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UK People, Reward and Mobility Newsletter

JULY 2020

IN THIS ISSUE

In this issue we look at some of the key employment law developments that have taken place over the past month. In particular, we examine how employers can support victims of domestic abuse, analyse a recent case on contract splitting under TUPE, consider an Advocate-General's opinion on indirect discrimination between two groups of workers with the same protected characteristics and look at the benefits and drawbacks of a flexible working revolution.

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The developing role of employers in supporting victims of domestic abuse

The UK government is seeking views on availability of flexible working and unplanned leave for domestic abuse victims. This forms part of a new review of how employers and the government could better support victims of domestic abuse in the workplace. Domestic violence may not seem obviously linked to the workplace and duties of employers. However, around 75% of victims of domestic violence are also targeted in their workplace. An abusive environment at home can also have serious implications on an individual's health, work and performance. As such, it is a topic which is becoming increasingly relevant to employers.

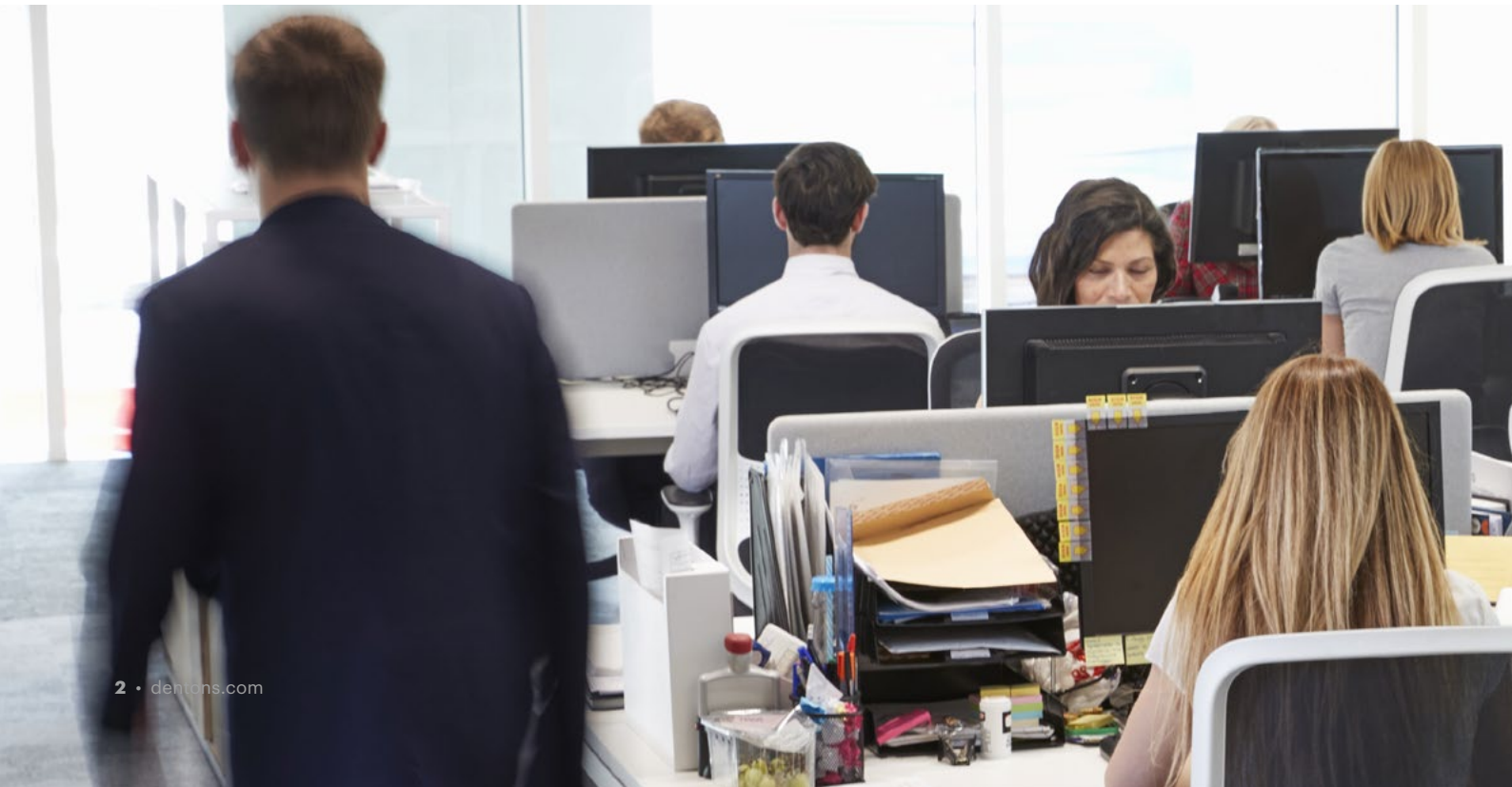
The launch of the review is particularly timely, with the UN Secretary-General António Guterres noting that: "...lockdowns and quarantines are essential to suppressing COVID-19. But they can trap women with abusive partners." This issue is unlikely to be temporary. Even as lockdown restrictions ease, many are still unable to return to their place of work and remote working looks to play a larger role in the future of the workplace. The review also comes as the government's ground-breaking Domestic Abuse Bill continues through Parliament which will bring into law a statutory definition of domestic abuse that includes coercive or controlling behaviour, as well as emotional and economic abuse.

IN THE PRESS

In addition to this month's news, please do look at publications we have contributed to:

- People Management – **Verity Buckingham** provides guidance on how employers should handle annual leave during the coronavirus pandemic.
- Journal of the Law Society of Scotland – **Alison Weatherhead** looks at some of the key issues and challenges facing employers as workplaces begin to open up again after lockdown.

The review was launched by Business Minister Paul Scully, who has said that "domestic abuse may occur in the home, but its impact stretches into every aspect of survivors' lives". The review aims to provide employers with the tools they need to support workers who are affected by domestic abuse. Nicole Jacobs, Domestic Abuse Commissioner, has said that employers can play a "pivotal role" in supporting victims. It was noted that work and spending time away from their abusers can provide "crucially important" independence for victims of domestic abuse. CIPD chief executive Peter Cheese said: "EHRC research also finds that 75% of those enduring domestic abuse are targeted at work, from harassing phone calls and abusive partners arriving



at the office unannounced." Employers should be provided with the support and training to recognise when workers may be at risk and how to provide sensitive and practical support.

As part of the review, views are sought on the availability of flexible working and unplanned leave for domestic abuse victims. Other options to improve the workplace for victims include how employers can help tackle economic abuse, such as by paying wages to a different bank account or making emergency salary payments available for those in real financial hardship. The review has been launched as the government recognises that, with one in five victims needing to take time off work due to abuse, employers must have the confidence and knowledge to provide support.

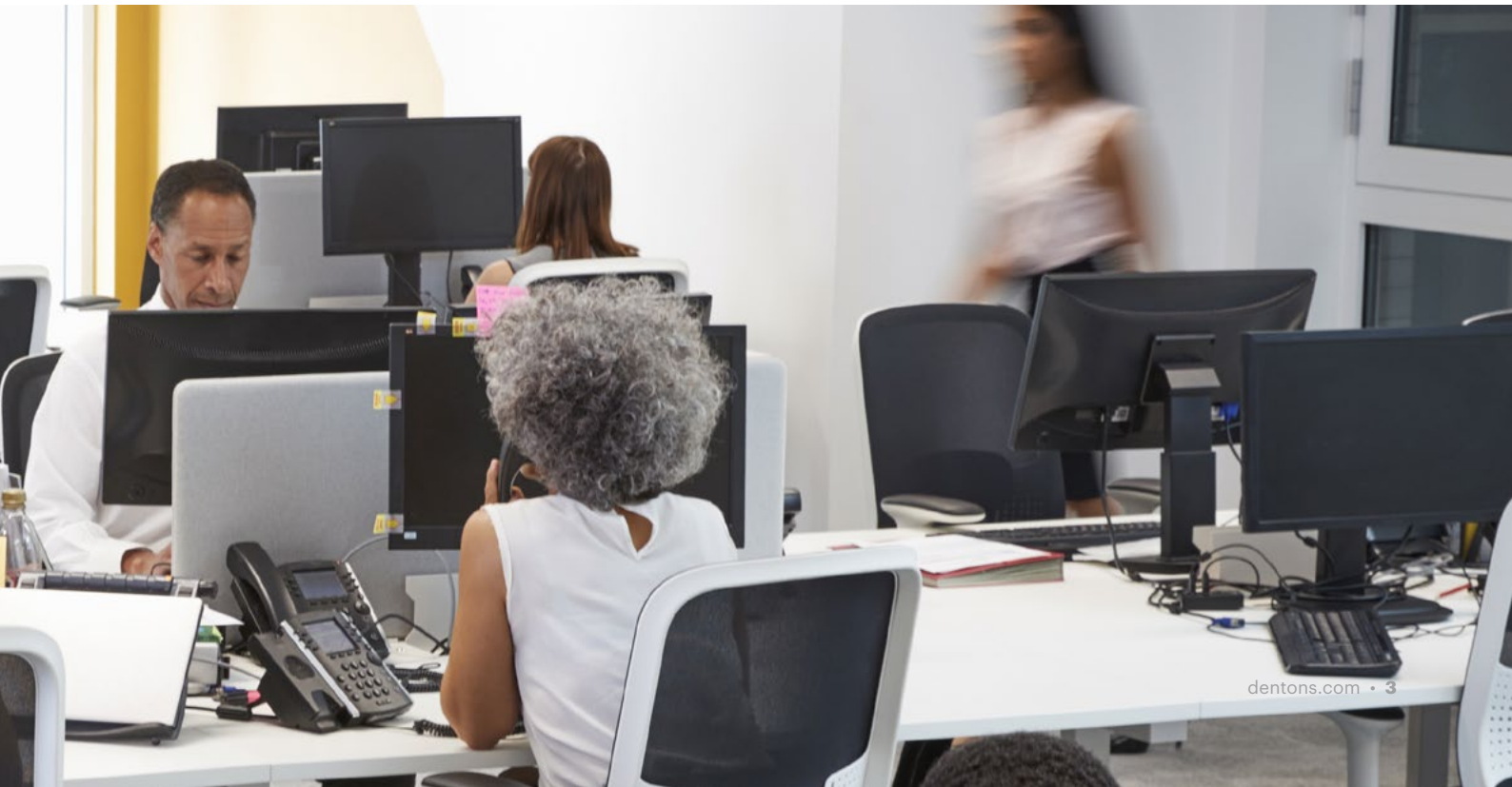
The review will involve a call for written evidence from stakeholders on the specific employment needs of domestic abuse victims, and how they are met by current employment rights and practices. The government also seeks to explore examples of best practice from employers within the UK, as well as evidence from other countries on how they approach domestic abuse, to see how the UK's current employment framework could be enhanced. The review will also include a series of roundtables, run by the Department of Business, Energy and Industrial Strategy (BEIS) and Home Office, with organisations and individuals who wish to share their views directly.

BEIS is initially seeking written evidence from employers and other stakeholders on the specific needs of abuse victims and whether these are met under current employment practices by 9 September 2020. It will later consider best practice from employers in the UK and abroad, with a view to improving the current employment rights framework.

Comment

This is certainly an area to watch for employers, as the scope of duties toward employees seems set to change with a greater focus on providing practical support to victims of domestic abuse. However, for now, the emphasis appears to be on a responsive approach where victims of domestic abuse have notified their employers of their situation. At this stage, there does not seem to be a suggestion that employers should require employees to tell them, or otherwise seek to confirm, if an employee is suffering domestic abuse outside the workplace. The purpose of the review is to provide employers with the tools they need to support employees who have sought help in relation to domestic violence.

More broadly, this consultation reflects a changing understanding of the significance of interplay between home and work. Employers are no longer disregarding employees' home-related issues. Instead, they are starting to look at home-related issues as a piece of the puzzle in promoting employee welfare and strong engagement in the workplace.



Can TUPE split employees?

The ECJ has issued a very surprising TUPE decision in the case of *ISS Facility Services v. Govaerts*. This case considered the application of the EU Acquired Rights Directive in Belgium. The Directive is implemented in the UK as the TUPE Regulations. As a reminder, the UK is bound by ECJ decisions and UK courts are bound to interpret the TUPE Regulations in line with the EU Acquired Rights Directive, where possible. If not possible, the Regulations may need to be amended.

The established UK position is that, on a TUPE transfer, employees broadly follow the services/business to which they are wholly or mainly assigned. Where the services being transferred are split so that the assignment of an employee is unclear, they remain with their current employer. Employees are not split between two or more new employers on a pro rata basis. In the *Govaerts* case, the ECJ has decided that an employee's employment can be split between two or more new employers where TUPE applies. It was left to the national courts to determine how this would be assessed. The consequence is that an employee could move from having one employer to two, or indeed more. The case is contrary to the well-established position in the UK. The UK Employment Appeal Tribunal has decided that an employee's employment could not be split in the way proposed by the ECJ.

Practical impact

This is a real hot spot in practical terms. Working out who is assigned to an "economic entity" or "an organised grouping of employees carrying out activities", and who is not, can be challenging. Especially where services are being fragmented or where only part of a business is sold. Transferees are keen to avoid inheriting extra employees. Transferors are concerned about redundancy costs for employees who are left behind. Employees are concerned about being left in limbo. This decision muddies the water further for employees and employers where TUPE is triggered.

Until we have a UK court judgment applying this decision, we expect little will change in practice in the UK. However, clients will need to be alive to arguments being raised based on this case.

- Transferees should be more cautious about the situation where employees are left in limbo. Employers may be more likely to claim a transfer of employees on a pro rata basis among different transferees. In the UK, courts will seek to protect employees and this argument might therefore be successful. This could be a good reason for more collaboration between transferees. It may make sense to agree on a case-by-case basis where employees transfer, so employees move as a whole person. However, where this cuts across TUPE, employee consent will be required.
- Transferors may argue that all employees transfer, on a pro rata basis, as aligned with services or the part of the business transferring. The ECJ suggested this would be determined by the value of the different parts of the contract and the time the employee spent on each part. This approach will save transferors redundancy costs, which they would otherwise incur. We recommend that clients are proactive in working with their incumbent providers to ensure that there is clear/100% allocation of employees. This is already common in contracts and should be considered going forward.
- Employees can work with their current employer to agree a clearer approach to assignment, so they are not faced with future multiple employers.
- Contracts should be reviewed/amended going forward where it would be in clients' interests for there to be greater certainty on these issues. This would typically concern the allocation of employees to particular activities or a particular part of the business.
- In contracts, it would be sensible for clients to require, or at least ask, current providers and future providers to work collaboratively to ensure a smooth transition of services and employees.

Business transfers only?

One important technical point to note. There are two types of transfer in the UK: business transfers and outsourcing/consequent changes in service provider (service provision change (SPC)). SPC is a UK concept that is not in the EU Acquired Rights Directive. UK courts may well choose to distinguish this case from transfers, which only meet the requirements of an SPC. Employees have alternative recourse in an SPC where they may argue that being "split" among multiple employers is a material detriment to them and resign. That said, the ECJ stated in the *Govaerts* case that, where a division would be impossible or would adversely affect the rights of the employee, transferees will be considered liable for the termination of the employment contract, regardless of whether it was initiated by the worker.

It is to be hoped that UK courts will limit the impact of this decision to business transfers. However, remember that many changes in service provider can meet the requirements of both types of transfer. Do not just assume, because you are dealing with an insourcing or outsourcing situation, that only the SPC rules apply and there can be no pro rata split. A change of provider in the outsourcing context can be a business transfer and an SPC – indeed, this is often the case.

EDITOR'S TOP PICKS OF THE NEWS THIS MONTH

- FCA goes to court to protect scheme member outcomes
- Anonymous witness statements in disciplinary investigations
- Chancellor outlines further support for employers in response to COVID-19
- Misuse of Coronavirus Job Retention Scheme funds: don't risk it, take action now!
- Back to business as usual for the Pensions Regulator?
- Mandatory ethnicity pay reporting set to be debated in Parliament

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Differentiating between two groups with the same protected characteristic may amount to indirect discrimination. However, does this apply in the UK?

VL was a psychologist working in a hospital in Krakow. In December 2011 she obtained a certificate confirming her disability, which she submitted to her employer (the Hospital) that month. In 2013, the Hospital decided to pay a monthly allowance of 250 Polish złoty (approximately €60) to employees who submitted a certificate attesting to a disability. The relevant date for the grant of the allowance was the date on which the certificate was submitted, rather than the date on which the certificate was obtained. This meant that the allowance was granted to 13 employees who submitted certificates after the grant was announced. However, it was not retrospective as the intention was to increase recruitment. The 16 employees who had already submitted their certificate, including VL, were therefore not entitled to the allowance.

The Polish appellate court asked the Court of Justice of the European Union (CJEU) to consider whether, in treating two groups of workers with the same protected characteristic (in this case disability) differently, the employer had breached the principle of equal treatment.

The EU law

The Equal Treatment Directive form 2000 established a general framework for equal treatment in employment across the EU. It defines indirect discrimination as occurring *"where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage* ***compared with other persons*** *unless:*

i. *that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary ... "*

The UK already had the Disability Discrimination Act in place prior to the enactment of the EU Directive. However, the UK government was obliged to take the wording of the Directive into account when formulating a definition of indirect discrimination under the Equality Act 2010 (the EqA). Section 19 of the EqA states that *"a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. A provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*

a. *A applies, or would apply, it to persons* ***with whom B does not share the characteristic****,*

b. *It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when* ***compared with persons with whom B does not share it****,*

c. *It puts, or would put, B at that disadvantage, and*

d. *A cannot show it to be a proportionate means of achieving a legitimate aim.*

Advocate General's opinion

The Advocate General considered whether the Equal Treatment Directive allows the use of a group with the same protected characteristic as a comparator. He noted that the purpose of the Directive is to "lay down a general framework designed to guarantee equal treatment in employment and occupation to all persons, by offering them 'effective protection against discrimination on one of the grounds covered by Article 1'." He also considered the European Commission's position in VL's case which admitted that it is, in the abstract, possible that the Directive can apply "within groups of disabled persons".

The Advocate General concluded that the Directive should be interpreted as allowing a comparison between individuals groups sharing the same protected characteristic. The Directive simply refers to the comparators as being "other people" with no requirements about their characteristics. In his view, the employer's date of certificate criteria was illogical and lacking in objectivity. As only a disabled worker could obtain a certificate, the criterion was inextricably linked to the protected characteristic of disability. As such, it was necessary to prevent two "like groups" from being treated differently because of an apparently neutral criterion intrinsically linked to a protected characteristic.

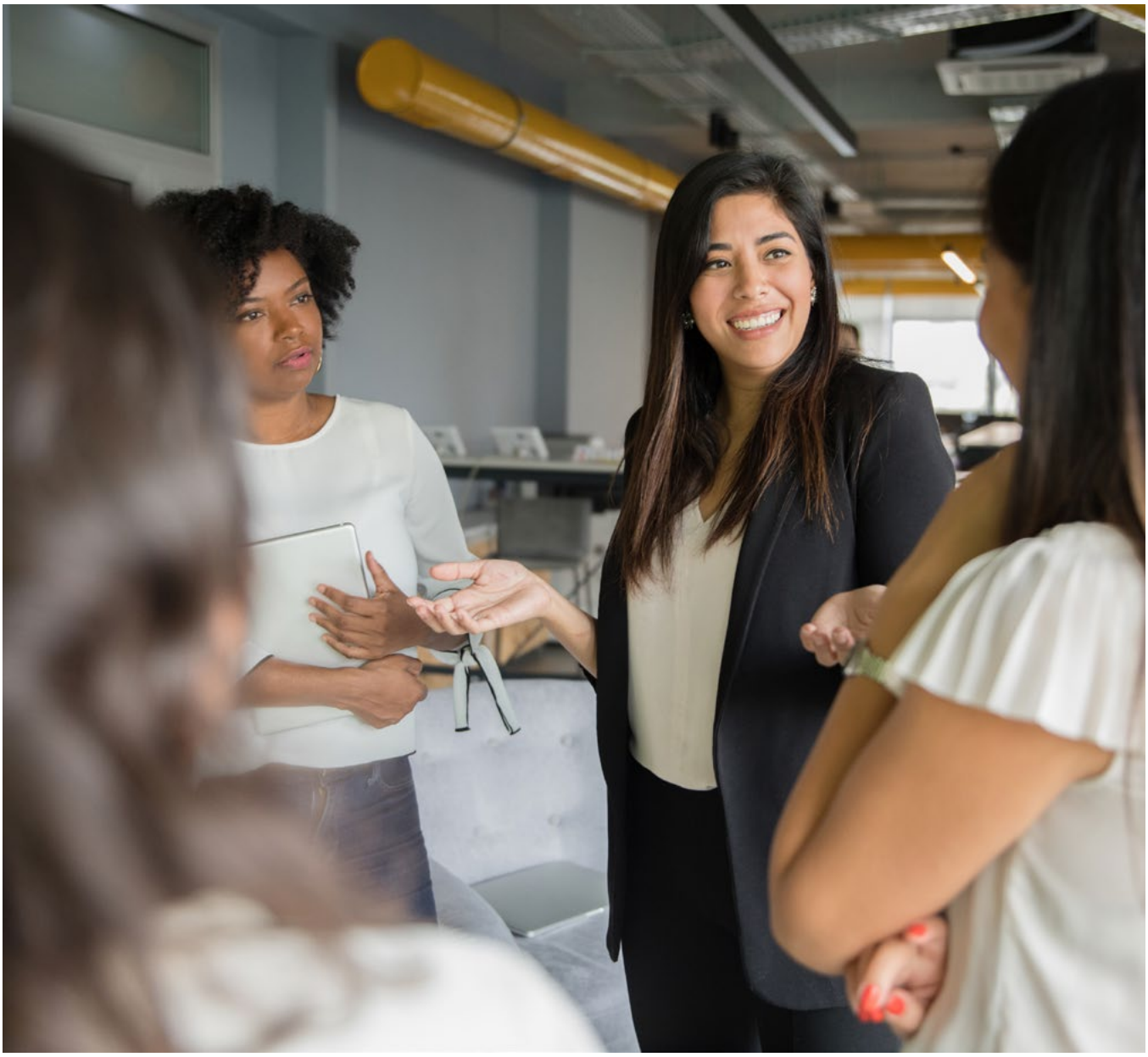
The position in the UK

The interpretation of the Advocate General is problematic in the context of the definition of indirect discrimination under the EqA. This is because the EqA clearly states that indirect discrimination requires a comparison with persons who do not share the characteristic. In addition, section 23(1) of the EqA states, that for the purposes of establishing the relevant comparator, "there must be no material difference" between the circumstances of those in the claimant's group and the comparator's group. This suggests that the only difference between the two groups should be the protected characteristic relied upon. As such, there is an argument that the UK definition of indirect discrimination may not be compatible with the EU Directive.

Comment

So far, the UK tribunals have not tried to apply the Advocate General's opinion into our domestic system. It would be premature, however, to conclude that the EqA and the Equal Treatment Directive are not compatible, especially given the Advocate General's comment that the purpose of the Directive is to "lay down a general framework designed to guarantee equal treatment in employment."

It is also important to keep in mind that the opinion is not binding on the CJEU. We are yet to see if the CJEU will share the Advocate General's view and, if so, to what extent. With Brexit looming, it seems unlikely that this opinion will have a significant impact on the existing case law or that it will necessarily require any changes in the EqA.



The new normal for workplaces: flexible working revolution or back to life as we know it?

There is talk of a flexible working revolution in the post-COVID-19 world, but will the workplace really change that dramatically and, if so, what will that mean for employers and employees alike and what are the pros and cons of a remote workforce?

Tech/social media appears to be leading the way. Mark Zuckerberg announced to his workforce last month that going forward Facebook would be making the most of its open roles in the US available for remote recruiting and hiring. Later this year, many of its current employees will also be able to apply to change to remote working. Mr Zuckerberg predicts that half of its c.45,000 employees will work from home within a decade and this move will lead to people leaving the traditional tech hubs of London and Silicon Valley and heading out of town. Interestingly, he has indicated that salaries will be adjusted to reflect the employee's new locale and there is, of course, no detail as to how this would be calculated or policed, other than the promise of *"severe ramifications"* for those who lie about where they are living.

This is all part of Facebook's MO of leading the charge of modern working. However, is this a move for the better? Mr Zuckerberg's opinion is that remote working policies would spread economic opportunities, improve diversity and be better for the environment. There are already reports that almost half of workers want to continue with flexible working even after COVID-19 restrictions are lifted.

Anyone who has been working at home for the last two to three months has enjoyed the benefits: more sleep, more exercise, more time with the kids (arguably way too much...) and more time with the dog (at least they do not need to be home schooled!). However, what about the downsides? A permanent remote working model poses many practical, logistical and legal questions:

- Can you effectively manage employees remotely? Managers will need to adapt and make sure that they schedule and keep regular phone and Zoom catch-ups with their direct reports. Remote working undoubtedly reduces the amount of one-on-one contact and employees will need regular touch points to know that they are on track.
- How do you monitor productivity? Arguably, output should not be any harder to measure. We know that physical presence does not necessarily equate to productive work.
- How do you ensure employees are taking adequate breaks and you, as an employer, are complying with Working Time legislation? This is more difficult to police with a remote workforce. You will need to make sure that contracts and policies are up to date and employees are informed about what you expect. Managers will need to question employees about their remote working habits and be alive to warning signs from those who are working excessive hours to guard against burn-out.

- How do you ensure the health and safety of your remote workforce in their home environment? A survey by the UK's Institute for Employment Studies of more than 700 employees since the start of the lockdown found that more than a third reported extra aches, pains or discomfort in their neck or back than usual. Laptops are not designed to be worked on all day, every day. If employers are proposing to move to a remote working model, they will need to equip employees adequately. This will clearly have a cost implication, but the cost of equipping remote employees and assessing work stations must be balanced against the ever-increasing cost of office space. Remote working is still likely to be a no-brainer when compared with the cost of prime city office space.
- Is there an impact on mental health and, if so, how do you minimise that risk and manage it? Octavius Black, Chief Executive of the Mind Gym, says: "*There is a risk of productivity collapse as people burn out, can't cope, feel exhausted, and opt out. Companies won't notice until quite far down the road, and will find it hard to recover.*" (*Financial Times*, 21 May). Managers and HR need to be alive to the warning signs of burn-out and mental health problems. This should form part of their risk assessment. Support needs to be accessible, such as employee assistance programmes, internal and external coaching, and access to private medical services. Employers need to encourage open discussion about the importance of mental wellbeing. If employees feel comfortable about raising these issues, it is to be hoped that warning signs will not be missed and productivity will not suffer.
- How do you ensure your remote workforce is bonded and motivated? During the lockdown, we have all found increasingly more creative ways to engage with our colleagues, friends and family remotely. Thanks to the resurgence of the traditional quiz, we all now know random facts such as the name for a group of hedgehogs (a prickle for anyone who has not completed it!). Both adults and children alike have been racing round their homes on scavenger hunts with colleagues and classmates. However, sometimes those remote drinks on a Friday can be rather awkward and face-to-face team meetings at varying locations will become important to maintain that sense of team spirit that is essential to productivity.

Employment lawyers have been advising employers for years on the ease with which they can refuse flexible working applications. However, post COVID-19 that is likely to be more difficult – if it was doable and acceptable during lockdown, why is it not okay after the restrictions have been lifted? Clearly, these have been extreme circumstances. Employers had barely any warning of lockdown or time to prepare and there has been some "making do" – some work has to be better than none. Employers are advised to keep some form or record of any issues they have experienced owing to remote working and to keep their options open.

How close are we to having a right to work from home enshrined in our legislation? The suggestion of more protections to work from home and the benefits of remote working were detailed in the Taylor Report published in 2017. The government's response in 2018 said "*as part of the statutory evaluation of the Right to Request Flexible Working in 2019, the government should consider how further to promote genuine flexibility in the workplace*". Boris Johnson committed his government to making flexible working a default right for workers in the party's 2019 manifesto: "*We will encourage flexible working and consult on making it the default unless employers have good reasons not to*", but how often do manifestos actually come to life? However, we are living in unprecedented times and this movement has undoubtedly been accelerated and propelled into the national debate by COVID-19.

Comment

I started this job mid-lockdown, so I have never visited my office – I do not even know where to make a cup of tea, or where the loo is. I was fortunate to have met a number of my colleagues before lockdown and I have joined a supportive and fun team. However, nothing can remove the strangeness of meeting the majority of your colleagues over the phone, or via email and Zoom. Without doubt, you can build relationships over these mediums, but it takes more time. Nothing quite replaces face-to-face contact that enables you to read and respond to speech and body language. Certainly from my experience as a newbie remote worker, some situations can be hard to evaluate and read because you do not have established relationships and knowledge of the individual characters involved and their relationships with others. However, we will adapt, if nothing else, because we might have to, and fast!

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