



### Perceived Disability Discrimination

At the start of the year the Employment Tribunal ("ET") in the case of *Chief Constable of Norfolk v Coffey* UKEAT/0260/16 found that the employer perceived the employee to have an actual or a potential disability which could lead to the employer having to make adjustments to her role, either now or in the future. The tribunal concluded that this amounted to direct discrimination and the employer's appeal was dismissed by the Employment Appeal Tribunal ("EAT"). Deciding whether someone perceives another as disabled requires careful analysis of whether they perceived that person to have an impairment with the features that are set out in the Equality Act 2010, this can be a difficult task.

### Whistleblowing

The EAT has confirmed the circumstances in which a worker can sue a colleague based overseas for whistleblowing detriment, and held that those accused of detriment must have knowledge of, and be personally motivated by, the protected disclosure, before they can be held accountable, (*Malik v Cenkos Securities Plc* UKEAT/0100/17). Employers need to be aware that an overseas worker sufficiently connected to Great Britain will take the benefit of the Employment Rights Act 1996 and the burden, in terms of liability for whistle-blower detriment.

### Employee Surveillance

The European Court of Human Rights ruled that an employer's installation of hidden video cameras to monitor employees violated their Article 8 privacy rights. Their decision was in line with the ICO guidance that permits covert surveillance of employees only in exceptional circumstances, (*López Ribalda and others v Spain* Application nos. 1874/13 and 8567/13)

### Pensions Auto Enrolment

The DWP has published its 2017 review, and announced a series of reforms and proposals for implementation in the mid 2020's subject to discussions with stakeholders on the implementation approach, analysis of the increased costs for business and an assessment of the impact of the increases in statutory minimum contribution rates due in 2018/19.

### Criminal Records Checks

A new online service has been launched for individuals applying for basic criminal records checks, as applicants in England and Wales will now be required to apply directly to the DBS to obtain a certificate.

### Is Time Spent on Standby Working Time?

In February the European Court of Justice ("ECJ") has held that time spent by firefighters on standby is "working time" under the Working Time Directive. The requirement to stay at home and respond to calls within eight minutes sufficiently limited their ability to engage in non-work activities, (*Ville de Nivelles v Matzak* ECJ Case C-518/15). Employers need to be aware of the extra costs involved if response times are "significantly restricting".

### New Rates

From 1 April 2018 there are new rates for the living and minimum wage and increases to statutory maternity, paternity, adoption and shared parental pay and sick pay from 6 April 2018. On 6 April 2018 the maximum compensatory award for unfair dismissal and the maximum amount of a week's pay will increase to £83,682 and £508 respectively.

### Taxation of Termination Payments

On 6 April 2018 new rules on the taxation of termination payments came into effect. Broadly speaking all payments made to employees in respect of notice payments, including damages for breach of contract, will be taxable. When dealing with settlement agreements there is now a requirement to calculate the post-employment notice pay using complex formula.

### GDPR

With effect from 25 May 2018 The Data Protection Act 2018 (DPA 2018), commonly known as GDPR came into force; employers must have the correct internal procedures and policies in place. We offer a free no obligation Employment Health Check to check compliance.

### Employer Knowledge of Disability

The Court of Appeal in the case of *City of York Council v Grosset* [2018] EWCA Civ 1105 has upheld the decision that an employer had discriminated against a disabled employee after they were dismissed for misconduct despite the employer being unaware that their actions were due to their disability. The decision is significant, as it confirms that employers will be liable for discrimination arising from disability even where they have reasonably concluded, based on the evidence, that there is no correlation between an employee's actions and their disability.

### **Dismissal for a Series of Misconduct Issues**

The EAT upheld a tribunal's decision that a hospital trust fairly dismissed an employee for a series of misconduct issues despite there being no evidence of gross misconduct or previous wrongdoing, (*Mbubaegbu v Homerton University Hospital NHS Foundation Trust* UKEAT/0218/17). However, employers should always exercise caution before reaching a decision to dismiss an employee with no prior warnings where there is no clear single act of gross misconduct.

### **Worker, Employee, Independent Contractor or Self-employed?**

In June The Supreme Court held that a plumber was a worker as well as being an employee under the extended definition of the term in the Equality Act 2010. Despite the plumber's contract labelling him as an independent contractor and the presence of a limited right of substitution, personal service was the dominant feature of the contract. Although largely a fact-sensitive case, the decision highlights the difficulties that parties can face in determining an individual's legal status for employment law purposes, (*Pimlico Plumbers Ltd and Mullins v Smith* [2018] UKSC 29).

### **Issuing Warnings for Disability Related Absence**

The EAT noted the importance of employers being able to justify their decision to issue a warning when dealing with disability-related absence, even in this case where the employer granted an extended period of sickness absence, (*DL Insurance Services Ltd v O'Connor* UKEAT/0230/17). This case serves as a reminder to employers of the sensitivities of dealing with disability-related absence.

### **Increase in Employment Tribunal Claims**

The latest Employment Tribunal statistics have revealed a continuing trend for the increasing numbers of single employment claims following the abolition of employment tribunal fees.

### **Sleep-in Shift Workers Rights to Pay**

In July 2018 The Court of Appeal held that carers working sleep-in shifts are only entitled to national minimum wage when they are required to be awake for the purposes of working, not when they are asleep but on call, (*Royal Mencap Society v Tomlinson-Blake; Shannon v Rampersad (t/a Clifton House Residential Home)* [2018] EWCA Civ 1641).

### **Dismissing an Employee on Long Term Sick Leave**

The EAT ruled that the dismissal of an employee on long-term sick leave could not be objectively justified under the Equality Act 2010 and held that dismissal was not proportionate, (*Ali v Torrosian and others (t/a Bedford Hill Family Practice)* UKEAT/0029/18). In this case the employer's liability arose from their failure to properly consider whether any reasonable adjustments should be made before reaching their decision to dismiss.

### **ACAS New Guidance on References**

New basic guidance on employment references has been published by ACAS, covering whether an employer is required to provide one and its content and can be found on their website.

### **Parental Bereavement Leave**

The Parental Bereavement (Leave and Pay) Act 2018 was granted Royal Assent on 13 September 2018 and is likely to come into force in 2020, it introduces a new statutory right to paid leave in the event of the death of a child under 18.

For advice about any of the issues raised in the newsletter or other issues relating to employment law, please contact Anna Illingworth.

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