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THE CHAMBERS OF TIMOTHY RAGGATT QC

Employment Law Update

Covid-19 and Discrimination Law

Suzanne Palmer (1995)

This article will examine some potential discrimination law issues which employers may encounter as employees begin to return to the workplace, and give advice on how to avoid those problems

The current pandemic has created unprecedented problems for employers and employees. It has also seen unprecedented levels of state intervention to try to mitigate some of the effects which lockdown measures have had on employment relationships. Many employers and employees will have found that the crisis has forced a rapid exploration of new ways of working, and some of the lessons learned about what is possible will be valuable going forward.

In her recent article, http://www.4kbw.co.uk/wp-content/uploads/Employment-Law-Update-May-2020-V2.pdf, Jennifer Lanigan explored the new government guidance issued on 10 May 2020 and its implications for employees and employers in terms of health and safety obligations in the workplace as employees return. This article looks in more detail at the situation of employees who cannot or do not wish to return to work for reasons related to protected characteristics.

It is worth a brief recap of the employment rights protected by the Equality Act 2010.

The Act prohibits a number of types of discrimination and related conduct, including the following:

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- Direct discrimination – where a person is treated less favourably because of a protected characteristic (whether they have that characteristic, are perceived to have it, or associate with someone who has that characteristic)
- Indirect discrimination – where an employer applies a provision, criterion or practice which puts someone with a protected characteristic at a disadvantage, and cannot show that that provision, criterion or practice is a proportionate means of achieving a legitimate aim
- Harassment – where a person is subjected to unwanted conduct related to a protected characteristic, and that conduct has the purpose or effect of violating the person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment
- Victimisation – where a person suffers a detriment because he or she has done a "protected act" such as raising a grievance or bringing a claim making allegations of discrimination
- Discrimination arising from disability – where someone is treated unfavourably because of something which arises from his or her disability
- Failure to comply with the duty to make reasonable adjustments in order to prevent someone being placed at a disadvantage because of his or her disability
- Pregnancy and maternity discrimination – unfavourable treatment of a woman because of her pregnancy, or a pregnancy-related illness, or in relation to maternity leave

The protected characteristics covered by the Act include age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

It is important to bear in mind current guidance about who is most at risk from the coronavirus. That does not mean that they are more likely to catch the virus, but it means that if they do, they are more likely to suffer severe symptoms or to die from coronavirus-related symptoms. The NHS website separates people at enhanced risk into two categories: those who are at high risk (clinically extremely vulnerable) and those who are at moderate risk (clinically vulnerable). https://www.nhs.uk/conditions/coronavirus-covid-19/people-at-higher-risk-from-coronavirus/whos-at-higher-risk-from-coronavirus/

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Those who are considered to be at high risk include people who:

- have had an organ transplant
- are having chemotherapy or antibody treatment for cancer, including immunotherapy
- are having an intense course of radiotherapy (radical radiotherapy) for lung cancer
- are having targeted cancer treatments that can affect the immune system (such as protein kinase inhibitors or PARP inhibitors)
- have blood or bone marrow cancer (such as leukaemia, lymphoma or myeloma)
- have had a bone marrow or stem cell transplant in the past 6 months, or are still taking immunosuppressant medicine
- have been told by a doctor they you have a severe lung condition (such as cystic fibrosis, severe asthma or severe COPD)
- have a condition that means they have a very high risk of getting infections (such as SCID or sickle cell)
- are taking medicine that makes them much more likely to get infections (such as high doses of steroids)
- have a serious heart condition and are pregnant

People who are considered to be at moderate risk include people who:

- are 70 or older
- are pregnant
- have a lung condition that's not severe (such as asthma, COPD, emphysema or bronchitis)
- have heart disease (such as heart failure)
- have diabetes
- have chronic kidney disease
- have liver disease (such as hepatitis)
- have a condition affecting the brain or nerves (such as Parkinson's disease, motor neurone disease, multiple sclerosis or cerebral palsy)
- have a condition that means they have a high risk of getting infections
- are taking medicine that can affect the immune system (such as low doses of steroids)
- are very obese (a BMI of 40 or above)

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It will be immediately apparent from these lists that a number of protected characteristics under the Equality Act are potentially engaged, in particular disability, age and pregnancy.

For Equality Act purposes:

- Age is defined by reference to a person being "of a particular age group";
- Disability is defined as a physical or mental impairment which has a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities. It is important to bear in mind here that "normal day-to-day activities" relate to a person's ability to perform normal activities of daily living (shopping, walking, travel, social interaction, personal care and the like) rather than activities specific to the workplace. In addition, certain medical conditions are deemed to be a disability, regardless of impact on activities. These include cancer, HIV and multiple sclerosis.

The next step is to consider the advice which is currently being given to people in these "at risk" groups. As at the date of writing (although the NHS advice was due to be reviewed on 20 May 2020), the current advice is as follows:

For people in the "high risk" group, the current advice remains that these people should be shielding. This includes:

- stay at home at all times – do not leave your home to buy food, collect medicine or exercise
- stay at least 2 metres (3 steps) away from other people in your home as much as possible
- get food and medicine delivered and left outside your door – ask friends and family to help or register to get coronavirus support on GOV.UK if you need it

For people in the "moderate risk" group: 'If you're at moderate risk from coronavirus, it's very important you follow the advice on social distancing. This means you should stay at home as much as possible. But you can go out to work (if you cannot work from home) and for things like getting food or exercising.

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What is the potential impact of this in terms of discrimination in the workplace?

Clearly, people who have been advised to engage in "shielding" are still being told that they should not leave their homes at all, which would appear to preclude a return to the workplace. Those in the "moderate" category are effectively being told that they should be extra cautious in following the social distancing advice which applies to the population at large. However, depending on their personal and health circumstances, they may have to be more cautious than others in terms of their potential exposure to the virus, because of its potential impact on them arising because of their health condition. They may, for obvious reasons, be reluctant to return to a working environment (including a commute to and from work) if this increases their potential exposure to covid-19.

Some practical examples of problems which this may present in the workplace.

It is not difficult to envisage how issues might manifest themselves for employers requiring their employees to return to work. Examples of problematic cases might include:

- Employees with known disabilities which have already been accommodated. There may be employees whose disabilities are already known, and in respect of whom reasonable adjustments have already been agreed. However, those adjustments may no longer be practicable. For example there may be an employee with mobility issues who is normally allowed to work in a particular area of the workplace, potentially with special equipment or facilities, but where those usual arrangements cannot be maintained because of new social distancing arrangements;

- Employees with previously unknown disabilities which have now become an issue, or with a previously known disability which did not require adjustments. It is not difficult to envisage that an employee with a condition such as diabetes or asthma, performing a sedentary role, may not previously have felt the need to raise their

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disability with their employer, or may have made their employer aware of it but not required any specific adjustments. However, such an employee may now have heightened anxiety about their ability to return to a working environment;

- Employees who are not themselves within an "enhanced risk" group, but who live in a household with, or have significant caring responsibilities for, people who do fall within such a group. Again, such employees may be reluctant to expose themselves to risk of infection which other employees would be prepared to tolerate;

- Employees who, by virtue of being over 70 or being pregnant, fall into the "moderate risk" group.

- Employees who have significant caring responsibilities for school-age children and whose children are not yet able to return to school.

It is of course right to say that any return to the physical workplace is predicated on the assumption that employers have in place suitable arrangements to maintain social distancing and to protect the health, safety and welfare of all employees. This obligation arises from the Health & Safety at Work Act 1974 (discussed in Jennifer Lanigan's article), and is reinforced by current government guidance. However, given the enhanced risk which continues to apply to significant sections of the population, it is likely that there will be instances where even if best practice is followed and social distancing measures are put into place, in consultation with unions or employee representatives, to protect the workforce, there will be employees for whom the risk of returning to work appears to be unacceptably high.

How, then, is an employer to avoid those instances turning into employment disputes? As ever in discrimination cases, there is a balance to be struck between the reasonable and proportionate need of the employer to have its work done, and the rights of the individual employee not to suffer less favourable treatment linked to a protected characteristic. The extent and reasonableness of the employer in seeking to find ways to circumvent the problem will almost invariably, in practical terms, be a factor a tribu-

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nal will look at in deciding whether or not unlawful discrimination has taken place.

The ultimate sanction available to an employer if an employee refuses to return to work is disciplinary action or dismissal. However, it will be apparent from the discussion above that in the case of an employee who is unable or unwilling to return to work for reasons related to covid-19, the Equality Act may well be engaged. If the reason for the refusal to return is that the employee has an underlying health condition which puts them in an enhanced-risk group of the population, then dismissal or disciplinary action may potentially constitute either direct discrimination or discrimination arising from disability. If the reason is that they live with or care for someone who falls within such a group, then it may be argued to be direct discrimination on grounds of association with someone with a disability (association does not apply in cases of "discrimination arising from disability" under Section 13). If the reason is that they are pregnant, then there may be discrimination on grounds of pregnancy. If the reason is that they are over 70, then there may be discrimination on grounds of age. If the reason is that they have to care for children who cannot attend school, then it may be argued to be indirect discrimination on grounds of sex.

Direct discrimination cannot be justified. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim. A similar justification defence arises in relation to discrimination arising from disability. However, it is unlikely that any employer would succeed in arguing proportionality without having first demonstrated that all reasonable steps had been taken to comply with the duty to make reasonable adjustments to prevent the employee being placed at a disadvantage by his or her disability.

The first step should always be consultation with the employee, in order to establish what their concerns are and what steps could be taken to overcome them. Some concerns will arise from physical features of the workplace, some from social interaction at work, some from the nature of the duties being carried out (for example the extent of any face-to-face communication with members of the public), and some from the arrangements ancillary to the work itself (for example the commute to and from work).

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By understanding those concerns, it is more likely that informed consideration can be given to whether they can be addressed.

When considering what adjustments are or are not "reasonable" to make, a tribunal will usually consider several factors which, although not referred to explicitly in the Equality Act, existed within the equivalent provisions of the Disability Discrimination Act 1996 which preceded the Equality Act. These will include:

- The extent to which taking the step would prevent the disadvantage (the effectiveness of the step);
- The extent to which it would be practicable to take that step;
- The financial and other costs which would be incurred in taking the step, and the extent of any disruption it would cause to the employer's activities;
- The availability to the employer of financial or other assistance in taking the step;
- The nature of the employer's activities and the size of its undertaking.

Many of these factors will clearly be "live issues" in relation to an employer's response to concerns over Covid-19. Any adjustments are likely only to be required for a relatively short period (of weeks or months) during the pandemic crisis. This may mean that employers can be more flexible (eg in relation to working hours or shift patterns) than they would be in considering permanent arrangements, but it may also mean that the costs and disruption associated with any measures could be disproportionate relative to their benefit. The nature and size of the employer's undertaking is also likely to have a direct correlation to how much it requires the physical presence of employees in the workplace.

In recent information published online about the impact of covid-19 on business (https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/conditionsanddiseases/articles/coronaviruscovid19roundup/2020-03-26), the Office for National Statistics broke down businesses into four broad categories, whilst making the point that these categories did not adequately reflect the wide variety of activities within each industry sector. Overall, 28% of employees are fur-

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loughed, and the number working from home has risen from 27% in 2019 to 47% in 2020:

- "Key worker" related industries still operating largely in person, including healthcare industries, (44% of the workforce). In that sector, 16% of employees are furloughed and the number working from home rose from 21% in 2019 to 39% in 2020;
- Business service industries largely operating from home, including ICT and professional services, (28% of the workforce). In that sector, 21% of employees are furloughed and the number working from home rose from 37% in 2019 to 64% in 2020;
- Industries largely shut down in response to government guidance, including restaurants and entertainment with relatively few opportunities to work from home (11% of the workforce). In that sector, 72% of employees are furloughed and the number working from home rose from 20% in 2019 to 34% in 2020;
- Industries being encouraged to go back to the workplace since 10 May 2020, including manufacturing and construction, (16% of the workforce). In that sector, 38% of employees are furloughed and the number working from home rose from 23% in 2019 to 30% in 2020.

It is apparent from these figures, broad though they are, that in some sectors, alternative arrangements such as working from home are more readily achievable than in others. However the number working from home has increased in all categories. That is perhaps not surprising. Anecdotally, many employers and employees have been surprised with how much work can be achieved, at least on a temporary or modified basis, remotely. The widespread availability and effectiveness of remote communication tools such as remote access to office servers, and meetings software such as Zoom, Skype, GoToMeeting and Teams has meant that a good deal of both internal and client- or public-facing operations have been possible with the workforce working remotely. That is likely to continue to be the case in some sectors, and there may be a greater scope for ongoing flexibility within those sectors.

In other sectors, manufacturing, construction and leisure/entertainment businesses being obvious examples, remote working is less widespread and likely to be less effective. It is these industries, which often require

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physical presence of staff in the workplace as a core component of the activities, which are likely to experience greater difficulties in accommodating staff who do not yet wish to return. Even in these sectors, however, there may be adjustments which could be made to working arrangements to allow employees to return to work, even if they fall within "enhanced risk" groups.

Employers should be prepared to give careful and creative consideration to what adjustments could be made, learning from the experience of what has happened so far during lockdown. Examples could include:

Physical arrangements involving premises, over and above the general "social distancing" measures being put in place for the majority of the workforce:

- Separate access routes to the premises for those who fall within vulnerable groups, and separate working and/or washing and eating areas for those people, to allow greater than usual social distancing;
- Making reserved parking spaces available to those who are particularly vulnerable and do not wish to use public transport;
- Additional cleaning or "deep cleaning" measures.

Arrangements involving equipment, software or facilities:

- Additional software and technological equipment to allow people to work remotely;
- Additional personal equipment such as headsets and telephones to allow people to avoid sharing equipment with others;
- Additional personal protective equipment, such as overalls, gloves, visors or face masks, particularly for those who may be more vulnerable to the coronavirus;

Adjustments to duties, hours or shifts:

- Staggered shift patterns to allow some workers to travel to and from work, and carry out their work, at quieter times;
- Reallocating duties on a temporary basis between staff, to allow vulnerable staff members to work in home-based or non-public-facing roles;
- Modifying performance-related pay arrangements or performance

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targets where an individual's vulnerabilities restrict their ability to work;

- Allowing certain activities to take place remotely, for example training and supervision, meetings, appraisals, interviews, grievance and disciplinary hearings.

Adjustments to policies, procedures etc:

- Modifying, varying or disapplying policies in relation to sick leave, sick pay, attendance management, special leave, annual leave for people who are shielding, self-isolating or unable to attend the workplace for health reasons.

With the likely forthcoming increased availability of privately supplied antibody-testing kits, it may be that some employers will be considering obtaining testing kits and/or facilities, and enabling, encouraging or requiring employees to use them, particularly in the presence of any symptoms. Making testing available to staff in or near the workplace may well prove to be a useful tool in helping to ensure that staff members are in a position to return promptly to work if they are tested with a negative result. However, care needs to be taken to respect employees' right to privacy in relation to matters relating to their health, and it will not generally be permissible to require an employee to be subject to any medical examination or assessment against his or her wishes, or to share with his or her employer the outcome of any medical appointment or assessment. Care needs to be taken to consult the employee's contractual terms and seek advice where appropriate.

In addition, caution needs to be taken in terms of redundancy selection exercises. It is apparent that the difficult economic circumstances brought about by Covid are likely to continue for some considerable time after lockdown ends. However, any selection criteria, even if ostensibly on objective grounds such as performance against targets or attendance, have the potential to impact disproportionately on people who fall within "enhanced risk" groups such as those over 70, those with underlying health conditions, pregnant women, or indeed women with school-aged children.

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In relation to any dismissal, particularly where health is concerned and arguably even more so in relation to any potential disability-related issues, it is a well-established principle of good industrial practice that the employer should take all reasonable steps to consider alternatives to dismissal before proceeding to dismiss the employee. That will include having given consideration to reasonable adjustments in the case of a disability.

It is also worth pointing out that the Prime Minister stated on 11 May 2020 that employers should not expect parents without childcare support available to return to work as it was an "obvious barrier to their ability to get back to work". This was not stated expressly in relation to those at enhanced risk from the coronavirus, but seems likely to apply by extension. Whilst this public statement does not form the part of any legislation or official guidance, and cannot bind employers, it is something which could be taken into account by a tribunal when considering whether it is fair or unfair in all the circumstances of a particular case to dismiss.

On that issue, it is worth bearing in mind that the Chancellor announced on 12 May 2020 that the Coronavirus Job Retention Scheme (the furloughing scheme) would now be extended until the end of October 2020. Under that scheme, which was discussed in Daniel Wand's article, Coronavirus Job Retention Scheme Extended (http://www.4kbw.co.uk/wp-content/uploads/Employment-Law-Update-May-2020-V2.pdf), the government will pay 80% of a furloughed employee's salary or wages up to a maximum of £2,500 per month. If an employee is not willing to return to the workplace and is unable to perform their work from home, it may be worth considering whether or not he or she meets the criteria to be furloughed. Obviously the requirements of the furlough scheme are that there should be no work for the employee to do. However it may be that with temporary restructuring, such as the temporary re-allocation of that employee's duties to another existing employee who is able to attend the workplace, a decision can be taken that the scheme applies. This would have the advantage of retaining the employee as an employee until such time as there is work available for them to do. To move to dismissal without considering this possibility might be regarded as potentially unfair or discriminatory.

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Clearly, in unprecedented times which look set to have a long-term adverse impact on the economy, employers will be anxious to become operational as swiftly as possible. However, the point is being made widely that getting out of lockdown is far more complex than getting into it. It is likely that employment tribunals will be sympathetic to the difficulties which employers face, but will expect them to be flexible and reasonable towards individual employees whose particular circumstances (including their age, health or family responsibilities or circumstances) made them more vulnerable than others to the effects of the coronavirus. In addition, employers are unlikely to want to spend the months and years following the end of lockdown occupied with tribunal litigation rather than with rebuilding their businesses. If in doubt, it may be wise to err on the side of caution.

22 May 2020

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