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Employment News

bto solicitors

Employment Law Spring Seminars

Over April and May we are running free employment law seminars over lunchtime for employers, senior management and HR staff. **Managing Workplace Stress - Causes and Effects** is on Tuesday 25 April 2017 in Glasgow. This session will consider what can happen when workplace stress is not managed properly and some of the legal and other risks that arise as a result. Our guest speaker, Rebecca Norris, an Occupational Psychologist and Work and Wellbeing Consultant, will provide practical guidance for employers. We will also have a representative from BTO's **band 1** ranked personal injury team to provide an overview of our recent experience of stress claims.

Following on from our session on stress at work, in May we are running **Disability Discrimination at Work - Managing the Legal and Practical Issues**. Dates are Edinburgh: Tuesday 9 May 2017 and Glasgow: Tuesday 23 May 2017. Disability discrimination claims are becoming increasingly common and the law can be complicated. This practical session will provide delegates with an up to date understanding of disability discrimination law and practice and offer practical pointers for managing the often complex and competing rights and issues that can arise in this area. You can book a place at any of these seminars **HERE** or email **marketing@bto.co.uk**

The Apprenticeship Levy in Scotland

The Apprenticeship Levy remains relatively poorly publicised, and many employers are unaware of what it will mean for them. It is now less than 1 month until the scheme starts.

The Levy is a payment made by employers to a central fund to support and pay for apprenticeships in the UK. The Levy applies across the UK, and applies (technically) to all employers with effect from 6th April 2017. However, due to the operation of the rebate/allowance system, in practice the Levy only impacts on employers with an annual salary bill of more than £3 million.

The rate is 0.5% of the employer's annual salary bill, but with an allowance/credit of £15,000. So, for example:

Employer has an annual wage bill of £6M.
0.5% of £6M is £30,000.
Less the £15,000 allowance
= Annual levy payment of £15,000.

Continued on next page

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Employers with a salary bill of £3M or less will not need to make a payment.

The administration of the scheme (but not the fundamental basis of payment) differs between different parts of the UK, so employers who operate in (say) Scotland and England, will have their levy payment split according to the proportions of Scottish and English staff, and administered by the 2 different authorities. HMRC will collect the levy through monthly PAYE, and the Scottish Government will receive the appropriate sum through the block grant. The figure received by Scotland for 2017-18 is expected to be around £220M.

The Scottish government will use the levy income to support skills, training and employment, including expanding the Modern Apprenticeship programme. A Workforce Development Fund is to be established from Autumn this year. The Scottish Apprentice Advisory Board will provide input and ensure that employers' views are considered.

The Levy will apply to all employers who meet the criteria, there is no exemption for those who already fund their own apprenticeships. Conversely, employers who do not pay the Levy (as the wage bill is not high enough) can still seek funding for apprenticeships in the usual way.

HMRC will continue to publish details of exactly how the calculation will be carried out, and payment made, and it is expected that further details will be forthcoming as to how the money will be spent in Scotland. Employers who will have to pay the Levy may want to review their training practices, and consider whether supported approved apprenticeships, with the benefit of external funding, would ensure that at least the employer sees some return for their payment.

Court of Appeal upholds decision that 'self-employed' plumber has worker rights

A recent Court of Appeal ruling looks set to help protect the rights of workers engaged in the emerging "gig economy".

In *Pimlico Plumbers Ltd and Anor v Smith*, the Court of Appeal has upheld the decision of the Employment Appeal Tribunal that a plumber, who had signed a contract suggesting that he was self-employed, was in fact a 'worker'.

Mr Smith worked as a plumber for Pimlico Plumbers Ltd for 6 years. The contract governing their relationship described him as a "self-employed operative". Mr Smith was required to work a minimum number of working hours each week, wear a uniform (which displayed Pimlico's logo) and use a branded van leased from Pimlico for his work, giving the impression he was employed by the company. The contract restricted his ability to work for himself or other companies and provided that he could only swap jobs with other Pimlico operatives. However, he could choose when he worked, which jobs he accepted and was required to provide his own tools and equipment. He also filed self-employed tax returns, dealt with his own insurance, was VAT registered and submitted regular VAT invoices to the company.

Mr Smith suffered a heart attack, following which he sought to reduce his working days. The company

refused, subsequently terminating its arrangement with Mr Smith. Mr Smith sought to challenge this, bringing a number of claims in the Employment Tribunal including unfair dismissal, wrongful dismissal, entitlement to pay during medical suspension, holiday pay, wages, disability discrimination and failure to provide written particulars of employment. This raised issues regarding his employment status.

UK employment law provides different levels of protection for employees, workers and self-employed contractors, with employees enjoying the greatest protection. Workers have more limited rights and do not, for example, have the right not to be unfairly dismissed. Workers do, however, have more

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employment rights than self-employed contractors, including the right not to be unlawfully discriminated against, and the right to receive the national minimum wage as well as paid holidays.

The Employment Tribunal decided that Mr Smith was not an employee (and so could not claim unfair dismissal), essentially because there was no obligation on the company to provide any work and the obligation to pay was limited. However, it held that he was a worker under *section 203(3) of the Employment Rights Act 1996* and also in "employment" under *section 83(2) of the Equality Act 2010* meaning that it had jurisdiction to hear the claims of disability discrimination, holiday pay and unlawful deduction of wages. On appeal, the Employment Appeal Tribunal upheld this decision.

Pimlico appealed to the Court of Appeal. The Court of Appeal dismissed the appeal, holding that the original Tribunal had been right to regard Mr Smith as *"an integral part of [Pimlico Plumbers'] operations and subordinate to [it]".* The Master of the Rolls observed that *"the case puts a spotlight on a business model under which operatives are intended to appear to clients of the business as working for the business, but at the same time the business itself seeks to maintain that, as between itself and its operatives, there is a legal relationship of client or customer and independent contractor rather than employer and employee or worker."*

"...UK employment law provides different levels of protection for employees, workers and self-employed contractors..."

The Court of Appeal stated that in the context of *section 203(3)(b) of the Employment Rights Act 1996, Regulation 2 of the Working Time Regulations 1998* and *section 83(2) of the Equality Act 2010*, a distinction is to be drawn between:

1. Persons employed under a contract of service;
2. Persons who are self-employed, carrying on a profession or a business undertaking on their own account, and who enter into contracts with clients or customers to provide work or services for them; and
3. Persons who are self-employed and provide their services as part of a profession or business undertaking carried on by someone else

concluding that the Employment Tribunal had correctly concluded that Mr Smith fell into category 3 rather than category 2.

This is an interesting decision as unlike earlier decisions where it has been held that an express right of substitution or delegation was incompatible with an obligation of personal performance, the facts of the present case suggest that there was no such express right nor was there any scope to imply such a right in Mr Smith's contract. The Court of Appeal found that Mr Smith was obliged to work a minimum number of hours per week and held that the degree of control exercised by the company over him was inconsistent with the company being a customer or client of a business operated by Mr Smith. It further held that the Tribunal had been correct to place weight on the onerous post-termination restrictions contained in the agreement between the parties which prevented Mr Smith from working as a plumber within a restricted area for three months post termination.

"Mistakes can be costly (in terms of defending litigation and liability for tax, national insurance, penalties and interest) and could lead to adverse publicity for your business."

Unlike other recent high-profile cases, this decision is binding on other courts and tribunals and is likely to be a key authority in forthcoming cases involving the "gig economy".

This is an interesting decision and serves as a timely reminder of the importance of correctly classifying and identifying individuals' employment status. Mistakes can be costly (in terms of defending litigation and liability for tax, national insurance, penalties and interest) and could lead to adverse publicity for your business. As ever, taking early legal advice is advisable in this complex and fast-developing area of law.

Time off for religious observance

In the recent case of *Gareddu v London Underground*, the Employment Appeal Tribunal ("EAT") wrestled with the thorny issue of time off to attend religious festivals or other religious observance.

Mr Gareddu was a Roman Catholic from Italy. For a number of years he had sought, and been allowed, to take 5 consecutive weeks' holiday over August each year, to travel to Sardinia and spend time with his family and attend a number of "ancient religious festivals" which took place over that period.

In 2013 there was a change of line manager and he was told that in future he would not be able to take more than 3 weeks' holiday at a time during the school holidays.

He submitted a claim for indirect religious discrimination arguing that:

- His desire to attend festivals in Sardinia was a manifestation of his religious belief
- The employer's policy of not allowing staff to take more than 3 weeks' consecutive holidays, while applies equally to all staff, put (or would put) staff with his religious beliefs at a disadvantage, as they would thereby be unable to participate in the desired religious observance
- This policy could not be objectively justified

The tribunal rejected the claim, expressing scepticism about the Claimant's evidence and ultimately concluding that his assertion that he needed to attend festivals in Sardinia ***over a 5 week period*** was not made in good faith. He did not in fact (contrary to his initial evidence) attend the same festivals every year, and it was a matter for family discussion as to which festivals to attend. His 5 weeks in Sardinia were more about spending time with his family than attending specific religious festivals. Essentially, there was no need for him to take these 5 consecutive weeks.

The EAT rejected the employee's appeal, finding that the tribunal had been entitled to come to that conclusion. It was accepted that attending religious festivals may very well be a valid manifestation of the Claimant's religious beliefs, but the Claimant had failed to show that he needed 5 weeks off to attend specific festivals. It was not fatal to the Claimant's case that he also went to Sardinia to enjoy time with his family, but it seems that in this case that had been the main reason for the employee seeking 5 weeks off – there was not a rigid pattern of festivals that he had to attend that covered the whole 5 week period.

While the employee's claim failed here, the case is a useful reminder of the issues facing employers when considering time off for religious festivals

- If the employer has a policy placing limits on the duration or timing of holidays or other time off, that could adversely impact on employees of a particular faith and could lead to claims. Employers may have to objectively justify their policy
- Arguably, those of a particular faith should not be given special treatment – priority for holidays, or access to special paid leave – if that would not be available to others. That could discriminate against employees with no faith. It is important to have a fair and equitable system for holidays and time off that treats adherents of all faiths equally (as well as those with no faith)

"It is important to have a fair and equitable system for holidays and time off that treats adherents of all faiths equally (as well as those with no faith)."

ACAS have published useful guidance on this area, also with advice on facilities for prayer in the workplace, impact of fasting, hours of work during Ramadan and other areas employers should be aware of.

All employers should take time to consider the religious beliefs of their employees and how they may be affected by working arrangements and policies. Expert advice should be sought.

The importance of the collective agreement – beware!

In the first instance case of *Dunkley and others v Kostal UK Ltd*, an Employment Tribunal has held that an attempt to bypass a recognised trade union and negotiate with individual employees directly amounted to unlawful inducement in breach of section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA").

A trade union had asked staff in a consultative ballot whether to accept a package of pay increases (and a Christmas bonus) and a number of detrimental changes to terms and conditions. This was rejected.

The employer decided to contact all employees directly to offer the same package. Staff were told that if agreement was not reached, there would be no bonus. Details were also given as to the number of staff that had accepted with some reference to what trade union representatives and union members had done (since a number had accepted the offer). Staff were later advised that in the absence of agreement, those who did not accept the offer could be dismissed.

"The employer decided to contact all employees directly to offer the same package. Staff were told that if agreement was not reached, there would be no bonus"

The trade union argued that the employer's approach amounted to a "prohibited result" under section 145B of TULRCA, under which an employer may not make offers to members of a recognised trade union where the purpose of the offer is to cease collective bargaining.

The Employment Tribunal rejected the employer's argument that because it was seeking a temporary solution to an impasse, the prohibition did not apply. The Tribunal also rejected the argument that the main purpose behind the offers was to ensure that the employees did not lose the bonus. The Tribunal held that it was "exceptionally improbable" that the company did not intend to circumvent the collective bargaining process when it made the offers.

It is not permissible for an employer to abandon collective negotiation when it does not like the result of a ballot, and to approach the employees directly to strike deals.

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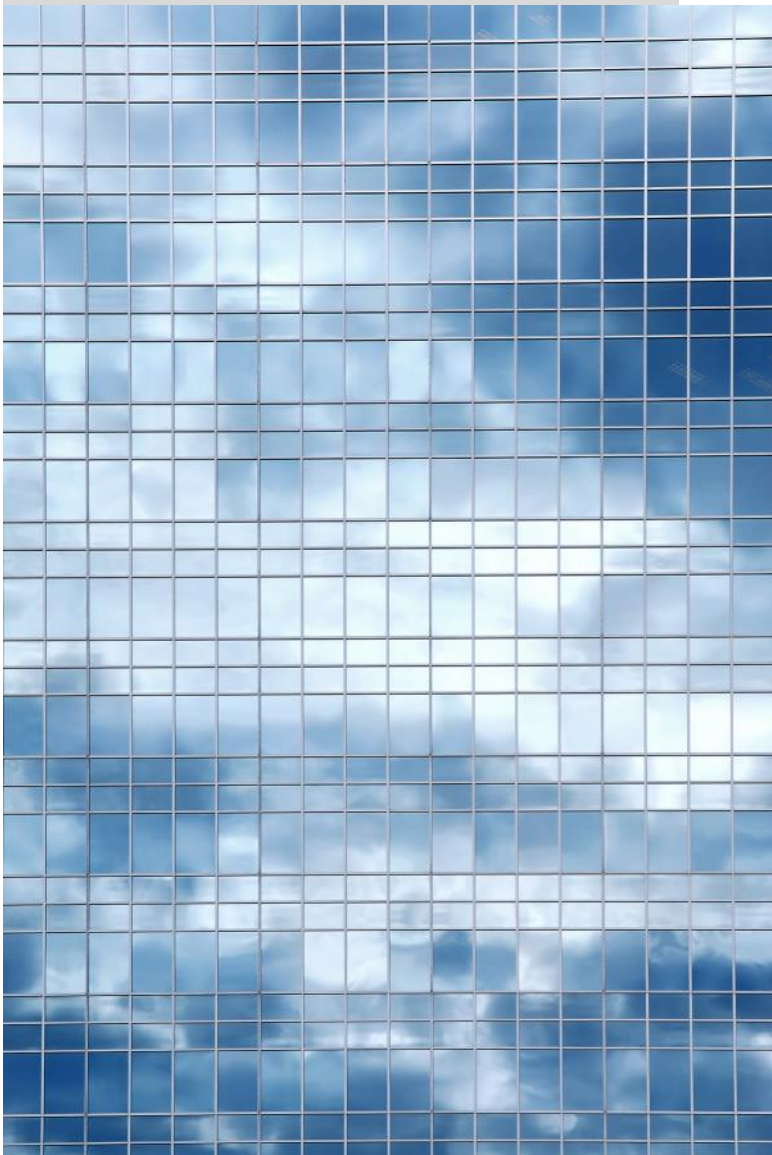
This case is an important reminder of the need to follow established processes in connection with changes to terms and conditions. Where collective bargaining machinery has been established to consider changes to terms and conditions, that forum should be used to seek agreement.

This is a difficult area with the consequences of getting it wrong being significant.



Workplace relocation – is it a redundancy situation?

It is not uncommon for employers to close one place of work, and transfer the work to another existing site, or to new premises. Employees may be told that there is no longer a job for them at their former place of work, but that the company wants them to work at the new location. Traditionally, employers had 2 choices:

1. Treat this as a redundancy situation, on the basis that the employer's requirements for employees to do work of a particular kind *at the place where the employee was employed* have ceased. Employees would be offered alternative employment at the new site. If they accept that offer, their employment continues, and there is no redundancy pay. If they refuse the offer, their employment will end due to redundancy and they will be entitled to redundancy pay unless the offer of alternative employment was a suitable offer *and* it was unreasonable for the employee to refuse it.

2. If there was a contractual mobility clause, whereby employees could be required to work at other locations, then the employer could choose to rely on that clause, and insist that the staff relocate. No question of redundancy arises, and if staff refuse to relocate, the employer would potentially dismiss for misconduct – the employee's refusal to follow a lawful instruction.

Both these approaches would be valid, but the employer must be clear from the outset which of the 2 approaches he is adopting and cannot "dodge from one position to another".

In the recent case of *Kellogg Brown & Root (UK) Ltd v Fitton & Anor* the Employment Appeal Tribunal ("EAT") reminded employers that there are limits on the scope of option 2, and that this will not always be a solution.

The employer in that case closed its premises in Greenford, and proposed to move staff to its existing premises in Leatherhead, some distance away. The employer adopted option 2 and stated that it was issuing an instruction for employees to report to Leatherhead, the company having changed the place of work in terms of the contractual mobility clause. The company offered a certain amount of assistance with extra travelling costs and was willing to be flexible on start and finish times to assist with avoiding traffic.

Two employees refused to relocate as it would mean 20 -30 extra hours of travel time per week. They were dismissed for gross misconduct – refusing to follow a lawful and reasonable order.

The EAT upheld the tribunal's decision that they were unfairly dismissed. There were 3 main issues to consider, and the tribunal had found that:

- The mobility clause itself was excessively wide and not sufficiently clear. It stated that the mobility clause would not apply in exceptional circumstances but it was not clear what those would be or who should decide what was "exceptional"
- The order to relocate to Leatherhead was not a reasonable one for these employees given the impact it would have on them
- The refusal to follow the order was in any case not unreasonable given the employee's personal circumstances

It followed, therefore, that the employees could not be said to have been guilty of misconduct, it was not reasonable for the employer to conclude that they had, and the dismissals were therefore unfair.

The EAT's judgement does not address the issue of compensation but it seems unlikely that the employees would be awarded significant compensation for lost earnings – had the employer not acted unreasonably, the employees would have been fairly dismissed for redundancy. The "basic award" of compensation would, however, equate to the statutory redundancy payment they would have received. The employer could have saved itself a lot of trouble by agreeing to pay redundancy from the outset.

This case is a useful reminder of the limits placed on mobility clauses and other contractual terms. Just because a term appears to give an employer a particular power, does not mean it will always be reasonable for the employer to rely on it, or unreasonable for the employee to refuse to comply. Expert advice should of course be taken when these issues arise.

Doing nothing leads to dismissal: Gross negligence = gross misconduct?

The Claimant in this case had been employed by Sainsbury's for around 26 years before being summarily dismissed for gross misconduct. At the time of dismissal he was a Regional Operations Manager, one of the more senior posts in the company. He was responsible for 20 stores. The Claimant's claim was for wrongful dismissal. This is different from unfair dismissal. Wrongful dismissal is a claim in essence for breach of contract. The question for the court was whether the Claimant had committed gross misconduct so as to justify summary dismissal (and thereby deprive him of sums otherwise due to him under his contract).

The Judge at first instance held that the Claimant had committed gross misconduct and that his summary dismissal was therefore lawful (and the Claimant received no damages).

The case involved an internal employee engagement procedure predicated upon the belief that having staff who are more engaged, motivated and who take pride in their work will lead to improved customer service which in turn leads to happier and more loyal customers.

"Sometimes senior staff will be under an obligation to take positive steps to protect the employer's position and a failure to do so could itself result in disciplinary action, and potentially a fair (and lawful) dismissal."

The Claimant worked with an HR partner. The HR partner had attempted to influence the outcome of the procedure and distort the reality by trying to focus on certain more committed staff members. The Claimant learned about what the HR consultant had done and did nothing to remedy the position. It was ultimately accepted that the Claimant was not complicit in any way with the HR partner but he was dismissed because he "was aware that the HR partner had communicated to stores in a way that deliberately set out to manipulate the scores" and he "failed to take any adequate steps to rectify this serious situation". The Respondent concluded that together the actions (or inactions) demonstrated gross negligence "which was tantamount to Gross Misconduct".

The question for the Court was whether the Claimant had committed gross misconduct and if so, whether it

justified summary dismissal under his contract of employment.

The disciplinary policy defined gross misconduct as "a breach of our standards or rules that is so serious that it can lead to summary dismissal when you are dismissed immediately without notice". There were examples of what could amount to gross misconduct, such as breach of health and safety rules. The final example in the list was "any other serious breach of procedure or policy that leads to a loss of trust and confidence".

The judge at first instance found that although the Claimant was not dishonest and had not made a conscious decision not to take steps to eliminate the effects of the HR partner's actions, the Claimant's failure to take active steps to remedy the situation amounted to gross misconduct and justified his summary dismissal given the facts. All trust and confidence had been destroyed. The judge concluded that the Claimant was in serious dereliction of his own duty to the company, given his obligation to ensure that the process was properly carried out.

The Appeal Court noted that "whether misconduct justifies summary dismissal of a servant is a question of fact… There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal.'

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The Appeal Court accepted that while dishonesty and other deliberate actions which poison the relationship will obviously amount to gross misconduct, in an appropriate case so can an act of gross negligence.

The question for the judge at first instance was whether the negligent dereliction of duty in this case was "so grave and weighty" as to amount to a justification for summary dismissal. The Appeal Court confirmed that it was open to the judge at first instance to hold that the Claimant was himself guilty of gross misconduct. The Claimant was a Regional Manager and as such responsible for ensuring the successful implementation of the process in his region. He was not the person who would carry out the exercise but once it became known to him that the integrity of the process was being undermined or at least was at risk of being undermined, it was his duty to ensure that this was remedied. The Appeal Court found that the Claimant ought to have taken positive steps to remedy the situation. His failure to do so amounted to a serious dereliction of duty which amounted to gross misconduct because it had the effect of undermining the trust and confidence in the employment relationship.

This case is a useful reminder that each case should be considered on their merits. Sometimes senior staff will be under an obligation to take positive steps to protect the employer's position and a failure to do so could itself result in disciplinary action, and potentially a fair (and lawful) dismissal. Dealing with such issues can become complex. Speak to your BTO expert for a helping hand.

April

New legislation coming into force in April 2017

- National Minimum Wage and National Living Wage increases
- Apprenticeship rate increases
- Employment Tribunal award increases
- Family friendly allowances increases
- Gender Pay Gap Reporting comes into force
- Apprenticeship Levy comes into effect

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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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