Issue: June 2017

Employment News

bto solicitors

Redundancy due to disability related absence

We have often been asked to advise employers in one difficult scenario: an employee has been off sick with a disability related illness, or is on maternity leave, and in their absence the employer realises that the employee actually did very little, even when at work, and that their duties could easily be absorbed by others in the company.

Had the employee not been absent due to disability/childbirth, the employer would not have realised this, and employment would have continued. Would a redundancy dismissal be discriminatory?

The recent Employment Appeal Tribunal ("EAT") decision in ***Charlesworth v Dransfields Engineering Services Ltd*** deals with this in the context of a disability related absence. The employee was off for 2 months for surgery in relation to cancer. In his absence the employer realised he could save the employee's £40,000 salary by assigning his duties permanently to others, and making the employee redundant. This was a unique post and there were no other roles he could take on – he was duly dismissed for redundancy following his return to work. The tribunal had to consider whether a redundancy dismissal would be discrimination for "something arising in consequence of a disability". The employee argued that his absence was an "ingredient" in his dismissal, and that there was sufficient connection for this to be unlawful treatment.

Those who attended our recent seminar on disability discrimination will be aware of the wide interpretation being given to this type of claim by the tribunals, so that if there is some causal link between the disability and the unfavourable treatment, this may well be sufficient connection for there to be discrimination, which will be unlawful unless it can be justified.

The EAT in this case, however, upheld the employment tribunal's finding that the dismissal of Mr Charlesworth was not discrimination "for something arising in consequence" of disability. It was true that the disability related absence was part of the context of the decision, but there was insufficient causation. The absence simply led to the employer identifying something which it might very well have identified in other ways, i.e. that it could manage without him. The tribunal had been entitled to decide that the absence was not an "operative" or "effective" cause of the redundancy dismissal. It was necessary that the treatment was in some way "because of" the absence (even if not the sole reason) but in this case that test was not met.

This is an important decision in relation to a thorny point, but employers should of course be very careful when dealing with any employee who has a disability and/or disability related absences. Expert legal advice should be obtained.

In this edition

www.bto.co.uk

48 St. Vincent Street Glasgow G2 5HS
T: 0141 221 8012 F: 0141 221 0288

One Edinburgh Quay Edinburgh EH3 9QG
T: 0131 222 2939 F: 0131 222 2949

Doctors and the law – blowing the whistle?

Medical practitioners are regulated by the General Medical Council (GMC). The GMC's Guidance, 'Raising and acting on concerns about patient safety', sets out the GMC's expectation that all doctors will, whatever their role, take appropriate action to raise and act on concerns about patient care, dignity and safety.

Doctors employed in the UK by NHS employers who raise patient safety concerns in the workplace are often viewed as difficult by colleagues as well as trouble–makers. This can often cloud an employer's view on how to deal with the matter. The employees often feel targeted and treated unfairly afterwards – but is that because they "blew the whistle"? Such employees may have protection in terms of whistleblowing legislation and employment law generally.

One recent Court of Appeal case (*Dr Kevin Beatt v Croydon Health Services NHS Trust*) looked at these very issues. In this case, a consultant cardiologist brought proceedings asserting that he had been unfairly dismissed for blowing the whistle after revealing what he claimed were unsafe practices at a hospital in England. The whistleblowing legislation (contained in the Employment Rights Act 1996) applies UK wide and the principles of this case therefore apply in Scotland also.

Croydon University Hospital dismissed **Kevin Beatt** in September 2012 after he highlighted patient safety concerns in the wake of a patient's death. The unusual aspect to this case was that the Trust explicitly and expressly stated in the dismissal letter that the reasons for dismissing him included the fact that he had made unsubstantiated and unproven allegations of an unsafe service within the hospital.

On the basis of the wording of the dismissal letter, Mr Beatt argued that he had been dismissed because he had made protected disclosures which had been made in the public interest (i.e. raised patient safety concerns). The case therefore hinged on whether his concerns were in fact protected disclosures in terms of the whistleblowing legislation. If the concerns he raised were classed as protected disclosures, there would be a finding of automatic unfair dismissal for whistleblowing with unlimited compensation.

The Trust's only defence was that he had not raised the disclosures (patient safety concerns) in good faith, arguing that he had raised the concerns in bad faith and with an ulterior motive. Good faith was a legal requirement for a disclosure to be "protected" at that time.

This was a risky strategy which ultimately failed for the Trust as the Court accepted that Mr Beatt had raised the concerns in good faith, that in terms of his dismissal

letter, the disclosures were the express reason for his dismissal and therefore he had accordingly been automatically unfairly dismissed for raising concerns ("blowing the whistle"). He is now likely to receive significant financial compensation.

The Judge in the case warned that *"if there is a moral from this very sad story … it is that employers should proceed to the dismissal of a whistleblower only where they are as confident as they reasonably can be that the disclosures in question are not protected"*. That is not an easy task nor is it risk-free.

A common theme in such cases was picked up by the Judge in this case who noted that *"it comes through very clearly from the papers that the Trust regarded the [employee] as a trouble maker …..and it is all too easy for an employer to allow its view of a whistleblower as a difficult colleague or an awkward personality… to cloud its judgment about whether the disclosures in question do in fact have a reasonable basis or are made (under the old law) in good faith or (under the new law) in the public interest – those questions will ultimately be judged by a Tribunal"*.

It is worth noting that the facts of this case are rather unusual in that it is more common for a whistleblower to be dismissed by their employer ostensibly for another legitimate reason and it is usually the employee who challenges this, arguing that the true reason for their dismissal is that they have blown the whistle.

The case is a useful review of the cases and law in this area, but given that the dismissal took place in 2012, the law has now moved on. There is no longer a requirement for a disclosure to be made in "good faith" before it can qualify as being a protected disclosure and for the whistleblower to have legal protection from detriments/ dismissal because he or she blew the whistle.

Early legal advice on such matters is essential, whether you are a potential whistleblower or the employer requiring to manage a whistleblower at work.

Sleepovers and National Minimum Wage – Are Staff Sleepworking?

In some areas, particularly the care sector, employees are often required, in addition to their daily hours of work, to sleepover at the employer's premises and be available to deal with any emergencies that may arise. A vexed question for many years has been the issue of whether employees would be entitled to the national minimum wage for these hours in addition to the day shift.

Over the years there have been a number of reported cases, interpreting the provisions in the National Minimum Wage Regulations ("NMWR") dealing with "time work", resulting in a general approach to the effect that:

- The first question is to determine whether the employee is "working" during the night shift. It is necessary to accept that an employee may be working even if they sleep throughout the shift without interruption, if on a proper interpretation of the employment contract and the employee's role, the requirement to be on site amounts to "work"

- It is only if the sleepover does not amount to work, that one can take account of the rules in the NMWR that relate to sleepovers. These provisions deal with time that is not working time, but the employee requires to be available for work. In such a case, time spent sleeping is expressly excluded from working time (the minimum wage only applies when the worker is actually awake and carrying out duties). However, that consideration does not arise if the sleepover is "work" rather than time "available for work".

This is a very difficult approach for employers to manage, and the reported cases over the years have fallen on different sides of the line according to their facts. Clarity was sought in the recent Employment Appeal Tribunal case of *Focus Care Agency v Roberts* (and 2 other cases being heard at the same time). There was extensive discussion of the legal position, with the employers' QC seeking to persuade the tribunal that time spent asleep should never attract the minimum wage. It was argued that since criminal sanctions can apply in this area, for failure to pay the minimum wage, there is a need for the law to be clear, so employers can be certain as to their duties.

Unfortunately, the EAT was unable to resolve the issue on the basis of a clear answer – they could not say that minimum wage either does, or does not, apply to sleepovers. It requires a "multifactorial" approach whereby a tribunal needs to look at all the facts and assess firstly whether the employee is actually working during a sleepover, simply by virtue of the requirement to be on the premises.

- An employee can be working merely by virtue of being present, even if there is nothing for them to do

- The fact that an employee is entitled to sleep does not mean they are not working

- Relevant factors to look at will include:
  - The employer's purpose in assigning the sleepover to the worker. Is there a regulatory, statutory, or contractual requirement to have a worker on the premises?
  - To what extent are the employee's activities restricted? Can he/she pop out for a while or would they be disciplined for that?
  - What responsibility does the employee have if something happens? Merely to call the emergency services or to take action personally?
  - To what extent does the employee have to use their skill, judgement, experience, expertise when called upon during the sleepover? Does the employee decide what intervention is required?

"A vexed question for many years has been the issue of whether employees would be entitled to the national minimum wage for these hours in addition to the day shift."

For those involved in sleepover arrangements, the uncertainty therefore continues, and it will be of little assistance to seek guidance from the decided cases, as they all turn on their own facts. Employers should take expert legal advice to fully assess the particular circumstances of their case and ensure compliance with the legislation.

Finally, it is important to note that (unhelpfully) the NMWR provisions on working time differ from those in the Working Time Regulations, in relation to weekly working hours, rest breaks, night work etc., with the result that particular time could be "working time" for one set of Regulations but not for the other.

Recruitment and avoiding discrimination – Watch out!

Discrimination law is widely drafted and is aimed at protecting those with the relevant protected characteristics at all stages of employment – from recruitment to post employment termination.

In the case of *Government Legal Service v Brookes*, the Employment Appeal Tribunal upheld the decision of an Employment Tribunal that requiring an applicant with Asperger's to sit a multiple choice test as part of a recruitment process was unlawful disability discrimination.

"The application of a rigid and inflexible recruitment policy could give rise to risks"

This issue arose as the Service has an annual graduate recruitment process. Thousands of applicants apply for around 35 roles each year. The first stage in the recruitment process is to sit an online multiple choice test. The purpose of this was to test decision making abilities. The Claimant asked that adjustments be made to the process which included changing the way in which answers were given. The Service advised her that it was not possible to adjust the test but other adjustments would be made, including in relation to the time to sit the test and the provision of an interview in certain situations. The Claimant scored 12 out of 22. As the pass mark was 14, her application was not taken forward.

Ms Brookes argued that the Service had indirectly discriminated against her by reason of her disability and that the treatment was unlawful because the failure to progress her application amounted to discrimination because of something arising in consequence of her disability. She also argued that there had been a failure to make reasonable adjustments.

The Employment Tribunal upheld each of her claims. It found that there was a provision, criterion or practice (PCP), namely requiring all applicants to take and pass the online test. From the evidence before the Tribunal, it was clear that the PCP generally placed people who had Asperger syndrome at a particular disadvantage compared with those who did not have it. The evidence showed that the Claimant was herself put at that disadvantage since her impairment resulted in a lack of social imagination particularly in hypothetical scenarios. The Tribunal had to determine, however, whether the treatment was justified. There was a legitimate aim - testing a fundamental competency. However, the Tribunal found that the means used to achieve the aim were not proportionate. There was a less discriminatory means to achieve the outcome, namely implement the adjustments that had been proposed in this case which were found to be reasonable.

Following the claims being upheld, the Tribunal awarded £860 compensation and made a recommendation that the employer issue a written apology to the Claimant and review its recruitment procedures with a view to greater flexibility in the psychometric testing regime for disabled applicants.

The Employment Appeal Tribunal agreed with each of the Employment Tribunal's findings and upheld each of the Claimant's claims.

This is a reminder of the wide application of discrimination law. Employers need to ensure that proper consideration is given to all candidates at all stages of employment. The application of a rigid and inflexible recruitment policy could give rise to risks.

Employers should ensure that proper consideration is given, at an early stage, as to potential adjustments that may be needed and that requests made of applicants are genuinely and fully examined. The Equality and Human Rights Commission's Code provides good guidance to help employers in this area.

Contact your BTO employment expert for further information.

Expatriate employees and UK employment law

Many UK businesses recruit employees to work solely overseas, and the question arises as to whether these individuals have unfair dismissal rights under UK employment law.

Unhelpfully, the Employment Rights Act ("ERA") is silent on the issue of "territorial jurisdiction" i.e., in what circumstances can someone working abroad bring a claim under the ERA? Under earlier legislation, those who worked mainly overseas were specifically excluded.

In the leading case of ***Lawson v Serco Ltd***, the court stated that "the circumstances would have to be unusual for an employee who works and is based abroad to come within the scope of British labour legislation". It was acknowledged in that case, however, that there would certainly be cases where UK employment law would apply, for example where the employer was a UK business and the employee was posted abroad to work for the benefit of that UK business.

The test has developed over the years and now focuses on the need for a "sufficiently strong" or "substantial" connection between the individual and the UK, in order for UK employment law to apply.

This issue arose in the recent case of ***Green v SIG Trading Ltd***. The employer was a UK business, opening a new business area in Saudi Arabia. Mr Green was recruited for that role. He had lived in the Middle East for many years and had no UK residence, though he was a UK national. He continued to live in Lebanon and commute to Saudi Arabia. He made occasional visits to the UK. His manager and support staff were in the UK. He was not entitled to join the UK pension scheme, and did not pay UK tax and NI. He was issued with a contract of employment subject to English law and referring to UK legislation (the tribunal stated that this had been done as a matter of "convenience" as the company did not have a Saudi Arabia-format employment contract available. The company ran separate "accounts" for the Saudi Arabia operation, so Mr Green was not directly contributing to the profitability of the UK-based operation.

The employment tribunal decided that Mr Green could not bring unfair dismissal claims in the UK under UK law. There was insufficient connection with the UK, and a much stronger connection with Saudi Arabia.

This decision was overturned by the EAT and the case was sent back to the tribunal to reconsider. While the tribunal had rightly carried out an exercise of comparing the links with the UK and the links with Saudi Arabia, and weighing up which were stronger, it had failed to attach proper weight to the terms of the employment contract which stated that the employment was subject to UK law. That was not conclusive but it was an important factor and the tribunal had wrongly disregarded it. Proper weight should be given to the fact that the parties had agreed in writing that UK law should apply, and there was no suggestion that they had in fact intended some other law to apply.

This case is a cautionary reminder to any company which engages staff to work abroad, not to just use standard UK employment contracts, but to think carefully about the relevant law, the choice of legal system which will apply, and whether it is intended that the employee will have rights under UK law. It will usually be essential to take advice both from UK lawyers and from lawyers in the foreign territory.

Pregnancy/maternity discrimination cases to be considered in same way as direct discrimination cases

Appeal Tribunal determines approach to be taken when deciding the reason for the treatment in pregnancy discrimination cases.

In the case of *Interserve FM v Tuleikyte* (UKEAT/0267/16/JOJ) the Claimant went on maternity leave in June 2013. In October 2013 a manager recorded her as having left employment on 14 June 2013. This was due to the company's policy which stated that employees absent without pay for three months or more would be treated as having left their employment. As the Claimant was not eligible for maternity pay, she was absent without pay. The manager erred since the Claimant's employment actually ended on 13 May 2014. The Claimant brought a claim for pregnancy/maternity discrimination as a result.

The Employment Tribunal decided that the act of recording the Claimant as having left employment with effect from 14 June 2013 was an act of maternity discrimination. It reasoned that as the Claimant had been treated unfavourably because she was on maternity leave, the treatment was inherently discriminatory. There was no requirement to look any further (for example as to why the Respondent had acted as it did).

The Respondent appealed arguing that the Tribunal approached the matter in the wrong way. The Employment Appeal Tribunal upheld the appeal and issued important guidance in dealing with pregnancy/ maternity discrimination cases. The fundamental question in a direct discrimination case is what the reasons/grounds for the treatment are. That is a fact sensitive inquiry. The case law in this area notes that there are two different types of cases:

- 'criterion cases' - where the criterion is inherently based on or linked to the protected characteristic or where its application amounts to the reasons for the treatment complained of. In these cases there is no need to look any further.
- 'reason why cases' – in all other cases the Tribunal requires to consider the mental processes of the putative discriminator and decide what the real reason for the treatment was.

The Employment Appeal Tribunal decided that this approach requires to be taken in pregnancy/maternity discrimination cases too.

In this case, the Respondent's policy had two criteria: the individual had to be absent for three months and the individual had to be without pay for three months. Both had to be considered together as part of the policy. As the policy was seemingly neutral and applied in the same way to those on maternity leave or absent for other reasons, this was not a 'criterion case' but a 'reason why case'. This means that the Tribunal would require to consider what the real reason for the treatment was. The case was therefore remitted to the Tribunal to consider this point.

"Consideration needs to be given to the how workplace policies affect those with a particular protected characteristic…."

Going forward, therefore, employers should ensure that they carry out an impact assessment in relation to their policies in this area. Consideration needs to be given to the how workplace policies affect those with a particular protected characteristic, whether there are inherently discriminatory criteria at play and if not, whether there is a risk that the reason for the particular treatment could potentially be because of the protected characteristic. These types of cases can also give rise to indirect discrimination claims and employers should ensure that there is clear documentary evidence as to the legitimate objective being pursued and be clear that the way in which this is achieved is proportionate, i.e. reasonable and necessary.

Expert employment law advice is recommended given the complexity of the legal rules in this area.

And finally....what do you know about the General Data Protection Regulation (GDPR)?

According to a recent YouGov survey less than half of senior decision makers are aware of the new GDPR rules while over a third surveyed believe GDPR is not an issue for the sector they work in.

GDPR stands for the **General Data Protection Regulation** and all businesses that use personal data have until 25 May 2018 to comply with the new GDPR legislation.

With GDPR fines of up to 20 Million Euros or 4% of annual global turnover, whichever is greater, the risk of falling foul of this legislation is not something that businesses should ignore or put off considering until the 2018 date.

For employers this means reviewing:

- the legal basis used for processing personal data – GDPR compliant consent is very difficult to obtain in an employee/employer relationship
- the fair processing information provided to employees about how their personal data is being processed
- how a data breach will be handled including reporting to the regulator and notifying data subjects

Employers should now be:

- updating policies, procedures, privacy notices and your methods of obtaining consent
- checking that written contracts with third party data processors are in place and are GDPR compliant
- putting in place processes for handling new data subjects rights and the changes to subject access requests
- deciding how you will raise awareness of the GDPR obligations for all employees.

These are just some of the obligations that the GDPR will bring to the employee side of businesses and organisations. GDPR will also regulate how consumers are marketed to and how all customer or client data records are processed.

There is no exemption for any sector or size of organisation. GDPR compliance is not optional and the GDPR changes will come into force well before Brexit. Now is the time to consider how you will comply with GDPR. We have the experts on hand to help you meet your legal obligations in this important area.

Contacts: Paul Motion or Laura Irvine, Email **datadefence@bto.co.uk**
Visit our **GDPR page** or call 0141 221 8012 / 0131 222 2939.

The Team

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

Glasgow: 0141 221 8012

Edinburgh: 0131 222 2939

Employmentlawyers@bto.co.uk

Please feel free to forward on this newsletter.

To subscribe to our Employment Law mailing list: click here or email marketing@bto.co.uk

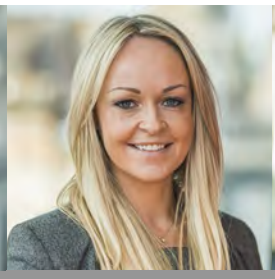
Follow BTO on Twitter:

@btosolicitors

If you wish to be removed from this mailing list, please click here.
Thank you.

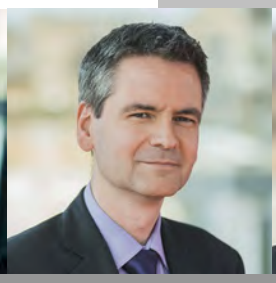
Caroline Carr
Partner & Accredited Specialist
cac@bto.co.uk

David Hoey
Partner & Accredited Specialist
dho@bto.co.uk

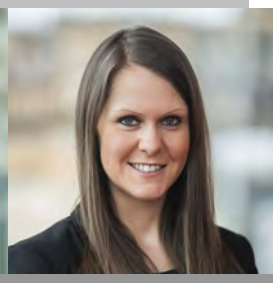


Laura Salmond
Partner
lis@bto.co.uk

Rhona Wark
Consultant
rmw@bto.co.uk



Douglas Strang
Associate
dst@bto.co.uk



Lesley Grant
Senior Solicitor
ljg@bto.co.uk