RWK Goodman

HR Hub – Legal Update

29.06.23

Malcolm Gregory, Partner

malcolm.gregory@rwkgoodman.com

Mobile: 07789 172989

Adrian Henderson, Associate

adrian.henderson@rwkgoodman.com

Mobile: 07917 904776

Data Subject Access Requests

On 24 May 2023, the Information Commissioner's Office (ICO) published new guidance for employers on how to deal with a Subject Access Request (SAR).

The ICO reported receiving over 15,000 subject access complaints between the period April 2022 and March 2023 and noted the guidance comes in response to the fact that many employers are misunderstanding the nature of SARs or underestimating the importance of responding to requests.

Do we have to comply with a SAR if we've already provided documents as part of an Employment Tribunal claim?

The guidance clarifies the position where an employer receives a SAR during Tribunal proceedings. The ICO confirms that even if an employer has already disclosed information through the disclosure process, they must still comply with a SAR. It is important for employers to be aware that disclosure in Tribunal proceedings and disclosure as part of a SAR exercise, will differ.

What if we come to an agreement with the employee?

The guidance confirms that an individual's right of access cannot be overridden by a settlement or non-disclosure agreement. It goes on to clarify that if a settlement agreement contains provision for an individual to waive their rights of access, or tries to limit them, it will likely be held unenforceable.

What about social media platforms?

Where an employer uses social media platforms for business purposes, they should include these platforms in their searches.

Do we have to search CCTV footage?

If a worker requests CCTV footage, employers should review and redact third party information, i.e. the faces of other people captured in the footage. If this is not possible, employers should provide stills of the footage with other people's identities redacted.

Top tips for dealing with SARs

1. Produce a data map which traces the use of data from its source to its destination. This will allow you to easily view where different types of data are stored in your organisation.

2. Review your IT infrastructure and ensure you are able to search for personal data across different mediums.

3. Train managers and HR staff to ensure they can identify a SAR. Reminder, the individual does not need to use the words Subject Access Request!

Vicarious Liability

A recent Supreme Court case has clarified the position for employers regarding vicarious liability.

The general position is that an employer is vicariously liable for acts carried out by an employee in the course of their employment. A two-stage test is applied to determine whether an employer is vicariously liable.

1. Is the relationship between the employer and the tortfeasor akin to employment?

2. Is the wrongful conduct so closely connected with acts that the tortfeasor was authorised to do that it can fairly and properly be regarded as done by the tortfeasor whilst acting in the course of their employment or quasi-employment?

Trustees of the Barry Congregation of Jehovah's Witnesses v BXB

Facts

The Claimant was a female member of the Barry Congregation of Jehovah's witnesses. The Claimant was raped by an elder of the congregation, Mr Mark Sewell at his home. The patties were not engaged in activities related to the congregation at the time, but had become close friends, together with their spouses and had frequently socialised together.

The Claimant brought a claim against the Barry Congregation on the basis they were vicariously liable for the actions of Mr Sewell.

Decision

The High Court and Court of Appeal upheld the Claimant's claims, finding that the trustees of the Barry Congregation were vicariously liable. The trustees of the congregation appealed the decision.

On appeal, the Supreme Court applied the two-stage test as above. As for the first limb, the court held that the relationship between the Congregation and Mr Sewell was akin to employment. This was on the basis that Mr Sewell was carrying out work on behalf of, and

assigned to him, by the organisation. Elders were required to follow the rules of the organisation and there was a process by which individuals could be made or removed as elders.

As to the second limb, the Supreme Court held that Mr Sewell's actions were not so closely connected with acts that he was authorised to do as an elder. The court held that Mr Sewell did not rape the Claimant whilst carrying out his activities as an elder, but at his own home at a time when he was not exercising control over the Claimant in his position as an elder. The court held the Claimant was in Mr Sewell's home because of her close personal friendship with him.

Whilst the court accepted it was likely the Claimant and Mr Sewell would not have become friends had it not been for Mr Sewell's position as an elder, the court concluded this was not sufficient to satisfy the close connection test and therefore the Claimant's claim fails.

Comment

This case has provided helpful clarification for employers on the boundaries of vicarious liability. Specifically, the judgment confirms that employers will not be liable for acts which are not closely connected with the activities a wrongdoer is authorised to do.

Statutory defence

An employer has a defence if it can show it took all reasonable steps to prevent the alleged perpetrator from doing the alleged act of discrimination or from doing anything of that description.

Practical tips for employers

1. Ensure all staff receive training on the organisation's expected standards of behaviour. Ensure this training is regularly refreshed.

2. Ensure the organisation has robust policies regarding acceptable behaviour, use of employer resources and confidentiality. All staff should be made aware of these policies and where they can find them.

3. Deal with any existing matters promptly.

ACAS Guidance: Reasonable adjustments for mental health

ACAS has issued new, non-statutory guidance to support employers and employees in respect of reasonable adjustments for mental health at work.

The guide suggests that if an employee splits their time between the workplace and working from home, employers need to consider how adjustments can be put in place for both areas.

What reasonable adjustments can be made for mental health?

ACAS have given a range of practical measures which employers could consider when implementing reasonable adjustments:

1. Changing someone's role and responsibilities

- Reviewing tasks or deadlines to help someone have a reasonable workload
- Breaking down work into short term asks to reduce the complexity of someone's work and to provide structure to the working day
- Reviewing particular responsibilities that an employee finds stressful, for example, customer facing work
- Moving an employee into a different role of department

2. Reviewing working relationships and communication styles

- Modifying supervision to provide regular check-ins, prioritising work and creating structure in the working day
- Agreeing methods of preferred communication to reduce anxiety, for example, avoiding spontaneous phone calls
- Clearly identifying what working and communication styles are preferred by the employee

3. Changing the physical working environment

- Relocating an employee's workspace to reduce sensory demands
- Providing rest areas away from the main staff area to allow an employee time away from social demands
- Providing reserved parking to reduce the stress of commuting
- Allowing an employee to work from home to manage distractions

4. Policy changes

- Offering an extended phased return to support someone to build up hours gradually
- Being flexible with absence "trigger points" to ensure someone is not disadvantaged by taking leave when they are unwell

Right to unpaid carer's leave

The Carer's Leave Act 2023, which received royal assent on 24 May 2023, introduces a new legal entitlement for employees to take up to one week's unpaid leave from work in any 12-month period, to provide or arrange care for a dependant.

According to Carers UK, more than 1 in 7 people in any workplace is a carer. Currently, employees who require time off for caring responsibilities must either take annual leave, or unpaid time off to deal with emergencies. The issue with the latter is that an employee cannot take this time off to deal with known commitments, for example, a scheduled hospital appointment. The new right will be available from an employee's first

day of employment and will allow employees to take unpaid carer's leave for planed and foreseen caring commitments.

The leave can be used for caring for a spouse, civil partner, child, parent, someone living in the same household as the employee, or for a person who reasonably relies on the employee for care.

The leave must be used for caring for a dependant who has a "long-term care need". This means that they must:

a. have an illness or injury (physical or mental) that requires, or is likely to require, care for more than three months;
b. have a disability for the purposes of the Equality Act 2010; or
c. require care for a reason connected with their old age.

Employees taking carer's leave will be protected from any detriment or dismissal as a result of their having taken carer's leave. If an employer dismisses an employee for a reason connected with their taking carer's leave, this will be automatically unfair.

There is no requirement for employees to evidence their entitlement to carer's leave and instead, employees will be required to self-certify their absence.

Further regulations are expected to define and limit circumstances as to how the leave can be taken and whether particular activities are to be treated as "providing or arranging care", or not.

It is not yet known when the law will come into effect, however it is not expected to be before April 2024.

Right to redundancy protection

Following a government consultation in 2019, evidence revealed that an estimated 54,000 women per year felt they had to leave their jobs due to pregnancy or maternity discrimination.

Currently, an individual on maternity leave (or shared parental or adoption leave) takes priority in the search for suitable alternative employment if their role is to be made redundant. Failure to do so may result in the employee bringing a claim of unfair dismissal on the basis the dismissal was not procedurally fair.

The Protection from Redundancy (Pregnancy and Family Leave) Act received royal assent on 24 May 2023. Under this law, the period for preferential treatment is extended to pregnancy (before maternity leave) and for a period following the parent's return to work.

The Act permits the Secretary of State to make regulations to provide further details on the protection. It is expected that the period of protection will run from when a woman tells their employer they are pregnant (or have been matched with a child for cases of adoption) until 6 months after returning to work.

Neo-natal care

The Neonatal Care (Leave and Pay) Act 2023 also received royal assent on 24 May 2023. This Act provides up to 12 weeks paid neonatal care leave for employees with caring responsibilities for babies who spend at least one week in neonatal care.

Employees will be able to utilise this leave from day one of their employment; however, the leave must be taken within 68 weeks of the child's birth.

Employees will also benefit from a statutory right to neonatal pay. This will be available to employees who have 26 weeks' continuous service and who earn at least the lower earnings limit.

Further regulations will set out the duration and conditions of this type of leave. It is expected this law will come into effect around April 2025.

General Case Law Update

1. When is a disability likely to last for 12 months or more?

Morris -v- Lauren Richards Ltd [2023] EAT

Facts

The Claimant suffered from anxiety for three and a half months up to her dismissal but did not have a significant history of mental health issues. Her anxiety began when she suffered a loss of confidence and became overwhelmed at work. The Claimant was dismissed and the Claimant brought a claim of disability discrimination.

Decision

The ET concluded that the fact the Claimant's anxiety related to workplace issues and was therefore unlikely to persist following termination of her employment, meant that her condition was not long term and therefore was not classified as a disability under the Equality Act 2010.

The Claimant appealed to the EAT. The EAT held that the ER had erred in considering events that had taken place after the act of discrimination (her dismissal) and instead the question should have been, whether the Claimant's condition "could well" continue for a period of 12 months or more without reference to the dismissal. The EAT held that even if the effect of a condition is relatively short term, if it had been present prior to the act of discrimination, an ET is entitled to find that it amounts to a disability because it "could well" last for 12 months or more.

The case was remitted to the ET for a re-hearing on this point.

Comment

This case highlights the low threshold applied to whether a condition is likely to last for 12 months or more. It would be sensible for employers to seek medical advice at an early stage to help make this assessment and whether the individual is afforded protection under the Equality Act 2010.

2. Discrimination: Sole decision-makers or influenced by others?

Alcedo Orange Ltd v Ferridge-Gunn [2023] EAT

Facts

Shortly after the Claimant started employment, concerns were raised about her performance by her line manager and the company's managing director. Soon after, the Claimant informed her line manager she was pregnant.

A meeting was held between the Claimant and her line manager where improvements in the Claimant's performance were noted, however concerns remained.

The Claimant took 2 days sick leave for morning sickness, during which time the line manager discovered the Claimant had failed to process some documents. The line manager told the managing director that the Claimant had misled the managing director about her performance (although this was unfounded as the failure coincided with the Claimant's sickness absence).

The Claimant returned to work. Her line manager was unsympathetic to the Claimant's circumstances, asking whether the Claimant's morning sickness was "contagious" and asking how much time she would need off.

The Claimant's employment was terminated the following day on grounds of poor performance.

The Claimant brought a claim of pregnancy discrimination.

Decision

The ET upheld the Claimant's claim on the basis her line manager was influenced by the Claimant's pregnancy when suggesting to the managing director that the Claimant had misled him about her performance. The ET held this was a key factor in the managing director's decision to dismiss.

The Respondent appealed the decision noting that the Tribunal had not been referred to the case of *Reynolds* which confirmed the employee who did the discriminatory act must have been themselves motivated by a protected characteristic. This case also held that an act cannot be discriminatory based on someone else's motivation.

The EAT held that the ET was wrong to find that a pregnant employee's dismissal was discriminatory when the ET had not made clear findings as to whether the decision to dismiss was made by a sole-decision maker, or whether the sole-decision maker was influenced by others.

Comment

This case provides a useful reminder of the Court of Appeal's decision in *Reynolds*. The decision maker must have themselves been motivated by the discriminatory reason. It is not enough for a decision maker's decision to be discriminatory based on someone else's motivation. That said, employers should be wary that there can be joint-decision makers and therefore those who influence a decision-maker could also be held liable.

Future Developments

Consultation on TUPE, Non-compete restrictions and the Working Time Regulations)

- The Government recently published a policy paper and consultation entitled "Smarter regulation to grow the economy". The consultation launched on 12th May 2023 and closes on 7th July 2023.

- The proposed reforms aim to "cut red tape for businesses whilst safeguarding the rights of workers" and propose a number of changes to Working Time Regulations 1998 and the Transfer of Undertakings (Protection of Employment) Regulations 2006.

Non-compete restrictive covenants

- Proposed reform to limit the duration of non-compete restrictive covenants to a period of 3 months. This will be limited to non-compete restrictions only and will not extend to other types of restrictions, for example non solicitation clauses.

Working Time Regulations

- Introduction of rolled up holiday pay, to be calculated at 12.07% and to be paid to workers with every payslip.

- Merging of "basic" and "additional" statutory leave entitlements into one pool of statutory leave of 5.6 weeks to be governed by one set of rules.

- Reforms to the calculation of holiday pay to reduce the "administrative burden and complexity of calculating holiday pay".

- Removing the requirement for businesses to keep records of employee working hours for almost all members of the workforce.

TUPE

- All small businesses (those with less than 50 employees) will be permitted to consult directly with employees if there are no existing employee representatives in place, rather than having to elect employee representatives for the purpose of consultation.

- Businesses of any size to be able to consult directly with employees where there are no existing employee representatives where a transfer of fewer than 10 employees is proposed.