Issue: October 2016

Employment News

bto solicitors

Discriminating against "fake" job applicants

Some employers will be familiar with the scenario where an individual applies for a job, which on the face of it they are not suitable for, and there is a suspicion they do not genuinely want it. They might set out a list of demands for "reasonable adjustments" for disability, or may make clear they have another protected characteristic. There are some applicants, unfortunately, who will apply for a job not because they genuinely wish to secure it, but because they wish to bring a claim for discrimination when they are not offered it (or not given an interview etc.). Particularly in cases where there are complex requirements in relation to disability, the employer is being "set up to fail".

The European Court has recently considered whether such job applicants have the protection of European law (and the national provisions on discrimination which implement European law) if the rejection of their application could be said to have been discriminatory.

The Court concluded that where an application is made not genuinely with a view to obtaining employment, but only with a view to being a job applicant and then claiming compensation, European law does not protect that person. There are various protected categories of individual – employees, jobseekers etc. – but the category of "persons not genuinely seeking employment" is not protected.

This decision provides some good news for employers, and a potential line of defence if claims are brought by "spurious" applicants, but employers should be cautious about letting this decision affect their recruitment practices. There is no way of being certain whether an application is genuine or not, and therefore an employer will be taking a significant risk if it decides not to treat a particular application in a fair, even handed and non-discriminatory way. Where an applicant requests that "reasonable adjustments" be made, that should be carefully considered.

It is important to review your recruitment practices and ensure that they do comply with equal opportunities requirements. Remember that job applicants can bring tribunal claims for discrimination (with potentially unlimited compensation) and while a "fake" job applicant will have no protection, you cannot know in any particular case whether that fact can be proved.

In this edition

Autumn Employment Law Seminars

For details and to reserve your place, see page 5 of this newsletter.

"Excellent briefing and use of case studies to support".

"Very informative and engagingly presented."

"Covered a lot in a short time. All very useful."

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

www.bto.co.uk

Are you ready for the upsurge in claims?

The Scottish government intends to abolish employment tribunal fees for claims raised in Scotland. We don't have a date for that yet, and we don't know the detail, but we can speculate as to the potential consequences.

Employers will remember that for claims raised before 29 July 2013, tribunal claims did not require payment of any fee. Claimants could represent themselves, and as it is very rare that a party ever has to pay the other side's costs, Claimants could raise a claim, safe in the knowledge that, at worst, it was unlikely to cost them anything. On the other hand the employer had to face disruption, wasted management time, and often significant legal costs.

All that changed in July 2013 when it became mandatory, UK wide, for a Claimant to pay a fee to raise a claim, and also a fee to have a hearing fixed. For a simple unfair dismissal claim the fees would be £1200. Exemption for fees is possible for those in very difficult financial circumstances, but the vast majority of potential Claimants need to pay the fees (or have their Union do so).

The effect of the fees has been well documented. Depending on precisely what statistic you consider, tribunal claims have dropped by 65% to 80%. That is not due to employers suddenly starting to treat their staff better!

While many "unmeritorious" claims will certainly have been discouraged, there can be no real dispute that a great many individuals with claims which were valid and arguable have been dissuaded from pursuing the matter due to the fees they would have to pay. The fear is that the result of the fees regime has been not just to weed out the "nonsense" claims but that it also acts as a real barrier to justice.

Various legal challenges have been made to the UK government's introduction of fees, and all challenges so far have failed. The SNP made a commitment in their manifesto for this year's Holyrood elections that if they were in government, they would abolish tribunal fees in Scotland (that power being devolved following the Smith Commission), and that is therefore now very much on the cards.

The proposed abolition of fees raises some important questions. Will we see employees based in England raising their claims in Scotland to avoid the fees, and will the Scottish tribunal system be able to cope?

"...some employers are taking their employment law obligations less seriously on the basis that they feel it is unlikely (given the drop in claims) that they will actually have a claim against them."

More importantly for employers, many observers have formed the view over the last few years that some employers are taking their employment law obligations less seriously on the basis that they feel it is unlikely (given the drop in claims) that they will actually have a claim against them. If fees are abolished that attitude will be dangerous, as it can be assumed that there will be a significant increase in claims, perhaps back to pre-July 2013 levels (though there are other factors that have contributed to the decrease in claims such as ACAS early conciliation, protected conversations etc.).

Are you comfortable, therefore, that your employment and HR practices are compliant with the law and best practice? Have your managers had proper training in dealing with these issues – managing absence, investigations, disciplinary and grievance hearings, and flexible working requests?

Is your holiday pay scheme compliant with current case law? Is your equal opportunities policy up to date, and is it known to staff (or lying in a drawer somewhere)? Are your staff given equal opportunities training?

"Are you comfortable that your employment and HR practices are compliant with the law and best practice?"

All these issues should be carefully considered. Prevention is better than cure, and you should carry out a full review of your employment practices to ensure you have no reason to be concerned about any increase in claims.

We can assist with all these matters – it is important that expert advice is taken from people who know your business, and steps implemented that are tailored for you and right for your business.

Please contact any member of the team to discuss.

Salary preservation as a reasonable adjustment?

Employers will be aware that the Equality Act requires reasonable adjustments to be made where a disabled person is placed at a particular disadvantage in the workplace. Common adjustments include hours of work, additional support, changes to workload etc.

Another adjustment that is also quite common, where an employee is unable due to their condition to continue in their role, is to look at whether they can be redeployed into another vacancy that the employer has, that the employee would be able to fulfil despite the disability. Previous authority has suggested this could even include transferring an employee to a promoted post and waiving the usual requirement for a competitive interview.

More commonly, the transfer is to a more junior post. Traditional thinking has been that there would be no requirement to preserve the employee's previous (higher) salary, unless the contract stated this would be done, but a new decision of the Employment Appeal Tribunal ("EAT") suggests otherwise.

Mr Powell was employed by G4S as a First Line Maintenance ("FLM") engineer. He became unable to fulfil this role due to a back injury (which amounted to a disability). While medical investigations were carried out, he took on a new role as a "key runner" which he was able to carry out. This would normally be a more junior role with a lower salary, but he was allowed to retain full salary. He was led to believe this change would be "long-term" but not necessarily permanent.

Once the medical investigations were concluded, a year later, G4S sought to regularise matters. They were willing to offer the alternative role on a permanent basis but on the lower salary that would normally apply. Mr Powell refused and was dismissed, there being no other options available.

Mr Powell claimed unfair dismissal and disability discrimination, claiming that his contract had been varied at the start of the new role, a year ago, so that he was entitled to the higher salary for the new role. The tribunal rejected this argument. He argued alternatively that there was a duty to make reasonable adjustments when the job was being made permanent, the reasonable adjustment being to pay the higher FLM salary for the more junior role. He argued also that the dismissal was discriminatory due to this failure.

The employment tribunal agreed that the employer should have made the adjustment and allowed the more junior job on the higher salary, there being no evidence that the employer could not afford to do so.

The employer appealed and the appeal was rejected by the EAT, which reviewed all the previous authorities and held that there is no reason in principle that the employer should not pay the employee more than the job was worth, in order to address the disadvantages the employee would otherwise suffer. It rejected the argument that this amounted to "charity" for disabled persons and could not have been Parliament's intention.

"The effect of this comment might be to dissuade employers from maintaining salary while short-term or temporary adjustments are implemented."

It was stressed that each case must be judged on its own facts, and it was relevant here that the employer had been paying the higher salary for the junior role for a year before it sought to regularise matters. The effect of this comment might be to dissuade employers from maintaining salary while short-term or temporary adjustments are implemented.

The EAT commented: "I do not expect that it will be an everyday event for an Employment Tribunal to conclude that an employer is required to make up an employee's pay long-term to any significant extent - but I can envisage cases where this may be a reasonable adjustment for an employer to have to make as part of a package of reasonable adjustments to get an employee back to work or keep an employee in work. They will be single claims turning on their own facts… The financial considerations will always have to be weighed in the balance by the Employment Tribunal"

The EAT states therefore that this does not set a precedent that in all cases it will be reasonable to maintain a higher salary in a more junior role, and such cases may be unusual. However, this gives a potential argument to all employees who are placed in such a position due to a disability and is something employers will have to wrestle with. One unanswered question is how big a drop in salary might an employer have to make up – it really will depend on all the facts and circumstances of the case.

This is a controversial decision, with wide ranging implications for employers, which may potentially be subject to further appeal. This decision could also lead to the re-opening of a point that many thought had been settled - whether it would be a reasonable adjustment to pay a disabled person full pay when off sick instead of sick pay or SSP. As the latest decision is authority that employers may have to take purely financial steps to assist an employee, could that extend to the issue of sick pay? It may be that this will be raised in future litigation.

"The law in this area is a minefield and G4S would not have expected this outcome."

The law in this area is a minefield and G4S would not have expected this outcome. Employers should take great care when dealing with employees who may have a disability, and take expert legal advice.

Zero Hours Contracts – Good, bad or indifferent?

There has been considerable media activity around the issue of zero hours contracts, not least given their prominence in some businesses and the apparent desire by some business owners to eliminate their use. The Office of National Statistics reported that around 2.5% of the UK working population has a zero hours contract. That amounts to the entire population of Glasgow and Aberdeen combined. Research has also shown that zero hours workers tend also to be young, part time, women or in part time education. What are these contracts and what rights exist?

A definition

A zero hours contract is a contract whereby the employer is under no obligation to offer the worker any work. There is no guarantee that work will be offered and the worker has no guaranteed hours or pay. This creates inherent flexibility for both employer and worker. The employer has the ability to manage fluctuating demands in workload by calling upon such workers if needed and the workers have the ability to work elsewhere and gain experience etc. That flexibility can create problems for workers given the inherent uncertainty that exists and some employers have reportedly been misusing the contracts to exploit workers.

What's the problem?

One of the perceived issues was that some employers were imposing exclusivity upon workers ie preventing workers from working for a competitor (despite the absence of any guaranteed work). This meant that such workers had no guarantee of any income. The Government took action and introduced a number of protections.

The protections

In summary a zero hours contract worker is protected in the following ways:

- With effect from 26 May 2015 a provision within a zero hours contract which prohibits the worker from working for another employer (an "exclusivity clause") is unenforceable.

- With effect from 11 January 2016 it became automatically unfair to dismiss an employee because of a breach of the unenforceable exclusivity clause. It also became unlawful to cause a worker to suffer a detriment because of reliance on the exclusivity clause.

Thus care should be taken if you engage zero hours contract workers to make sure that any exclusivity clause is not enforced or relied upon. Compensation can be awarded where the above rights are infringed. It is important to ensure that the terms and conditions upon which all individuals are engaged have been considered. The employment team at BTO can help.

Other rights

It is also important to remember that in addition to these specific rights, individuals who enter into a zero hours contract do have other protections.

It is likely that an individual who enters into a zero hours contract will be a "worker" in law – i.e. an individual who has contracted personally to provide services who is not genuinely self-employed. Workers have the right to receive the national minimum (or living) wage, the right not to be unlawfully discriminated against, the right to paid holidays, rest breaks and other rights. The issue as to paid holidays can be difficult given the absence of any guaranteed hours but there are ways in which holidays for such workers can be calculated (and paid).

"Employees" have the same rights as workers in addition to certain others, including the right not to be unfairly dismissed (assuming the individual is qualified to claim unfair dismissal), the right to a redundancy payment (subject to the qualification requirements) and other rights too (such as in relation to maternity etc).

Reports suggesting that zero hours workers have no rights are therefore inaccurate but it is important to look at the relationship carefully to understand firstly whether it is a zero hours contract at all and secondly whether the individual is genuinely self-employed, a worker or an employee.

Employee or worker

There is no textbook or flow chart that will give a definite answer as to whether the particular contract is a contract of employment or a worker's contract as the issue depends upon a Tribunal's assessment of the full factual matrix. A Tribunal would also look at the reality of the situation; the fact the contract says it is not an employment contract will not prevent the relationship being one of employment if that is the reality. (*Cont'd next page)*

Zero Hours Contracts – Good, Bad or Indifferent?

A Tribunal would consider:

- ☐ Does the employer require to provide work?
- ☐ If offered, does the person require to do the work?
- ☐ Is there detailed control and supervision of the individual?
- ☐ Is the person integrated in the workplace like other employees?
- ☐ Is there a fixed hourly/daily rate (as opposed to a payment "per job")
- ☐ Is there protection against financial risk if the job goes wrong?
- ☐ Does the individual use the employer's tools and equipment and wear the company uniform?

No one issue is decisive but a Tribunal will form a view from the full picture in each case. It may be that the individual is an employee during periods when work is actually carried out. The issue in these cases will be whether the periods when no work is done is covered by an employment contract or whether the gaps in service break continuity of service. There have also been cases where over time a relationship has become an employment relationship. It is also possible for the individual to be an employee during periods when work is carried out. The issue in those cases is whether the gaps in service break the continuity needed to claim unfair dismissal and a redundancy payment or not. There are circumstances in which gaps in service don't necessarily break continuous service (such as where there is a temporary cessation of work or there is a custom and practice in place such that the parties regard the relationship as continuing).

Practical issues

The first issue for employers is to consider what type of contractual arrangement is needed. Zero hours contracts tend to be used to deal with fluctuating demand and are generally inappropriate for core staff. Employers should consider introducing a Policy that sets out the employer's position in relation to when such workers would be appropriate, how they will be recruited, how the arrangement will be documented and how the arrangement will work in practice (including in relation to holidays, termination etc). Transparency is key together with dialogue with staff and their representatives to create a fully engaged and committed workforce.

Autumn Employment Law Seminars

If you have not already booked yourself a place at our free employment law seminars, here's a reminder of the topics and dates.

October

There will be very few employers who have never had to deal with employee departures, whether by resignation or by dismissal. It is a reality of the modern workplace that some staff will be unhappy and look to move on to pastures new. Our team of experts will provide practical tips for facilitating the break up process.

Edinburgh 11/10/16:
TO BOOK: click here

Glasgow 13/10/16:
TO BOOK: click here

November

Our annual review of the year's developments. We will look at the important employment law developments that happened throughout the year, covering the major legislative changes and relevant cases in the field while also looking ahead to changes on the horizon.

Edinburgh 15/11/16:
TO BOOK: click here

Glasgow 22/11/16:
TO BOOK: click here

New addition to employment team

We're happy to welcome new team member Rhona Wark. Rhona is a highly experienced commercial litigator who demonstrates diverse expertise across a spectrum of legal disputes, including contractual claims, shareholder disputes, director's malfeasance, partnership disputes, interdicts, breach of copyright and covenants. Rhona also holds a master's degree in employment law and has a particular interest in this field.

Rhona has vast experience in commercial dispute resolution, both pursuing and defending in all the Scottish courts and at the Supreme Court. She also has extensive advocacy experience before tribunals and panels, in particular at the Employment Tribunal.

Rhona's practice includes advising individuals and businesses across a broad range of sectors, including financial services, property, construction and retail, ranging from PLC'S to SME's and start-ups. She provides advice in relation to all aspects of their businesses involving commercial and contractual disputes. These include the full range of employment law issues, such as unfair dismissal, discrimination, TUPE, senior executive exits and redundancy. Rhona enjoys working closely with her clients on all facets of their business in relation to commercial matters and people management.

Rhona can be contacted on 0141 221 8012 or rmw@bto.co.uk

Share This

Do you know someone who might be interested in receiving this newsletter?

If so please feel free to forward it on to them.

To subscribe to our Employment Law mailing list:

click here or email marketing@bto.co.uk

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 you.

Glasgow: 0141 221 8012

Edinburgh: 0131 222 2939.

Follow BTO on Twitter:

@btosolicitors

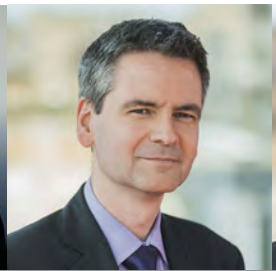
If you wish to be removed from this mailing list, please **click here**.
Thank you.

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