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a word from the editor

Happy New Year to you all! As I write the first editorial of 2021, while working from home and looking out of the window, the weather is miserable, which perhaps sums up the way the majority of people are feeling at this time.

We are in the midst of another national lockdown and the attendant issues that brings. The first phase of the Government's vaccination programme is underway, with the aim of vaccinating every adult in the UK this year. This will cover: (a) every care home resident by the end of January; (b) everyone over 70, NHS frontline staff, care workers and anyone who is clinically extremely vulnerable by mid-February; (c) the rest of the priority groups and over 50s after that, possibly by May; and (d) every adult in the UK by September. The second phase will cover the rest of the population, mainly those under 50.

Could these be the first steps to returning to some resemblance of normal life? Does this mean that the current preventive measures will stay in place until September? Will those businesses that are closed (especially those in the leisure sector) be allowed to re-open this year? Will you need to be vaccinated in order to travel abroad? These are just some of the questions the vaccination programne raises.

It goes without saying that employment lawyers will again have to remain vigilant in this ever-changing landscape when advising clients this year.

'employment lawyers will have to remain vigilant when advising clients this year'

The other pressing issue affecting the country and many businesses is, of course, that the UK is no longer part of the EU. Travel restrictions are now in place when travelling to Europe and free roaming charges for mobile phones have ended. Rules relating to immigration have changed, with a new points-based system for foreign citizens (except Irish nationals) wanting to live and work in the UK. The UK and the EU have agreed that there will be no taxes on goods when crossing borders and no limits on the amount of goods that can be traded. However, businesses in England, Scotland and Wales will need to make customs declarations as if they were dealing with countries elsewhere in the world. The exception is Northern Ireland, as the UK and EU have agreed to keep an 'invisible border' without checkpoints between Northern Ireland and the Republic of Ireland. EU legislation, which now forms part of national legislation under the European Union (Future Relationship) Act 2020, is likely to change over time. The Government's website, *www.legislation.gov.uk/eu-legislation-and-uk-law*, provides a useful overview.

During the first lockdown, the number of single employment tribunal claims presented (April to June 2020) increased by 18%, which, in my view, was probably caused by the pandemic rather than any other factors.

On behalf of the editorial committee, I would like to pay tribute to Stephen Levinson, who sadly died on 13 January this year. Stephen sat on the ELA Briefing editorial committee for more than 20 years. I had the pleasure of attending meetings with Stephen over the years, at which he always provided astute and reasoned insight to discussion and debate. He was a passionate and engaging employment lawyer who will be missed by present and former colleagues alike.

MARC JONES, IBB Law LLP

in brief

A bleak outlook for the employment tribunal

Unanswered telephone calls and unacknowledged emails are a regular feature of the tribunal user experience. Tribunal statistics published in December 2020, for the third quarter of last year, reveal the extent of the resourcing crisis facing employment tribunals. The number of outstanding single claims increased to 40,000, surpassing the 2009-10 peak caused by the financial crisis. Receipts of single claims were up by 13% and disposals down by 39%, when compared with the same period in 2019. The increasing backlog is attributed to the Covid-19 pandemic.

The pressures wrought on the tribunal system by the current crisis were detailed in a letter from the Senior President of the Employment Tribunals to the Justice Committee. Sir Keith Lindblom cited three ways in which the pandemic has impacted the ability of the tribunal system to dispose of claims: a reduced ability to hold in-person hearings; disruption to the labour market, prompting more claims; and the tribunal case management system which cannot be accessed remotely. Although tribunals have made significant progress in responding to the first of these challenges – tribunal sitting days had increased to pre-Covid levels by September 2020 – the use of HMCTS Cloud Video Platform cannot alone solve the systemic problems facing the tribunal. Too few judges, sitting days and staff, as well as premises of variable quality and a poorly functioning case management system were all cited as ongoing obstacles to the timely and efficient handling of cases.

Although the Government promised additional funding to courts to support them through the Covid-19 pandemic, the Justice Minister revealed in December that very little of this would be allocated to employment tribunals. In response to a written parliamentary question, Chris Philp confirmed that just £3.4 million of the £80.8 million Covid-funding budget would be given to employment tribunals.

'[there are] too few judges, sitting days and staff'

Gender pay gap reporting in 2021

In March 2020, just days before gender pay gap reports were due, the Government Equalities Office (GEO) and the Equalities and Human Rights Commission put out a joint statement suspending enforcement of the gender pay gap reporting deadline. Most employers would have finalised, or been in the throes of finalising, their reports at that stage. Yet, nearly a year on, less than 55% of in-scope employers have filed their 2019-20 pay gap reports.

In December 2020, the GEO published detailed guidance on gender pay gap reporting. This contained no suggestion that enforcement of the forthcoming deadline for 2020-21 reports would be suspended; employers should assume it will be business as usual for pay gap reports this year.

The GEO's guidance provides helpful confirmation for employers that employees who were furloughed on reduced pay should be excluded from pay statistics. This is because pay calculations are performed using the pay of *full-pay relevant employees* (ie those employees employed on the snapshot date who were not receiving reduced or no pay during the relevant pay period as a result of being on leave). Employees who were furloughed, but whose pay was not reduced, will be included in pay calculations.

The pay statistics of employers who used the furlough scheme from its inception may well be markedly different to statistics reported in prior years. It has been widely reported that significantly more women than men have been furloughed. In addition, Office for National Statistics data shows that lower paid workers were more likely to be furloughed on reduced pay. Both these factors mean that low paid women may be excluded from pay calculations. This is likely to translate to an artificial increase in the average hourly rate of pay for women, incorrectly indicating that an employer has succeeded in narrowing its gender pay gap.

The Government previously committed to reviewing gender pay gap reporting obligations in 2022. In doing so, it rejected calls for an earlier review on the basis that it needed five years' worth of data in order to evaluate the regulations and their impact. Incomplete reporting in 2020 and unrepresentative data in 2021 will hardly assist in assessing progress.

Workplace rights post-Brexit

A week before the end of the Brexit transition period, negotiations between the EU and the UK were concluded with the parties announcing a Trade and Co-operation Agreement (TCA). The TCA was implemented into UK law on 30 December 2020 and came into force with provisional effect from 1 January 2021. Ratification by the EU, which entails approval by the EU Parliament, is required prior to 28 February 2021, when the provisional application period expires.

Contained within the level playing field provisions – which proved to be one of the most contentious areas in the negotiation – are a short set of clauses relating to workplace rights. These provisions cover fundamental rights at work; occupational health and safety; fair working conditions and employment standards; information and consultation rights; and restructuring of undertakings.

Under the provisions, the UK commits not to weaken or reduce workplace rights below the levels of protection in place at the end of the transition period. This includes reducing protection by way of a failure to enforce rights. However, this principle of non-regression only applies in so far as it affects trade or investment between the UK and the EU, meaning it does not act as an absolute commitment not to weaken workplace rights. Moreover, in relation to the future development of employment laws, the UK has committed only to 'continue to strive to increase protections'.

The commitments are reciprocal and either side may take remedial action if the terms are breached. However, it is unclear how exactly a material impact on trade and investment will be determined. Any potential breach entitles the other party to impose *rebalancing measures* (subject to following the dispute resolution mechanism). Rebalancing measures include the ability to impose duties on the other party's goods. This should act as a strong deterrent against weakening workplace rights.

A new approach to equality

Liz Truss, the Minister for Women and Equalities, has delivered a speech setting out the Government's new approach to equality. Ms Truss believes there is a problem with the debate around equality in the UK, namely that it 'has been dominated by a small number of unrepresentative voices'. Consequently, the Government intends to shift its focus away from the protected characteristics of the Equality Act 2010 and will instead consider a wider range of issues, including social background and geographic inequality.

Several equality developments were expected in 2020, including legislation curbing the use of non-disclosure agreements, an extension of redundancy protection for pregnant women and new parents and the Government's response to the consultation on workplace sexual harassment. It is unclear as to what the Government's change in focus means for the future of these developments.

LOUISE MASON, Linklaters LLP

Protected beliefs and Covid-19 vaccinations

ALEXANDRA CARN, Keystone Law

In the fight against Covid-19, the Government has started the largest vaccination programme in history. However, not all individuals will have the vaccine. This may be for medical reasons but it may also be due to their beliefs. This article focuses on workers who refuse to be vaccinated due to their belief, commonly referred to as 'anti-vaxxers'.

A November 2020 report from the Centre for Countering Digital Hate (CCHD) on the anti-vaccination industry revealed that one in six are unlikely to agree to a Covid-19 vaccination. This is not insignificant. The efficacy of the vaccines is between 70% and 95%, and so those that are vaccinated still remain at risk while the virus remains in circulation.

Employers' duties

Employers have a number of legal duties regarding health and safety in the workplace, most notably under the HSWA. The general duty is that employers are responsible for ensuring the health and safety of their employees so far as reasonably practicable (HSWA ss.2 and 3).

Breach of this duty has serious consequences. A body corporate that breaches the duty can face criminal prosecution. Criminal sanctions include unlimited fines. Prosecutions can be against individual directors, managers or other similar officers, all of whom can be exposed to fines and/or custodial sentences (HWSA s.37). In addition, the Company Directors Disqualification Act 1986 s.2(1) empowers the court to disqualify an individual convicted of an offence in connection with the management of a company. This includes health and safety offences. Companies can purchase insurance to protect directors; however, such protection can only be obtained for the cost of civil damages and for the legal costs in defending proceedings and not for criminal fines or penalties (Companies Act 2006 s.233).

Workers who refuse vaccination

What is the position of a worker who refuses to have a vaccine? Absent legislation, they are not breaking any law or, in the minds of many, doing anything wrong. Employees who are dismissed may claim unfair dismissal but there is a greater consideration.

'Belief' is one of nine protected characteristics covered by the EqA 2010. Its scope is far greater than just employees; it also covers job applicants, employees, apprentices, shareholders and workers. Discrimination because of belief provides for potentially unlimited compensation.

Under the EqA, belief is defined as 'any religious or philosophical belief and a reference to belief includes a reference to a lack of belief'. Some of the key factors (from *Nicholson*) in establishing a protected belief include:

- the belief must be genuinely held;
- it must be a belief, not an opinion or viewpoint based on the present state of information available;
- it must be a belief as to a weighty and substantial aspect of human life and behaviour;
- it must attain a certain level of cogency, seriousness, cohesion and importance;
- it must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others; and
- it may be based on science.

A reason that may be cited for refusal to have a vaccination is the conspiracy theory that the Covid-19 vaccine is actually a 5G chip designed for mind control. Conspiracy theories as a protected belief were specifically considered in *Farrell*.

In this case, the tribunal had to consider whether an employee's belief that the 9/11 and 7/7 attacks were 'false flag' operations authorised by the US and UK Governments. Mr Farrell was an intelligence analyst employed by the Police

'a belief that vaccination is wrong per se may be difficult to establish … most people will have historically had vaccines and or required their children to have them'

Authority. He prepared a terrorist threat assessment that explained his views about false flags. He was then dismissed; essentially on the basis of 'some other substantial reason', namely that his views were incompatible with his contract and precluded him from properly performing his role.

In determining whether Mr Farrell held a protected belief, the tribunal found that although his belief was genuinely held it was not considered to be a protected belief as it failed to meet 'even a bare standard of coherence and cohesion'. Also of note in *Farrell* are the judge's comments that cogency and cohesion are 'a more difficult thing to achieve when beliefs are about matters where there is a substantial amount of evidence in the public domain, as opposed to where beliefs relate to the unknowable for example the existence of a deity'. There is an obvious analogy here with 5G conspiracy beliefs and, following *Farrell*, it would appear that such would not qualify as a protected belief.

Similarly, a belief that vaccination is wrong *per se* may be difficult to establish as a belief, as most people will have historically had vaccines and or required their children to have them. However, a belief that vaccines should not be used until they have had 'proper' trials may be a protected belief. History relates a number of serious adverse consequences of vaccines being delivered too fast and too soon; to take but a few, Guillain-Barre syndrome was linked to flu vaccines in 1976 and narcolepsy linked again to a flu vaccine in 2009. It is established scientific opinion that to identify rare side effects requires the study of tens of thousands and that requirement cannot be met by early adoption of a vaccine. A belief in anti-vaccination is clearly important and there is likely to be cogent data that shows that a vaccine without extensive trials over a long period of time should not be considered safe.

A broad range of maxims have been held to be beliefs within the remit of the EqA. These include anti-fox hunting (*Hashman*), climate change (*Nicholson*), public service broadcasting (*Maistry*) and that it is wrong to lie in any circumstances (Hawkins). Being a Jehovah's Witness is an established protected religious belief (*Thompson*) and that belief involves refusal of medical intervention in the form of blood transfusions.

However, the decision in *McClintock* may suggest that a belief in anti-vaccination for scientific reasons would not qualify. In *McClintock*, it was held that to establish a belief there needed to be a philosophical viewpoint in which the individual actually believed; it was not enough to have 'an opinion based on some real or perceived logic or based on information or lack of information available'.

Beliefs that did not meet the threshold include: belief in mediums (*Power*), belief that people should wear poppies for Remembrance (*Lisk*) and that Jews are God's chosen people (Arya). However, it remains clearly arguable that a belief in anti-vaccination for scientific reasons is a protected belief.

Workers working with unvaccinated workers

What is the position if a worker complains to his employer that he does not want to work in proximity to someone who has refused a vaccination?

Employees who raise concerns about health and safety have special protections. ERA1996 provides that an employee who is dismissed for raising health and safety concerns (ERA s.100(1)(c)), for leaving or staying away from dangerous workplace (ERA s.100(1)(d)) or talking action to prevent danger (ERA s.100(1)(e)) are automatically unfairly dismissed and the usual two-year qualifying period for bringing a claim for unfair dismissal does not apply. Employees are also protected against other detriment pursuant to ERA s.44. Further, an employee who raises health and safety concerns may also be protected under the whistleblowing laws (ERA s.103A).

The above applies to employees only and not to workers. However, if (as suggested above) a belief in anti-vaccination may be capable in some circumstances of being a protected belief, then it must follow that a belief in vaccination is also a protected belief. This may not, however, afford workers much protection as any detriment suffered would not be because of their belief in vaccination, but rather that they did not want to work with the unvaccinated. However, a belief in a safe working environment seems an entirely credible protected belief. There is also the route of making a protected disclosure, which extends to workers (ERA s.230(3)).

This leaves the position whereby: (a) the anti-vaccination worker cannot be dismissed without the risk of a claim for detriment due to a protected belief (and for employees also an unfair dismissal claim); and (b) the vaccinated worker cannot be dismissed without risk of a whistleblowing claim (and for employees an unfair dismissal claim).

The law is clear that all qualifying beliefs are equally protected (*Henderson*). So how would an employment tribunal decide between the rights of a worker who believed in the right to a safe working environment against one

'a belief in a safe working environment seems an entirely credible protected belief'

who was anti-vaccination? The same type of conflict arose in the 'gay cake' case (*Lee*). Although not an employment law case, it was a claim under the EqA relating to the provisions relating to providing services (EqA ss.13(1) and 29(1)). In this case, a Christian baker refused to ice a cake with a message supporting homosexual marriage. The Supreme Court somewhat fudged the issue by finding that the refusal was not discrimination contrary to the EqA, as the refusal was because of 'the message not the man'; it thus avoided the need to address that conflict head on. However, where there is a *prima facie* case of discrimination, the issue may then be one of the balance between the right not to be discriminated against and the rights and freedoms of the discriminator. This is not an easy task.

An answer for employers in such circumstances may be to continue to operate stringently Covid-19-secure workplaces. Employees can be legally required to work if proper processes have been adopted. However, for many employers already faced with the significant costs, difficulties and effects on profits of managing Covid-secure workplaces may see the vaccine as a means of getting their businesses back to being fully operative.

This is particularly so in those workplaces that depend on employees working in close proximity, such as kitchens and factories. Further, as vaccines are not 100% effective and because it is not yet known whether vaccinated individuals can still transmit the virus, there is no guarantee that even a fully vaccinated workforce is a 100% safe workforce. It remains the case, therefore, that even with a substantial vaccine take up, Covid-19 secure practices such as wearing of masks and social distancing will need to remain in place for some period of time.

Owing to the risk of civil liability, it has been suggested that workers who refuse a vaccine, whether by choice or medical necessity, may be required to sign a waiver indicating that they understand the medical risks of this decision and accept the associated risks. It is trite law that liability for personal injury caused by negligence cannot be waived where it has been caused by negligence (Unfair Contract Terms Act 1977). However, personal injury claims that have arisen can validly be settled by a settlement agreement. This may

'this could lead to a form of vaccine segregation, with vaccinated employees housed in different premises from the unvaccinated'

lead to any worker signing a settlement agreement being required to declare whether they have had Covid-19 and if they have, to settle any claims related to the same. This could also be extended. Many individuals who contract Covid are asymptomatic and/or do not have a test. This may open up an argument as to whether such a term would be enforceable if a worker had been exposed to Covid-19 in the workplace, but there was no way of determining definitively whether they had had the virus or not.

If employers risk claims from either the vaccinated or the unvaccinated, could this lead to a form of vaccine segregation, with vaccinated employees housed in different premises from the unvaccinated? This is both a disturbing and fundamentally unattractive proposition for a myriad reasons, not least cultural inclusivity. Further, what about those employees who cannot be vaccinated for medical (rather than belief) reasons – which side of the building do they work in? They may also be the ones most clinically vulnerable. Will that then create a third tier? Although segregation may be possible for larger employers, it is clearly not going to be a realistic option for smaller employers.

There is a further overlay. A report in the *Lancet* of November 2020 reported that black and Asian ethnicities have a higher risk of Covid-19 infection than white individuals, and further that Asian ethnicities may be at higher risk of intensive care admission and death. This potentially leads to scope for indirect race, colour, nationality or ethnic origin discrimination, if the employer is implementing practices that put such groups at a disadvantage. This is also extendable to indirect sex discrimination (men being at greater risk of Covid-19 than women) and perhaps most notably, age discrimination.

Indirect discrimination is, of course, not unlawful if it is shown to be a proportionate means of achieving a legitimate aim. This requires the employer to effectively show that there were no other options available to it, but to do what it did and there is no margin of discretion like the band of reasonable responses available in unfair dismissal claims (*Lax*). The EHRC Services Code states: 'The more serious the disadvantage caused by the discrimination provision, criteria or practice, the more convincing the objective justification must be.' To have a modern form of workplace apartheid, has the potential to be very serious indeed.

The above is only some of the myriad legal questions that anti-vaccine issues raise. There are also extensive public law, contractual and tortious implications. This is another example of how pre-Covid laws are not fully equipped to deal with this unprecedented situation. If the CCHD is right about one in six refusing a vaccine, these issues are ones that employers will have to face and ultimately, the courts may have to grapple with.

KEY:

HSWA	Health and Safety at Work Act 1974
EqA	Equality Act 2010
Nicholson	*Grainger Plc v Nicholson* [2010] IRLR 4
Farrell	*Farrell v South Yorkshire Police Authority* [2010] ET/2903805/10
Hashman	*Hashman v Milton Park (Dorset) Ltd (t/a Orchard Park)* [2009] ET/3105555
Maistry	*Maistry v BBC* [2010] ET/1313142/210
Hawkins	*Hawkins v Universal Utilities Ltd (t/a Unicom)* [2012] ET/2051234/12
Thompson	*Thompson v Luke Delaney George Stobbart Ltd* [2011] 7/11FET
McClintock	*McClintock v Department of Constitutional Affairs* [2008] IRLR 29
Power	*Greater Manchester Police Authority v Power* [2009] UKEAT/0434/09
Lisk	*Lisk v Shield Guardian Co Ltd* [2011] ET/3300873/11
Arya	*Arya v Waltham Forest LBC* [2011] ET/3200396/11
ERA	Employment Rights Act 1996
Henderson	*General Municipal and Boilermakers Union v Henderson* [2014] UKEAT/0073/14
Lee	*Lee v Ashers Baking Co Ltd* [2018] UKSC 49
Lax	*Hardy & Hanson Plc v Lax* [2005] EWCA Civ 846

The laws of redundancy in France

ALAIN-CHRISTIAN MONKAM, Monkam Solicitors Limited

International companies might consider making employees redundant overseas because of the turmoil caused by Brexit and the Covid outbreak. French employment laws often appear complex to foreign employers. This is true! However, various French Governments have tried to unlock and ease the redundancy statutes.

Understanding French redundancy

The French statute provides for a unique definition of redundancy, ie 'a dismissal notified by the employer (a) for one or several reasons not related to the person of the employee; (b) resulting from the closure or the transformation of the workplace or the modification refused by the employee of an essential element of the contract of employment; (c) relating to economic difficulties, technological mutations, reorganisation to safeguard competitiveness, the closure of activities'.

French laws do not discriminate between individual and collective redundancies. This is a definition that applies to every redundancy, regardless of the number of employees ultimately dismissed.

Economic difficulties mean the decrease of orders received by the company (or its turnover drop) during:

- one quarter where there are less than 11 employees in the relevant company;
- two consecutive quarters where there are more than 50 employees and less than 300 employees in the company; or
- three consecutive quarters where the company has 300 employees or more.

The technological mutations should be sufficiently serious and important to justify a redundancy. French case law provides various examples of lawful redundancy based on technological mutations: an employee who cannot fulfil his tasks anymore because of the computerisation of the company; or an employee whose technical functions are removed because of an updated technology used by the company. However, the employer must show that sufficient training was provided to the relevant employee.

The safeguarding of the company's competitiveness has long been admitted as a valid redundancy reason; for example, threats to the company's survival because of the lower range of prices implemented by competitors or a permanent drop in the market share of the products sold by the company. However, the French Supreme Court has stated many times that a redundancy is also unfair when the business sector of the group employer as a whole is making a profit.

The closure of activities needs to be total and to relate to the whole company. The closure of just one establishment might justify redundancies only if such closure is necessary to keep the company competitive. The tribunal checks that the closure is not the fault or mistake of the employer, that employees were appointed even though the employer knew that closure was inevitable or that the closure of activities is a means to increase the profits of the group.

Selection criteria

The employer must select the employees that the company wants to make redundant in accordance with a fair selection method.

First, the employer must draft the pool(s) of selection, which is the group of employees holding similar positions to the one(s) considered for redundancy by the employer. The employer should not draft the pools in accordance with the mere job titles or qualifications, but using the real tasks performed by the employees. Once the pools are drafted, the employer can apply the criteria to select those employee(s) to be made redundant.

These criteria should be discussed and agreed with the trade unions through a collective bargaining agreement.

'French statutes set out a mandatory dismissal letter, the lettre de licenciement, containing mandatory reasons'

When there is no bargaining agreement, the law sets out mandatory criteria that the employer should take into account:

- the size of the employee's family – special care must be given to single parents;
- the years of service (first in, last out);
- the situation of employees whose redeployment or re-engagement might be difficult because of their age or particular physical or mental disabilities; and
- professional qualities.

The employee representatives (*Comité Social et Economique*) should be consulted on the choice of criteria and the points given to each criteria. The selected employees can claim the disclosure of these criteria by written request sent or handed to the employer no later than 10 days from the contract termination.

Individual consultation

One selected, the employer must hold an individual consultation with the relevant employee when individual redundancy is under consideration.

The purpose of the individual consultation is to:

- inform the employee of the reasons of the redundancy (a written record handed to the employee is advisable);
- discuss the relevant employee's opinion and wishes;
- discuss possible alternative employment; and
- crucially, provide the employee with either a *Contrat de Sécurisation Professionnelle* or *Congé de Reclassement*, depending on the company headcount.

Both measures are similar to training contracts that might involve Pole-Emploi, the French job centre, and might extend over 12 months.

Following the consultation and specific minimum periods, the dismissal can take effect. French statutes set out a mandatory dismissal letter, the *lettre de licenciement*, containing mandatory reasons (notably the economic reasons for the dismissal and the priority of reemployment).

Collective consultation

The employer must hold consultations with employee representatives where collective redundancy is under consideration. The main purpose of the collective consultation is to provide information relating to ways of avoiding or reducing the number of dismissals and mitigating their consequences.

The scope and the content of the duty to consult depends on the number of employees in the company and the scale of redundancies. Crucially, the employer must follow one of the following two tests to identify the extent of its obligations:

- when the employer wants to dismiss fewer than 10 employees within a 30-day period;
- or when the employer wishes to dismiss 10 employees or more within a period of 30 days.

Where the company has 11 employees and less than 50 employees, the employer has a duty to consult with the employee representatives, the *Comité Social et Economique* (CSE); where the company has 50 employees or more and it intends to dismiss 10 employees or more within a period of 30 days, the employer must draft a *plan de sauvegarde de l'emploi*:

- the employer may negotiate this plan with the Trade Union representatives;
- the CSE must be consulted with; and
- ultimately, the employee has to seek the approval of the French administration.

The plan sets out various measures to avoid or reduce the number of redundancy dismissals: find alternative employments inside or outside the company in the French territory; transfer of undertakings in order to avoid the company closure; and the creation of new activities, employee training or working time reduction.

The timetable of the consultation depends on both the company headcount and the number of terminations expected. In the case of *plan de sauvegarde de l'emploi*, the maximum consultation period of the CSE is:

- two months if the number of redundancies is less than 100;
- three months if less than 250; or
- four months if above this limit.

Breaching French law

There are various remedies when an employer breaches the French laws of redundancy. Some of the most important ones are as follows.

First, where a French employment tribunal rules that a redundancy is unfair, the employee is entitled to specific compensation depending on their years of service and the company headcount. The maximum compensation is limited

'there are various remedies when an employer breaches the French laws of redundancy'

to 20-months' salary. If the breaches relate to the individual consultation procedure, the relevant employee can claim a compensation limited to one month's salary.

If the employer does not comply with the rules relating to the selection criteria, the company might be fined up to €3,750.

If the breaches relate to the collective consultation of the employee representatives, the compensation should be calculated in accordance with the loss suffered by the relevant employees. Further, the company might be fined €3,750 per employee affected.

If the employer breaches the laws regarding the French administration consultation, the company should be ordered to compensate the loss suffered, plus a fine of €3,750 per employee concerned by the redundancy.

When the employees are entitled to a *plan de sauvegarde de l'emploi* and are dismissed with no plan at all, they can apply to the tribunal to claim either their reinstatement or a compensation no lower than six month's salary (provided they have a minimum of two years' service). The law sets out the same compensation (with no seniority condition) where an administration's approval of a *plan de sauvegarde de l'emploi* is reversed by the tribunal.

Collective voluntary terminations

There is a specific mode of termination where several employees accept to voluntarily leave in the context of redundancy in the company, ie a 'rupture conventionnelle collective'. The French administration is involved as it needs to give its approval.

In the first instance, such a mode of termination must be provided for by a bargaining agreement negotiated with the trade unions. This agreement sets out:

- the method of consultation of the employee representatives;
- the number of terminations that are considered (or the implementation duration of the agreement);
- the conditions that the applicant employee should meet (professional categories, years of service etc) and the method of application;
- the criteria to select various applicants;
- the method to calculate the termination payment;
- the method of individual termination agreement with the successful applicants; and
- the measures to support the employees' external redeployment.

Once entered into, this collective bargaining agreement must be notified to the French administration, which has 15 days to approve or reject it.

KEY:

Redundancy	Code du travail article L. 1233-3
Technological mutations, case law	Cass. soc. 15 October1992: Bull. Civ. 1992, V, No.513 Cass. soc. 19 December 1990: Bull. Civ. 1990 V, No.687
Competitiveness, case law	Cass. soc. 7 July 2009: RJS 10/2009 No.774 Cass. soc. 27 March 2012: RJS 6/2012 No.533 Cass. soc. 28 February 2012 No.10-21.050
Closure of activities, case law	Cass. soc. 26 February 1992: RJS 1992 No.422 Cass. soc. 28 October 2008: RJS 1/2009 No.24
Selection criteria	Code du travail article L. 1233-5
Individual consultation	Code du travail articles L. 1233-11 to L.1233-14
Contrat de sécurisation professionnelle	Code du travail articles L. 1233-65 to L. 1233-70
Congé de reclassement	Code du travail articles L. 1233-71 to L. 1233-75
Lettre de licenciement	Code du travail article L. 1233-16
Comité Social et Economique Information	Code du travail articles L. 1233-8, 1233-10 and 1233-31
Plan de sauvegarde de l'emploi	Code du travail articles L. 1233-61 and L. 1233-62
Specific periods	Code du travail articles L. 1233-30 to L. 1233-36
Unfair dismissal remedy	Code du travail article L. 1235-3
Rupture conventionnelle collective	Code du travail article L. 1237-19-1

Gender reassignment: expanding the protected characteristic

ROBIN MOIRA WHITE, Old Square Chambers and SIOBAN CALCOTT, Brethertons LLP

In Taylor, described by Stonewall as a 'landmark' case, the Birmingham employment tribunal settled the long-standing doubt that the protected characteristic of 'gender reassignment' includes non-binary and gender-fluid individuals.

The protected characteristic

The Equality Act 2010 s.7(1) states: 'A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.'

It is first to be noted that no medical process or supervision is required (as was the case with the prior regulations, the Sex Discrimination (Gender Reassignment) Regulations 1999).

Secondly, a physiological attribute of sex may refer to reassignment surgery, hair removal or the like, but 'other' attributes of sex will be non-physiological attributes such as hair length or style or clothing.

The facts of the case

Ms Taylor had worked for Jaguar Land Rover for nearly 20 years as an engineer, presenting as male and earning substantial praise for her work. In 2017, she approached her employers to say that she was beginning a gender transition and characterised herself, at that time, as gender-fluid or non-binary. She thereafter wore female clothing on some days. She became increasingly visible by representing the company at recruitment events and helping to establish an internal LGBT network. Management were initially supportive but she began to receive comments about being referred to as 'it', was asked 'if that was her Halloween get up' and received comments about her dress and appearance.

When Ms Taylor raised the 'it' comment with human resources, the response from one individual was: 'What do you expect them to call you?' When she raised the difficulties with management, she was told that action could only be taken if she 'named names', which the tribunal found was a far weaker response than the employer would have taken on health and safety issues or did, in fact, take in respect of a 'gifts and hospitality' policy, about which a strongly worded piece was circulated in the internal magazine.

When the claimant suggested supportive action from her manager such as wearing a rainbow lanyard during 'Pride' month, she was laughed at. The claimant became increasingly ill and resigned. She claimed constructive unfair dismissal and gender reassignment discrimination, harassment and victimisation.

Gender-fluid or non-binary

Jaguar Land Rover attempted to avoid liability by claiming that the claimant was not within the protected characteristic of gender reassignment as she, at the relevant time, described herself as gender-fluid or non-binary rather than transitioning from one binary gender to another.

The tribunal recognised this as a 'novel' point on which no authority exists. It accepted the claimant's submissions that the tribunal should consider the statements made by Solicitor General Vera Baird QC when she was piloting the 2010 Equality Act through the House of Commons. She had been clear that gender reassignment 'concerns a personal move away from one's birth sex' and 'moving a gender identity away from birth sex' (para 177, page 45).

The tribunal summed up their finding on the novel point in para 178: 'We thought it was very clear that Parliament intended gender reassignment to be a spectrum moving away from birth sex, and that a person could be at any point on that spectrum. That would be so, whether they described themselves as "non-binary", ie at different places between point A and point Z at different times, or "transitioning" ie moving from point A, but not necessarily ending at point Z, where A and Z are biological sex. We concluded that it

'we thought it was very clear that Parliament intended gender reassignment to be a spectrum moving away from birth sex'

was beyond any doubt that someone in the situation of the claimant was (and is) protected by the legislation because they are on that spectrum and they are on a journey, which will not be the same in any two cases. It will end up where it does. The wording of s.7(1) accommodates that interpretation without any violence to the statutory language.'

Jaguar Land Rover's actions

The tribunal was scathing about the employer's failures to act, especially given that it has more than 50,000 employees and contract workers at its plants in the West Midlands, characterising the state of affairs as 'astounding' and noting 'that hindsight featured strongly' in the employer's evidence.

Witnesses at the tribunal were the claimant's first- and second-line managers, and the more senior managers who had dealt with her grievance and grievance appeal. The tribunal was sympathetic to the managers who had been unsupported and out of their depth. None had seen the employer's equal opportunity policy or received useful training on dealing with such issues, and the tribunal described human resources advice as 'woeful'. The result was that nothing was done to deal with the increasingly desperate situation the claimant found herself in beyond referring her to occupational help, which the tribunal described as treating the symptoms and not tackling the cause. No steps were taken to educate the workforce about expected behaviour or about toilet use by employees who might be perceived as unconventional, which was another of the claimant's problems.

The result

Ms Taylor succeeded in her discrimination and constructive dismissal claims. The tribunal also awarded a 20% uplift for failure to follow the Acas code in respect of the unsatisfactory grievance process. Unusually, it also awarded aggravated damages for both the 'wanton' disregard of the claimant in the workplace *and* for the insensitive manner of her cross-examination in which it was suggested that she had been 'hypersensitive'.

In advance of a remedy hearing, compensation was agreed at £180,000. Jaguar Land Rover voluntarily accepted recommendations put forward by the claimant that it should have an external body examine their approach to diversity and inclusion across all protected characteristics and report at annual intervals over the next five years. The tribunal gratefully noted those voluntary recommendations. There will be no appeal of the substantive reasons. A costs hearing was scheduled for January 2021.

Diversity heroes

An interesting feature of the judgment was that, in reply to a point made by the respondent in the case that one person *could not* make a difference to a discriminatory situation, the tribunal responded as follows in para 150: 'We shall now turn to the question of whether one person can make a difference. All of us, and probably everyone in this room, can recall at least one teacher who made a profound difference to their lives. Without going into detail about the history of the equalities movement, it is absolutely apparent that one person can make a difference and on many occasions has.

'They were not always people who had any intention of being a champion – they were people who by their actions brought about a change. We, as an employment tribunal, have come up with a brief list of people who have made the world a better, and more equal, place. We could have added many more. Our list was: Rosa Parks, Doctor Martin Luther King, Harvey Milk, Mia Yamamoto, Baroness Jane Campbell, Sir Bert Massie, Pele, Viv Anderson and Dame Tanni Grey-Thompson. Specific to the legal field, our list was: Baroness Hale, Judge Tess Gill (of El Vino Fame) and, sadly, recently deceased, Ruth Bader Ginsburg (who rejoiced in being referred to on social media as "The Notorious RBG"). In terms of the present case, it is fair to say that the claimant has been a person who has made a difference at Jaguar Land Rover, albeit at great personal cost. The claimant would, in turn, nominate her representative.'

The effect on the protected characteristic of gender reassignment

The case is only at first instance but it is a powerful and authoritative judgment by an experienced tribunal judge tracking the Equality Act provision back to its parliamentary roots. While the point can be re-argued in another case, no substantive criticism of the judgment has appeared since a digest of the judgment was made available in September and the full judgment was released in late November 2020.

The effect is to widen the protected characteristic to include gender-fluid or non-binary individuals. There also seems no reason that other complex gender identities that

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involve a move away from birth sex should not also be protected. Examples might be 'gender queer' individuals whose presentation combines elements that might be thought proper to either gender. An example is the Austrian singer Conchita Wurst who combines a generally female appearance with a male beard.

Equally, 'a-gender' or 'gender-neutral' individuals, who identify without a gender are likely to be protected. In a very real sense, this can be seen as a move away from gender reassignment towards gender identity protection. It is also to be remembered that s.7 of the Equality Act requires no medical process.

But there are limits and protection still requires there to be a move away from natal sex. So a transvestite, who wears the clothes of the opposite sex but has no intention of altering their gender would, the authors believe, not be protected.

The effects on employers

Employees with complex gender identities will find support in the judgment, but there are likely to be a number of consequences for employers.

First, workplace policies will need to be examined to ensure that complex gender identities are included. Practical issues like toilet use will need to be considered.

Secondly, training of managers and the workforce will need to be considered; ensuring that a knowledge resource is present in the human resources function of any large employer and available to small or medium sized enterprises will be important. Binary transitions pose problems in terms of ensuring that matters such as pronoun use and the employer's position on inappropriate comments are well-known; for transitions to complex gender identities, all the more so.

Thirdly, employers need to ensure that effective action is taken when problems come to light or are raised as part of a grievance.

Without action on the above areas, employers are unlikely to make out the 'reasonable steps' statutory defence, just as Jaguar Land Rover was unable to.

Subsequent to the issues that form the subject of the case, Ms Taylor now presents as female and uses female pronouns, which the tribunal used when referring to her and are used in this article. The authors represented the claimant in her claim to the Birmingham tribunal.

KEY:

Gender Reassignment Regulations	Sex Discrimination (Gender Reassignment) Regulations 1999 (SI 1999/1102)
Taylor	*Taylor v Jaguar Land Rover Ltd* ET1304471/2018

Long Covid: is it a disability?

KATHERINE FLOWER and DAVID RINTOUL, Slaughter and May

Long Covid is increasingly recognised as a serious and long-lasting condition. This article considers whether and when long Covid could amount to a disability under EqA 2010, and what this means for employers.

The pathology of long Covid remains little understood, but there is a growing awareness of how it manifests itself. A recent peer-reviewed investigation, led by Oxford University's Professor Trisha Greenhalgh, has examined the experience of long Covid sufferers in the UK.

What we now know is that long Covid can affect anyone, including working-age individuals who were previously in good health, and those for whom the acute illness was not severe. We also know that long Covid can encompass as diverse a range of symptoms as breathlessness, overwhelming fatigue, muscle pains, 'brain fog', chest pains, persistent cough, skin rashes, diarrhoea, and even heart failure and strokes. We also know that those in long Covid support groups are continuing to report symptoms many months after their initial infection.

The definition of disability

Disability is defined under s.6 EqA 2010 as a 'physical or mental impairment that has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities'.

The requirement for an impairment

As a novel disease, the term 'long Covid' has no formal medical definition. For the purposes of the definition of disability, however, it is well established that there is no need for a formal medical diagnosis to identify the existence of an impairment. The absence of any formal diagnosis of a 'post-acute' or 'chronic' condition will not, therefore, be determinative.

It is also not strictly necessary to determine the precise nature of the impairment, provided its existence can be deduced from the effect it has on an individual's day-to-day activities. A 'functional' approach is required, which involves identifying the effect of an impairment, not necessarily its clinical name or its underlying cause. This functional approach could be significant in the context of a long Covid sufferer, who may be experiencing a range of symptoms that are fluctuating, varied and difficult to pin to a specific pathological or mental cause.

Given the breadth of conditions that may amount to a 'physical or mental impairment' under the EqA 2010, a person suffering from long Covid is very likely to be able to show that this requirement has been satisfied.

A substantial and adverse effect on day-to-day activities

A person suffering from breathlessness, chest pain and/or fatigue may well, if the symptoms are sufficiently severe, be unable (or at least find it more difficult) to carry out tasks that most people would consider 'everyday'. In the long Covid context, the more difficult question is likely to be whether, on the particular facts, the effect of such an impairment is 'substantial'.

In answering the 'substantial' question, a tribunal will need to compare a person's ability to carry out normal day-to-day activities against *that person's* ability had they not been impaired. (This is different to the test regarding the scope of 'normal' day-to-day activities, which will be judged by reference to those activities that can be regarded as 'everyday', and excludes activities that are normal only for a particular person or group.)

In the case of someone who was previously active, able and energetic before contracting Covid, and who experiences a dramatic decline in their abilities, identifying a substantial effect may be straightforward. For others, the effect of the impairment itself may be less clear cut.

'for a claimant displaying severe and debilitating long Covid symptoms, the substantial adverse effect condition may well be satisfied with relative ease'

'Hidden' symptoms such as a deterioration in memory or attention-span that may result from long Covid are not so easily measured, and the relapsing-remitting nature of some symptoms may mean that the apparent severity of the condition varies from day to day.

It is also important to remember when making any assessment that physical impairments may result in mental effects. Someone who is suffering long Covid may, for example, experience additional strain on their mental health (low mood, heightened anxiety, sleeplessness and even post-traumatic stress), which can potentially impact on their day-to-day activities.

Many patients experience a range of symptoms that a tribunal would consider collectively in reaching its conclusion. The Acas guidance provides an example to illustrate this approach which is potentially relevant to long Covid: 'Tom has breathing difficulties, so he can be slower moving around, lack energy during the working day and have problems sleeping at night. Taken individually, these effects might not be substantially adverse. But taken together, they could amount to a substantial adverse effect' (page 7).

In the context of long Covid sufferers, the assessment of whether an adverse effect is substantial (for which the bar is low, being defined as 'more than minor or trivial') will be highly fact specific and may entail a detailed assessment of the medical evidence. But for a claimant displaying severe and debilitating long Covid symptoms (whether individually or cumulatively), the substantial adverse effect condition may well be satisfied with relative ease.

The requirement that the effect is long term

'Long term' for these purposes means the impairment has lasted 12 months or is likely to last at least 12 months, or is likely to last for the rest of the person's life (Sch 1 para 2 EqA 2010). The first confirmed cases of Covid 19 in the UK were identified on 31 January 2020, and our collective awareness of long Covid has developed only gradually since then, so it remains too early to say that long Covid *has* brought about an impairment that has lasted 12 months. However, 'likely' here means 'could well happen' and is a lower test than a balance of probabilities.

In *Daouidi*, the CJEU held that relevant evidence that a limitation is long term 'includes the fact that, at the time of the allegedly discriminatory act, the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress or the fact that that incapacity is likely to be significantly prolonged before that person has recovered'. In other words, notwithstanding that long Covid has been around for less than 12 months, its impact on those suffering with it *may* satisfy the long-term requirement.

Given the range of possible symptoms, employers will need to consider the cumulative effects of long Covid. In *Hay*, the EAT considered the case of an individual who was suffering from tuberculosis, as well as a range of other respiratory impairments. The tuberculosis alone would not last 12 months, but the claimant had a 'constellation of symptoms' (not all of which were attributable to the tuberculosis) that would last more than a year.

With each passing week, more evidence becomes available regarding the long-term effect of long Covid and the time horizons for recovery, and by the time a discrimination case founded on an allegation that a long Covid sufferer is disabled is heard in the employment tribunal there is likely to be a clearer understanding of the possible duration of long Covid symptoms. However, any such future tribunal will need to make its assessment of the likelihood of the condition lasting 12 months or more based on the evidence available *at the time of the alleged discrimination*.

From today's vantage point, those who continue to experience severe symptoms more than, say, six months after initial infection, with no positive indications of improvement, must be well placed to argue that their impairment 'could well' last a further six months, and thereby satisfy the 'long-term' requirement.

What should employers do?

Until more is known about this condition and its long-term impact, employers need to be mindful that an employee or worker with long Covid (or one who is associated with someone suffering from long Covid) *may well* attract additional protections under the EqA 2010.

Employers will need to make proactive enquiries into the severity and possible duration of the condition as experienced by the relevant individual. Understanding how the symptoms change over time will be an important part of this assessment – if someone experiences cycles of

'until more is known about this condition … employers need to be mindful that an employee or worker with long Covid may well attract additional protections under the EqA 2010'

improvement followed by relapses, for example, a mere snapshot at a given point in time will be insufficient, and detailed input from occupational health and/or clinicians should be sought. In the context of an unfamiliar disease with unpredictable characteristics and an unclear prognosis, the need for such pro-active enquiry and ensuring a sound evidential basis for decision-making is particularly acute.

Employers should avoid treating long Covid sufferers less favourably because of the condition itself, but also as a result of anything arising from the condition. Disciplinary action for long Covid-related sickness absence, for example, may well give rise to discrimination arising from disability claims. Behavioural changes or misconduct caused by stress that arises from the effects of long Covid could also trigger this kind of claim (*Grosset*).

Given the array of possible symptoms that may arise from the condition, it will be difficult to pre-empt those policies that might *indirectly* discriminate against long Covid sufferers, but allowing flexibility regarding, for example, avoiding early morning or back-to-back meetings for those experiencing exhaustion and fatigue are likely to be helpful.

Similarly, in relation to the duty to make reasonable adjustments, the unpredictability of long Covid symptoms means it is difficult to pre-empt what adjustments may be required to alleviate any substantial disadvantage and to support long Covid sufferers back to work. Timely and thorough engagement with occupational health will help identify the particular support that may be needed, but the typical menu of altering duties, working hours, location of work (such as extended remote working) and phased returns should all be considered.

Documentaries and press articles about long Covid in recent months have helped raise general awareness, but there is also an equal amount of misleading information and opinion that has been shared on social media in particular. Training for managers regarding how to handle staff suffering from both Covid-19 and long Covid will help to ensure that matters are managed sensitively, appropriate support is made available and policies and procedures are not applied in a discriminatory way.

KEY:

EqA 2010	Equality Act 2010
Greenhalgh report	'Persistent symptoms after Covid-19: qualitative study of 114 "long Covid" patients and draft quality principles for services', 20 December 2020
Acas guidance	Disability discrimination: key points for the workplace (July 2017)
Daouidi	*Daouidi v Bootes Plus SL* [2017] IRLR 151
Hay	*Ministry of Defence v Hay* [2008] IRLR 928
Grosset	*City of York Council v Grosset* [2018] IRLR 746

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