

### Issue of Disability



In some disability cases, the issue of whether the employer has knowledge or should have knowledge of an employee's disability is a crucial one. A recent case confirmed on the facts that an employer did not have knowledge of the disability when the Occupational Health (OH) report stated that she did not have a disability and because there was nothing in the face to face meetings that indicated this. The key learning points are that case law states that it is unsafe to just rely on an OH assessment without having proper discussions with the employee and that ultimately the decision as to whether someone is disabled is one for the employer and not the medical practitioner.

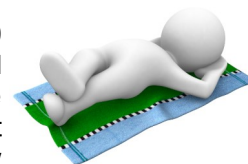
### Taylor report: Government's response

The Government has just published its 80 page response to the Taylor review of modern working practices. It is fair to say that a lot of its ideas are still subject to ongoing consultation. Set out below are some initial observations:

- Employment status – employee/worker/self employed status will be clarified.
- There will be further National Minimum Wage (NMW) crackdowns.
- There will be a right to written particulars of employment for all workers from day 1.
- There will be additional payslip rights for all workers, including casual and those on zero hours contracts.
- There will be a right for all workers to request 'a more stable contract which has the aim of providing more secure working conditions.
- It will be easier for atypical workers to show continuity of employment.
- There will be additional protection for 'gig' economy workers
- There is holiday pay reform and this may include extending the reference period from 12 to 52 weeks.
- Agency workers' rights and protections are being looked at.
- There will be greater enforcement by HMRC of rights such as NMW/Holiday pay .
- There will be significantly larger fines for employers who do not comply with employment tribunal judgments.
- Pregnancy/Maternity rights will be reviewed.

### Rest periods

Workers are entitled to a 20 minute break if they have worked 6 hours in a day. A recent case has confirmed that, in most industries, employers must allow them one continuous break of at least 20 minutes rather than allow them to have several breaks totalling 20 minutes. Any health and safety policies or risk assessments need to reflect this.



### Holiday pay



There has been a noteworthy European Court of Justice (ECJ) decision that relates to a scenario where an employer paid an employee on a commission only basis and did not pay any holiday pay for a number of years. The ECJ has ruled that, in these circumstances, workers are entitled to all their entitlements up to the date of termination of their employment.

This case has wider ramifications because it means that, if an employer has incorrectly assessed holiday entitlement, then a worker can claim holiday pay for all of their employment. A good example of this relates to someone who an employer regards as self-employed but is in fact a worker under the Working Time Regulations (WTR)

This case now returns to the Court of Appeal. The judges will have determine how to apply the ECJ ruling to UK law, how to deal with the provisions of the WTR which prevent leave carrying across into another year, address the Government's legislation which provides that there is a 2 year limitation period on these claims and consider series of deductions arguments as set out in the *Bear Scotland* case. The other point to note is that all of the above discussion relates to the 4 week entitlement under the Working Time Directive but there may be ramifications for the additional 1.6 weeks under the WTR.

### Collective Bargaining

A recent case has highlighted the dangers of employers negotiating directly with employees where there is a collective bargaining mechanism in place with trade unions. An employer was found to have made illegal inducements to collective bargaining under 145B Trade Union and Labour Relations Consolidation Act 1992 and received a £400,000 penalty.

The employer felt that it had reached an impasse in its pay negotiations and hence made direct offers to its employees. The Tribunal ruled that this constituted a deliberate attempt to bypass the collective bargaining arrangements. It is also noteworthy that for this claim to succeed, it didn't require the employer to want to end the collective bargaining permanently and it was no defence that it still continued to negotiate with the unions in addition to making direct pay offers to union employees.

However, the judge stated that "if collective bargaining breaks down, to the extent that the employer has a proper purpose for making offers directly to workers, there is nothing to prevent such offers being made" but on this set of facts this wasn't the case and he seriously questioned the employer's handling of negotiations and motives. The key points to note are that it would normally be risky to break away from an agreed collective bargaining process and this should this be contemplated only if there were a complete breakdown in negotiations. If you get to that situation, take legal advice.

### Heath and Safety - Watch your back



There was an interesting case relating to manual handling which relates to back injuries and lifting. A midwife had to carry an oxygen cylinder. She had been trained in manual handling. She suffered a back injury when lifting this

equipment and argued that the employer should have done a risk assessment before she was required to do any lifting. Many personal injury claims succeed if there hasn't been an adequate risk assessment.

The Court of Appeal rejected her claim. The findings of fact were that the design, shape and weight of the object coupled with the lack of any other complaints from other staff meant that there was not a need to do a risk assessment. The employee needed to show that there was a real risk of injury that the employer had not foreseen.

It is obviously essential that all staff are properly trained in manual handling and it would have been better had some risk assessment been undertaken, as this claim would have been lost if there had been a greater risk of injury. It is essential that employers check with their staff as to whether there are any issues in team and one to one meetings and consider whether there are better ways of working and whether superior equipment is available.

You need to factor in that the ability of different individuals to lift will vary and this needs to be factored into your assessment of what is appropriate for them to do. It goes without saying that records need to be kept up to date on all of this.

### Employee Monitoring

On 18 December 2017 a draft set of regulations, The Investigatory Powers (Interception by Business etc. for Monitoring and Record-keeping Purposes) Regulations 2018 (the Regulations), were published. It is intended that they will replace The Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 (the Telecommunications Regulations). These regulations seem to replicate what is in the Telecommunications Regulations, which provide for circumstances where, in a business context, it is lawful for the purposes of RIPA 2000 to intercept communications (including those of employees) without consent.

### HMRC tax bulletin



We recommend that HR and payroll professionals read Employer Bulletin 70 as it contains the HMRC position on its approach to the PILON changes that take place on April 6<sup>th</sup> 2018.

### Whistleblowing

The Court of Appeal has confirmed that a whistleblower is not precluded from arguing that their post-termination losses were attributable to pre-dismissal detriments. That is a question of fact that an employment tribunal would have to assess. This seems consistent with section 49 of the Employment Rights Act that states that an



employment tribunal can award compensation of an amount that it considers just and equitable in all the circumstances having regard to both the infringement to which the complaint relates and **any loss which is attributable to the detrimental treatment** (*emphasis added*). The court also rejected the argument that, as a matter of law, a lawful act of termination breaks the chain of causation between pre-termination detriments and post-termination losses.

### **Contact details**

If you have any queries relating to this newsletter or wish to seek employment law advice or discuss training needs, please contact: [andrew.brett@norfolk.gov.uk](mailto:andrew.brett@norfolk.gov.uk), 01603 223101



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