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Albion Chambers EMPLOYMENT AND PROFESSIONAL DISCIPLINARY TEAM NEWSLETTER

Regulations, regulations, regulations

Criminalising attendance at work

I don't know about anyone else, but certainly for me, it feels as though each week there are a new set of regulations or an amendment governing employment relationships, whether it be the job retention scheme or the new job retention bonuses, most of which are helpful and, for the most part, welcomed.

That brings me to *The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England)* Regulations 2020 (the Regulations). Did you ever envisage a day when it would be a criminal offence to attend the workplace or to permit someone to attend the workplace? No neither did I but, as with a lot of things, Coronavirus has changed this basic position.

The Regulations came into force on 28 September 2020. If an individual receives a positive test result or is notified that they have to self-isolate, then it is now a criminal offence to attend the workplace during the isolation period or to permit a worker or agency worker to do the same. Regulation 2 requires positive individuals, or those responsible for children who test positive, to notify the Secretary of State of the names of the people they live with and where they will be isolating. Notification of self-isolation via the NHS app does not count as notification for the purposes of the Regulations. You may be wondering what the point of notification via the app is when the message is that we can all ignore that.

Self-isolation means staying at home, the home of a friend or family member, the home of the responsible adult if a child is concerned, bed and breakfast accommodation or other suitable place. This is a stark difference to the lockdown message of stay in your own homes. A person who tests positive must isolate for 10 days and those that have had close contact with someone who tests positive must isolate for 14 days. How to calculate the start of isolation is set out in Regulation 3.

Despite the obligation to self-isolate when one receives a positive test result, you may be surprised to know that there are a long list of exemptions. These are:

(i) to seek medical assistance, where this is required urgently or on the advice of a registered medical practitioner, including to access—

a) services from dentists, opticians, audiologists, chiropodists, chiropractors, osteopaths and other medical or health practitioners, or

b) services relating to mental health,

(ii) to access veterinary services, where this is required urgently or on the advice of a veterinary surgeon,

(iii) to fulfil a legal obligation, including attending court or satisfying bail conditions, or participating in legal proceedings,

(iv) to avoid a risk of harm,

(v) to attend a funeral of a close family member,

(vi) to obtain basic necessities, such as food and medical supplies for those in the same household (including any pets or animals in the household) where it is not possible to obtain these provisions in any other manner,

(vii) to access critical public services, including social services, and services provided to victims (such as victims of crime),

(viii) to move to a different place specified in sub-paragraph (a), where it becomes impracticable to remain at the address at which they are.

It seems that the Government is content for positive individuals to potentially spread the virus through the Tribunal system, as long as they are required to participate in legal proceedings. Perhaps remote working will remain for some time?

Regulation 8 puts an obligation on workers who have been informed that they must self-isolate, and are due to undertake work outside of the place they are isolating, to notify their employer that they must isolate, including the start and end dates. The information must be provided as soon as reasonably practicable and before the worker is next due to work.

Regulation 9 imposes the same obligations on agency workers, but they must notify their agent, principal or employer (where they are not the agent or principal). If any of those three receive a notification they must inform the other two of the relevant information, i.e. if an agent receives notification they must inform any principals and employers.

An employer of a worker or agency worker who knows of the requirement to self-isolate must not knowingly allow them to attend any place of work outside of where they are isolating, unless it is in accordance with isolation requirements, those being the exemptions above (Regulation 7).

If a worker does attend work when they shouldn't, due to self-isolation or they are required to by their employer and comply with the request, Regulation 10 enables a police constable (amongst others listed) to use reasonable force to remove the worker to the place they are self-isolating or direct them to return. This should be considered

carefully if the employer is requiring a worker to attend the workplace, as it may harm their reputation if the police turn up to remove workers who should not be there.

Regulation 11 sets out a number of offences and Regulation 12 sets out the value of the fixed penalty notices (FPN) for some of the offences (the FPN is explained below):

1. A person who fails to self-isolate, fails to provide any information required under Regulation 2, fails to notify that they must isolate or requires a worker/agency worker to attend the workplace without reasonable excuse commits an offence;

a) Where an employer commits this offence in contravention of Regulation 7:

FPN is £1,000 for a first offence

£2,000 for a second offence

£4,000 for a third offence

£10,000 for the fourth and any additional FPN.

b) Where a worker or agency worker commits an offence in contravention of Regulations 8 or 9(2):

FPN is £50

c) Where an agent, principle or agency worker's employer commits an offence in contravention of Regulation 9(4) or (6):

FPN is £1,000.

2. A person who fails to self-isolate without reasonable excuse, has reason to believe they will come into contact with another person/group, comes into contact with them and is reckless as to the consequences commits an offence:

a) The first FPN is £4,000

b) The second FPN is £10,000.

3. A person who obstructs any individual carrying out their functions under these Regulations, including police constables under Regulation 10, commits an offence;

4. A person who contravenes a requirement in or imposed by Regulation 10 without reasonable excuse commits an offence;

5. A person who knowingly gives false details of the address they or a child who must isolate will be staying at, or gives false details of the people living in the same household as an adult or child who must isolate commits an offence. It is also an offence to falsely state that someone is a close contact of a person who tests positive:

a) The FPN is £1,000 for a first offence

b) £2,000 for a second offence

c) £4,000 for a third offence

d) £10,000 for the fourth and any additional FPN.

6. If a director, manager, secretary or someone holding some other similar position in a corporation, consents or allows an offence to be committed under the Regulations by the corporation, or it is attributable to the neglect of such a person, the officer is guilty of an offence along with the corporation;

a) The FPN is £1,000 for a first offence

b) £2,000 for a second offence

c) £4,000 for a third offence

d) £10,000 for the fourth and any additional FPN.

These offences are punishable by a fine in the Magistrates' Court. A fixed penalty notice (FPN) may be issued first and if that is paid within 28 days of the date of the notice criminal proceedings will be avoided. Proceedings may be brought by the Local Authority or Crown Prosecution Service. Information provided under Regulation 2 can be introduced into proceedings for an offence under the Regulations or proceedings for perjury (Regulation 15).

People are being encouraged back into the workplace if they cannot work from home, but this now comes with a risk if they may have the virus. Employers need to think very carefully before requiring individuals to attend the work place if they have been notified that they must isolate. Requiring someone to attend a work place is likely to result in a hefty fine, the possibility of criminal proceedings and damage to reputation, particularly if police attend. Other employees may also wish to rely upon Sections 44 and 100 of the Employment Rights Act 1996 if they are subjected to a detriment or dismissed as a result of refusing to attend the work place, taking steps to protect themselves or others or raising concerns with their employers, due to a Covid-positive employee having attended the workplace in contravention of these Regulations.

Lucy Taylor

Due to the fast moving nature of the legislation in this field and publication lead times, this article is accurate as of 8 October 2020

Interim relief and constructive dismissal

A legal paradox?

My colleague, Richard Shepherd, has already discussed the practicalities and the availability of the remedy and the steps required to be taken in seeking it (see https://www.albionchambers.co.uk/chambers-news/fraudulent-furloughs-dobbing-dismissals-guide-interim-relief-employment-tribunals). A useful synopsis of matters that should be considered alongside this article. However, a recent application, on behalf of a solicitor client, led to an interesting turn of events which got me to consider the availability of interim relief in the context of constructive unfair dismissal.

The background to the matter is as follows: the complainant alleged that he had made a protected disclosure relating to the abuse by his employer of the Coronavirus Job Retention Scheme ("CJRS"). In consequence, the complainant alleged, his employer removed the 'top-up' payment they were making in addition to that provided under the CJRS and also demoted him. On the facts the complainant had been subject to a detriment which led to his decision to resign; the resignation constituting a constructive dismissal.

An application for interim relief was made. In a rather adroit move, the employer confirmed in writing that it would agree to reinstate the complainant in the event of a successful application, and enquired whether the complainant would accept this. If the complainant would not, the respondent argued, the application was otiose as they were seeking something that they would not accept in any event. Should the complainant pursue the application then they would seek costs against them on that basis.

Following this logic through did seem to present a problem, specifically in relation to constructive dismissal claims. If a complainant in a whistleblowing claim resigned and claimed constructive dismissal, then he did so clearly on the basis that there had been a fundamental

breach of either the express or implied terms of his contract (usually the Malik term).

Accepting an offer of reinstatement appears to be contradictory in the context of constructive dismissal, in that having established that it was 'likely' that the actions of the employer had destroyed or seriously damaged trust and confidence, how then could the complainant accept an offer of reinstatement without potentially compromising their position at the substantive hearing?

So, in a constructive unfair dismissal claim, where the employer offers reinstatement, is the employee at risk of costs if they refuse such an offer? Or does it render an application for interim relief irremediable in a constructive dismissal claim? Is an employee deprived of the opportunity to obtain a continuation order under s.130 of the Employment Rights Act 1996 ("ERA 1996) in such circumstances? Therein lies the paradox.

Unfair Dismissal – the remedies

Dismissal for the purposes of Part X, s.95(1)(c) of ERA 1996, includes circumstances where the employee terminates the contract, with or without notice, in circumstances in which he is entitled to do so due to the employer's conduct. Section 103A of ERA 1996 provides further protection for whistleblowers where the reason for the dismissal is that the employee made a protected disclosure.

Where the dismissal, actual or constructive, is based upon the employee having made a protected disclosure, it will also be an automatically unfair dismissal (see *Melia v Magna Kansei Ltd [2005]* EWCA Civ 1547, para. 33). Mr Justice Burton, considering the interpretation of s.47B 2(b) of ERA 1996, fortifying the position that constructive dismissal claims were included within the within the ambit of Part X of the ERA 1996 (*ibid, para.46*).

S.112 of ERA 1996 sets out the remedies available to the tribunal for claims of unfair dismissal, and which include compensation or one of the orders at s.113 of ERA 1996. The orders are either reinstatement or re-engagement. When considering which order to make, it is mandatory that the tribunal explain to the complainant what orders it may make (see *Cowley v Manson Timber Ltd [1995]* ICR 367). Unlike compensation, both of these orders recognise a continuation of the contract of employment.

Where the discretion to make an order at s.113 of ERA 1996 is exercised, the tribunal turns to the provisions of ss.114 and 115 of the 1996 and first considers whether to make an order for reinstatement taking into account whether the complainant wishes to be reinstated, the practicability of doing so and whether there was any contributory fault on the part of the complainant. Having addressed these points, and determined that an order for reinstatement cannot be made, the tribunal then goes on to consider whether an order for re-engagement should be made. Similar consideration to those applicable to reinstatement is given. If no order is made under s.113 of ERA 1996 then the tribunal shall make an order of compensation.

Ultimately, the application of the remedy under s.112 and s.113 of ERA 1996 is discretionary, based upon a number of factors that the tribunal must take into account.

Whistleblowing - the remedies

Where a worker has been subjected to a detriment contrary to s.47B(1) of ERA 1996, the usual remedy is compensation. Where the detriment complained of is dismissal within the meaning of Part X of ERA 1996, the relevant complaint is one of unfair dismissal pursuant to s.47B(2) and s.103A of ERA 1996, the usual remedies for unfair dismissal being available as have been outlined above. There are two important exceptions to this general rule however. The first is that any award of compensation is not fettered by an upper limit, the second is the availability of interim relief under s.129 of the ERA 1996.

Interim Relief – available orders

The remedy of interim relief in ERA 1996 is an import from the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A"). The provisions of ss.128-132 of ERA 1996 are derived from those of ss.161 – 166 of TULR(C)A.

On a successful application for interim relief under ERA 1996, a tribunal has the following options:

i) Subject to the employer's agreement, it may *reinstate* the employee (s.129(3)(a));

ii) Subject to the employer's and employee's agreement, it may *re-engage* the employee in another job on terms no less favourable (ss.129(3)(b)) and 129(6) respectively). Where the employee does not agree, subject to that position being 'reasonable', the tribunal will order a continuation of the of the contract (s.129(8)(a));

iii) Where the employer fails to attend or states that he is unwilling or unable to reinstate or re-engage the tribunal can make an order that the contract of employment shall continue (s.129(9)(b)). The continuation of the contract provides for payment of salary and receipt of all other contractual benefits, from the date of dismissal until the date at which the claim is determined (s.130(1)).

Unlike an offer of re-engagement, where the employee may decline and benefit from a continuation order, there is no explicit and reciprocal entitlement within s.129(3)(a) of the ERA 1996. On the face of it then, if the employer offers reinstatement and the employee declines, there is no provision for a continuation order to be made.

Continuation Orders

The EAT has recognised that the effect of a continuation order is limited to the payment of pay and benefits and the continuity of employment. It does not mean, however, that the contract continues, it being recognised that the contract has come to an end (*Dawling v M E Ilic Haulage Limited [2004]*. All ER (D) 87 (Apr) and *Langton v Secretary of State for Health [2013]* All ER (D) 170 (Oct). The mutuality of obligation is recognised as being no more.

Where a continuation order is made the consequences of it are that any award determined under s.130(2) of ERA 1996 is offset against the employer's overall liability. The continuation order is therefore compensatory in nature. Compensation is, as we have seen above, one of the remedies available to a tribunal under the provisions of s.112 of the ERA 1996.

Interplay between s.113 and s.129 of the ERA 1996.

Reinstatement and re-engagement are orders, I argue, derived from the powers prescribed at s.113 of the ERA 1996. This view is supported when one considers s.167(2) of TULR(C)A in which the interpretation of both reinstatement and re-engagement '*…means and order for reinstatement or re-engagement under s.113 of [the Employment Rights Act 1996]…'.* Being thus derived from s.113 of the ERA 1996, in order to comply with its obligations, the tribunal must, I submit, take into account the views of the complainant before it determines whether to order reinstatement or re-engagement (see *L Bass v Travis Perkins Trading Company Ltd (2008))* and also the practicability of doing so.

'Practicability' will extend to logistical matters, such as whether the availability of the role, but it also extends further from the employer's perspective. If the employer has genuinely and rationally lost trust and confidence, re-engagement will

not be practicable (see *United Lincolnshire Hospitals NHS Foundation Trust v Farren [2017]* ICR 513). This position has been recently confirmed in the case of *Kelly v PGA European Tour [2020]* UKEAT 0285/18/2608. Whilst both decisions relate specifically to the remedy of re-engagement there is nothing to suggest that issues of practicability in this context wouldn't equally apply to reinstatement. Additionally, the fact that these cases have been assessed from the perspective of the employer does not, in my submission, import exclusivity. The overarching legal principle is that a breakdown in trust and confidence goes to the practicability of ordering reinstatement or re-engagement. This must have reciprocal effect for both the employer and the employee.

Conclusion

Distilling the above down, my view is that s.112 and s.113 of the ERA 1996 essentially provide one of three remedies: reinstatement, re-engagement or compensation.

S.129 of the ERA 1996 does similarly and provides for reinstatement, re-engagement or a continuation order (vis-à-vis compensation). As the orders of reinstatement and re-engagement are derived from ss.112 and 113 of ERA 1996, it follows that the appropriateness of such an order must be determined with reference to ss.115 and 116 of ERA 1996 and relevant case law.

Accordingly, the requirements of s.112(2)(b) of ERA 1996 must require the tribunal to take into account the complainant's wishes (as well as the views of the employer) as to whether they want the tribunal to make an order of reinstatement or re-engagement.

In the event that a complainant 'wishes' not to be reinstated or re-engaged, and such a position is considered to be reasonable, or that the tribunal determines that either order is not practicable, then under s.112 of ERA 1996 compensation may be awarded. My view is that s.130, being compensatory in essence, is a corollary to s.112, and it must follow that in the event that either order is determined to be unapplicable, it is within the power and discretion of the tribunal to make a continuation order.

The only other possible interpretation of the operation of s.129 of ERA 1996, in these particular circumstances, is that it is only open to the employer to decline reinstatement. A complainant accepting an offer in circumstances where the Malik term had been breached by their employer seems counter-intuitive, and that position seems difficult to reconcile against the grounds upon which a successful application for interim relief would be made. To my mind, the remedy and the grounds are diametrically opposed in this particular situation.

Additionally, the operation of s.129 of ERA 1996 in this way means that it is open to a respondent to issue a costs-warning letter on the basis that application is vexatious. A strict interpretation of s.129 of ERA 1996 would mean that where an offer of re-instatement was made, the wishes of the complainant, and the reasonableness of those wishes, would not be sought by the tribunal. The determinative factor would only be whether the employer would offer reinstatement. If the employer offered re-instatement, and the complainant subsequently refused that offer, then there would be no other order. Simply put, why would the complainant continue with an application for something that they were never going to accept? There is a strong argument, perhaps, that the application would satisfy the definition of 'vexatious litigation' provided by Lord Bingham in *A-G v Barker (2001)*.

In the particular circumstances of the case outlined above, a further possible problem arises. The complainant was demoted from a senior role to one with a more 'junior' set of responsibilities. Is an offer of re-instatement then an offer to be re-instated to the previous role or the demoted role? Whilst this would almost be certainly clarified in the offer or subsequent correspondence, it does introduce a further set of considerations.

From the complainant's perspective they may wish to argue that it is actually an offer of re-engagement as, under s.129(8)(a) of ERA 1996, they are entitled to decline the offer and obtain a continuation order. From the perspective of the employer they may wish to argue that it is, in fact, re-instatement as this then precludes the employee (on a strict interpretation of s.129 of ERA 1996) from obtaining a continuation order. However, the employer arguably runs the risk of undermining their own position if they were to re-instate an employee to a position that they had demoted them from, pending the substantive hearing and determination of that issue.

A constructive unfair dismissal is a dismissal for the purposes of Part X of ERA 1996. The remedies available, and the considerations to be made in determining the suitability of those remedies is clearly outlined at ss.113 – 116 of ERA 1996. The application of interim relief, where it involves an order of reinstatement or re-engagement must, in my view, also require the tribunal to follow the procedures set out at ss.114 and 115 of ERA 1996. Any other conclusion undermines the availability of the remedy of interim relief for complainants of constructive dismissal, in my opinion.

To that end my argument is that a continuation order must stand alone as a remedy in its own right, and that its availability must extend to the entire gamut of situations contemplated under the ERA 1996 Part X. That can be the only logical conclusion, as I see it, as any other interpretation would place a complainant in an invidious position of having to decide whether to reject an offer that they do not want, thereby inviting arguments of vexatious litigation and possible costs consequences, or accepting that offer and then potentially undermining their own case.

Darren Stewart

Mind the gap

Material factors need not justify pay disparity in equal-pay claims

Amongst the many causes that have caused a stir in recent times, the issue of the gender pay gap would be right up there. A Google search on the gender pay gap will show you a plethora of statistics on the discrepancy of pay between men and women. The Court of Appeal recently contributed to this debate in the case of *Samantha Walker v Co-Operative Group Limited [2020]* EWCA Civ 1075. This latest decision clarifies the ambit of the material factor defence to equal pay claims.

The Law

The law for equal pay provides that an employee is entitled to contractual

terms, including those related to pay, that are as favourable as those of a comparator of the opposite sex in the same employment. Where there are no express terms within an employment contract, s.66 of the Equality Act (EqA) implies a 'sex equality clause'. This means that the less-favourable term in an individual's contract will be modified to reflect the more favourable term of the comparator.

However, the sex equality clause does not apply if the employer proves that the differences attributable to a material factor are not based on sex (s. 69(1), EqA). In the case of *Glasgow City Council v Marshall [2000]* ICR 1996, Lord Nicholls provided for three elements of the material factor defence:

(i) The explanation put forward also must be genuine and not a sham;

(ii) The factor must be a material factor;

(iii) The factor must not be 'sex tainted', which would occur where the factor applied gives rise to direct or indirect discrimination.

The focus of the case of Walker was the second element on whether the respondents had put forward acceptable material factors to justify a pay discrepancy.

Facts

The Co-operative Group Ltd (CGL) ('The Respondents') promoted Mrs Walker ('The Appellant') to the role of Group Chief HR Officer in February 2014. She was part of an executive committee that was considered essential to the Company's survival. In March 2014, the appellant's salary was set at £400,000. This was later increased to £425,000. The two named comparators, NF and AA, were also executives at the same level but had a higher salary than that of the appellant. In justifying the pay difference, CGL put forward four material factors which were accepted at the time. The factors were:

(1) Vital roles: They saw the two comparators as vital to the immediate survival of the company.

(2) Executive experience: Mrs Walker had been newly promoted to the executive role and unproven at that level.

(3) Flight risk: They considered that it was crucial to retain NF and AA in the role as they had been hired by a previous CEO who had left CGL and they might have followed the previous CEO.

(4) Market forces: AA was on a higher package as he was a top corporate lawyer with particular experience in the Co-op Bank separation.

In February 2015, a job evaluation study (JES) was completed which scored Mrs Walker's role higher than that of the comparators. However, the comparators were still paid at a substantially higher rate. Unsurprisingly, a dispute arose and in April 2016, CGL gave Mrs Walker 12 months' notice of the termination of her employment.

It was agreed that the pay difference in 2014 was justified based on the material factors. The issue was whether these material factors could continue to apply following the JES in 2015 which showed that Mrs Walker's role was scored higher than that of her comparator.

ET and EAT

At first instance, the tribunal found that at some stage between February 2014 and February 2015 the importance of the comparator's role declined, and the appellant's job had overtaken those of her comparator. The historical explanations provided for the pay difference in 2014 were no longer material at the time of the job evaluation in 2015. Hence, they found in favour of Mrs Walker for her equal pay claim.

The EAT allowed the appeal from Co-op Group on the basis that there had been no new decision about pay since March 2014 and, therefore, the material factors accepted by ET continued to apply. In any event, there was insufficient evidence that the material factors had ceased to apply. Mrs Walker appealed.

Court of Appeal

At the Court of Appeal, the appeal was dismissed. The court found that there was insufficient evidence before ET to justify that all four material factors had ceased to apply. In respect of each of the two comparators, there was at least one material factor, if not more than one, which explained the difference in pay.

As for the material factors themselves, the court held that whether the material factors are 'justified' is not a question for the ET. The test is whether the factors put forward are significant and relevant in a causative sense, which would go to explaining the difference in pay. This raises the question of what is the difference between 'explain' and 'justify'. How can the factors explain the pay gap without justifying them?

In my view, the Court is taking a position that is neutral of any value judgment and interpreting the meaning of 'material factors' accordingly. When one looks at the ordinary meaning of 'justify', it is to 'show or prove to be right or reasonable'. The Court of Appeal is clear that there is no need to assess whether the factors are right or reasonable. Rather, the law only requires the employer to explain why it is a relevant and significant factor for the business in question.

However, forwarding material factors will not be enough. One should always go a step further and consider if the factors applied are a PCP which might give rise to indirect discrimination, i.e. factors which would put women at a particular disadvantage.

In this case, while arguably the role was equally vital, it was still acceptable for the respondent to explain the pay difference on the basis of other factors such as experience of the male comparator. Even if that may not be considered a justifiable factor in eyes of many for the historical disparity in the appointment of women at the executive level, to which Mrs Walker had just been appointment in 2014. Careful readers will notice that I have just made a value judgment that the court carefully restrained from.

You may have a view on how this contributes to the long-term objective of reducing inequality, but as far as the defence of 'material defence' is concerned, there is clarity in law for now.

Ehsanul Oarith

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Albion Chambers
Employment Law Seminar

Metadata and Employment Cases:
The what, the why and the how

Metadata is everywhere and is becoming increasingly important, used as a powerful evidential tool in litigation.

A seminar to answer these important questions:

- How much do we really know about metadata?
- Where would we look for it?
- How would we interpret it?
- And what do those digits and hashes (not hashtags!) actually mean?
- What do they tell us about the credibility (or not) of a case?

To address these and other questions, we've teamed up with a leading Information Security Practitioner, Ceri Charlton.

When and where
This will be an online seminar on
Friday, 4 December 2020 at 9.30am.

About Ceri
Ceri has years of experience working with some of the country's top financial and accounting businesses. He has developed and tested security systems used for financial transactions and has been tasked with pressure testing the penetrability of networks. He has a breadth of experience in analysis and data security.

What to expect
In this FREE half-day seminar, Ceri will explain how metadata is created, how it can be obtained and how it can be interpreted.

With the help of Albion's Darren Stewart and Alec Small, this will be a practical seminar; you will be taken through a hypothetical narrative illustrating, in practical terms, how the theory applies at the chalkface. This seminar will be of use to those involved in litigation as well as also those who need to understand how this increasingly-technical subject applies, and what it reveals.

Although a highly-technical subject, this seminar has been intentionally crafted for legal professionals and does not assume any prior knowledge of the material.

How to book
Click here to register for your place on this free seminar.