-term depression
- Elements of test, including ‘long-term’ need to be considered at the time of the alleged discrimination (rather than, as in this case, simply whether the illness lasted 12 months)
- Need to consider alternative limb “*likely to last 12 months*” which needs evidence

Disability Discrimination Update

Ishova v TfL [2020] IRL 368 CA

- Meaning of Provision Criterion or Practice
- C went on long-term sick after grievance investigation. Later required to attend work without further investigation of grievance
- A one of act is not necessarily a PCP
- PCP connotes state of affairs (e.g. how similar cases treated or would be treated) or continuum

Disability Discrimination Update

Rakova v NW London Healthcare [2020] IRLR
505 EAT

- Meaning of 'substantial disadvantage'
- C alleged that requirement that she use software put her at substantial disadvantage
- Substantial disadvantage of individual not connected to the needs of the business

Monitoring of home-working

- Why monitor?
 - To check that employees are working
 - To ensure employees not overworking
 - Performance monitoring
 - Potential business efficiencies and reorganization
- How?
 - E-monitoring
 - Managerial contact

Monitoring – the legal framework

- If monitoring is excessive:
 - It may not be considered to be objectively justified under s.19(2)(d)
 - It may be considered harassment under s.26
- Reasonable expectation of privacy; Campbell v. Mirror Group [2004]
- Principle is derived from A.8 the right to respect for his private and family life, his home and his correspondence
- Computer Misuse Act 1990, s.1 – an offence to cause a computer to perform any function with intent to secure unauthorised access to data
- Data Protection Legislation and 7 Data Protection Principles

Limits of monitoring

Barbulescu [2017] IRLR 1031: ECHR identified 7 factors:

- whether the employee had been notified about the implementation of such measures;
- the extent of the employer's monitoring and the degree of intrusion into the employee's privacy;
- whether the employer had provided legitimate reasons to justify monitoring;
- whether a monitoring system based on less intrusive methods would have been possible;
- the consequences of the monitoring for the employee;
- whether the employee had been provided with appropriate safeguards

Lopez Ribalda [2020] IRLR 60: Applied the 7 factors to CCTV evidence of theft; held not a breach of right to fair trial to rely on footage in dismissing employees.

Tips for applying the Data Protection Principles

- Consent and contractual permission
- Transparency
 - inform employees individually as per A. 13 and 14 GDPR
 - What steps may be taken to monitor them
 - Whether BYODs are monitored
- Update privacy policies
- Make clear that excessive or unauthorized monitoring is misconduct
- Guidance to employees to limit their personal data, e.g. turning off webcams

Pitfalls of remote meetings

- Intrusion into privacy - the dreaded backgrounds
- Time of calls/meetings, and duration
- Provide documents etc ahead of time
- Ensure all relevant employees included
- Know who is on the meeting

Disparate impact of lockdown on women

ONS Report shows:

- Men and women - equal division of time with home schooling
- Amount of schooling depended on age of children (and presence of pre-school children)
- Women spent significantly more time on other childcare
- 1/3 women said mental health suffered, 1/5 men

Home Schooling

- Government plan for all schools, colleges and nurseries to open in September 2020 BUT: -
 - Unions testing government on safety and viability
 - Still testing and requirement of “appropriate action”:
 - 1 case: small groups self-isolating for 14 days
 - 2+ cases: larger number self-isolating
 - Outbreak: detailed investigations and testing unit

Home Schooling

- Schools will be expected to have plans in place to offer remote education to pupils who are self-isolating
- Considerable disruption and potential stress for workers
- Disproportionate impact on women

Statutory Dependents Leave

- Under s.57A Employment Rights Act 1996
- For employees only
- Unexpected disruption of arrangements
- Does not mean “*sudden*” (***RBS v Harrison*** [2009] IRLR 28), not for long-term care (***Qua v John Ford Morrison*** [2003] ICR 482)
- Can take a “*reasonable*” period
- Not paid leave unless provided for in the contract
- Protected from detriment and dismissal

Parental Leave

- Under s.76 Employment Rights Act 1996
- Also only for employees only
- 18 weeks per qualifying child
- Employers encourage to devise own scheme.
Default scheme in MAPLE Regs: 4 weeks/year,
1-week blocks
- Protected from detriment and dismissal for
requesting or taking parental leave

Flexible Furlough Scheme

- Last updated 17 July 2020
- Previously furloughed employees can return part-time
- Covers longer-term responsibilities
- Paid

Cyberbullying and working from home

- Employees' new vulnerability to bullying
 - Isolation from colleagues
 - Disruption of lines of management
 - No surrounding work culture
 - Fear of redundancy
- New form of an old problem
 - Assumptions that WFH is less effective for certain groups
 - Micromanagement and over-monitoring
 - Abuse of employee vulnerability

Cyberbullying - examples

- *Game Retail v. Laws* [2014] EAT, Eady J: offensive tweets connected to employment.
- *Otomewo v. Carphone Warehouse* [2013]: employee harassed when colleagues updated his Facebook status to out him.
- *Peninsula Business Services v. Baker* [2017]: surveillance to confirm disability was capable of amounting to harassment.
- *Spragg v. Richemont Ltd* [2018]: surveillance capable of amounting to victimisation.
- *Solomon v. University of Hertfordshire* [2019]: micro-managing of WFH employee capable of being a detriment for purposes of discrimination / victimisation.

How can employers guard against Cyberbullying?

- Encourage contact between employees and between employees and management
- Protocols for monitoring / performance targets
- Training
- Investigate allegations of misconduct
- Remind employees that the old rules still apply

The Rogue Manager – Employer's Liability

- S. 109 (1): Anything done by a person (A) in the course of A's employment must also be treated as also done by the employer
- S. 109 (3): it does not matter whether done with the employer's knowledge or approval
- Two elements of liability:
 - An employment relationship between the employer and harasser; or
 - Acts carried out in the course of employment

Close Connection Test

- The question is not whether the wrongful acts were modes of carrying out authorised acts, but rather whether the torts were so closely connected with the employment that it would be just to hold the employer liable; **Lister v. Hall** [2001] House of Lords
- An unbroken sequence of events, and amounting to an abuse of his position; **Mohamud v Wm Morrison Supermarkets** [2016], Supreme Court. “*His employers entrusted him with that position, it is just that they should be held responsible for their employee’s abuse of it*”, per Lord Toulson

Clarification of the test

Barclays Bank v. Various and WM Morrison v. Various [2020] UKSC 12.

- Supreme Court confirmed Mohamud did not change or widen the law.
- Two key questions must be asked:
 - First, what functions or field of activities have been entrusted by the employer to the employee?
 - Second, was there a sufficient connection between the position the employee was employed in and the wrongful act, so as to make it right for the employer to be held to be liable?

Reasonable Steps

- S.109(4): defence to show all reasonable steps taken to prevent employee's conduct.
- Burden of proof is on the employer;
- Only steps already taken;
- Not relevant to ask whether the taking of steps would have made a difference; **Canniffe v East Riding of Yorkshire CC** [2000].
- Rather there are two questions to be asked:
 - Were there any preventative steps taken by the employer:
 - Was there any further step the employer could have taken, that was reasonably practicable?

Reasonable Steps II

- EHRC suggestions include:
 - Implementing a policy, making employees aware of it and reviewing regularly;
 - Providing training
 - Dealing effectively with complaints
- However, the mere existence of a policy will not be sufficient; **Quashie v Yorkshire Ambulance Service** [2015]
- Defence made out in **Al-Azzawi v Haringay Council** [2000] where employer had adopted the 3 steps above and proved that not merely a matter of paying lip service

Agents

- S.109 (2): Anything done by an agent for the principal, with the authority of the principal, is to be treated as done by the principal
- *“An agent may stand in the shoes of the principal in dealing with A, but if while wearing them he treads on B's toes I see no good reason why he should not be liable to B just as much as if it had been A's toes that were crushed”*; **Nailard v. Unite** [2019] Court of Appeal per Underhill LJ
- Note s. 109 (4) does not apply in relation to agents

Liability for failing to prevent harassment?

- **Nailard** also considered whether union breached S. 26 in failing to prevent the harassment;
- House of Lords in **Pearce v. Governing Body of Mayfield School** [2003] held such failure would not amount to direct discrimination, c.f. **Burton v. Devere** [1997].
- Although “conduct related to” is wider than “on the grounds of”, it still would not permit such a claim;
- Only if the failure *itself* is on the grounds of/related to sex.

Return to Work and Mental Health

- Fear/phobia of Covid-19
- Not wanting change to routine or return to old routine
- Personal issues in lockdown: relationships, financial
- Bereavement

Return to Work and Mental Health

- Communication
- Reminder of available resources, e.g. counselling helplines
- MIND Wellness Action Plan
- St John Ambulance Mental Health First Aider
- Flexible working

Return to Work and Indirect Discrimination

- ONS Report found disparate impact on certain groups, in particular black people x4 greater risk of death cf. white
- PHE report also shows disparate impact, e.g. Bangladeshi x2 greater risk of death cf. White British
- Blanket requirements on staff could be indirectly discriminatory (requiring justification)
- Need to take appropriate steps to protect employees at higher risk because of their ethnicity

Return to Work and Indirect Discrimination

- May also be indirect sex discrimination: PHE report identified men twice as likely to die as women
- May be indirect disability discrimination too
- Employer's justification would be around requirement to keep certain staffing levels to meet customer demand, maintain safety or even maintain viability of the business
- Involves consideration of what steps employer has taken to reduce risk and what alternatives considered

Return to Work and Disability Discrimination

- Disability wider than “clinically (extremely) vulnerable” in government shielding guidance
- Assess rights of affected individuals in the round
- Where employee at serious risk of illness, requiring them to come to work may be breach of duty of care and implied duty of trust and confidence as well as disability discrimination (especially failure to make adjustments)
- WFH legislation may be introduced

Concluding remarks

- Questions welcome by email - addresses on next slide
- Webinar available on the website
- Look out for our Autumn programme!



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