Employment Law Newsletter

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Individual managers liable for whistleblowing

The Court of Appeal has confirmed that individuals can be liable for the unlawful dismissal of a whistleblower. On the facts, a senior Executive had sent an email telling another employee to dismiss the whistleblower. This will mean that Claimants are likely to also sue managers in addition to their employer if they suffer a detriment as a consequence of whistleblowing.

Data Breach – adverse judgment for employers

There has been a rise in the number of claims made for data breaches. Companies such as Facebook and Google have been in the news recently. Morrisons suffered a significant defeat in the Court of Appeal. It was held liable for the actions of a disgruntled employee who caused 100,000 workers' personal data to be accesssible online. Morrisons were held liable notwithstanding that this was an act of an employee acting maliciously. The Court also flagged up issues about Morrisons not doing enough preventative work to safeguard the data. HR professionals should review with their IT colleagues their processes and systems for allowing access to data and their ability to restrict posting it online. A further consideration is whether insurance policies will cover such breaches and whether insurers will exclude liability for these types of claims.

Harassment claim unsuccessful

An interesting case has flagged up that the Claimant's own attitudes and behaviour is highly relevant when assessing whether harassment has occurred. The employee alleged that he had been called a 'fat ginger pikey' on a number of occasions. No one considered that the employee was fat and only one person knew that he was from the traveller community. The culture of work was one where there was 'jibing and teasing' amongst the staff, in which the employee had participated, and at the time he did not complain about the remark. In light of this, the EAT rejected his claim.

These cases will turn on the nature of the remarks, the attitudes of the victim, the culture of the office, and even in offices where banter is commonplace, whether any remark can be seen to have "crossed the line". Employers need to factor in how they can minimise the risks of being liable for such claims - policies and culture need to be reviewed with managers.

Holiday rights – employers must do more

The European Court gave an important ruling that makes it clear that staff (employees and workers) must be given accurate information about their right to paid holiday and **most significantly take steps to actually ensure that they take it.** If that doesn't happen, then leave entitlements can roll over into the next holiday year. It has been suggested that employers will have to do more than just simply have a policy in place. HR professionals will need to work out how they are going to meet these requirements.

Postponement of Disciplinary Hearings

It is not unusual for employees to ask for disciplinary hearings to be postponed if their trade union representative is unavailable. An employer must grant an employee's request for postponement if the alternative time is reasonable and within 5 working days of the original date.

In a recent case, an employee had been represented by the same official throughout a disciplinary process who could not attend the scheduled hearing date but could attend on a date within 2 weeks of the original date. The employer rejected the employee's request for a postponement and proceeded with the hearing.

The EAT upheld a decision that the failure to postpone the hearing meant that this was an unfair dismissal even though it accepted that the statutory right to be accompanied had not been infringed. This is a warning to all HR advisers that there is a need to act reasonably on postponement requests. Arguments that the tribunal had imposed its own view as opposed to merely judging whether the refusal to postpone was within a reasonable band of employer discretion did not succeed.

Consultation on ethnicity pay reporting

The Government is currently consulting on whether to introduce mandatory ethnicity pay reporting. It will be interesting to see whether Baroness McGregor-Smith's 2017 'Race in the Workplace' recommendations will be implemented. The consultation closes on 11 January 2019.

Disability discrimination attendance warnings

A recent case has flagged up the importance of following sickness absence procedures if disabled employees are to be warned about their lack of attendance. An employer issued a warning to an employee who had 60 days off within a 12 month period and had reached a trigger threshold. Although the EAT held that the employer had a legitimate reason for its actions, it was nonetheless liable for disability discrimination because the employer had not consulted OH or asked the manager about the impact of the employee's absence on the rest of the team. Consequently, the point to note is that if you don't follow your own policies, you run the risk of losing an ET claim.

Vicarious liability for unofficial work drinks party

The Claimant attended a HGV firm's Christmas party. After the party finished a number of attendees went to a local bar for further drinks. The MD of the company was 'overseeing' matters. There was then an argument about the Claimant employee's contractual terms. The Claimant challenged the MD about this and was punched by the MD for his troubles! The High Court felt that this was a private matter and that the company should not be liable for the actions of the MD. However, the Court of Appeal disagreed and held that the firm **was** liable for its MD's actions. This was because there was still a sufficient connection between this incident and the earlier official party. The court noted that the MD was in a dominant position and, just prior to the assault, he chose to 'wear his managerial hat and delivered a lecture to his subordinate'. This may be a controversial decision but it serves as a warning and there is a real need to consider what training and guidance is required to avoid all of this especially with the Christmas party season nearly upon us.

Disability guidance from the Court of Appeal

The Court of Appeal has flagged up that employers would be wise to record the reasonable adjustments they are making for employees with a disability and provide a copy to the employee. That will also help to make it clearer as to whether an employee has been subject to a PCP (Provision, Criteria or Practice) that places them at a disadvantage. On the facts in this case, this would have meant updating a job description to reflect the adjustments that had been agreed. You might think that this is unnecessarily elaborate but an NHS Trust had to contend with lengthy litigation that lasted 5 years on points arising out of this and was something that Court of Appeal noted could have been prevented in 5 minutes.

Tribunal Fees

It has been reported that the Government is considering reintroducing tribunal fees. This is one to watch and it will be interesting to see how it can overcome the earlier ruling which led to their abolition.

Government response to consultation on Parental Bereavement

The Parental Bereavement (Leave and Pay) Bill received Royal Assent in September 2018 and will come into force in April 2020. It creates a statutory right to time off work for employed parents, with pay where eligibility requirements are met, following the loss of a child.

The Government has conducted consultation on how best to implement matters and announced that bereavement leave can be taken either as a single block of two weeks or as two separate blocks of one week. It will now extend the window in which the statutory leave and pay can be taken to 56 **weeks** from the date of the child's death (this period was initially going to be within 56 days of the bereavement). This will offer bereaved parents the flexibility to take the leave and pay at the times when they most need it to support their grieving, including around the first anniversary of the child's death.

Non-Disclosure Agreements

The House of Commons Women and Equalities Committee has recently launched an inquiry into non-disclosure agreements (NDAs) in harassment and discrimination cases. It will consider when they are most likely to be used, whether they should be banned or restricted and what safeguards are needed to prevent their unethical use. The Committee will also factor in the role of internal grievance procedures, fairness and transparency obligations on employers and the role of boards and directors into their deliberations.

Contact details

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