A newsletter from irwinmitchell

Edition 8 - Spring 2016

Focus on Employment

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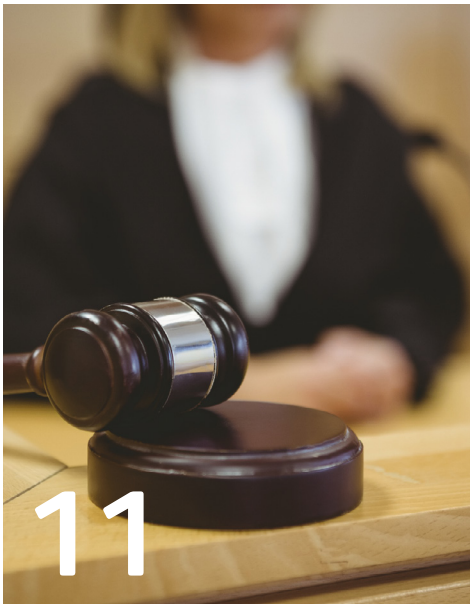

LEGISLATION TRACKER:

What is in force or expected to come into force this year?

2016		
1 January	**Whistleblowing**	"Prescribed persons" are required to produce annual reports of whistleblowing disclosures (without identifying the worker who made the disclosure, their employer or other person about whom the disclosure was made).
11 January	**Zero hours contracts**	Regulations came into force which provides the right to unfair dismissal protection for employees working under a zero hours contract who are dismissed because the employee has failed to comply with an exclusivity clause.
31 March	**Modern slavery**	Organisations with a turnover of £36 million must publish an annual slavery and human trafficking statement in respect of financial years ending on or after this date.
1 April	**National Living Wage**	Introduction of the National Living Wage for workers aged 25 and over paid at the rate of £7.20 per hour.
1 April	**Penalties for failing to pay the National Minimum Wage or National Living Wage**	Penalties for failing to pay the appropriate rates doubled from 100% of the shortfall in wages to 200% of the shortfall, capped at £20,000 per worker.
6 April	**Increases to ET limits**	Increase in the maximum compensatory award for unfair dismissal to £78,962 (from £78,335). Increase in the maximum amount of a week's pay used to calculate statutory redundancy payments and various awards including the basic award for unfair dismissal claims to £479 (from £475).
6 April	**Limits on number of postponements to ET hearings**	Parties can only make two applications to postpone hearing dates and costs may be imposed against a party who makes a late application.
6 April	**Statutory payments for SMP**	No increase in the weekly rates. These will remain as follows: 1. SMP, SAP; PP and ShPP - £139.58 per week 2. Sick pay - £88.45 per week.
8 May	**Recruitment agencies**	Changes affecting the regulation of recruitment agencies come into effect. Employment agencies will not have to agree terms and enter into a written contract with the hirer before providing services.
23 June	**Referendum**	Referendum on whether UK should remain in the EU.
Date TBC – expected October 2016	**Gender Pay Reporting**	Section 78 of the Equality Act 2010 enables the Government to make regulations requiring employers with over 250 employees to publish details of their gender pay gap. The Government's response to the consultation is expected soon.

Date TBC	**Repayment of public sector exit payments**	Qualifying individuals will be obliged to notify their new and previous employer where they propose to return to any part of the public sector (as an employee, self employed contractor or office holder) after they have received a public sector exit payment within the previous 12 months. Public sector exit payments include those paid for loss of employment, including enhanced redundancy payments, discretionary payments to buy out actuarial reductions to pensions and severance payments. It does not apply to payments in lieu of notice, contractual bonus payments or those made in connection with incapacity, or payments awarded to the individual by a court or tribunal. Qualifying individuals are those who earned £80,000 or more within 12 months of receiving their exit payment. Repayment will be tapered, so for example, an employee returning within two months of receiving an exit payment will repay more than an employee returning nine months after receiving the payment.
Date TBC	**Exit payments and apprentice-ships**	The Enterprise Bill 2015-16 will introduce: • A £95,000 cap on exit payments made to public sector workers to end six-figure payoffs. • Regulations to restrict the use of the word "apprenticeship" to Government-accredited schemes and to increase the number of public sector apprenticeships offered.
Date TBC	**Trade unions**	Proposed changes to balloting rules for industrial action including enhanced rules for "essential public services", removing the prohibition on using agency staff to cover striking employees, measures on picketing, facility time, political donations and additional powers for the Certification Officer.
Date TBC	**Tax treatment of termination payments**	Proposals include treating all payments in lieu of notice as taxable. The government's response to the recent consultation is expected later this year.
Date TBC	**Company directors**	All company directors should be natural persons (not corporate entities). There will be a 12 month grace period after which corporate directors will cease to be directors by operation of law.

News in Brief

ACAS report highlights increase in bullying

ACAS says that its helpline took over 20,000 calls last year on bullying and harassment and believes that this might mean that workplace bullying is on the increase. ACAS are going to begin a public debate on workplace bullying to help identify better solutions and is considering introducing a new code of practice on unwanted behaviour in the workplace - Workplace Trends 2016

Enforcement of Tribunal Awards and Settlements

BIS has published its form for claiming penalties from employers for non-payment of tribunal awards or settlements.

Under the new scheme which came into effect in April, a Claimant who has not been paid any sums under a settlement or tribunal award can ask BIS to issue a penalty of 50% of the outstanding amount, subject to a minimum of £100 and a maximum of £5,000 - View guidance and form

Low Pay Commission consultation on national minimum wage and national living wage

The LPC has opened a consultation seeking views on the existing rates of NMW and NLW and the rates that should apply from April 2017. Views are also sought on issues surrounding compliance and enforcement. The consultation closes on 29 July 2016.

From April 2017, all of the rates, including the NLW, will be uprated in parallel. The LPC will recommend to the government in October 2016 the level of rates to apply from April 2017.

Companies criticised for reducing overtime to meet costs of NLW

A number of recognised "brands" such as Tesco and B&Q have faced widespread criticism following allegations that they have cut overtime rates to fund increases in pay to workers aged 25 and over.

Revised HMRC guidance on employment intermediaries

HMRC published updated interim guidance on the tax and reporting obligations of employment intermediaries and businesses contracting with them. This will be included in HMRC's Employment Status Manual.

The revised guidance specifies that an agency agreement falling within the rules need not name a particular worker and that the legislation applies to any substitute sent by a worker. It is irrelevant whether the agreement provides for more than services (for example, goods). The revised guidance confirms that the test of supervision, direction or control also applies when determining whether the employment intermediaries travel expenses rules apply - View guidance

Advice on potential employment implications of Brexit

The TUC has published a 55 page advice, written by Michael Ford QC, on the potential implications of Brexit on employment and health and safety law.

The advice states: "All the social rights in employment currently required by EU law would be potentially vulnerable" and that there would be years of uncertainty for workers and employers if the UK votes to leave the European Union - Read more

Long-term health conditions threaten UK economy

The Work Foundation has published a report which indicates that the number of people with long-term conditions threatens to overwhelm Britain's economy and the NHS. It believes that the situation will get worse unless the government takes urgent action. It suggests that government should offer tax rebates and financial incentives to employers that support people with long-term conditions to remain at work.

Flexible hiring could help improve performance

A report by the Joseph Rowntree Foundation in a study of 3.5 million job ad's found that only 6.2% of vacancies for "quality" jobs (those paying at least £10.63 per hour) were advertised with options to work flexibly. This rate was considered to be the amount parents, older people and disabled people need to earn to meet basic minimum income standards.

It found a wide gap between flexible working (which is widely available) and flexible hiring (which is relatively rare). The report suggests that this cuts employers off from a proportion of the skilled market and is particularly damaging for those sectors with skills shortages such as IT and engineering. Read report

Employer National Insurance contributions for young apprentices abolished

Employers of apprentices aged 25 and under no longer have to pay NICs. The change came into effect on 6 April 2016 and applies to both existing employers with apprentices and those taking on a new apprentice.

Tips on dealing with dyslexia in the workplace

It is estimated that around 1 in 10 people have dyslexia. It predominately causes reading and writing difficulties but memory, mathematics, organisation and sequencing skills can also be affected.

Dyslexia is a disability and workers with this condition are protected from discrimination under the Equality Act 2010.

There have been a number of employment cases which provide some pertinent advice for employers.

Dyslexia in the workplace

1. Don't allow your staff to name call

You would think that it should be perfectly obvious that dyslexic staff should be treated with dignity and respect by their colleagues and managers and these messages are often reinforced in diversity or equal opportunities training. None the less, some employers still get this lamentably wrong. The owner of a barbers shop who referred to one of their female hairdressers with dyslexia as "thicky Vicky" and, after she complained, sacked her was guilty of both direct disability discrimination and discrimination arising from a disability - *Fenn v Schreeve ET*.

2. Consider whether there are any reasonable adjustments you can make

Most of the reported cases involve allegations that the employer has failed to make reasonable adjustments to ameliorate the disadvantage to the employee across a range of workplace situations. For example:

Interviews

In *Noor v Foreign and Commonwealth Office*, the EAT found that changes should have been made to the interview process to accommodate a dyslexic candidate disadvantaged by the fact that he had been asked questions about competencies not listed in the job description during the first interview. The EAT made it clear that employers must remove any disadvantage to "eliminate the practical difficulties and embarrassment caused and create a level playing field" for the interview.

But, it was not a reasonable adjustment in *Haynes v Chief Constable of Gloucestershire* to dispense with a promotion board interview in circumstances where an experienced policeman sought promotion to a more senior level.

Disciplinary and grievance hearings

The Employment Tribunal recently took Starbucks to task for its failure to adjust its standard procedures for dealing with misconduct allegations against a member of staff with dyslexia. The minutes of the meeting were handwritten so she couldn't read them and this placed her at a substantial disadvantage. Starbucks also required the claimant to sign and agree the notes at the end of the meeting, which again put her at a substantial disadvantage. She also needed more time to read and understand typewritten documents and providing these two days before the hearing was not deemed to be long enough. They were also criticised for typewritten documents provided in an extremely small font and in single line spacing. This aligns with professional guidance which recommends that documents should be font size of no less than 11pt, have clear typefaces such as Arial and increase the spacing between lines. *Kumulchew v Starbucks, ET*.

It might also be appropriate to adjust the right to be accompanied and allow dyslexic members of staff to bring a family member or friend to assist them at disciplinary or appeal hearings – *Robertson v Otis Ltd, ET*.

Dismissal

A dyslexic consultant neonatologist dismissed for bullying colleagues claimed that her condition made it more likely that she would engage in that type of behaviour and sought to argue that her dismissal was a breach of her employer's duty to make reasonable adjustments. She argued that the practice of normally dismissing employees for gross misconduct should be adjusted. The EAT disagreed and indicated that the *"subtle problems of perception and misreading of verbal cues are a world away from the sort of behaviour of which the Claimant is accused."*

Dyslexia, like many disabilities, is part of a spectrum and may be mild or much more serious. Whilst there are no hard and fast rules about whether it will in all cases be a disability for the purposes of the Equality Act or, if it is, what is or might be a reasonable adjustment, these cases demonstrate that an employer who knows that an employee has dyslexia must consider whether they are disadvantaged when applying for work, seeking promotion or in respect of enforcing workplace rules. If they are, then there is a risk of disability discrimination claims and they must consider making changes to level the playing field and remove the disadvantage.

GENDER PAY GAP

Is there a gender pay gap anywhere in your organisation?

Not sure? Then you are not alone but if you employ 250 employees or more you will be expected to know the answer to this and publish it.

What is a gender pay gap?

This is a term used to describe any difference in the average pay of all women and men. Since 1997, the gap between men and women's average pay has been monitored by the Office for National Statistics. In 2015, the gap was 9.4% for full time employees and 19.2% for all employees (owing to the fact that more women work part time than men and part time workers of both sexes earn less per hour, on average, then their full time counterparts).

Which employers are affected?

Both private and voluntary sector employers with a workforce of 250 or more are required to comply with the duty. Public sector employers are excluded, but the Government announced last year that it will introduce separate legislation to ensure that these are subject to the same obligations.

The requirement to have at least 250 employees is judged on 30 April each year so a company that in April 2017 only has 245 employees will not have to comply with the duty even if on 1 May 2017 it employs further 5 individuals, but would have to do so the following year (assuming its employment figures remained static or increased). One issue of concern to many of our clients was whether group companies have to aggregate employees across different subsidiaries. The Regulations, as currently drafted, do **not** require this.

Are all employees counted?

Only "relevant employees" are counted. These are defined as someone who normally works in the UK and whose contract of employment is governed by UK legislation. This is likely to exclude employees of contractors and temporary agency workers regularly used by the employer. This is a narrower definition than the one included in the Equality Act, and may, therefore be subject to change when the final Regulations are published.

What information has to be provided?

The government has published draft Regulations. At present, employers must publish:

- Overall gender pay gap figures calculated using both the mean and median average hourly pay. (The median is thought to be the best indicator as it is not distorted by the small number of very high earners).
- The numbers of men and women working across each of four pay bands.
- The 'gender bonus gap' for their organisation and details of the proportion of men and women who received a bonus in the same 12 month period.

What counts as pay?

Pay **includes** basic pay, paid leave, maternity pay, sick pay, area allowances, shift premium pay, bonus pay and other pay (including care allowances paid through the payroll, on-call and standby allowances, clothing, first-aider or fire warden allowances).

The issue of including bonus information throws up some interesting issues. Bonuses that are paid in the **pay period** ending 30 April will be reported twice; in the employers headline gender pay gap figures and in their gender bonus gap figures. This may skew the headline figure and, to avoid confusion, may result in businesses paying bonuses at a different time in the year.

Pay **does not include** overtime pay, expenses, the value of salary sacrifice schemes, benefits in kind, redundancy pay, arrears of pay and tax credits.

Pay period

Pay is to be calculated over a specific reference period according to how often the employee is usually paid, but ending on 30 April each year.

How is the pay gap calculated?

To generate average earnings figures unaffected by the number of hours worked, employers will need to calculate an hourly rate of pay for each relevant employee. The gross weekly pay is determined using weekly pay divided by weekly basic paid hours for each relevant employee. However, it is not yet clear whether the reference to basic paid hours refers to contractual hours or the actual hours worked (the later would give a much clearer representation).

Employers must identify quartiles for the overall pay range. This is likely to require:

1. Listing all relevant employees in order of increasing pay rates.
2. Dividing that list from top to bottom into four groups containing equal numbers of employees (made up of men and women).
3. Determining the parameters of each pay band by reference to the lowest earning employee and the highest earning employee in the pay band.

Where do we have to publish this information?

On a searchable UK website that is accessible to the public as well as your employees. The information must be retained for three years.

In addition, employers will also have to upload the information to a government sponsored website (which is likely to display the information in some sort of league table).

Can we opt out?

The current proposals will require all businesses with employees over the 250 threshold to comply. There are no opt-outs. However, the government has decided against imposing penalties for non compliance. Instead it will run "periodic checks", produce sector based tables and it is also considering "naming and shaming" those organisations that do not comply.

It is possible that businesses may also face reputational damage if they do not provide the information.

What are the risks to our business if our report shows disparity between the pay of men and women?

There might be perfectly good reasons for this including the fact that more men hold the most senior roles or more women work part time in your organisation. This is not unlawful.

However, if you discover that there is a difference between pay within specific roles and grades, you will need to undertake further work to ascertain the reasons for it. If these relate to gender, then your organisation will be vulnerable to a claim. Claims for Equal Pay can be brought in the Employment Tribunal (generally within **six months** from the end of the employment contract) or in the County Court (within **six years**). Trade unions are likely to scrutinise the information provided to try and find out if any claims can be brought. Claims can be brought for six years' back pay (five years in Scotland).

When will the final Regulations be published?

The government has indicated that it will publish final Regulations in the summer.

When will this duty take effect?

The government has said that the Regulations will come into force on 1 October 2016, but employers will have until April 2018 to publish the required information for the first time and will then be required to publish each year.

However, the first data snapshot will be 30 April 2017. This is the date on which employers will be required to calculate their gender pay gap even though they have until 29 April 2018 to publish the actual report. The requirement to publish information on bonuses asks businesses to revaluate the preceding 12 months, which means that decisions that you make now will be subject to scrutiny.

How do you enforce the terms of a

SETTLEMENT AGREEMENT?

How do you enforce the terms of a settlement agreement?

You have entered into a legally binding settlement agreement with a former employee and have paid him the agreed amount of compensation. In return he has agreed not to pursue any claims against the business and has made certain promises to you (known as warranties).

What happens if, after the employee receives the money, he breaches the agreed terms?

This will depend on whether provision has been included for this in the settlement agreement.

Some agreements include repayment provisions. If the employee breaches any material terms of the agreement, their employer will be able to recover any money paid to him/her and recover it as a debt. These can be problematic and are usually unenforceable if they amount to a penalty (rather than a genuine pre-estimate of the loss suffered by the employer).

It is more common for the contracts to include an indemnity from the employee to the employer for any losses it suffers as a result of the employee's breach.

Remember – if you have not yet paid the employee the agreed amount, you will not have to do so in the event that he materially breaches its terms.

What is a material term?

A material term is one that if breached has a serious effect on the innocent party. In the context of a settlement agreement, the following actions by an employee are likely to constitute a material breach, which allows the innocent party to terminate the agreement:

- Bringing an employment claim included in the list of claims the employee has agreed not to pursue.
- Making adverse and/or derogatory statements that result in damage to the employer or its reputation in breach of a clause in the agreement.

Breaching a trivial or minor clause will not be sufficient. Most settlement agreements require the employee to return all property belonging to the employer within a specified timeframe. You would not normally be able to terminate the agreement and recover all (or some of) the money you have given the employee in circumstances where, for example, the employee has failed to return his identity pass, but you probably would be able to do so if he failed to return expensive IT equipment, or a car.

Will the parties still be bound the terms of the settlement agreement?

This will depend on the terms of the agreement. If the employee fails to comply with a condition precedent (which provides that payment will only be made if and when certain conditions are met), the employer is entitled to withhold or recover the compensation payment. In these circumstances, the parties will remain bound by the terms of the agreement and the employee would not, for example, be able to bring new employment claims against their employer. In other circumstances, where the employee has breached a material terms of the settlement agreement and has not yet received the money, the employer can either bring the contract to an end (in which case neither party would be bound by it), or if payment has been made to the employee, affirm it and sue for compensation or recovery of the sums paid.

Can you recover all of the money paid to the employee?

This will depend on whether you have an enforceable repayment clause or, if you are relying on an indemnity clause and can justify recovering all of the money you have paid out. If the payment to the employee includes statutory payments they are entitled to anyway (such as a statutory redundancy payment), you would not normally be able to recover this element.

Relevant factors include the length of time that has elapsed since the settlement agreement was agreed. The longer the gap, the less likely you will be able to recover all monies paid out.

How do you recover the sums?

The terms of the agreement are legally binding and if they include provisions for the compensation to be repaid in the event the employee materially breaches it terms, you can take action to recover the money.

You will need to send a letter before action to the employee to explain that they have breached the terms of the agreement and provide details of the evidence that you have to support this. Give the employee a reasonable amount of time to respond (14 days is usually sufficient). If the employee disputes the facts, refuses to repay the money or simply ignores the letter, you will have to take action to recover it.

For debts in excess of £750.00 you can issue a Statutory Demand, which ultimately could result in the employee being made bankrupt if they do not comply with the terms of the Demand. Alternatively, you can issue proceedings against the employee for breach of contract and pursue them through the court process, although this can be more time consuming and costly.

The value of your claim will determine how your proceedings are dealt with by the court, with claims less than £10,000 generally being determined through the small claims procedure which is a more simple process.

We can help you

Irwin Mitchell is well positioned to be able to assist you with pursuing breaches of settlement, or indeed any, agreements in order to recover sums which are rightfully owed to you.

For further information on settlement agreements, please contact:

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Case Law Update

Can an employee blow the whistle about a cramped workstation?

They might be able to according to the EAT in *Morgan v Royal Mencap Society*, but only if the employee can demonstrate that they reasonably believed that their complaints were in the public interest. This can only be determined at a full hearing.

Facts

Ms Morgan worked for the charity for almost three years. During her employment she injured her knee and complained on three separate occasions to senior staff that her working area was cramped and that this was adversely affecting her knee. We don't know how Mencap reacted to these complaints but clearly, whatever steps they took were not to Ms Morgan's satisfaction and, she resigned claiming both constructive unfair dismissal and that she had suffered a detriment as a result of having made a protected disclosure.

In order to get past the post on her whistle-blowing complaint, she had to demonstrate that she had a reasonable belief that the disclosure of wrongdoing (in this case her lack of desk space) was in the public interest. When pressed on this point, she said that she believed the public would be "shocked" by her working conditions and that these presented a health and safety risk to others. She then went on to say "the public ought to know about charities that behave in this manner". Mencap, not unreasonably, thought that her complaint could not be said to be in the public interest as it only affected her and it made an application to strike out this part of her claim at a preliminary hearing.

Mencap was initially successful and Ms Morgan appealed to the EAT.

Decision

The EAT said that the case should proceed to a full hearing to determine if Ms Morgan did reasonably believe that her complaints were in the public interest. This is because there is a high threshold which must be satisfied before a claim can be struck out before hearing any evidence.

Tips

This case again demonstrates that tribunals will not strike out claims, of even seemingly hopeless cases, at an early stage. Tribunals will be expected to test by evidence whether the individual bringing the claim a) did believe that their disclosure was in the public interest and b) whether that subjective belief was a reasonable one to hold. We can only hope that common sense prevails when the case is heard. The "public interest" test introduced in 2013 to prevent individuals being able to bring whistle-blowing claims on the basis of a breach of their own contractual rights is creaking at the joints. The case of ***Chestertons***, which involved an estate agent who complained that profit figures had been manipulated to reduce the bonus paid to him and around 100 of his peers, is due to be heard by the Court of Appeal in the autumn. We hope that the Court of Appeal will take the opportunity to clarify what is meant by the "public interest".

Whistle-blowing – when does an allegation amount to a disclosure?

When it conveys information according to the EAT in *Kilraine v London Borough of Wandsworth*. It does not matter what "label" is attached to the disclosure.

Facts

Ms Kilraine alleged that she had been dismissed as a result of making four protected disclosures. She complained in an email to a senior member of staff that the local authority was failing in it legal obligations towards her in respect of bullying and harassment and in particular "numerous incidents of inappropriate behaviour". She also alleged in a separate complaint that her line manager had failed to support her when she had raised a safeguarding issue.

The tribunal found that these were allegations rather than disclosures of information and did not qualify as protected disclosures. Ms Kilraine appealed.

Decision
The EAT dismissed the appeal and said that Ms Kilraine had not gone far enough to establish that she had made protected disclosures. In relation to the complaint about discrimination, it said that this was an allegation; the term "inappropriate" was too vague to clearly include, say, a criminal offence or a failure to comply with a legal obligation. The other complaint did convey some information about what happened during the meeting, but she had not shown that her line manager was in breach of any legal duty or that she reasonably believed that there was such a duty.

Tips
This case demonstrates that employees who wish to gain the protection of the whistle-blowing legislation must be in a position to point to a particular disclosure. Alleging that this or that is wrong is not enough without corroborating evidence. In this case, the employee made a number of complaints, but only sought to badge these as "disclosures" after she was made redundant.

Are employers obliged to continue childcare vouchers under a salary sacrifice scheme during maternity leave?
Not according to the EAT in *Peninsula Business Services v Donaldson*.

Facts
Peninsula offered its staff the ability to purchase childcare vouchers by way of a tax efficient salary sacrifice scheme. However, it imposed a condition that employees could not use this during maternity leave.

Ms Donaldson wished to join the scheme but, as she was pregnant, she believed that the condition of entry was discriminatory and she refused to join. She alleged that the scheme conditions were indirectly discriminatory on the grounds of sex and that she had suffered a detriment for asserting her right to maternity leave.

In order to succeed with her detriment claim, Ms Donaldson had to show that childcare vouchers were a non-cash benefit and as such, had to be maintained during maternity leave as only remuneration could be suspended during this period.

The tribunal held that the vouchers were non-cash benefits and should be paid to women on maternity leave. Peninsula appealed.

Decision
The EAT reversed the decision and allowed the appeal. It found that childcare vouchers did amount to remuneration and as such employers do not have to provide them during maternity leave. It found that a salary sacrifice scheme, in effect, diverted salary. The money was still earned but was earmarked for another purpose.

Tips
HMRC guidance provides that salary sacrifice schemes amount to non-cash benefits and therefore should continue during maternity leave. The EAT said that this was not correct.

This decision is to be welcomed. Continuing vouchers during maternity leave produces a windfall benefit for the employee and imposes a cost on the employer. However, the EAT admitted that its interpretation was driven by a belief that requiring employers to pick up the tab for childcare vouchers during maternity leave would discourage employers paying SMP (rather than enhanced payments) from offering the scheme.

It is likely that these issues will be subject to further appeal. The EAT's analysis is vulnerable to attack and employers wishing to withdraw childcare vouchers during maternity leave should take advice before changing their policy.

Is it fair to dismiss an employee for gross misconduct for pretending to be ill?
Yes on the facts of *Metroline West v Ajaj, EAT*.

Facts
Mr Ajaj was a bus driver and, having slipped at work, was signed off because of alleged difficulties walking and sitting for long periods. He was seen by the company's occupational health advisor who said that he was not fit for work and he also was referred for physiotherapy by his GP.

His employer became suspicious about the seriousness of Mr Ajaj's injuries and covertly recorded him. A number of meetings took place, during which Mr Ajaj maintained that he was not yet well enough to return to work as a bus driver. During one meeting, Mr Ajaj was shown covert footage taken of him walking and shopping and he was asked to provide an explanation because his employers believed that the footage indicated that he was not as incapacitated as he claimed to be.

He was subsequently dismissed for making a false claim for sick pay, misrepresenting his ability to attend work and for making a false claim of an injury at work. This amounted to gross misconduct.

He claimed that he had been unfairly dismissed and the tribunal, at first instance, agreed. Metroline appealed.

Decision
The EAT also found that the dismissal was fair. On the facts, the tribunal had been entitled to believe that Mr Ajaj had misrepresented his injury. Pretending to be ill amounts to dishonesty and is a fundamental breach of the implied duty of trust and confidence between employer and employee.

Tips
Generally, employers are expected to accept a Fit Note at face value and must have a reasonable belief that an employee's illness is not genuine before deciding to dismiss. This will require a reasonable investigation.

Even if you have reasonable doubts about an employee's condition, you must not make assumptions or immediately accuse the employee of lying. If you do so, they may claim disability discrimination or resign and claim constructive unfair dismissal and, if you dismiss them, they may be able to claim unfair dismissal.

For long term conditions, it is helpful to obtain a medical report which you may be able to use to challenge the employee's assertion that they remain too ill to work. Generally, it is better to obtain a report from a health professional not treating the employee who can review the employee's condition objectively through impartial eyes, rather than from the employee's own GP.

For short term absences a return to work interview will give you the opportunity to quiz the employee a bit more about the nature of their illness and ask them to explain any inconsistences. However, this case makes it clear that if you reasonably believe the employee is lying about their illness, they can be fairly dismissed for gross misconduct.

Does raising performance issues with an employee suffering from stress and on sick leave breach the implied duty of trust and confidence?

Yes on the facts of *Private Medical Intermediaries Ltd and others v Hodkinson, EAT*.

Facts

Miss Hodkinson was a director of sales. She had a thyroid dysfunction and was considered to be disabled and had time off due to her illness. After a period of sickness leave she returned to work on reduced hours. A short time later she went off sick again with work related depression and anxiety. She believed that this had been caused by bullying by her line manager and another manager and her Fit Note cited this as a cause of her depression. The CEO then wrote to Miss Hodkinson to ask her if she wished to raise a grievance. She wrote back indicating that she was too upset to communicate properly without breaking down and was "distraught" at the treatment she had received from her managers.

The CEO took legal advice and sent a further letter to Miss Hodkinson suggesting that they meet soon at a neutral location. The letter indicated that he had spoken to the managers to find out what had gone wrong. It also set out six areas of concern about her performance and commitment he wanted to discuss with her.

Miss Hodkinson resigned and claimed constructive unfair dismissal (amongst other claims).

The tribunal found that she was over sensitive and prone to exaggeration and had not been bullied. It also found that the letter was not part of a campaign to drive her out (as had been suggested). The company did have genuine concerns, but all of these had previously been brought to her attention. However, a reasonable employer would have known that the letter would have caused her distress and she was entitled to treat it as a repudiatory breach; her dismissal was therefore unfair. The company appealed.

Decision

The EAT upheld the finding of constructive unfair dismissal. The letter did not raise serious issues and many of these had been dealt with and were closed.

Tips

Maintaining appropriate contact with an aggrieved employee on sick leave is a common problem for employers. This case does not mean that it is never appropriate to raise performance concerns with an employee absent on work related stress, but care should be exercised. It will be relevant to consider how long the employee is likely to be off work and to consider whether the allegations can wait until the employee returns.

The key message though is not to conflate a grievance with separate performance issues (unless the grievance is about how performance is being managed). In most cases it is better to resolve the grievance before any potential performance or disciplinary issues.

Is a warning given for imposing religious views on colleagues an act of discrimination?

Not according to the EAT on the facts of *Wasteney v East London NHS Foundation Trust*.

Facts

Ms Wasteney is a practising Christian and held a senior role within the mental health team at the Trust. She launched an initiative in which volunteers from her church provided religious services at the centre where she worked. However, these were suspended following concerns that improper pressure had been put on staff and service users about Christianity. Ms Wasteney was given informal advice about the need to ensure that there were appropriate boundaries between her spiritual and professional life.

Sometime later a Muslim colleague made a complaint about Ms Wasteney. They complained that she had been invited to church events, sent religious books and told that she needed to let Jesus into her life. The colleague believed that Ms Wasteney was "grooming" her and had also laid hands on her during prayers.

The Trust considered that Ms Wasteney had failed to maintain professional boundaries and was issued with a final written warning, which was reduced to a first written warning on appeal. She alleged that she had been discriminated against on the grounds of her Christian religion.

The tribunal rejected her complaints. It acknowledged that the context of the disciplinary action was related to her religious beliefs, but the warning was issued because her beliefs blurred with her professional boundaries and she had placed improper pressure on a junior member of staff. She appealed to the EAT, arguing that the tribunal had failed to take sufficient account of her right under the European Convention of Human Rights to manifest her beliefs.

Decision

The EAT upheld the tribunal's decision. This was not a case involving consenting adults. The colleague did not consent and Ms Wasteney had placed improper pressure on a junior colleague.

Tips

This case is the latest in a line of cases which have found that proselytising at work is, generally, inappropriate. Employers can properly take disciplinary action against an employee for improperly manifesting a religious belief but should not do so for simply manifesting that belief.

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