RMI Employment Law Bulletin
Autumn 2022

Welcome to the Autumn Edition of the RMI Employment law email bulletin.

In the last two quarterly updates, we have been speculating on whether or not the array of proposed Employment Law Legislation, which was contained in the Employment Bill, would progress into Law. The Queen's speech has, for now at least, answered a firm 'no' to that question. Readers of these bulletins will remember that the Employment Bill had contained a range of proposals, notably those protecting vulnerable workers and an extension to rights for women. It does not mean that the proposals will not ever proceed, but it looks like nothing will be happening this year and it remains to be seen if the provisions will be a priority for the remainder of this Parliament for the new Prime Minister. Whether you view the delay as good or bad, it does mean that employers will not in the foreseeable future have to grapple with new obligations and laws.

In this update we therefore turn our attention instead to employment-related issues in the news that are progressing and look at some interesting recent cases.

News

- Healthcare Professionals to be able to provide fit notes
- Temporary workers during industrial action

Case Law Update

- The danger of sham redundancy
- Covid Case Law update

1. Healthcare Professionals to be able to provide fit notes

This July saw other Healthcare Professionals such as Pharmacists, Nurses, Occupational Therapists and Physiotherapists, also being able to provide fit notes. It means that GPs alone will not have to bear the burden. The reason behind the change in the law is to assist GPs, who are very over-burdened, with what is often a paper exercise for them.

This is to be welcomed, but if there is a concern it is probably that widening the category of professionals who can give fit notes, to those who perhaps have less of an overview of the employee's health, might only heighten the trend that the health care professional will always sign off the employee, if they request it, without a real examination of whether employees are, really, too ill to work.

2. Temporary workers during industrial action

Many of you will have seen in the news, in response to an increase in industrial action, that the Government announced an intention to introduce legislation that will allow employment businesses to supply temporary workers during strike action. The Government is also proposing to raise damages that can be awarded against a trade union if they are involved in unlawful industrial action.

The move has obviously been criticised by the left and by the unions as undermining the fundamental right of employees/workers to withdraw labour in a democratic society. There has also been some comment that employment businesses fear that their reputation could be damaged by such an arrangement, not wanting to be seen as a modern-day supplier of 'scab' labour. Given the present turmoil in Government, it remains to be seen whether or not the Government's previous intention that the legislation would come into effect 'in weeks', will prevail.

Case Law Update

3. Rentplus UK Limited vs Coulson (2022) EAT 81

In Tribunals, both the employer and employee can obtain a 25% uplift or 25% reduction to compensation if the other side has failed to follow the ACAS Code of Practice on Disciplinary Grievance Procedures (this is under section 207(a) of TULRA 1992).

The uplifts are strictly applicable only to disciplinary matters relating to failures in relation to capability and conduct and in terms of the failure of either side to follow the Code in respect of grievances.

Facts

In this case, the Claimant claimed that she was frozen out by a new chief executive in 2017 who did not like her and was critical of her performance, and rather than dealing with the matter via disciplinary procedures relating to capability and conduct, the employer subsequently commenced a reorganisation and ended up dismissing her by reason of redundancy.

The Claimant won her claim in the Employment Tribunal - the Tribunal finding that the redundancy was in effect a sham and that the decision to dismiss had been taken long before the reorganisation. It also upheld the claims for sex discrimination arising out of the facts. The employer appealed to the Employment Appeal Tribunal (EAT).

Part of the employer's appeal was on the grounds that the ACAS Code does not apply to redundancies. The employer also argued that because the Tribunal found a discriminatory dismissal, that the Code was not applicable as it was a normal unfair dismissal. They also appealed on other matters.

The EAT struck down the employer's appeal. They found, effectively, that because the Tribunal had found the redundancy to be a sham, the employer could not escape the uplift because its asserted reason was redundancy. The Judge stated that "*I do not consider that an employer can side-step the application of the ACAS Code by dressing up a dismissal that results from concerns that an employee is guilty of misconduct, or is rendering poor performance, by pretending that it is for some other reason such as redundancy*".

The Judge also went on to find that just because the Tribunal had made a finding of sex discrimination that did not mean the Code could not apply. It was perfectly acceptable for Tribunals to find that the reason for the dismissal was really conduct or capability but was tainted by discrimination and that would still mean that an uplift was possible, if the Code had been breached.

The maximum 25% uplift was also justified on the basis that there had been in effect a complete failure to follow the Code, as the employer had invented a fake process for redundancy, on the findings of the Tribunal.

Comment

There is sometimes a grey line between capability dismissals, where an employee has not performed which leads to a subsequent decision by the employer that the position itself might be removed from the organisation and an employer using redundancy as a sham/side-step as a quicker way to address poor performance rather than going through capability procedures, which can be far more protracted than a redundancy consultation.

This case is a reminder that if a Tribunal finds a sham it can punish the employer with a maximum uplift to compensation for failure to follow the proper process.

4. Covid Case Law

As expected, we are now starting to see judgments from the Employment Tribunals and the Employment Appeal Tribunal on the application of the unprecedented situation caused by the Covid pandemic (and the understandably rushed need by the Government to introduce vast new Regulations and law to deal with the pandemic from 2020 onwards).

In a first instance decision (*Burke v Turning Point Scotland*), a Tribunal found that what has been termed "long Covid" could on the facts of that case constitute a disability within the meaning of the Equality Act 2010. In this case there was a variety of symptoms, some of which were vague and fluctuating, and some evidence which suggested the employee would not be able to establish disability within the meaning of the Equality Act, but overall, the Tribunal sided with the employee.

In the case, the Claimant employee got over the burden of proving that it was likely to be long-term (in which he would have to prove that the condition lasted or was

expected to last more than 12 months in total) by uncertainty around a potential return to work date, on the medical evidence. This entitled the Judge to find that it 'could well happen' that the condition and the substantial effects would be long-term.

Comment

Each case in relation to long Covid will rest on its facts but it is a reminder that with potentially over a million people saying they have long Covid symptoms, it remains a risk for employers that dismissals relating to long Covid could result in claims in disability discrimination.

In another case, *Rodgers v Leeds Laser Cutting Ltd,* an employee was found not to be automatically unfairly dismissed, because he left his job alleging fears about catching Covid and passing on to vulnerable children. Whilst an employee's fear of circumstances giving rise to serious and imminent danger can constitute grounds for automatic unfair dismissal or automatically unfair constructive dismissal, on the facts here, the Tribunal found the employee did not have a reasonable belief in that danger.

There were a number of matters which led the Tribunal to make such conclusions including the employee being seen out and about driving and working in a pub during the pandemic and the employer's reasonable steps of maintaining social distancing and other measures. The facts led the Tribunal and the EAT to uphold the employer's defence to the claims.

Comment

The case is good news for employers and establishes that Tribunals will look into the reasonable belief of the employee and that this involves looking at the employee's other actions outside of work and whether the employer took reasonable steps to maintain health and safety during the pandemic.

In Conclusion

Please note: In this bulletin we aim to keep you up-to-date on some of the latest developments in employment law and although the bulletin is not intended to provide a comprehensive summary of all the changes to the law, we hope to highlight some key areas of change for motor industry employers. Any advice contained in the above is general in nature and will need to be tailored to any one particular situation. As an RMI member you have access to the RMI Legal advice line, as well as a number of industry experts for your assistance. Should you find yourself in the situation above, contact us at any stage for advice and assistance as appropriate.