Equality and discrimination in employment during the COVID-19 Pandemic

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Introduction

1. Section 4 of the Equality Act 2010 ('EqA') defines the protected characteristics as age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, religion or belief, sex and sexual orientation. The current public health and economic emergency that society and business face has the potential to impact upon each protected characteristic. For example, there are reports of increased racist behaviour and commentary targeting Chinese and Italian citizens. There have also been publicised grievances around a requirement to wear protective equipment and the impact on religious dress. Such issues could be tested in the courts under the provisions of the EqA.

2. However, it seems likely that the most common issues that are going to arise will be around disability, pregnancy and maternity and age in light of Government guidance. Therefore this article will focus on those three protected characteristics.

3. The Government guidance has made it clear that equality and discrimination law remains unchanged. Therefore, the burden on employers under the EqA remains and should not be overlooked, minimised or cast aside despite the pressing and exceptionally difficult situation that they may face. The Government is alert to this potential issue. For example, under the Updated guidance on the Coronavirus Job

Retention Scheme (4 April 2020) the government states under the section "*Agreeing to furlough employees*":

"Employers should discuss with their staff and make any changes to the employment contract by agreement. When employers are making decisions in relation to the process, including deciding who to offer furlough to, equality and discrimination laws will apply in the usual way."

4. The furlough scheme is developing on an almost daily basis and its scope has to be understood from public announcements. Its development is therefore somewhat unpredictable.

Vulnerable groups under COVID-19 guidance and Protected Characteristics under the Equality Act 2010

5. On 16 March 2020 the Government issued the Social Distancing Guidance which "strongly advises" certain categories of "vulnerable groups" to practice social distancing measures including working from home and avoiding public transport.

6. The Government has identified "vulnerable groups" as individuals who are:

(a) aged 70 or older (regardless of medical conditions)

(b) under 70 with an underlying health condition listed below (ie anyone instructed to get a flu jab as an adult each year on medical grounds):

i. chronic (long-term) respiratory diseases, such as asthma, chronic obstructive pulmonary disease (COPD), emphysema or bronchitis
ii. chronic heart disease, such as heart failure
iii. chronic kidney disease
iv. chronic liver disease, such as hepatitis
v. chronic neurological conditions, such as Parkinson's disease, motor neurone disease, multiple sclerosis (MS), a learning disability or cerebral palsy
vi. diabetes
vii. problems with your spleen – for example, sickle cell disease or if you have had your spleen removed

viii. a weakened immune system as the result of conditions such as HIV and AIDS, or medicines such as steroid tablets or chemotherapy

ix. being seriously overweight (a body mass index (BMI) of 40 or above)

(c) those who are pregnant

7. In addition, there are some clinical conditions which the Government advises put people at even higher risk of severe illness from COVID-19. Those in that category should have now received direct communication from the NHS with advice about the more stringent measures that they should take in order to keep themselves and others safe.[1] On 21 March 2020 the Government issued the Shielding Guidance which sets out the categories of people the government consider fall within this remit. People falling into this group are those who may be at particular risk due to complex health problems such as:

(a) people who have received an organ transplant and remain on ongoing immunosuppression medication;

(b) people with cancer who are undergoing active chemotherapy or radiotherapy;

(c) people with cancers of the blood or bone marrow such as leukaemia who are at any stage of treatment;

(d) people with severe chest conditions such as cystic fibrosis or severe asthma (requiring hospital admissions or courses of steroid tablets);

(e) people with severe diseases of body systems, such as severe kidney disease (dialysis);

(f) women who are pregnant and have significant heart disease.

8. The NHS communications include informing individuals to remain inside for 12 weeks (from receipt of the letter). In some cases this means not going outside in any circumstances including a home garden.

[1] A BBC article published on 7 April 2020 reported that many people have in fact been overlooked: https://www.bbc.co.uk/news/uk-england-52123446

9. NHS Digital, which compiled the list of those to receive the communications, said it had identified about 900,000 patients who should have already received an official letter or text. However, the BBC reported on 7 April that GPs and hospital doctors were now adding a further 600,000 patients.[2] It is therefore clear that this could potentially extend to hundreds of thousands in work.

10. Practitioners, individuals and employers with knowledge of the Equality Act 2010 (EqA) will even at first blush recognise that there is very likely to be a significant overlap between those whom are identified as vulnerable and/or who need to shield by the Government and those who are likely to fall within the protected characteristics of the EqA.

11. The SSP (General) (Coronavirus Amendment) Regulations 2020 SI 2020/287 (in force 13 March 2020), amend regulation 2 of the SSP (General) Regulations 1982 SI 1982/894, deem unfit for work a person who is self-isolating in accordance with official guidance. There is seven days entitlement to SSP for employees with the symptoms of coronavirus and 14 for those self-isolating as a result.

12. The Regulations do not cover the situation where an employee is a vulnerable individual identified by the social distancing guidance if they are unable to work from home, unless they, or a member of their household have symptoms and are self-isolating. Neither has the Government sought to trigger s64 Employment Rights Act 1996, which would (if activated) provide that an employee suspended from work by his/her employer on medical grounds is entitled to up to 26 weeks' remuneration.[3]

13. None of the above impacts upon contractual schemes that might be in place but the applicability of such schemes will depend on how "sickness" or "ill-health" is defined. In any event, employees who are shielding in line with public health guidance can be placed on furlough.

14. Where an employee is suspended by their employer on health and safety grounds, because of a possible risk of infection which does not fall within the government's self-isolation advice, it is likely that they have the right to continue to receive full pay on the basis of the employer's implied duty to pay wages. This is unless there is an express

[2] https://www.bbc.co.uk/news/uk-england-52123446

[3] It cannot at this stage be ruled out that the Government might trigger s64 ERA.

contractual provision to the contrary, and that the employee is contractually entitled to be provided with work. Such exceptions are rare.

Employees who refuse to attend work because of disability

15. As people with certain health conditions are according to the aforementioned Government guidance at higher risk of serious illness or death if they contract COVID-19, a requirement to attend work or travel on public transport and consequential decisions about pay may amount to discrimination. This is the same if the employee self-isolates because of a disability.

16. Employers must consider very carefully whether the employee has a disability as defined under s6 EqA. If there is any debate then the current social distancing guidance might impede the ability of an employer to investigate further. For example, at present it is unlikely that medical assistance or assessments would be permissible.

17. Therefore, employers will need to be practical and realistic as to the risk that an employee might have a disability. This includes taking reasonable steps to obtain further information about any relevant condition(s). Many employers will need to act cautiously before disregarding any conditions as a disability given the current climate. In some circumstances it might be clear from the condition itself, the fact an employee is on the vulnerable list or perhaps NHS shielding communications. Equally, it might be obvious that the employee does not meet the requirements of s6 EqA. Unfortunately, there is no automatic litmus test (apart from conditions already enshrined as 'deemed disabilities' under the EqA). Employers are therefore likely to be cautious.

18. For those who do have a disability, disciplinary action, detriment or dismissal may result in a claim of discrimination or victimisation. Cautious employers will therefore be slow to take such steps in the current climate even where an employee refuses to attend work.

19. There will be an argument in due course that a requirement to attend work (or by association use public transport) might amount to a provision, criterion or practice 'PCP' for the purposes of indirect discrimination or discrimination arising from disability under the EqA.

20. It is entirely possible that such a requirement could be indirectly discriminatory against the employee and those who share their disability for the purposes of s19 EqA. In

addition, any unfavourable treatment such as cutting pay, disciplinary action or dismissal might arguably arise in consequence of their disability in such circumstances, i.e. a decision to self-isolate or shield because of their disability, for the purpose of s15 EqA.

21. Such claims are of course subject to the defence of objective justification. Therefore, employers should consider carefully whether such a PCP can be justified as a proportionate means of achieving a legitimate aim. Legitimate aims could include meeting business demands, health and safety or ensuring adequate staffing levels. This will always be determined by the employment context and in any event, claims under s15 EqA are also subject to actual or constructive knowledge of disability.

22. Reasonable adjustments should be considered by employers. The obvious considerations will be working from home or in an alternative role. If after proper consideration the reality is that reasonable adjustments are not possible it cannot be presumed by an employee that failure to pay them will amount to a failure to make reasonable adjustments. The purpose of making reasonable adjustments is after all to keep the employee in or to return to work (see for example, ***O'Hanlon v Commissioners for HMRC [2007] IRLR 404***). However, the point is not necessarily unarguable and this is likely to be something that the Employment Tribunal will need to determine in due course.

23. If there is no EqA angle, employers might consider disciplinary proceedings as appropriate for an employee who refuses to attend work. However, this again should be done cautiously in light of the protection afforded to employees who raise a health and safety concern, stay away from a dangerous workplace or take action to prevent danger. Such employees are protected against dismissal which would be automatically unfair and do not require two years' service under s100(1)(c)-(e) Employment Rights Act 1996. These provisions might become relevant for front line workers, those working in large warehouses, supermarkets and delivery companies etc.[4] Such decisions will not be easy for employers given the novel situation that the pandemic has created.

24. As to the issue of dismissal, given that the furlough scheme does appear to apply to those within the vulnerable category or shielding, it is envisaged that a large number

[4] There is also the possibility of protection against dismissal and detriment under the whistleblowing regime in similar circumstances e.g. a compliant that the workplace is unsafe but that is beyond the scope of this article.

of employers are likely to utilise this scheme when employees are unable to work from home.

Refusal to attend work due to living with someone in a vulnerable category

25. This is likely to cause difficulty for employers. The first consideration will always be whether the employee can work from home (which is the Government's primary position in any event) whether in their own role or potentially an alternative position.

26. The Government's own shielding guidance does not provide any entitlement or presumption that family members have to remain at home with a vulnerable relative in the household. Instead it appears to provide for the following of social distancing within the home to avoid any spread of COVID-19. The guidance does not therefore require someone in the same household as the vulnerable individual to stop working. Accordingly, a refusal to attend work in these circumstances might be dealt with as a disciplinary or performance issue. It is too early to predict how sympathetic the Tribunal will be to claimants in such cases.

27. Despite the guidance, some employers are allowing home working in alternative roles, unpaid leave[5] without any disciplinary repercussions or are in fact paying employees. It is entirely possible that employees might find that they are furloughed under the Job Retention Scheme in any event thus removing (at least temporarily) the concern. The furlough scheme is available to, *"employees who are unable to work because they have caring responsibilities resulting from coronavirus"* but an employer is not necessarily obliged to take this action. This guidance might also apply to those caring for individuals who are no longer looked after due to school, care homes or other institutions having closed.

28. Employers should be alert to the consideration of whether the relative (or person with whom the employee lives) might have a disability by reason of their vulnerable status. For example, a child with severe asthma or a husband receiving cancer treatment. In such circumstances, the employee might be protected under the provisions of the EqA on the basis of associative discrimination. Associative discrimination applies to claims of direct discrimination (***Coleman v Attridge Law and another [2008] ICR 1128***), harassment and victimisation. Whilst there is no UK appellate authority on whether indirect discrimination is capable of application on the basis of associative discrimination the ECJ decision in ***CHEZ Razpredelenie Bulgaria AD v Komisia za***

[5] Employees on unpaid leave cannot be furloughed unless they were on unpaid leave after 28 February 2020.

zashika ot diskriminatsia [2015] IRLR 746 suggests that it might be. It is not permissible by reason of the wording of s15 and 20 of the EqA to bring claims for discrimination arising from disability or reasonable adjustments (***Hainsworth v (1) Ministry of Defence; (2) Equality and Human Rights Commission (Intervener) [2014] EWCA Civ 763)*** on the basis of associative discrimination.

Refusing to attend work due to fears about COVID-19

29. There is an increasing number of staff who are refusing to attend work because they are fearful about contracting COVID-19. If the issue relates to health and safety the above considerations in relation to automatically unfair dismissal and detriment protections are relevant to this issue also. In addition, protections under the whistleblowing regime may become relevant if the employees concern amounts to a protected disclosure under the Public Interest Disclosure Act 1998.

30. In the context of the EqA, employees with pre-existing mental impairments such as anxiety and depression might be more affected by the tremendous social and economic changes that are taking place and/or fear about contracting COVID-19. In addition, it is entirely possible that a larger number of employees might start to develop such conditions over the next few weeks and months. This could lead to genuine ill-health absence and the usual statutory sick pay/contractual sick pay provisions will be relevant.

31. Caution will again need to be deployed in determining the reason for the refusal to attend work, available alternatives to attendance and how to deal with the issue. Employers are best advised to be alert to disability issues around any refusal to attend work out of fear or concern.

Furlough: Selecting employees

32. When making a decision to furlough staff the employer should be careful to evidence what selection criteria (formal or otherwise) was used. It is entirely possible that such a decision might result in challenges from employees who as a result of the scheme are paid less than colleagues who are retained on full pay. The reality may be that such decision have or will be made in haste, perhaps without any selection criteria or documentary evidence to support why one employee was selected over another. Whilst it might be impractical, employers should try and document decisions and the reason for them in case their decision making is called into question before the Tribunal.

33. Selection on the grounds of a protected characteristic will only be potentially permissible in very limited cases and is likely to be challenged under the provisions of the EqA. Following government guidance to protect health and safety may well be a legitimate aim for the purposes of defending any claims where the statutory defence of objective justification is available but any action taken must still be proportionate and necessary. We will have to see in due course how the Tribunal's grapple with decisions in this regard.

Pregnant employees

34. Outside of the Government's guidance employers have additional legal duties to protect the health and safety of new and expectant mothers in the workplace including:

    (a) To conduct risk assessments in the workplace;

    (b) Alter working conditions or hours to avoid significant risk (regulation 16(2) Management of Health and Safety at Work Regulations 1999 (MHSW Regulations);

    (c) To offer suitable alternative employment on terms that are not substantially less favourable (where it is not possible to alter working conditions or hours) (regulation 16(3) MHSW Regs and s67 ERA 1996);

    (d) Where suitable alternative employment is not available or the employee reasonably refuses it to suspend the employee on full pay (regulation 16(3) MHSW Regs and s67 ERA 1996).

35. Pregnant employees have been strongly advised to socially isolate, avoid travelling on public transport and work from home where possible. If the employee's job does not allow for this and there is no suitable alternative employment available it is strongly arguable that the employer should consider suspending the employee on full pay in accordance with regulation 16(3) MHSW Regulations.

36. It is also worthwhile noting that whilst an employer cannot lawfully force an employee to commence maternity leave early, it will start automatically (i.e. before the employee's chosen commencement date) if the employee is absent from work wholly or partly because of pregnancy after the beginning of the fourth week before the expected week of childbirth. The maternity leave period will commence automatically

on the day after the first day of absence under regulation 6(1)(b) Maternity and Paternity Leave etc Regulations 1999.

37. Beyond maternity leave employers will undoubtedly be faced with many employees who have increased childcare pressures arising from the overwhelming closure of schools and nurseries. In such circumstances, employers will need to be alert to possible issues that may arise under the sex discrimination provisions of the EqA. In addition, there may be an increased number of flexible working applications precipitated by the unique and urgent pressures arising from the pandemic.

Age discrimination

38. It is obvious from the Government's guidance that employers should be taking steps to protect employees who are in the vulnerable category because they are aged 70 or over. Claims of direct and indirect age discrimination are both subject to the defence of objective justification. Many of the matters discussed above will therefore be relevant in the context of a prima facie case of age discrimination.

39. It can be assumed that the majority of employees aged 70 or over will agree to work from home or will be furloughed. However, what happens if the employee refuses to do so or raises complaint?

40. Sending such an employee home without consent might amount to direct or indirect discrimination even if the contract of employment permits it. However, it is certainly arguable that following the government guidance and taking into consideration an employer's health and safety duties is a legitimate aim (in some ways it would be difficult to see how it would not be). However, the employer must act proportionately in the circumstances.

41. In such circumstances, the employee may well be entitled to full pay subject to the terms of the contract of employment or any subsequent agreement between the parties. It is also entirely possible that such employees may be furloughed in any event.

Discrimination in redundancy

42. This is an exceptionally difficult time for some businesses. The Updated guidance reminds employers that the current Job Retention Scheme runs from 1 March 2020 for 3 months adding:

    "When the government ends the scheme, you must make a decision, depending on your circumstances, as to whether employees can return to their duties. If not, it may be necessary to consider termination of employment (redundancy)."

43. It is worthwhile at this stage bearing in mind two things. Firstly, the Chancellor of the Exchequer and the Prime Minister have both indicated that the scheme might be extended. Secondly, the Updated guidance also assures employers that HMRC will process all claims made before the scheme ends. Both of these matters might prevent redundancy situations arising in the immediate short term. However, practically it is difficult to see how HMRC will be able to process the number of claims being made or when this means sums will actually be paid to the businesses.

44. Should the Job Retention Scheme be extended then it is unknown how long that would be for; what the rate of recoupment would be (i.e. 80 per cent or some lower figure) and/or what terms and conditions might apply. It is unlikely that such details will be published for weeks.

45. If though despite the above, an employer finds that a genuine redundancy situation arises it is well established in case law that such processes and any consequential selection for redundancy should not be unlawfully discriminatory in breach of the EqA provisions. Unlike claims for ordinary unfair dismissal, claims under the EqA do not require 2 years' service.

46. It is arguable that any decision to make an employee redundant before the furlough scheme has been exhausted might result in arguments of unfairness independent of discrimination. However, it is reasonably foreseeable that some employers will not be able to pay staff at all due to issues around cash flow. Even then, it might be that in some cases employees will agree to defer their entitlement to pay until the employer is reimbursed, although the process for such agreements is likely to be protracted.

47. In any event, any linked dismissal claims might be hindered by legal arguments. For example, employers could seek to argue that a dismissal was reasonable in all of the circumstances due to the exceptional situation or that there was no dismissal (as a

matter of law) because of frustration of the employment contract. Frustration is a very limited doctrine in the context of employment law but the COVID-19 pandemic, its consequences and the strict orders of the Government which provide that some businesses had to close (otherwise be operating illegally) might be found to be frustrating events. This is exceptionally likely to be a matter for the appellate courts in due course. Such arguments do not prevent findings of discrimination due to the different legal tests applicable.

48. The EqA does not contain any provisions that relate specifically to redundancy. However, an employee may seek to rely on the EqA including where:

    (a) the redundancy was a 'sham', in that the dismissal was not by reason of redundancy, but was instead by reason of a protected characteristic and thus constituted direct discrimination contrary to s13 EqA;

    (b) the employee's selection for redundancy constituted victimisation for his or her bringing a discrimination claim or taking other action protected under s27(2) EqA;

    (c) the application of the selection criteria, the failure to offer alternative employment, or any other aspect of the redundancy process, was influenced by a protected characteristic and thereby amounted to direct or indirect discrimination.

49. Selection of a woman for redundancy for a reason related to pregnancy or childbirth will amount to an automatically unfair dismissal. It will also constitute direct discrimination under s18 EqA, which provides that an employer will be taken to have discriminated against a woman if it treats her unfavourably during the protected period of her pregnancy because of the pregnancy or an illness resulting from it, or because she is on compulsory maternity leave, or because she is exercising or seeking to exercise (or has exercised or sought to exercise) the right to ordinary or additional maternity leave. Employers need to be particularly aware of the risk of treating employees on maternity leave as out of sight, out of mind, as this can lead to discriminatory selection. However, an employee will not succeed if she is selected for redundancy for a reason which is genuinely unconnected with her pregnancy. Therefore, the battleground in such cases usually arises as to causation and the reason why the employee is dismissed. Careful recording of decisions and consultation during the redundancy process will therefore be incredibly important.

50. Employers will need to adapt redundancy selection criteria to avoid indirectly discriminating against women on maternity leave such as disregarding pregnancy-related absence in selection criteria based on attendance. This can be difficult for employers who must also try and avoid sex discrimination arising by disadvantaging male employees as was the case in ***Eversheds Legal Services Ltd v De Belin 2011 ICR 1137, EAT***.

51. A redundancy selection criterion or a selection process that directly or indirectly discriminates on the ground of age will be unlawful unless the employer can show that it is objectively justified. Usually claims arise not because of overtly discriminatory selection criteria or processes but because they are applied in a discriminatory way. The defence of objective justification is notoriously difficult to establish for employers. This does not negate the application of paragraph 1(1) of Schedule 22 of the EqA which permits acts of an employer which are obligatory under an enactment e.g. Act of Parliament or secondary legislation etc.

52. The most difficult protected characteristic to grapple with is likely to be disability. Direct discrimination in redundancy processes and selection is less likely to be established that the prohibitions against discrimination arising from disability (s15 EqA), indirect discrimination (s19 EqA) and failure to make reasonable adjustments (s20 EqA).

53. Overall, attendance perhaps intertwined with social distancing and isolation provisions are likely to be high risk and potentially unlawful selection criteria. In addition, alongside those who expressly have the protected characteristics themselves, there is likely to be a large proportion of the workforce who are disadvantaged because of their relationship with someone such as a family member who has a protected characteristic. Employers should be careful to ensure that they are alert to the risk of claims of associative discrimination arising in such circumstances (as summarised above).

23 April 2020

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