January 2015

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Employment Law Update

Whilst we're well into the swing of 2015, we hope that the forthcoming year is very happy, healthy and harmonious for you. Stay with us for employment law news as it happens; there's a lot in store.

We're covering varied ground too - the European Court of Justice's decision on obesity and how it can amount to a disability; an update on the judicial review of tribunal fees; some new legislation which limits the amount of holiday back pay that can be recovered, and more besides.

Save the date!

4th March 2015 - 9am-1pm.
Suffolk Showground, Trinity Park, Ipswich.
Gotelee free annual employment Seminar.

So if you're an HR Manager or Finance / Managing / Operations Director with responsibilty for HR you will benefit from attending this free seminar.

If you would like to book a space please use the booking form link on the covering email. Spaces are limited - first come, first served.

Tribunal fees - here to stay?

So it's back to work, and perhaps back to the drawing board for those pushing for the abolition of employment tribunal fees.

The tail end of 2014 saw the latest legal challenge resulting in defeat for UNISON, with the High Court turning down the union's second application for judicial review of the government's decision to bring in fees. While UNISON produced statistics showing a significant fall in the number of claims brought since fees were introduced, lack of evidence was a problem in the case - there were no actual individuals who could be shown to have been unable to bring claims because of cost.

That's not to say that this is the end of the matter. Far from it, it would seem. The Court has given permission to appeal, and during the course of this year we could see the emergence of the evidence UNISON needs. One thing's

certain: tribunal fees will remain on the agenda over the course of the next 12 months and there's no doubt they've resulted in fewer claims.

Who to contact?

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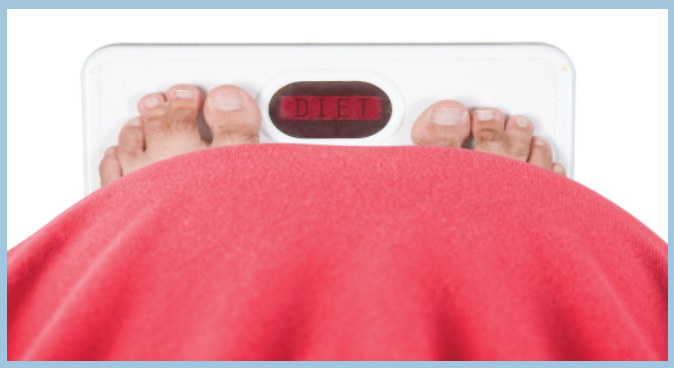
Obesity can be a disability

After some speculation, the decision is in: the effects of obesity can sometimes amount to a disability.

The European Court of Justice (ECJ) reached this conclusion following a referral from a Danish court in Kaltoft v Billund. The case concerned a childminder who claimed that his obesity was a factor in his redundancy.

What the ECJ has said is that if someone's obesity causes them to have a physical or mental impairment which satisfies the legal definition of disability, they could be protected by discrimination legislation. So obesity, by itself, doesn't confer legal protection, but its effects could render a person disabled for employment law purposes.

Not every obese person will be disabled. But those who are unable to participate in professional life on an equal basis with other workers could well be. This will have to be judged on a case-by-case basis, focusing on the effect of a person's obesity, rather than the cause or extent of the obesity itself.



What does this mean for employers? Well, you may need to become more aware of the way in which obesity affects your workers. If one of your employees is too large to use the standard workstation, you may need to make special arrangements - i.e. reasonable adjustments.

It could mean preferential allocation of parking spaces or bringing in new working patterns; the solution will be dictated by the circumstances.

Kaltoft v Billund

Pensions auto-enrolment

January 2015 delivers another important date in the ongoing auto enrolment timetable.

We're in the middle of a staged introduction of this pensions initiative which requires employers with at least one employee (meeting certain criteria) to automatically enroll them into a pension scheme. The largest employers should already have done it. On 1st January 2015, it's the turn of employers who have 58 PAYE scheme members. More staging dates will follow.

If you haven't started thinking about auto enrolment, make it your New Year's resolution. Employees who are aged between 22 and state pension age, who earn at least £10,000 per year and who work in the UK are entitled to be enrolled on a pension scheme from your staging date, so check when this is. You need to work out who is eligible, choose your pension provider and begin the important task of communicating this to your workforce.

There are processes to be designed, contribution levels to be decided, payroll systems to be aligned and staff to be brought up to speed on the changes. Getting to grips with this as far in advance of your staging date as possible is your best bet. But don't panic; talk to us.

Holiday pay claims limited

We've got a new set of regulations which take care of what, for some employers, was the worrying possibility of facing large, backdated holiday pay claims.

The Deduction from Wages (Limitation) Regulations 2014 limits holiday pay claims to two years before the date of the ET1 claim form. The Regulations apply to all unlawful deductions claims, with some exceptions – claims for SMP, SSP and guarantee payments, for example. The Regulations also make clear that the right to holiday pay is not incorporated as a term in employment contracts.

They come in the wake of ***Bear Scotland v Fulton*** (which we reported on last year) and which decided that non-guaranteed overtime should be included in holiday pay calculations if it is, or could have been, compulsory. Although the case put in place some important restrictions on claims, there are concerns that it might be overturned. But by limiting in legislation the extent of claims to a two-year period, the Regulations should provide some comfort to employers.

While it may be breathe-a-sigh-of-relief time, a word of caution: there is currently a window of opportunity for astute employees to take advantage of a brief transitional period. The Regulations only apply to claims presented on or after 1 July 2015. So there is potential for claims, stretching back longer than two years, to be issued now. Claimants would however need to clear the hurdles put in place by ***Bear Scotland*** and show a series of deductions, which isn't as easy as it sounds.

Redundancy and maternity leave

Ms Wainwright was on maternity leave when her job was made redundant. A new role was created and allocated to her colleague. She claimed automatically unfair dismissal, based on the requirement in the Maternity and Parental Leave Regulations for employees on maternity leave to be offered a suitable available vacancy where there is a redundancy situation.

She won her unfair dismissal claim. And a useful point emerged which is that it's not necessarily discriminatory for an employer to fail to offer someone like Ms Wainwright the alternative position. Although she had been treated unfavourably, it wasn't necessarily because of her pregnancy or maternity leave.

So while it is automatically unfair to fail to offer a suitable available vacancy to a woman on maternity leave in a redundancy situation, it shouldn't be assumed to also be discriminatory. This is significant in the context of compensation; unfair dismissal is capped, but there is no limit on the amount that can be awarded in discrimination cases.

Sefton Borough Council v Wainwright

Restrictive covenants under consideration

Changing employees' terms and conditions presents a number of pitfalls for employers. Rather than impose new arrangements, there's a bargain to be struck; if the terms are to be less favourable to the employee, for example, then this usually calls for some sort of benefit or other sweetener (known as consideration). It's an important point of contract law.

In the ***Re-use Collections*** case a question arose over the status of restrictive covenants. Specifically, could the employer rely on covenants which it had introduced to the employee's contract, but for which it hadn't offered any new consideration?

Mr Sendall worked for a family recycling business for many years without having a written contract. When Re-use took the company over, it issued a contract containing non-solicitation, non-dealing and non-compete clauses which Mr Sendall signed.

Not long after, he left to work for a competitor. Re-use wanted to enforce the covenants but the High Court held that it couldn't. Mr Sendall had not had "some real monetary or other benefit" for the contract variation, the Court said (and the covenants were unreasonably long in duration, in any event).

Re-use had argued that his benefits package, which included a pay rise, amounted to consideration, but the Court disagreed. The new contract confirmed mainly existing benefits and there was nothing to say that the pay rise was unique to Mr Sendall – or that it was linked to the new terms to which he was agreeing. It was significant that the employer had not made it clear that the pay rise was conditional on Mr Sendall accepting the new employment terms.

So Mr Sendall had not received any consideration linked to the change in his contractual terms. Bear this in mind when looking to amend terms and conditions. Make sure you give some sort of valuable consideration (a signing bonus, or perhaps extra holiday) and make clear that the employee is getting that benefit as a condition of accepting the new terms.

And, as always, take care over the wording of restrictive covenants. And if in doubt, take some advice.

Re-use Collections v Sendall & May Glass Recycling

Schizophrenia and gross misconduct

Mr Burdett suffered from schizophrenia. He was dismissed for gross misconduct following a series of assaults in the workplace.

The question for the Employment Appeal Tribunal (EAT) was whether the tribunal was right to have found his dismissal fair. Mr Burdett had admitted the gross misconduct and he'd admitted a serious error of judgment in discontinuing his medication without getting medical advice. The tribunal had held that in light of those admissions, very little investigation was needed and the employer had reasonable grounds for its belief. Given the nature of the misconduct, it was proportionate to dismiss, the tribunal said.

But the EAT thought differently. The evidence was that Mr Burdett had only committed the assaults because of his mental impairment. Admitting to the assaults was not the same as admitting that he had wilfully misconducted himself. The tribunal ought to have asked if there were reasonable grounds for concluding that Mr Burdett had carried out the assaults deliberately or in a grossly negligent way.

So gross misconduct requires culpability – and this is important to take into account when dealing with an employee who has a mental illness. It's not, as the EAT pointed out, a simple case of whether the employee did or did not carry out the act; it's more complicated than that. And you'll need to fully consider this before dismissing.

Burdett v Aviva

And finally... Offensive tweets and unfair dismissal

In the case of *Game Retail Ltd v Laws*, Mr Laws was Game's risk and loss prevention investigator. He opened a Twitter account (which didn't specifically link him to his employer) and began following the stores for which he was responsible so that he could monitor inappropriate activity. Sixty-five Game stores subsequently followed Mr Laws, after one of its managers encouraged them to do so.

But it was Mr Laws himself who got into hot water for posting offensive tweets. He was dismissed but initially won his unfair dismissal claim. Dismissal was not within the band of reasonable responses, the tribunal said. The tweets had been posted using Mr Law's own phone, outside working hours, and for private purposes. It hadn't been established that any member of the public had access to Mr Law's Twitter feed and had connected him with the company. Also relevant was the fact that Game's disciplinary policy didn't specifically say that use of social media in this way could be treated as gross misconduct.

The Employment Appeal Tribunal (EAT) disagreed. Mr Laws had not attempted to ensure that his tweets only went out to a private audience. He hadn't set up two accounts (one personal, one professional), nor had he adjusted his settings to restrict his followers. And he was knowingly tweeting in the context of having some 65 of the Respondent's stores following his feed – and on the recommendation of a store manager. It therefore couldn't be considered private usage.

A new tribunal will now reconsider the question of whether dismissal was within the band of reasonable responses.

The EAT steered away from issuing guidance on misuse of Twitter. Each case is different. But what we can say is that these are some of the important things to take into account:

- what the tweets say
- the employee's settings - have these been restricted?
- the association that may be made between the employee and the employer (not just in the profile section, but throughout the Twitter feed)
- use of separate accounts for personal and work purposes
- what the company disciplinary policy says about sanctions for social media misuse.

Happy tweeting to all our readers!