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***COVID-19 and the Return to Work:
An Epidemic of Claims?***

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The Question

What are the obvious legal issues that shall arise as a result of any (re-)commencement of the return to work?



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Get Thee Back To Work



Government Suggestion of Indemnity

- Steve Barclay, the chief secretary to the Treasury, said that he was “*keen to get people back in the office*”, adding: “*We think that’s best for the economy, to get back to normal as part of our recovery.*”
- Government reported to be considering offering a legal indemnity to employers to encourage more wholesale return (see Times 31/08/20)
- Seems unlikely and legal advice is that this would be ‘unwise’ and in invitation for employees to sue their employer

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Or not...



U Turn?

Michael Gove on 22/09/20 said there would now be “*shift of emphasis*”, also revealing the target for 80 per cent of civil servants to be in the office had been ditched.

“If it is possible for people to work from home, then we would encourage them to do so”



Yet Return Will Come...



Overview

1. The issue of Whistleblowing
2. The issue of Health and Safety Disclosures
3. The issue of Maternity/Sex Discrimination in the operation of Furlough etc.





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1. WHISTLEBLOWING



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Whistleblowing in 2 minutes

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- Workers (not limited to employees) 43K extension to the meaning of "worker" & "employer"
- A "qualifying disclosure", 43A & 43B
- Conversion into *protected* disclosure if made in accordance with respective requirements as to recipient:-
 - Employer/person responsible for relevant failure/ in the course of obtaining legal advice 43C, 43D, 43E (crown employees)
 - Regulator, 43F, rb that information disclosed, and any allegation, are substantially true
 - Anyone else 43G, gateways & reasonableness 43H exceptionally serious & reasonableness requirement
- = Protection for worker against
 - Detriment 47B
 - By the employer, employer's other workers, employer's agents 47B
 - Dismissal 103A

Disclosure of Information: ERA 43B(1) LITTLETON

- any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –
 - (a) that a criminal offence has been committed, is being committed or is likely to be committed;**
 - (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject**
 - (d) that the health or safety of any individual has been, is being or is likely to be endangered,**
 - (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.**

= "relevant failure"
- "public interest", nb *Ibrahim*: broad approach to showing rb

Legal Obligations, Criminal Offences

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Common law & contractual duties of care owed by employer to employee

Health and Safety at Work Act 1974, s 2(2)(a), s33;

Management of Health and Safety at Work Regulations 1999;

COSH 2002 (esp reg.2) – HSE's untested view is that reg. 2 extends to viruses;

PPE Regulations 1992, regs 4, 7;

Implied term of trust and confidence.

“legal obligation”

- Compliance with non statutory guidance is *not* a legal obligation: cf ***Butcher v Salvage Association***
- But failing to comply with guidance *may* be a basis for a (reasonable) belief that duties of care *have* not been or *are* not being complied with
- Or are likely to be not complied with in the future....
- See ***Elysium*** (later)



“likely to...”

- Was the likely relevant failure reasonably believed to be more probable than not? ***Kraus v Penna*** [2004] IRLR 260, EAT.

...the information disclosed was only that the company 'could' breach employment legislation and would be vulnerable to claims for unfair dismissal. At its highest, therefore, Mr Kraus's belief was limited at this early stage to the possibility or the risk of a breach of employment legislation, depending on what eventually took place.

....Mr Kraus did not himself believe that the information he disclosed to Mr Bolton tended to show that a failure to comply with a legal obligation was 'likely', in the sense of 'probable' or 'more probable than not'

- ***Tarrant and Tarrant v 3L Care Ltd and others*** Case No. 1300128/2018, 9th July 2019 (see para 381 – argued apply ***SCA-v-Boyle*** and rejected)
- Is ***Kraus*** correct?

Employer's subjective view as to whether worker made a disclosure

- Subjective: Irrelevant that recipient of disclosure did not *realise* that what the whistleblower had said or written amounted to a protected disclosure: ***Beatt***
- Objective: ***Riley v Belmont Green Finance Ltd t/a Vida Homeloans*** ...kind of specificity required, except in an obvious case (which this was not) to alert the person receiving the information disclosed to a breach or potential breach of a legal obligation

A disclosure of information?

- ***Kilraine***: No rigid dichotomy between 'information' and 'allegations'
 - Expressions of opinion may contain disclosures (e.g. ***Western Union***);
 - And so may questions: ***Simpson***
 - A refusal to work?
- Substance not form
- sufficient factual content and specificity such as is capable of tending to show one of the matters listed in sub-s (1)
- Context
- Aggregation of statements to form disclosures ***Robinson***
- Matter for evaluative judgment by a tribunal in the light of all the facts of the case.

Does the worker have to explain what they think the relevant failure is as well as giving information as to the (apprehended) facts?

- No requirement to make allegations: **Korashi**.
- **Fincham** “*must ... be some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the [employee is] relying.*”
- Sometimes signposting is required: general complaint about “*working practices and procedures*” **Riley v Belmont**
- But not if it is obvious in the context: **Western Union/ Bolton School**.
- Distinction is to be made between spelling out the legal obligation within the disclosure and in the subsequent ET proceedings: **Riley**

Wrong but reasonable belief as to legal obligation/crime? LITTLETON

- ***Babula v Waltham Forest College*** : a worker may have a reasonable belief as to the existence of a legal obligation even if that belief turns out to be wrong.
- ***Kilraine v London Borough of Wandsworth***: absence of anything in K's case or witness statement to suggest that she had a relevant legal obligation *of any kind* in mind when making her 4th disclosure
- ***Elysium Healthcare No 2 Ltd v Ogunlami***: more generous (reading between lines to take a disclosure of a breach of employer's policy to be a breach of contract)?

Rights and remedies

- S.47B- right not to be subjected to detriment by:–
 - Employer
 - A co-worker
 - The employer's agent
 - NB extended definition of worker & employer for these purposes.
 - ***Osipov***
- S103A, automatically unfair dismissal for reason or principal reason: nb interim relief
- S.105 (2), (6A), selection for dismissal for redundancy where s.103A reason applies

Whistleblowing – Reason for Treatment

- Distinct for detriment and dismissal
- “Severable” conduct
- ***Bolton School v Evans*** [2007] IRLR 140
- ***Panatiyou v Chief Constable of Hampshire Police*** [2014] IRLR 500
- Risk of abuse: ***Riley v Belmont Green Finance Ltd t/a Homeloans*** [2020] UKEAT/0133/19 “*In failing to set out why...the way in which the Claimant disclosed information to the Respondent was separable from the disclosures themselves, the Tribunal erred in law.*”



Reason for Treatment - Guidelines

- “Ordinary” unreasonable behavior not sufficient
- Set out basis of distinction;
- Robust and cogent evidence;
- Challenge your client.





- A employed by B
- B operates an office environment where some but not complete social distancing is possible
- B says will operate temperature checks
- A informs B that he does not consider that this is sufficient and states he's not coming to the office as "*it's just not safe*"
- B dismisses A and states reason is not any disclosure but his refusal to obey a reasonable instruction
- Discuss....



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2. HEALTH AND SAFETY



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Health and Safety Cases

- Ss. 44 & 100 ERA 1996: Detriment and Dismissal
- Not mutually exclusive: plead in alternative
- List of scenarios – ss. 44(1) and 100(1)
- Encourage use of H&S Representatives/Committee unless:
 - None exists;
 - Not reasonably practicable;
 - Reasonably believed serious and imminent danger

S44(1)(c) ERA

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

S44(1)(d) ERA

in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work,

S44(1)(e) ERA

in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

to comply with Directive words “**or to communicate these circumstances by any appropriate means to the employer.**” added.
Acheson (see later)

Case Law Guidance

- Applies to health and safety representative unless actions obviously outside scope of their role:
Goodwin-v-Gabletel [1997] IRLR 665
- Can apply to disclosures of third party risks (where the wording of the statute permits):
Masiak-v-City Restaurants [1999] IRLR 780

Guidance (Cont)

- Industrial action does not amount to ‘reasonable means’: ***Balfour Kilpatrick-v-Acheson*** [2003] IRLR 683
- Pattern of work that is lawful as regards health and safety law (rostered 9 consecutive nights) does not mean cannot have a reasonable belief that was harmful: ***Joao-v-Jury’s Hotel*** [2011] UKEAT/0210/11

Guidance Cont (2)

- If reasonable belief made out then the employer cannot dismiss on the basis that it disagrees unless it is able to show the employee's position is unreasonable: ***Oudahar-v-Esporta*** [2011] IRLR 730.





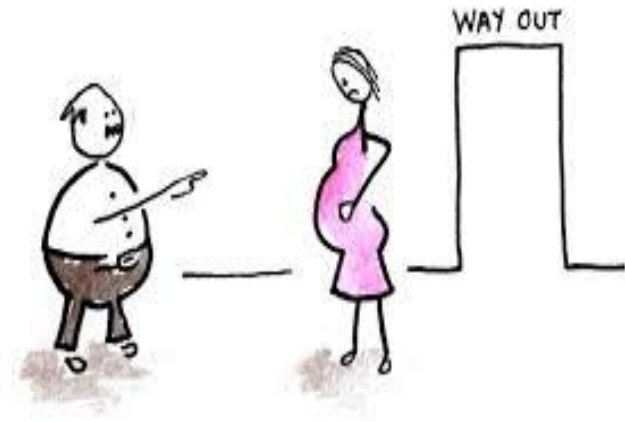
- Same facts as Case Study on whistleblowing
- Same outcome?





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3. MATERNITY/SEX DISCRIMINATION



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Protected Characteristics

- Gender (s11 Equality Act 2010 (“EA”))
- Pregnancy and maternity (s18 EA)



S18 EA

(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —

(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of it.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

NB ‘Protected period’ is from pregnancy to end of maternity leave

Prohibited Conduct

- Direct discrimination (s13)
- Indirect Discrimination (s19)
- Unfavourable treatment (s18(2-4))



Unfavourable?

Williams-v-Swansea [2019] ICR 230

“

28. It is necessary first to identify the relevant “treatment” to which the section is to be applied. In this case it was the award of a pension. There was nothing intrinsically “unfavourable” or disadvantageous about that... had he been able to work full time, the consequence would have been, not an enhanced entitlement, but no immediate right to a pension at all...

”



- Employer calls employees back to the office from Furlough
- Effect is seen that not calling back pregnant/maternity absent and part time workers
- Stated reason is does not wish to expose them to Covid-19
- Discuss....



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4. Practical Steps



Surge in Reports

- Protect indicate huge increase in disclosures to its confidential reporting line post lockdown:
 - Furlough abuse
 - Unsafe working environment
 - Unfair treatment of maternity absent employees.



Reasons For Surge

- Per <https://www.lexisnexis.co.uk/blog/covid-19/covid-19-whistleblowing-and-internal-investigations>

“anecdotal evidence that the lockdown has emboldened employees, whilst away from direct supervision in the office, to make reports about a range of other issues, from suspicions of fraud or financial wrongdoing to allegations of harassment.”

Staff

- Writing
 - Raise or document concerns in writing
 - Identify facts, failure and public interest;
 - Contemporaneous record of rationale;
- Official channels;
- More stringent tests if going outside employer;
- Discuss with trusted colleague, trade union or legal advisor
- Removal/discussion of documents – exercise great caution



The Need for Balance

- Excessive formalism can be counter-productive
- Yet inadequate detail may defeat the claim to protection



Employers

- Beware “*hidden*” or “*strategic*” disclosure
- Presume protected unless clearly not;
- Open organizational response to disclosures
 - S.43G(3)
 - Clear policy and framework. **Follow** it
 - Investigate and report conclusions
- Issues in remote investigations
- Check the status of the person



Employers - Conduct

- Consider possibility of *lago* case
- Consider severability
 - Clarity;
 - Cogence;
 - Caution
- Disciplinary/Appeal officer unaffected by disclosure
- Grievance during process: pause, investigate, report.
- Robust disciplinary process for detriment by co-worker



Confidentiality

- S43J ERA 1996 exclusion
- ***Pertemps v Ladak* [2020] EWHC 163 (QB)**: Interim injunction where breach of settlement agreement
- General exception for criminal offence by employee – s.43B(3)
- Breach of confidence relevant, but not decisive, in disclosure outside employer/prescribed person s.43G(3)(d)
- Publicity risks

The Take Away...



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QUESTIONS



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