SLAUGHTER AND MAY

Employment Bulletin

April 2020

COVID-19 – employment issues

Our client briefing on 13 March 2020 outlined key issues employers need to consider, including how to deal with a downturn, the implications of school closures, sick pay and incentive arrangements.

We issued a further briefing on 27 March, on the Government's Coronavirus Job Retention Scheme (CJRS). The CJRS is designed to help employers keep employees on the payroll if as a result of COVID-19 they are unable to operate or have no work for the employees. On 4 April 2020, the Government published a revised version of its guidance and we have produced a follow-up briefing, which provides an overview of the operation of the CJRS, noting the key changes in the revised guidance, as well as some areas where uncertainties remain.

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There have been further developments in employment law:

- The Government has announced that workers who have not taken all of their four-week statutory annual leave entitlement due to COVID-19 will be able to carry it over into the next two leave years. This is intended to ease the requirements on employers to ensure that workers take their statutory amount of annual leave in any one year. There is as yet very little guidance about how the carry over right will operate. It does not apply to the extra 1.6 weeks' leave under the Working Time Regulations, but this can be carried forward one year by agreement between workers and employers.

- The Home Office has published guidance for employers carrying out right to work checks during the coronavirus (COVID-19) pandemic. This guidance introduces temporary changes to manual right to work checks, with immediate effect. It confirms that:

    - Employees or prospective employees are no longer required to send their original documents. Instead, they must send a scanned copy via email or a mobile app (such as PDF scanning apps).

- Employers can then carry out a right to work check over video conferencing as opposed to face-to-face. The employer should request to see the original ID document and check this against the digital copy on file. It should then record the date of the check with the following wording "*adjusted check undertaken on [insert date] due to COVID-19*".

- Where an employee or prospective employee is unable to provide any documents, the employer should continue to use the Employer Checking Service.

The guidance goes on to state that the arrangements are temporary and do not provide a statutory defence against a civil penalty for the duration of an individual's employment. At the point that coronavirus measures end (which the Home Office will confirm), employers must carry out retrospective right to work checks on existing employees where the temporary measures were used.

Two employment measures have been delayed because of COVID-19:

- The extension of the off-payroll working rules to the private sector (under which the client rather than intermediary will be responsible for determining whether IR35 applies) has been postponed for one year, until 6 April 2021.

- Enforcement of gender pay gap reporting deadlines has been suspended for this reporting year (2019/20). Gender pay gap reports would otherwise have been due from employers with 250+ employees by 4 April 2020.

Employment rates and limits: April 2020

We attach an updated version of our Employment rates and limits document. This document summarises the various statutory rates of payment and limits on compensation for the main types of employment claim, applicable from 6 April 2020. We have also included a summary of the time limits and qualifying service requirements for claims, as well as a reminder of the various collective consultation timeframes.

Supreme Court finds that employer was not vicariously liable for employee's data breaches

Summary: The Supreme Court has decided that an employer was not vicariously liable for the actions of an internal auditor who deliberately disclosed employees' personal information on the internet. There was not a sufficient connection between the employment and the wrongful conduct for the employer to be held liable (*W M Morrison Supermarkets plc v Various Claimants*).

Key practice point: The Supreme Court's decision does not change the law in terms of employers' vicarious liability for the activities of their employees acting in the course of their employment, but the way the Court interpreted the law may have decreased the risk in relation to the actions of a "rogue" employee.

Facts: An internal IT auditor deliberately and maliciously copied payroll data onto a personal USB and later posted the personal details of almost 100,000 Morrisons employees on the internet, with the aim of causing harm to Morrisons. The employee was found guilty of various criminal offences. The Court of Appeal found that Morrisons was vicariously liable for his actions despite the Court accepting that there had been no relevant breach of data protection rules by Morrisons.

Decision: The employer's appeal was successful in the Supreme Court. The employee's wrongful disclosure of the data, outside working hours and from his personal computer, was not so closely connected with his task - transmitting payroll data to auditors - that it could be regarded as made while acting in the ordinary course of his employment. Two factors were of particular importance:

- In assessing whether an employer is vicariously liable, it is highly material whether the employee was acting on his employer's business or for purely personal reasons. Although the employment in this case offered the opportunity for wrongdoing, the employee was not engaged in furthering his employer's business when he committed it. He was pursuing a personal vendetta, seeking vengeance for disciplinary proceedings brought against him some months earlier.

- The close connection in time, and/or the unbroken chain of causation linking the provision of the data to the employee to his disclosing it on the internet, were not, on their own, sufficient to satisfy the need for a "close connection" between his actions and his employment.

Analysis/commentary: This appeared to be a classic case of the employee being on what previous courts have described as a "frolic of his own". The key issue on which the Supreme Court differed from the Court of Appeal was the significance of the reason why he had acted wrongfully. The Court of Appeal had said that this was irrelevant; the Supreme Court disagreed.

In the light of the GDPR regime, many employers will already have tightened up their data handling and security measures to attempt to protect themselves from this sort of liability. Organisations should already be ensuring that no employee has access to data beyond what is absolutely necessary for their role. Employers should continue to review their insurance coverage in respect of vicarious liability.

Another issue in the case was whether the Data Protection Act 1998 excluded vicarious liability for the employee's breach. Whilst it was not necessary for the Court to consider this point, because it had decided that the necessary conditions for the imposition of vicarious liability did not exist, the Court's view is that the Data Protection Act 1998 (and by extension the GDPR as well) is not an all-encompassing regime that excludes other forms of liability and claims. In particular, a data controller's compliance with its obligations does not automatically exclude a claim for vicarious liability. That means employers, as data controllers, will still need to manage both their wider fault-based obligations under the GDPR/the Data Protection Act 2018 and vicarious liability.

Employer was not liable for assaults by independent contractor

Summary: The Supreme Court has decided that Barclays was not liable for assaults by a doctor carrying out medical examinations on their behalf because, on the facts, the doctor was an independent contractor (*Barclays Bank v Various Claimants)*.

Key practice point: Employers can be vicariously liable for work done for them as part of their business but not for work by an independent contractor as part of the business of that contractor. The distinction will be a question of fact in each case.

Facts: The Court of Appeal had held that a bank was vicariously liable for alleged sexual assaults committed by a doctor engaged to carry out pre-employment medical assessments and examinations, even though the doctor was an independent contractor.

Decision: The Supreme Court allowed the bank's appeal. The doctor was not at any time an employee "*or anything close to*" an employee of the bank. He was an independent contractor, so the bank could not be vicariously liable for his actions.

The key factors which led the Court to conclude that the doctor was an independent contractor were:

- As well as being an employee in local hospitals, he had a portfolio practice, doing work for various companies and a government board. His work carrying out medical assessments of employees or prospective employees for the bank was a minor part of his practice.
- Although the bank did make the arrangements for the medical examinations and chose the questions he should ask, the same process would be true for other independent contractors hired by the bank.
- He was not paid a retainer, which might have obliged him to accept a certain number of referrals from the bank. Instead, he was paid a fee for each report and was free to refuse to conduct any examination offered to him.

Analysis/commentary: Whether or not vicarious liability applies will turn on the details of each particular relationship. This decision offers some guidance on the factors to be taken into account. However, the Supreme Court commented that someone who is a "worker" for employment protection legislation will not necessarily be in employment/a relationship akin to employment for vicarious liability purposes. The "worker" categorisation may be helpful, but it is not the same test.

Employers should continue to ensure they include indemnities in agreements with contractors and/or insure against liability for their actions.

Whistleblower's behaviour was not separable from his disclosures

Summary: The Employment Appeal Tribunal has found that a worker's behaviour was not separable from the making of whistleblowing disclosures and therefore the Tribunal should not have decided that any detriment was because of the manner of his whistleblowing rather than the disclosures themselves. However, the disclosures did not qualify for protection because they did not identify a specific legal obligation allegedly breached (*Riley v Belmont Green Finance Ltd*).

Key practice point: Where an employer has responded to the manner of whistleblowing disclosures, rather than the disclosures themselves, a whistleblowing detriment claim will not succeed. However, this does not apply unless the worker's behaviour is truly distinguishable from the complaints themselves. The fact of the disclosures and the manner of them will not be separate merely because an employee has behaved unreasonably.

Facts: R, a mortgage underwriter, was assigned to BGF on a temporary assignment. At a meeting with one of his managers, R made complaints about allocation of work and the functioning of IT and was generally negative about BGF. BGF terminated the assignment with immediate effect the next day. R contended that the termination of his assignment and the way in which he was removed from the premises were detriments because he had made whistleblowing disclosures. The Tribunal dismissed his claim, finding that R's treatment been motivated in part by his attitude and behaviour during the meeting.

Decision: The EAT overturned the Tribunal's decision on causation. It had failed to address the issue of whether R's behaviour was separable from the making of whistleblowing disclosures.

The EAT said that an employer who objects to "ordinary" unreasonable behaviour should be treated as objecting to the complaint itself and the facts in this case did not indicate that R's behaviour at the meeting had been anything other than, at worst, "ordinary" unreasonable behaviour. The disclosures played a more than trivial role in the decision to terminate his assignment, so the detrimental treatment was on the grounds of having made the disclosures.

However, the EAT agreed with the Tribunal that the complaints did not amount to qualifying disclosures, so the Tribunal's error on causation did not affect the outcome. R had not made a disclosure of information that, in his reasonable belief, tended to show failure to comply with a legal obligation. He had not identified the legal obligation that he said had been breached; the disclosure of common IT problems did not obviously identify a breach of a legal obligation.

Analysis/commentary: The case illustrates that unreasonable behaviour will not necessarily be sufficient for an employer to argue that its treatment of a whistleblower was a reaction to the manner rather than the fact of the disclosures. The causation test for detrimental treatment requires only that the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.

The EAT's decision that the worker had not identified a potential failure to comply with a legal obligation should be viewed with caution. There was a dispute about the evidence of what was said at the meeting – the worker maintained he had alleged specific breaches of mortgage lending rules. In some recent cases, tribunals have taken a less strict approach to the need to identify a legal obligation.

Horizon scanning

What key developments in employment should be on your radar?

April 2020	Annual updates to employment rates and limits
6 April 2020	All termination payments above £30,000 threshold subject to employer class 1A NICs
6 April 2020	Written statement of terms to be provided to employees and workers from day one of employment, and to contain extra details
6 April 2020	Threshold for valid employee request in relation to information and consultation lowered from 10% to 2% of employees
6 April 2020	Abolition of the opt-out of the equal pay protections of the Agency Workers Regulations (the "Swedish derogation")
6 April 2020	Change in reference period for calculating holiday pay for workers with variable remuneration, from 12 to 52 weeks

6 April 2021	Extension of off-payroll working rules to private sector – client rather than intermediary will be responsible for determining whether IR35 applies

We are also expecting important case law developments in the following key areas during the coming months:

- **Employment status**: *B v Yodel Delivery Network Limited* (CJEU: whether couriers have worker status under the Working Time Directive); *Uber v Aslam* (Supreme Court: whether drivers are workers for employment protection, minimum wage and working time purposes); *Addison Lee v Lange* (Court of Appeal: whether private hire drivers were workers); *IWGB v CAC* (Court of Appeal: whether couriers are workers for trade union recognition purposes)

- **Discrimination / equal pay**: *Ravisy v Simmons & Simmons* (Court of Appeal: territorial jurisdiction); *Asda Stores v Brierley* (Supreme Court: whether workers in retail stores could compare themselves with those working in distribution depots for equal pay)

- **Trade unions**: *Jet2.com v Denby* (Court of Appeal: refusal of employment)

- **Unfair dismissal**: *Awan v ICTS UK* (Court of Appeal: dismissal while employee entitled to long-term disability benefits).

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