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EMPLOYMENT LAW BULLETIN

FEBRUARY 2023

Welcome to Wrigleys' Employment Law Bulletin, February 2023.

This month we start by taking a look at the draft Code of Practice on dismissal and re-engagement published last month by the Department for Business, Energy & Industrial Strategy. This follows increased public and political concern about the so-called "fire and rehire" approach to changing terms of employment. A consultation on the proposed Code is seeking responses before 18 April 2023.

Our case review this month examines the recent EAT case of *McAllister v HMRC*. The EAT considered whether a dismissal for disability-related sickness absence was discrimination arising from disability or whether it was justified as a proportionate means of achieving the legitimate aim of ensuring employees were capable of satisfactory attendance.

In our final article, we consider the practicality of flexible working within the education sector, where presence in the workplace and adherence to set working hours might traditionally be seen to be a non-negotiable.

Our next **free virtual Employment Brunch Briefing** takes place on **4 April** and will focus on handling capability procedures, including where there are disability-related issues. It would be great to see you there. Please click on the link below to book your place.

We are delighted to announce that our annual **Employment Law Conference** will this year be an in-person event for the first time since 2019. It will take place in Leeds on **29 June**. Our key note speaker is Ruth Busby, People and Transformation Director for Great Western Railway and Network Rail Wales and Western. Ruth has extensive experience in dealing with diversity and inclusion, organisational change and Trade Union relations. Ruth also acts as a trustee for a national charity and has worked in senior HR positions in the civil service and higher education. Click on the link below to book your place. Please note this is a paid for event. **Our early bird booking offer ends 31 March**.

– Alacoque Marvin, Editor **alacoque.marvin@wrigleys.co.uk**

Forthcoming webinars:

4 April 2023 | 10:00 - 11:15 | Virtual
Wrigleys' Employment Brunch Briefing
Capability procedures: how to manage health and disability issues fairly
Speaker: Michael Crowther, solicitor at Wrigleys Solicitors
Click here for more information or to book

29 June 2023 | 09:00 - 16:30 | In-person conference
Wrigleys' Annual Employment Law Conference for Charities
Leading Through Change
Key note speaker: Ruth Busby, People and Transformation Director for Great Western Railway
Click here for more information or to book

If you would like to catch up on previous recorded webinars, please follow this link.

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Draft Code of Practice on dismissal and re-engagement published

Article published on 16 February 2023

If confirmed, the new code of practice could significantly impact the way employers approach changes to terms and conditions.

In 2021 British Gas hit the headlines in the UK for the way it sought to introduce changes to its contracts with its engineers, which ultimately led to many gas engineers who refused to sign up to the new terms being dismissed from their jobs. P&O Ferries followed in the headlines in March 2022 for the way its ferry staff were dismissed and replaced with staff on much lower hourly rates.

Politicians of all stripes decried these practices and promised action and immediately on the back of the P&O events the government announced it would be issuing a Statutory Code of Practice to address 'fire and rehire' practices.

The Department for Business, Energy & Industrial Strategy (BEIS) has now published the draft of this Code of Practice and launched a simultaneous consultation inviting feedback until 18 April 2023.

The draft Code of Practice

Paragraph 5 of the draft Code summarises its intentions: it has been created to ensure employers seeking to change terms of employment take all reasonable steps to explore alternatives to dismissal and to ensure employers engage in meaningful and good faith consultation with employees (or their representatives). Employers should not 'use threats of dismissal' to put undue pressure on employees to accept new terms and should seek to find an agreed solution. The draft Code makes clear that dismissal should be a last resort only considered where there is no reasonable alternative.

However, the draft Code does state that it is for employers to make economic and strategic decisions for the benefit of their business, and for employers to ultimately decide if changes to employee contracts are necessary for those purposes.

The key principles outlined in the draft Code are as follows:

- Employers must provide information to employees and their representatives as early as possible and continue to consult and negotiate with them in good faith for as long as possible to seek a resolution;
- As a matter of 'good practice' employers should continually reassess its proposals in light of negotiations and consultation feedback;
- Employers should provide meaningful information to employees and their representatives and both parties should seek to 'respond openly and in good faith to questions and concerns';
- If changes are agreed the employer should put them in writing setting out clearly what the amendments are and when they take effect. Employers should continue dialogue with staff over a period of time as new terms are adapted to, and feedback should be sought;
- If it becomes clear that employees are not going to accept the proposed changes and the employer considers it needs to unilaterally impose them, the employer should be aware of the risks of claims inherent in this approach and should re-examine its business strategy (presumably to see if alternatives are available) and why the proposed changes are needed;
- Even where an employer unilaterally forces the changes, the draft Code recommends employers approach the situation in the same way as set out above, and keep dialogue and feedback channels open; and
- Employers should only dismiss as a last resort and after a re-assessment and concluding there

is no other option available. Where employees are re-engaged on new terms, employers should keep the new terms in review and consider whether they are in fact required.

The draft Code also sets out the key legal issues for both employers and employees in these situations. For example, the Code highlights how employers need to be mindful of their legal obligations in respect of following collective bargaining procedures, obligations to consult collectively on redundancies or issues that arise as a result of a transfer of employment. The draft Code also explains how employees can work under protest of imposed changes and covers the possibility that the employment contracts will have been breached as a result of the imposition of changes by employers.

The draft Code stresses the importance of employers being transparent about the fact that it is prepared, if negotiations fail and agreement cannot be reached, to dismiss employees in order to force changes through. However, it makes clear that "a threat of dismissal should never be used only as a negotiating tactic in circumstances where the employer is not, in fact, contemplating dismissal as a means of achieving its objectives."

Impact

As a Statutory Code of Practice, the Code must be taken into account by a Court or Tribunal should an employee bring a claim for unfair dismissal and for certain claims under the Trade Union and Labour Relations (Consolidation) Act 1992, including for inducements to breach collective bargaining terms. An unreasonable failure to comply with the Code by the employer can result in an uplift to any tribunal award of up to 25%.

The draft Code is set out in a way that is accepting of the needs of businesses to be able to change terms and conditions in line with strategic considerations and that ultimately it is for the officers of that business to make those decisions.

Far from banning or preventing 'fire and rehire', the draft Code rather clarifies the conditions under which those practices – as well as changes to terms and conditions more generally – may be acceptable.

The draft Code does not fundamentally change the current legal risks for employers, although it does increase the financial risk of claims. Rather, it highlights the need for meaningful and good faith information and consultation processes and that employers consider whether their proposed changes to contractual terms and conditions are affected by this process.

Dismissal for long-term sickness absence was not discriminatory

Article published on 28 February 2023

Dismissal was a proportionate means of achieving legitimate aim of ensuring staff were capable of satisfactory attendance.

When dealing with employees absent from work due to sickness employers need to be mindful that they do not discriminate against the absentee on the grounds of disability.

Discrimination can arise directly or indirectly, but it can also 'arise from disability' under s.15 Equality Act 2010, which states this occurs where:

- a person (A) treats another (B) unfavourably because of something arising in consequence of B's disability, and
- A cannot show that the unfavourable treatment of B is a proportionate means of achieving a

legitimate aim.

Employers need to be alert to the fact that long-term sickness absentees, or those with frequent shorter term absences, may have a condition that meets the broad definition of a 'disability' under the Equality Act. If absence at work is linked to an absentee's disability, an employer applying an absence procedure and sanctions may be in breach of s.15.

However, employers will be able to defend such claims if they can show that the unfavourable treatment was proportionate in the pursuit of a legitimate aim.

A recent Employment Appeal Tribunal decision highlighted the nuances involved in determining whether an employee has suffered unfavourable treatment and, if so, whether the employer can justify it as a proportionate means of achieving a legitimate aim.

Case: ***Mr JMcAllister -v- Commissioners for HM Revenue and Customs [2022]***

Mr McAllister began work with HMRC in 2011. HMRC accepted that for the purposes of the claim (and for the purposes of the Equality Act), Mr McAllister was disabled on the basis he suffered from anxiety and depression.

After several months' sickness absence an Occupational Health report was obtained in early 2017 which stated Mr McAllister had ongoing stress, anxiety and depression triggered by work issues. A few months later, Mr McAllister was put on a phased return to work and invited to a formal attendance meeting where he was issued a first written improvement warning. Adjustments were put in place for Mr McAllister at work, which he confirmed were satisfactory.

In August 2018 a further OH report was obtained which confirmed Mr McAllister should be able to return to work with support. However, Mr McAllister's absences continued despite additional adjustments being explored..

HR advised that the case would go to a decision-maker with a recommendation of dismissal as HMRC could no longer support Mr McAllister's absence. Having considered the information before them, the decision-maker concluded the absence could no longer be supported and Mr McAllister was informed of the decision to dismiss him. Mr McAllister appealed the decision, but this was not upheld.

On dismissal Mr McAllister was awarded a payment under the Civil Service Compensation Scheme, as his dismissal was for reasons out of his control. However, this payment was reduced by 50% due to a lack of co-operation with the process. This was later amended to an 80% reduction after an appeal through the scheme.

Mr McAllister brought claims under s.15 of the Equality Act for discrimination arising from a disability.

<u>Tribunal decision</u>

It was commonly accepted that Mr McAllister's dismissal amounted to unfavourable treatment and that as disability-related absences had led to dismissal, the unfavourable treatment was due to something arising in consequences of his disability.

The Tribunal found that the dismissal was a proportionate means of achieving a legitimate aim, to: (i) ensure staff were capable of demonstrating satisfactory attendance levels; (ii) provide a good customer service; and (iii) apply policies and procedures fairly and consistently. On this basis, Mr McAllister's s.15 claim in relation to his dismissal did not succeed.

Mr McAllister also brought a s.15 claim in relation to the reduction of his Civil Service Compensation

Scheme payment. The Tribunal agreed with the claimant that the reasons for the reduction were in part connected with his disability and upheld this aspect of the claim.

The Tribunal also found Mr McAllister's dismissal on capability grounds to be fair, noting that HMRC had issued warnings and made genuine attempts to get Mr McAllister back to work based on OH report information and consultation with Mr McAllister, but that ultimately he was not able to do so.

EAT decision

On appeal, Mr McAllister highlighted the lack of evidence in respect of the legitimate aim ground (ii) above and argued this was fatal to the issue of objective justification for the unfavourable treatment. Mr McAllister argued that ground (ii) presented a 'real need' whereas ground (i) was not. He also claimed that ground (iii) was inherently discriminatory and likely to disadvantage disabled workers.

The EAT concluded that the Tribunal was entitled to find that HMRC presented legitimate grounds for its actions based on the evidence presented to it, even if there was no specific evidence to ground (ii). The EAT also found it it was open to the Tribunal to consider the views of HMRC management on the impact of Mr McAllister's absence in this area.

The EAT dismissed Mr McAllister's appeal.

The EAT also considered HMRC's appeal in relation to the finding that the Civil Service Compensation Scheme payment was discrimination arising from disability. The EAT held in HMRC's favour, that the 'relevant treatment' in this case was the payment of an award to the claimant and this was beneficial to him, rather than being unfavourable treatment.

Impact

The findings of the EAT underline the importance to employers of considering whether absences are linked to disability when following absence management procedures.

It is a common perception among employers that where an employee presents with a disability, there is relatively little they can do without falling foul of discrimination law. It is the case that there is an increased risk of claims where dismissal is because of disability-related absence, as this will be unfavourable treatment because of something arising from disability. However, the key for employers is ensuring that the dismissal is justified as a proportionate means of achieving a legitimate aim and that this can be evidenced should a claim be brought.

As seen in this case, HMRC was able to demonstrate that Mr McAllister's absence was putting a strain on resources and that HMRC had done what it could to try and return him to work with the assistance of OH support and exploring reasonable adjustments.

Employers should be prepared to evidence the legitimate aims, which means significant thought must be given before dismissal to what the aims are, how continued absence affects them, and how the unfavourable treatment considered will achieve the those aims. Evidence should also be gathered to show that the decision to dismiss is proportionate, including evidencing impacts of the absence on the business, other staff and resources.

Is flexible working really an option in schools?

Article published on 20 February 2023

Key legal considerations for schools and academy trusts.

It is easy to point to the barriers to increasing flexible working in schools. Timetabling, particularly at secondary level, has become ever more complex in recent years. As staff numbers and non-contact time have been squeezed, options for flexible working may well seem to have diminished rather than increased. With unprecedented demands on school budgets, the additional staff costs of some flexible arrangements, such as job-sharing, may also now be more likely to be seen as an avoidable extra.

Technology enabling remote and home working has been revolutionary in increasing flexible working options in many sectors since the Covid-19 pandemic. But can these really have a long term impact for student-facing roles, where being present in the room with pupils is largely non-negotiable?

Flexibility is the future

Despite the current economic pressures on employers, more flexible working is still very much the direction of travel across all sectors.

Future legislative changes on flexible working

The Government sees flexible working as a tool to support staff with caring responsibilities and to increase workplace equity, diversity and inclusion.

In its response to the 2021 consultation, *Making Flexible Working the Default*, the Government has indicated its intention to extend the statutory right to request flexible working to all employees from the first day of employment and to require employers to consult with staff on flexible working options before rejecting a request. The plans would allow employees to make two requests in a 12-month period (currently limited to one) and shorten the timeframe for responding to requests. New guidance will also be developed on dealing with temporary requests for flexible working.

Attitudes to flexible working

There has been a marked shift in working practices since the Covid-19 pandemic, with many more employers and employees adopting a flexible working approach.

New research by the Equal Parenting Project found that 59.5% of managers believe working from home improves the productivity of employees. Other types of flexible working are also associated with an increase in productivity. 44.1% of managers felt part-time work increased productivity and 43.7% felt that compressed hours had the same effect.

For more details on this research, please see our previous article Has Covid-19 changed how we work?

Increased focus on flexible working in schools

The Department for Education's Flexible Working in Schools was published in May 2022. This non-statutory guidance set out the benefits of flexible working, including retaining experienced staff, recruiting from a broader pool of teachers, promoting wellbeing and improving work-life balance. It also pointed out the potential for flexible working to attract former teachers back to the profession after a care-related career break, particularly in shortage subjects.

Many of our schools clients have seen an increased number of staff seeking the flexibility to develop their own "side-hustles" or to take additional jobs. For some this is a way to explore a transition away from a purely school-based career. For others, it is more about supplementing income in the cost of living crisis. There has also been an increase in requests for compressed hours and periods of home-working during normal school hours, particularly from senior leaders.

The current statutory right to make a flexible working request

All employees with at least 26 weeks' service for their employer currently have a statutory right to request flexible working. There is no requirement to have caring responsibilities to make such a request. Indeed, the employee does not have to explain their reasons for the request, although many will include such details to support their case in line with the school's flexible working policy.

How should flexible working requests be handled?

Employers must handle statutory flexible working requests "reasonably". This includes taking into account the statutory Acas Code of Practice on Flexible Working on dealing with such requests.

Where employers cannot agree to the request, they should consider whether there is a compromise arrangement which can be agreed. This element of discussion to explore a compromise arrangement is likely to become a requirement if and when the legislation is updated.

Requests can only be refused on one or more of eight specific business reasons.

Decisions on statutory flexible working requests must be made within three months, although employers and employees can agree to extend this period between them, for example to allow time to trial the changes. Employers should also allow employees a right of appeal.

What can be requested in a statutory flexible working request?

Employers sometimes assume that a flexible working request will always be a request to reduce working hours. This is not the case. Employees can also request to change their place of work and pattern of hours while maintaining their contractual hours.

It is also possible for employees to request additional hours in a flexible working request. Indeed, with the potential time efficiencies of replacing face to face with remote meetings and events, there may be part-time staff who now feel able to increase their hours if they are permitted to work from home for some of the time.

Do we need to respond in the same way to an informal or non-statutory request?

Any member of staff can of course make an informal request to work flexibly at any time, but the school is not required to follow the statutory process in that case. An informal request or a request from a member of staff who is not eligible under the statutory scheme does not entail the same process. However, schools should be mindful that they must still respond reasonably to such requests and on the basis of sound business reasons. They could otherwise risk discrimination, Part Time Workers Regulations or constructive dismissal claims.

Many schools channel all flexible working requests, statutory or otherwise, through the same internal process. This has the advantage of dealing with requests consistently and providing a paper-trail to evidence decision-making.

Can schools insist some roles are full time?

Many schools are having to restructure their teaching and support teams to try to balance the budget and make full use of staff resources. In doing so, schools should be aware of the legal risks

of selecting staff for redundancy or dismissing because of part-time status, and insisting that some roles are carried out full time.

The recent employment tribunal case of *McBride v Capita Customer Management Ltd* provides a salutary warning to schools. Full details of this case are available in our previous article Employee dismissed for refusing to go full time was unfairly dismissed and discriminated against on grounds of sex.

In this case, the claimant was permitted to job share after returning from a care-related career break. A team restructure took place and it was made clear that all roles in the new structure would be full time. The employer did not provide clear reasons for this decision. The claimant refused to work full time and was made redundant. She brought claims of indirect sex discrimination and unfair dismissal which the tribunal upheld.

Although the tribunal agreed that the employer had a legitimate business aim for the restructure, it found that it was not proportionate to require one person to carry out the role full time and not to allow a job share. It also found that there was in fact no redundancy situation (as there was no decrease in the kind of work the claimant carried out) and there was no other substantial reason to dismiss. The tribunal found that there was no proper evidence that a job share would not have been effective in the new structure.

The importance of evidence-based decision making

As this case shows, schools should avoid assuming that a working arrangement will not work without examining and documenting the rationale for that conclusion. Carrying out trials of proposed flexible working arrangements, followed by review and reflection, allows evidence-based decisions to be made rather than relying on long-held unsubstantiated views that flexibility is not feasible in schools.

This approach, if well managed, can lead to successful and innovative ways of working which benefit staff and pupils.

Where the evidence shows adverse impacts, a trial and review process could, alternatively, provide a strong foundation to defend a claim.

Taking a proactive approach to flexibility

Acas recommends that each flexible working request is dealt with in the order it is received. However, an agreement to one request will inevitably impact on the ability of the school to agree future requests.

The DfE guidance encourages schools to take a strategic and proactive approach to flexible working rather than reacting to individual requests in isolation.

Schools would be well advised to carry out a proactive review of the impact of flexible working in different roles. Carrying out staff surveys enables schools to take an overview of the likely level of demand for more flexible options. Schools are encouraged to build consideration of flexible working into the early stages of the timetable-planning cycle. This flexibility by design approach can help to avoid the negative impacts on staff morale, employee relations and educational outcomes of piecemeal arrangements made late in the school year.

What does flexibility look like in schools?

Flexible working arrangements which can work successfully in schools include:

- Late starts or early finishes

- Moving form tutor time to later in the day
- Virtual team meetings
- Consolidated PPA time working from home
- Shared management responsibilities
- Virtual parental meetings
- Split classes
- Virtual CPD from home

The legal considerations

While it is useful for schools to be proactive in assessing impact and setting policy on flexible working, it will always be necessary to look at each individual flexible working request on its own merits and to ensure that any refusal is based on one or more of the eight statutory reasons, supported by a strong rationale.

Schools which implement a blanket policy of refusing certain types of request (such as for part-time working) risk claims, including indirect sex discrimination and a failure to make reasonable adjustments for disabled employees.

Employees who have brought statutory flexible working requests are protected from detriment and dismissal because they have done so. Schools should also be aware of the special legal protections from part-time workers and for those returning to work after a period of family-related leave.

Schools are advised to seek legal advice at an early stage on both individual requests and policy decisions to mitigate the risk of complaints and claims.

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