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EMPLOYMENT UPDATE - MARCH 2015

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Our employment & equalities experts bring you the latest developments that may affect your business - what they are, and what you can do about them.

This month's update covers:

Exclusion from bonus scheme of disabled employees with sickness absence warnings was discriminatory

The Employment Appeal Tribunal (EAT) has upheld a tribunal's decision that the automatic exclusion from a bonus scheme of disabled employees who had received a sickness absence warning amounted to unlawful 'discrimination arising from disability'.

Managing sickness absence is a notoriously tricky area for employers, particularly when dealing with disabled employees, who may require more time off than others. Under section 15(1) of the Equality Act 2010, 'discrimination arising from disability' occurs where

both

a. A treats B unfavourably because of something arising in consequence of B's disability; and
b. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

There only needs to be a connection between whatever led to the unfavourable treatment and the disability. The unfavourable treatment need not be because of a person's disability for there to be 'discrimination arising from disability'.

The application, without modification, of an employer's sickness absence policy to a disabled employee may give rise to a 'discrimination arising from disability' claim. This includes consequential action as a result of a sickness warning having been issued, unless the unfavourable treatment is objectively justified.

In Land Registry v Houghton and others, the five claimants were disabled and each had sickness absences which triggered the employer's sickness absence policy. The employer had various reasonable adjustments in place for the claimants, and adjusted the normal trigger points that would usually lead to a warning. Despite these adjustments, each of the claimants eventually received a warning.

The employer operated a discretionary bonus scheme. Under the terms of the scheme, employees who had received a formal warning in respect of sickness absence during the relevant financial year were not eligible to receive the bonus. Employees who had received a formal warning for a conduct-related matter were potentially also ineligible. However, crucially, managers could use their discretion to ignore a conduct-related warning when determining bonus entitlement, but there was no such discretion to ignore a sickness absence warning. For instance, an employee who significantly improved their conduct after receiving a warning could be included, but an employee who significantly improved their attendance could not.

The disabled employees succeed in their claims. Although, the employer had reasonable adjustments in place to delay the issuing of a warning to an employee who was absent due to a disability, the fact that receiving a warning led to an automatic disqualification from the bonus scheme was sufficient to amount to unfavourable treatment in consequence of disability. It could not be objectively justified as once it was decided to issue a warning for sickness absence managers had no discretion on exclusion from the bonus scheme unlike the position for conduct warnings.

Had the employer included an element of manager's discretion in the bonus scheme as it had done for conduct-related warnings, it may have succeeded in justifying the scheme as a proportionate means of achieving the legitimate aim of encouraging and rewarding good performance and attendance. The tribunal and the EAT both focused on the fact that there was no scope to take account of an improvement post-warning, as there was for conduct warnings.

Employers operating bonus schemes linked to attendance should ensure that there is sufficient discretion built into schemes. Having reasonable adjustments in place to delay the issuing of a sickness absence warning is not the full answer, it is also necessary to provide flexibility as to the effect of that warning.

The rise of E-cigarettes: employers warned to update their no-smoking policies

E-cigarettes in the workplace: should you treat them as if they are cigarettes or have different rules for their use?

Why the concern?

Many smokers are now choosing electronic cigarettes. E-cigarette manufacturers promote the idea that using these products does not have the harmful effects of cigarettes. The rapid growth of E-cigarette use has led to such claims coming under scrutiny.

In 2014 the World Health Organisation published a report into the use, health effects and options for regulating E-cigarettes and other electronic nicotine delivery systems. The report acknowledged that these devices are likely to be less harmful than conventional smoking, but warned that their use may potentially increase the background air levels of nicotine and other substances which could be harmful to adolescents and pregnant women. The report also pointed out that E-cigarettes have not been subjected to many independent tests and that any impact on health arising from their use may not become obvious for some years.

Last year the EU Tobacco Products Directive (TPD) was passed. The Directive regulates the manufacture, presentation and sale of tobacco and related products. Its scope includes E-cigarettes containing up to 20mg/ml of nicotine. Above that level E-cigarettes are regarded as medicines. The UK has until 20 May 2016 to implement the Directive in

UK law.

Smoking in enclosed, or substantially enclosed, public places (including workplaces) has been banned across the whole of the UK since 2007. The legislation prohibiting smoking in the workplace defines smoking as lit tobacco or 'any other substance' that can be smoked when lit. E-cigarettes emit an aerosol that users inhale or 'vape' and this is produced from a heated solution containing nicotine. Due to the fact that they do not contain a combustible material that is actually smoked it is unlikely that E-cigarettes fall within the current legislation.

Many employers have no smoking policies that go beyond the current legislation, such as extending to all company premises not only those substantially enclosed. Unless a no smoking policy has been updated to specifically include the use of E-cigarettes in the workplace, an old policy is not going to assist an employer wishing to take disciplinary action for the use of E-cigarettes.

Recent tribunal case

A recent UK employment tribunal case has highlighted how important it is for employers to ensure that the use of E-cigarettes or "vaping" is included in their smoking policy.

The employment tribunal in Insley v Accent Catering considered a claim by a school catering assistant that she had been constructively dismissed by her employer as a result of facing disciplinary action due to having used an E-cigarette.

In this case, the headteacher of the secondary school where Ms Insley was working complained to her employer that he had seen her using an E-cigarette on school premises at the beginning of the school day in full view of pupils.

The employer investigated the incident as potentially bringing the company into disrepute as it was required to comply with school rules. Ms Insley initially denied the incident took place, but later conceded that she had used the device. Ms Insley was asked to attend a disciplinary hearing to decide whether her actions were considered to be serious enough to justify dismissal.

However, she resigned before the disciplinary hearing. The tribunal dismissed her claim for constructive dismissal on the basis that Ms Insley's employer had acted properly when asking her to attend a disciplinary hearing.

Although the employer successfully defended the case, the tribunal stressed that, because

Ms Insley had resigned, and not been dismissed, it could not decide the question of whether or not her use of the E-cigarette amounted to gross misconduct, justifying dismissal. It was not clear on the evidence before the tribunal whether smoking E-cigarettes was a breach of company policy.

If the disciplinary hearing had actually taken place resulting in a dismissal, the question of policy breach would have then been considered. An employer with a clear policy prohibiting the use of E-cigarettes on work premises will be in a much stronger position to defend a claim.

What should employers be doing now?

Employers should ensure no smoking policies are updated to take account of E-cigarettes. When updating policies care needs to be taken.

For example, employers who do not operate a full workplace smoking ban should not send E-cigarette smokers to designated smoking areas. E-cigarette users, as 'non-smokers'/those wishing to quit smoking, could potentially bring grievances, or even constructive dismissal claims, based on the employer's failure to provide them with a smoke-free environment. A separate area should be designated.

On the other hand, employers who do impose a wholesale ban may face complaints from employees who have been prescribed them for 'medicinal purposes'. Employers should be prepared to explain the reasoning behind the ban and support offered inside or outside the workplace for alternative methods for giving up smoking.

Consider the following actions:

- Review and amend existing smoking policy or consider introducing a new policy to deal with the use of E-cigarettes and other such electronic devices.
- Be clear on your policy before taking disciplinary action against employees for use of E-cigarettes.
- Ensure staff, agency workers and contractors are aware of the policy.
- Consider the possibility of introducing a 'vaping' area that is separate from any existing areas designated for conventional smoking.
- Raise awareness of support offered inside or outside the workplace for alternative methods for giving up smoking.

Whistleblowing in the financial services industry consultation

On 23 February 2015, the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) published a joint consultation paper 'Whistleblowing in deposit-takers, PRA-designated investment firms and insurers'.

The consultation is in response to the Parliamentary Commission on Banking Standards which recommended that banks put in place mechanisms to allow their employees to raise concerns internally and that the FCA and the PRA ensure these mechanisms are effective.

The FCA and PRA propose a package of measures to formalise firms' whistleblowing procedures:

- Put internal whistleblowing arrangements in place (if they are not already).
- Inform UK-based employees that they can blow the whistle to the FCA or the PRA.
- Offer protections to all whistleblowers.
- Include a passage in new employment contracts and settlement agreements clarifying that nothing in that agreement prevents an employee, or ex-employee, from making a protected disclosure.
- Allocate the prescribed responsibility for whistleblowing under the Senior Managers Regime and Senior Insurance Managers Regime to an individual (the "whistleblowers' champion") with responsibility for:
  - overseeing the effectiveness of internal whistleblowing arrangements, including arrangements for protecting whistleblowers against detrimental treatment;
  - preparing an annual report to the board about their operation; and
  - reporting to the FCA where an employment tribunal finds in favour of a whistleblower.

The consultation closes on 22 May 2015.

"Single establishment" criterion set to return in collective redundancy?

The Advocate General (AG) considers that the UK can legitimately limit the threshold for redundancies necessitating collective consultation to those where 20 or more redundancies are proposed at a 'single establishment'.

If followed, this will mean that the law returns to its pre-Woolworths litigation position;

employers must look at the 'establishment' question to decide whether the duty to collectively consult arises. It will be back to the future to argue, once more, about independence of management in a local context. There will be no automatic need for collective consultation where 20 or more redundancies are proposed across the business.

We must wait and see if the Court of Justice of the European Union will follow the AG's opinion but, for now, employers and the UK Government have reason to hope that the current situation will be overturned.

For more detail see our alert Good news day for employers and the UK Government as establishment criterion looks set to return in collective redundancy.

The reshaping of family-friendly leave is here

Soon Shared Parental Leave (SPL) will fully join the suite of family friendly leave to sit along-side maternity, paternity, adoption and parental leave, for births/placements for adoption expected on or after 5 April. Are you ready?

Although SPL came into force on 1 December last year its immediate effects were limited, as SPL only applies to parents of children due to be born/adopted on or after 5 April. This date is fast approaching but don't panic. There is still time to get ready.

If not done so already, employers should be:

- preparing policies, forms and guidance on SPL
- deciding whether to offer enhanced SPL pay and if so on what basis
- reviewing existing family leave policies to incorporate changes due in 2015 and references to shared parental leave
- planning how to communicate this new right to employees
- training line managers on SPL including how it will operate and how to respond to requests.

For a summary of the new regime considering its complexities and the extent of the changes, see our alert The impending 'birth' of shared parental leave.

The employment law 2015 numbers to know

Tribunal Awards

From 6 April the statutory limits on tribunal awards will be increased to:

- Limit on a week's pay - £475 (currently £464).
- Unfair dismissal basic award/statutory redundancy payment - £14,250 (currently £13,920).
- Unfair dismissal compensatory award - the lower of £78,335 or 52 weeks' actual pay (currently £76,574 or 52 weeks' actual pay).

Note: The new rates apply where the "appropriate date" occurs on or after 6 April (e.g. for unfair dismissal the effective date of termination) and not the date of the corresponding tribunal hearing. There is no limit on compensatory awards where the reason for dismissal is a public interest disclosure or connected to a health & safety matter.

Statutory payments rates

From 5 April:

- The standard rates of statutory maternity, paternity, shared parental and adoption pay increase to £139.58 per week (currently £138.18).
- The standard rate of statutory sick pay increases to £88.45 per week (currently £87.55).

TUPE: what happens to an employee who successfully appeals post-transfer against their pre-transfer dismissal?

In the recent case of Salmon v Castlebeck Care (Teesdale) Ltd (In Administration) the EAT remind employers that:

- Unless an employment contract specifically provides otherwise, a successful appeal against dismissal under a contractual appeal process results in reinstatement from the moment of dismissal.
- Transferees should look out for potential appeals against dismissal at the time of transfer and look for the necessary contractual protection against the costs of gaining unexpected employees, where possible.

Mrs Salmon was among a group of employees dismissed from Castlebeck Care for gross misconduct. Two months after her dismissal Castlebeck transferred its business to a

company called Danshell and shortly after that Mrs Salmon raised an internal appeal against her dismissal. Unusually, the appeal was heard by the transferee and the panel decided that her dismissal was unsafe. However, Danshell failed to communicate its decision, instead instructing third party consultants to negotiate a settlement agreement.

Mrs Salmon brought a claim at Employment Tribunal for unfair dismissal against both Castlebeck and Danshell.

At tribunal Mrs Salmon argued that the effect of her successful appeal was to revive her employment contract as if she had never been dismissed. As a consequence she was employed by Castlebeck immediately before the transfer and should have transferred to Danshell under TUPE. Her claim for unfair dismissal would therefore be against the more solvent transferee.

Mrs Salmon lost against Danshell but successfully appealed to the EAT.

The EAT confirmed that Mrs Salmon's contract of employment had revived and she had TUPE transferred to the transferee (Danshell). Her claim against Castlebeck was discharged.

It is of course unusual that the appeal was heard by the transferee. However, the EAT said that this decision was clearly consensual, and the validity of this process had not been challenged in the tribunal, so the EAT could not rule on whether that could invalidate the process. (However, previous case law had decided that the contractual obligation to hear and determine appeals heard post-transfer against dismissals effected pre-transfer lay with the transferors notwithstanding the transfer.)

Danshell had argued that as no contractual evidence had been submitted to Tribunal and there was no clear statement of reinstatement, success at appeal could in theory lead to a range of sanctions, including, for example, a recommendation that a settlement be pursued. Reinstatement did not always have to follow.

The EAT did not agree. The effect of a successful appeal is to revive an employment contract retrospectively, as if the employee had never been dismissed. So, without a contractual provision to the alternative, Mrs Salmon's successful appeal meant that the dismissal did not take effect.

It was also not necessary that an appeal decision be communicated (to the employee) to be effective. This is different to when an employee is told of their dismissal: then, communication is needed.

So, Mrs Salmon's contract of employment had revived and she had TUPE transferred to the transferee.

Due diligence and contractual protection will protect against such risks but, of course, neither of these may be possible in certain insolvency situations.

Related Employment, Labour & Equalities

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