COVID-19: HEALTH & SAFETY MEASURES AND DISCRIMINATION IN THE WORKPLACE

PRACTICE NOTE

Barry Coulter and Daniel Searle of Goldsmith Chambers provide this briefing note for solicitors dealing with employment matters. ***As the easing of the COVID-19 lockdown restrictions brings many back to work, employers should consider their health & safety duties and policies to ensure a safe working environment. The relevant legislation, together with practical steps to both avoid claims and to enforce rights, are discussed below.***

HEALTH & SAFETY

1. The employer has always had a duty to take reasonable care of the health and safety of their employees. This duty arises both in tort, under the Health and Safety at Work Act 1974 and as an implied term of the contract. This includes a duty to take reasonable steps to provide safe places and safe systems of work. Some practical steps and useful resources to assist in ensuring safe working practices are set out below.

2. It is possible that the Employment Rights Act 1996 will protect an employee who refuses to attend work due to a belief that they will be at risk of contracting COVID-19. A reasonable belief by the employee that attending would expose them to serious an imminent danger is a prerequisite for the protection. It is possible that a workplace in which there is a perceived higher risk of contracting COVID-19, which has not undertaken adequate mitigation of risk, could fall within that category. Both dismissal and action short of dismissal, such as withholding pay from an employer who refuses to attend work, may be protected by section 100(1)(d) and section 44 of the Employment Rights Act 1996 respectively.

3. Whilst a reasonable belief is required, the employee does not need to demonstrate that such a danger actually existed. It is accordingly imperative to ensure effective communication with employees in terms of the measures taken by the employer to minimise the risk (see: *Edwards and others v The Secretary of State for Justice* UKEAT/0123/14). Further, the employee does not need to communicate their concerns to the employer in order to be afforded protection under this section.

4. Notwithstanding the above, an employee may be summarily dismissed if he or she willfully disobeys any lawful and reasonable order of his employer (see both: *Ottoman Bank v Chakarian* [1930] A.C. 277; and *Buckoke v GLV* [1970 1 W.L.R. 1092). As above, employers should ensure they have implemented the appropriate mitigation and communicated the same to employees before embarking on dismissal.

5. It may be that an employee becomes blasé surrounding the health and safety rules implemented by the employer, however, the employer remains responsible; failure to reinforce the rules is a breach of duty.

Practical steps and useful resources

6. The general government guidance that all employers should be putting into practice is as follows (https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19):

    1. Carry out a COVID-19 risk assessment

    Before restarting work you should ensure the safety of the workplace by:

    - carrying out a risk assessment in line with the HSE guidance
    - consulting with your workers or trade unions
    - sharing the results of the risk assessment with your workforce and on your website

2. Develop cleaning, handwashing and hygiene procedures

You should increase the frequency of handwashing and surface cleaning by:

- encouraging people to follow the guidance on hand washing and hygiene
- providing hand sanitiser around the workplace, in addition to washrooms
- frequently cleaning and disinfecting objects and surfaces that are touched regularly
- enhancing cleaning for busy areas
- setting clear use and cleaning guidance for toilets
- providing hand drying facilities – either paper towels or electrical dryers

3. Help people to work from home

You should take all reasonable steps to help people work from home by:

- discussing home working arrangements
- ensuring they have the right equipment, for example remote access to work systems
- including them in all necessary communications
- looking after their physical and mental wellbeing

4. Maintain 2m social distancing, where possible

Where possible, you should maintain 2m between people by:

- putting up signs to remind workers and visitors of social distancing guidance
- avoiding sharing workstations
- using floor tape or paint to mark areas to help people keep to a 2m distance
- arranging one-way traffic through the workplace if possible

- switching to seeing visitors by appointment only if possible

5. Where people cannot be 2m apart, manage transmission risk

   Where it's not possible for people to be 2m apart, you should do everything practical to manage the transmission risk by:

   - considering whether an activity needs to continue for the business to operate
   - keeping the activity time involved as short as possible
   - using screens or barriers to separate people from each other
   - using back-to-back or side-to-side working whenever possible
   - staggering arrival and departure times
   - reducing the number of people each person has contact with by using 'fixed teams or partnering'

7. There is specific guidance found on the .gov website for the following eight industries:

   1. Construction and other outdoor work
   2. Factories, plants and warehouses
   3. Labs and research facilities
   4. Offices and contact centres
   5. Other people's homes
   6. Restaurants offering takeaway or delivery
   7. Shops and branches
   8. Vehicles

8. Whilst the WHO's guidance, "Getting your workplace ready for COVID-19, suggests providing face masks, it does not go so far as to suggest requiring that they should be worn. However, the government's "COVID-19 recovery strategy" provides that people should aim to wear a face-covering in enclosed spaces where social distancing is not possible, such as public transport and in some shops.

DISCRIMINATION

9. The government's social distancing guidance describes the following categories of people as "clinically vulnerable" to the effects of COVID-19:

    1. Individuals over the age of 70 (the WHO setting the age at 60), regardless of medical conditions;
    2. Women who are pregnant; and
    3. Individuals under the age of 70 with an underlying health condition.

10. The above-referred categories of people may also be entitled to protection under the Equality Act 2010 on the grounds of age (section 5), pregnancy (sections 4 and 18) and, potentially, disability (sections 4 and 15). It stands to reason that changes to the workplace in the coming weeks and months have a real possibility of engaging the Equality Act 2010. Employers should scrutinise their decision making within the framework of the anti-discriminatory legislation and employees should consider their options to ensure that their rights are protected.

11. The legislative provisions most likely to be engaged are discussed below, with a particular emphasis on disability discrimination.

Indirect discrimination (EqA 2010 s19)

12. Many new provisions, criterions and practices ('PCPs') may be introduced by employers which have the potential of causing indirect discrimination. Equally, employers may find that the reintroduction of PCPs which were perfectly proper in the pre-COVID world, are now not compatible with section 19. Such a PCP may include requiring all employees to return to work. Depending on the circumstances, this may also include requirements that employees travel to and attend a potentially unsafe work environment. An employer may seek to rely on the defence, provided by section 19(2)(d), that their PCP was a proportionate means of achieving a legitimate aim.

13. Accordingly, employers should not continue with "business as usual" and should apply anxious scrutiny to any PCPs which they intend on implementing or reintroducing.

Discrimination arising from disability (EqA 2010 s15)

14. Section 15 protects those with a disability from unfavourable treatment because of something arising in consequence of the employee's disability. Given that many employees with disabilities will currently be shielding in line with government policy, the application of attendance management procedures is likely to be brought to the fore. Both the absence management process and dismissal are unfavourable treatment for the purposes of the Act. Where disability-related and shielding-related absence counts towards an absence management review, this has the potential to breach section 15 unless the employer can show that such treatment was a proportionate means of achieving a legitimate aim (section 15(1)(b)).

15. In order to strike the right balance when determining the applicability of absence management procedures and whether to discount disability-related absences, employers should consider the following factors:

    1. Likelihood of an imminent return to work;
    2. Reasons for the absence;
    3. Nature and extent of the absence; and
    4. Whether reasonable adjustments can be made to improve attendance.

Reasonable Adjustments (EqA 2010 s21)

16. Section 21 imposes a duty on an employer to take reasonable steps to prevent employees with disabilities suffering substantive disadvantages as a result of their disability. There is a real risk that employers may breach section 21 if they fail to facilitate a disabled employees' request for homeworking roles. If there are no homeworking roles available, this failure may not necessarily be a breach of section 21.

17. The purpose of section 21 is to facilitate a disabled employee to remain in work or return to work (*O'Hanlon v Commissioners for HM Revenue & Customs* [2007] IRLR 404). Accordingly, it is not *necessarily* a breach of

section 21 to fail to pay a disabled employee who refuses to attend work without obtaining medical advice. Whether or not section 21 has been breached will be determined in the light of what is reasonable. Tribunals are unlikely to look sympathetically upon employers who have failed to pay employees who are shielding, however, the size and resources of the employer are also relevant factors when considering the reasonableness of the action.

18. Medical advice should be sought as soon as possible, either from the employee's GP or from Occupational Health; such advice should clarify any potential risks and set out any reasonable adjustments. Where the matter is urgent and there is insufficient time in which to obtain medical advice, employers may wish to err on the side of caution.

19. Section 21 imposes a *proactive* duty on employers; they should seek to obviate any impediments to work as soon as they are notified of the facts of the employee's disability. Provided that an employer has actual or constructive knowledge of the facts constituting the employees' disability, the employer should seek to make reasonable adjustments (*Gallop v Newport City Council* [2013] EWCA 1583). It matters not whether Occupational Health determine that an employee is disabled in accordance with the Act. Accordingly, employees should notify their employer of the facts which potentially constitute a disability within the meaning of the Act as soon as possible. Once an employer has constructive knowledge of these facts, they should act proactively and seek to obviate any substantial disadvantage arising.

Discrimination by Association

20. Protection may be afforded to employees who themselves do not have protected characteristics, but who are living with someone who does and is shielding in line with government advice. These employees may have some limited recourse to discrimination by association.

21. The landmark case of *Coleman v EBR Attridge Law* (2008) C-303/06 established that a person can be unlawfully discriminated against by their

association to another individual with a protected characteristic. The protection may protect against:

1. Direct discrimination;
2. Harassment; and
3. Victimisation.

22. Associative discrimination does not, however, protect against other forms of discrimination, such as indirect discrimination, discrimination arising from disability or a failure to make reasonable adjustments (*Hainsworth v Ministry of Defence* [2014] EWCA 763).

23. The government's shielding guidance, under the heading "living with other people", states:

"The rest of your household do not need to start shielding themselves, but they should do what they can to support you in shielding and to carefully follow guidance on social distancing."

24. Social distancing is, accordingly, envisaged within the household. This may or may not be a practical solution. Employers should consider implementing appropriate and sustainable solutions where it is not possible for an employee to self-isolate in their home from others with protected characteristics. Such measures could include, again, ringfencing appropriate homeworking roles or, at the very minimum, permitting a period of unpaid leave until further solutions can be found.

Practical Steps

25. Employers and employees should consider the following practical steps to avoid engaging the Equality Act:

- Ringfencing work which is appropriate for homeworking for those with relevant protected characteristics and who require homeworking roles.
- Permitting employees to take unpaid leave.
- Ringfencing parking spaces or permitting flexi-time working to avoid travelling at peak times.

- Obtaining medical advice from GPs and Occupational Health to determine reasonable adjustments.
- Undertaking risk assessments, particularly for those with protected characteristics.
- Discounting disability-related and shielding-related absence for the purposes of absence management policies.
- Medical testing for *all* staff.
- Employees should alert their employer to any potential disability, preferably with medical evidence.

This note is for general information only and is not and is not intended to constitute legal advice on any general or specific legal matter. For legal advice on particular cases please contact Ben Cressey, Senior Civil Team Clerk, on 0207 427 6810 to discuss instructing Counsel.

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