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Employment News

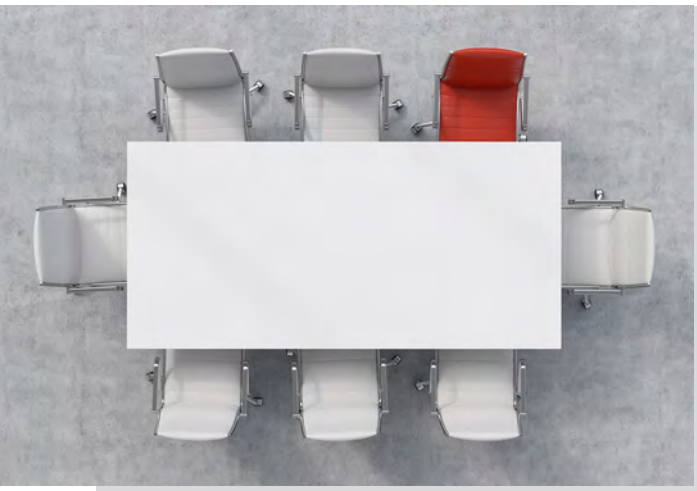
bto solicitors

Happy January from BTO's Employment Law Team

We hope that the new year finds you well. This month, BTO's Employment Law team has been busy creating our Spring employment law seminar programme. We always try to choose seminar topics based on feedback from previous seminar attendees. They tell us the most relevant and pressing employment law issues for them, which ensures that our seminars are highly relevant for employers, businesses and HR staff. Seminars are free to attend, very informal, relaxed and fun and will be announced soon. **Watch this space…**

Whilst our seminars are employer focussed this time, we also advise and assist employees and senior executives with employment law matters. We advise a spectrum of clients in the public and private sector, including insurers and membership organisations. Whatever your needs – from the drafting of policies and procedures, to dealing with disciplinary and grievance and employment tribunal claims, and negotiating Settlement Agreements – our team is ideally placed to assist. We understand that you need clarity with regards to costs, so our fees are discussed at the outset and can be flexible and tailored to your business or personal circumstances. To learn more about our employment law services and packages please **get in touch** or contact any of the team.

Reinstatement following unfair dismissal



Where an employment tribunal finds that an employee has been unfairly dismissed, the "primary" remedy which the tribunal can grant (if the employee wishes it) is to order that the employer re-employ the employee in their old role, or re-engage them in a new role, and pay them the wages they would have earned since the dismissal. While the employer cannot actually be forced to rehire the employee, there will be a further significant financial penalty if he does not.

Cases dealing with reinstatement are fairly rare, as it is quite unusual for the employee to seek this remedy. By the time of the hearing, the employee may have found other work, or may harbour ill will towards the employer and not want to return. For that reason, in most cases the remedy is simply an award of compensation.

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Even if an employee seeks reinstatement, a tribunal will not order that if it is *not practicable* for the employer to re-employ the employee. Employers often argue that it is not practicable to re-employ the employee because they have lost trust and confidence in the employee.

In the recent case of *United Lincolnshire Hospitals NHS Foundation Trust v Farren* an employee was dismissed in relation to a dispensing error and alleged falsification of documents. The employer considered the employee had been dishonest.

The tribunal found the dismissal was unfair. The employee sought reinstatement. The employer resisted this arguing it had lost trust and confidence in the employee due to her dishonesty during their internal process and during the tribunal process.

The tribunal rejected this argument and ordered re-engagement in another role. The tribunal did not accept there had been dishonesty, so there was no reason for the employer to have lost trust and confidence.

This decision was overturned by the Employment Appeal Tribunal which held that the tribunal had asked the wrong question and effectively substituted its assessment of whether the employee was trustworthy, for the employer's. The correct question was whether the employer had indeed genuinely lost trust and confidence, and whether there was a rational basis for that conclusion. If there was, then it could not be practicable to require the parties to work together again, notwithstanding the tribunal's view that the employer had failed to establish to the tribunal's satisfaction that the employee had actually been dishonest.

This is a welcome decision for employers, who should be less concerned about the prospect of being ordered to re-engage an employee who they have lost all trust in, assuming that loss of trust is genuine and rational.

Wide scope of disability discrimination claims

A recent decision of the Employment Appeal Tribunal ("EAT") has shed light on the way that tribunals should interpret the test for disability discrimination.

Disability is unique among the "protected characteristics" – the Equality Act prohibits not just direct and indirect discrimination but also unfavourable treatment that is "because of something arising in consequence of" the disability.

A classic example of this would be where a disabled employee is dismissed for disability-related absences. They may be treated no differently from any other employee with the same absence record but this treatment would be unfavourable (the employee is dismissed) and would be because of something arising in consequence of the disability (the absences). The employer would need to objectively justify that treatment, failing which it would be unlawful.

An employer will not be liable if he is unaware of the disability, but what if he is only unaware that the "something" that is the reason for his actions, is in fact related to the disability? The EAT's recent decision in *City of York Council v Grosset* addresses this.

A teacher suffered from cystic fibrosis. The employer was aware of this. The employee was dismissed for showing an inappropriate 18-certificate DVD to a class of 15 and 16 year olds. The employer had considered if this action was in any way related to the teacher's disability, and concluded on the evidence available to it, that the disability had not "caused" the teacher to act in that way. The conduct was not therefore "arising in consequence" of the disability.

At the employment tribunal hearing there was better medical evidence available. The tribunal was satisfied

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that an increase in workload had impacted on the employee's health, because of his disability, and had caused considerable stress and affected his decision making powers so that he made this error of judgement. The tribunal did not criticise however, the inquiries the employer had made into the medical position.

The employment tribunal held that there had been discrimination, and this was upheld by the EAT. The employee had been treated unfavourably (dismissed) for something (showing the DVD) and the tribunal was satisfied on the medical evidence now available to it that the "something" arose in consequence of the disability. It was not relevant that the employer had been unaware of that link, or that the medical evidence now available to the tribunal was not available to the employer.

"...an employer can be liable even though it considered, and reasonably concluded, that an employee's actions were not related to disability."

The EAT also accepted the tribunal's finding that the unfavourable treatment (dismissal) was not justified. While the protection of children was a valid objective, the dismissal of the teacher was not a proportionate step in achieving that objective, given the disability.
The employer was unable to rely on its lack of awareness that the teacher's actions were related to his disability, to justify its decision.

This case highlights a real contrast with the approach taken in unfair dismissal cases, where the tribunal must not second guess the employer, or try to determine an employee's guilt or innocence, but rather must assess the employer's actions, at the time, based on the information the employer had or reasonably could have had available. The opposite now applies in disability claims, where an employer can be liable even though it considered, and reasonably concluded, that an employee's actions were not related to disability.

Employers also need to be aware of last year's EAT decision in *Risby v London Borough of Waltham Forest*. A disabled employee was enraged because a meeting was to be held at premises which were not wheelchair accessible. His tirade of abuse included terms which were highly racially offensive. He was dismissed. The EAT held that the dismissal was for "something arising in consequence of disability". The "something" for which he was dismissed (his abusive outburst) arose in consequence of the disability because, had he not been disabled, he would not have been angered by the failure to accommodate his wheelchair. It did not matter that the disability was not a direct or physical cause of the employee's actions. There was sufficient connection to trigger the wording of the Equality Act. The employer would therefore need to objectively justify the decision to dismiss.

"Given that disability claims can lead to uncapped awards of compensation, employers need to tread carefully, and take expert advice."

Both these cases emphasise the difficulties employers face in managing workers with a disability. The potential scope of the claim for "unfavourable treatment because of something arising in consequence of a disability" is very wide and an employer may be liable even if it reasonably believed there was no connection between the employee's action and the disability. It is vital that employers who are dealing with issues of misconduct give the fullest consideration to the possibility of a link between the conduct and the employee's disability, and as demonstrated in Risby, it may be sufficient if the disability is a "background factor" in the employee's actions.

Given that disability claims can lead to uncapped awards of compensation, employers need to tread carefully, and take advice. Contact the BTO Employment Law team for expert legal advice.

Relying on expired disciplinary warnings

A recent Employment Appeal Tribunal ("EAT") decision provides some welcome (and rare) good news for employers.

The traditional position in relation to disciplinary action, clearly set out in the relevant authorities, is that an employer cannot rely on an expired disciplinary warning when deciding the penalty for a particular offence – the expired warning should be treated as never having existed.

That position was slightly relaxed some time ago by the 2008 Court of Appeal decision in *Airbus Ltd v Webb*. A number of employees committed an offence that would generally merit dismissal. In Mr Webb's case he had an expired final warning for a similar offence, and on this latest occasion he was dismissed. The other employees did not have a previous warning and so the employer decided not to dismiss them. The Court of Appeal decided this was legitimate – an employer does not *always* need to ignore the fact that a previous warning exists. It would be wrong to use an expired warning to justify dismissal for an offence that does not in *itself* merit dismissal, but where the latest offence does merit dismissal in itself, then the expired warning could be a valid reason for not deciding to impose a lesser sentence. The other staff who were not dismissed were given a "first chance" because, although the offence merited dismissal, it was a first offence. Mr Webb had already been given his "first chance" previously (the final warning) so there was no need to do so again.

This approach is reflected in the ACAS Guide which states that "A decision to dismiss should not be based on an expired warning, but the fact that there is an expired warning may explain why the employer does not substitute a lesser sanction".

The recent EAT decision in *Stratford v Auto Trail VR Ltd* further weakens the general principle that expired warnings should not be relied on.

An employee was being disciplined for his 18th disciplinary offence, offences which covered the entire period of his employment. There were no live warnings, as a final warning had recently expired. The employer frankly accepted when issuing the outcome to the employee, that the latest offence did not in itself justify dismissal. Nevertheless the employer was concerned about the history of offences, the employee's failure to recognise the seriousness of his

actions, and the near-inevitability of further offences being committed in the future. The employer dismissed the employee (with notice).

The EAT upheld the employment tribunal's finding that this was a fair dismissal. Despite the fact that the employer used the existence of expired warnings to elevate a non-dismissal offence into a dismissal (going beyond the situation in the *Airbus* case), this was legitimate. The history of misconduct and the likelihood of repetition were part of the overall circumstances to be taken into account in deciding whether the dismissal was fair.

> ***"This is good news for employers, many of whom will be familiar with the scenario of the employee who has a pattern of offending, waiting for warnings to expire before offending again."***

This is good news for employers, many of whom will be familiar with the scenario of the employee who has a pattern of offending, waiting for warnings to expire before offending again. The *Stratford* decision will potentially assist employers who find themselves in this situation.

However it is important not to see this as carte blanche to take account of expired warnings. The facts of this case are exceptional, given the significant history of misconduct, and in most situations it will remain the case that expired warnings should be ignored. Employers will also need to be aware of what their own policies say on this issue. Expert advice should, as ever, be obtained. Contact BTO to discuss further.

Does long-term stress amount to a disability?

The Employment Appeal Tribunal has issued an interesting judgment considering when work related stress can amount to a disability for the purposes of the Equality Act. In *Herry v Dudley Metropolitan Council* the employee alleged (amongst other things) that he had been unlawfully discriminated against by reason of his alleged disability. The employer did not accept that the Claimant had a disability during the relevant period.

As a matter of law a person (P) has a disability if P has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities. "Substantial" means more than minor or trivial. The effect of an impairment is "long-term" if it has lasted 12 months, or if the period for which it lasts is likely to be at least 12 months. An impairment is to be treated as having the requisite substantial adverse effect if measures are being taken to correct it and but for those measures, the impairment would have that effect.

The Court considered the extent to which depression by itself can amount to a mental impairment. The authorities noted that depression by itself would usually be insufficient since the question is whether the statutory test has been satisfied. A Tribunal needs to be satisfied that there is a mental impairment and that the requisite elements of the definition are present.

The Court looked at work related stress (the issue in this case) and said:

> "A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An Employment Tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an Employment Tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an Employment Tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the Employment Tribunal to assess."

"Given the complexity of disability discrimination law and the nature of the far reaching obligations upon employers in this area, expert advice is recommended."

In the case in question and in light of the evidence, the Tribunal was not satisfied that the legal definition had been satisfied. The Tribunal found that the Claimant did not establish any mental impairment by reference to stress. The Claimant's "stress" was "very largely a result of his unhappiness about what he perceives to have been unfair treatment of him". There was little or no evidence that his stress had any effect on his ability to carry out normal activities. The Claimant had therefore failed to establish that he was under a disability for the linked reasons that he did not establish a mental impairment and he did not establish the requisite substantial long-term adverse effect.

This case serves as a useful reminder that in order to be a disabled person for the purposes of the Equality Act, the constituent elements of the statutory definition require to be proven (by the leading of evidence). In many cases the position may be obvious but care is always needed. Given the complexity of disability discrimination law and the nature of the far reaching obligations upon employers in this area, expert advice is recommended. Speak to your BTO contact for more information.

How should Employers deal with workplace bullying?

A recent survey found that around one third of the working population was the victim of bullying with around 60% being fearful of raising the issue.

There is, perhaps surprisingly, no legal definition of bullying. The ACAS guidance document in this area notes that bullying is a widely defined concept and can encompass offending, intimidating, malicious and insulting behaviour, abuse or misuse of power through means that undermine, humiliate, degrade or injure a person. It is possible for bullying to be done by an individual or group and it can be obvious or insidious. It is unwarranted and unwelcome.

Examples within the ACAS document include spreading malicious rumours or insults, picking on someone, excluding or victimising a person, unfair treatment, misuse of power, unwelcome advances, displaying offensive materials, making threats or undermining somebody. Where an environment is created which relate to one of the relevant protected characteristics, such as disability, race, sexual orientation etc, such behaviour could amount to unlawful harassment.

"A recent survey found that around one third of the working population was the victim of bullying with around 60% being fearful of raising the issue."

Unlawful harassment is unwanted conduct related to one of the relevant protected characteristics which has its purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading or offensive environment.

Therefore bullying in the workplace can potentially be unlawful if it amounts to unlawful harassment. Where it falls short of satisfying the definition under the Equality Act, whether or not the behaviour is lawful depends upon the circumstances.

Where an individual has requisite continuous service it may be possible for that individual to resign and claim constructive unfair dismissal (if the behaviour amounts to a breach of the contract of employment, such as the implied term of trust and confidence), or where the employee suffers loss as a result of the employer's failure to look after the individual's health and safety, there may be a claim for damages. It is also possible that the health and safety rules may have been infringed which could lead to other consequences.

Workplace bullying can be complex with debilitating effects upon the victim. Employers can suffer in a number of ways where such behaviour exists, whether as a result of staff loss, demotivation, stress, absence or an impact upon productivity.

ACAS guidance emphasises the need to create and foster a culture which is open and transparent. Employers should consider introducing an anti-bullying policy which sets out the employer's approach. Staff should know what is and what is not acceptable and what the employer's approach to and position on bullying is. Sometimes bullying can be perceived by an individual to exist rather than be intentional on the part of the alleged perpetrator. This gives rise to other issues and employers should allow the alleged victim to the raise the issues to ensure the employer can investigate and the alleged perpetrator can understand the impact their behaviour is having, even if bullying was not intended.

Employers should consider the range of "tools in the toolkit" to deal with these issues, including the normal grievance and disciplinary policies, an anti-bullying policy together with the opportunity for counselling and/or mediation.

Ultimately the employer should lead by example. Staff should be instructed to act appropriately, whether in managing staff or otherwise, and complaints should be dealt with fully, consistently and fairly.

It can be difficult on occasions given the pressured working environment to avoid difficult working relationships. Nevertheless the benefit of ensuring that staff can work safely and productively cannot be underestimated.

Gender Pay Gap Reporting

The long awaited Regulations introducing the gender pay gap reporting obligations have been finalised - the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017. They apply to any private sector employer (a legal entity rather than a Group of companies) which employs 250 or more employees.

Starting from April 2017, employers must work out the average pay gap between their male and female employees during the pay period that encompasses a specific "snapshot" date (5 April 2017). That information must then be published within the next 12 months after the snapshot date, and remain on the company's website for 3 years. Information must also be submitted to the Secretary of State.

"They apply to any private sector employer (a legal entity rather than a Group of companies) which employs 250 or more employees."

There are detailed provisions as to what information must be provided, and how it is to be calculated. The basics are:

- Set out the gaps between the mean, and the median, rates of pay for men and women
- Set out the mean and median annual bonus/ commission gap between male and female employees, and how many male/female employees received a bonus at all
- Divide the payroll into 4 quartile pay bands (rank all employees' pay in order, highest to lowest paid, and then divide into 4 quarters containing equal numbers of employees) and state how many male and female employees fall into each category

As ever, the devil is in the detail, and the Regulations set out the definitions of the relevant terms:

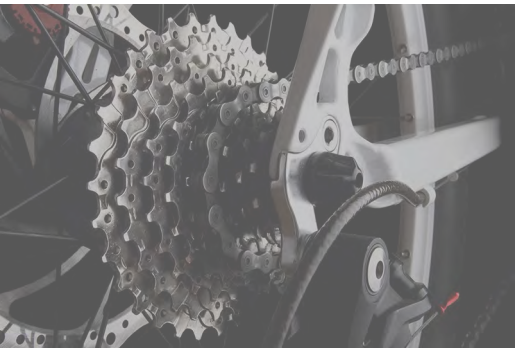
- A wide definition of "employee" is used, which will include many persons who are viewed as self-employed contractors. Only the genuinely self-employed, in business on their own account, will be excluded. Partners and LLP members are also excluded.
- However, staff who are absent on sick leave, maternity leave, or other family leave will be excluded from the pay gap calculation itself, as that could unfairly distort the true position in relation to wages
- "pay" includes bonuses, even if the bonus is awarded in terms of shares or share options – there are provisions as to how such awards should be valued

"If you are affected by these Regulations, you need to immediately start thinking about whether your payroll system is capable of providing the desired information, and what steps will need to be taken to carry out the necessary calculations."

There are very detailed provisions to assist with the calculation, but it is clear this will not be an easy task. If you are affected by these Regulations, you need to immediately start thinking about whether your payroll system is capable of providing the desired information, and what steps will need to be taken to carry out the necessary calculations.

This is a new and challenging area for employers, and it is important that expert advice is obtained. Call BTO to discuss further.

Employment status: The reality governs...



The issue as to employment status within the so called gig economy has again been raised in a recent Employment Tribunal claim, following the earlier claim by Uber workers.

In *Dewhurst v CitySprint UK Ltd*, the Employment Tribunal has held that a bicycle courier was a 'worker'.

The Claimant had a fairly regular work pattern, working around 4 days a week from 9.30am to 6.30pm. While the Claimant moved from job to job, there were gaps between jobs ranging from ten minutes to an hour.

The detailed contractual document setting out the terms of engagement had described the Claimant as a "self-employed contractor". The document also stated that the Claimant was under no obligation to provide services and CitySprint was under no obligation to provide work. The Claimant was also entitled to provide a substitute provided certain conditions were satisfied. It was also clear that payment was only due for each job completed

Having carefully examined the factual matrix the Tribunal concluded that the Claimant was a worker when logged into the CitySprint system. The Tribunal considered that the documentary position did not reflect what the parties had actually agreed. For example, in relation to sending a substitute, in reality the conditions made it such that only a fellow worker could act as substitute. The Tribunal concluded that the Claimant was integrated into the organisation and was not self-employed.

This case serves as another reminder that the contractual position that sets out the parties' relationship does need to properly reflect the reality of the situation. Care is needed in these types of cases to ensure that the status of the individuals carrying out the work is properly considered. Are the individuals employees or workers? Bear in mind the significant legal consequences in relation to each category, whether in relation to entitlement to holidays, unfair dismissal etc. As ever specialist legal advice in these cases is a must. Contact BTO to discuss further.

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The Team

BTO's employment team deals with employment law matters for a wide spectrum of clients in the public and private sector – employers, employees, insurers, and membership organisations.

Whatever your needs – from the drafting of policies and procedures, to dealing with employment tribunal claims – our team is ideally placed to assist.

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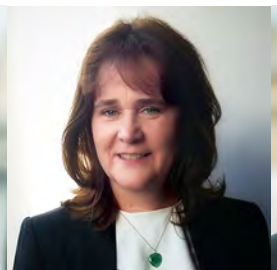

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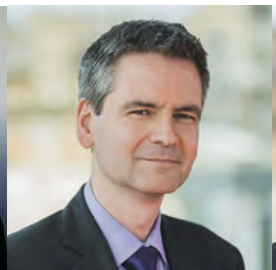

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