WORKMATTERS
The natural choice for human resources

# NEWSMATTERS

September 2017

## WELCOME TO THE FINAL NEWSLETTER FOR 2017

Our newsletter is written quarterly to ensure that you are kept up to date with employment issues, back copies are available on the website so you never miss out on the ever changing aspects of employment law. We offer helpful hints on how to handle situations within the workplace, but feel free to give us a call for both guidance and support.

This Quarter the focus is on changes in the law which will affect your business immediately and a look at tattoos and dress codes which have come under scrutiny recently by the Government and a look at Apprenticeships for small to medium sized organisation.

1) Employment Tribunal statistics 2017

2) Summary of Tribunal cases in 2017

3) Abolishment of tribunal fees

4) Cyber Bullying

Our main topic this quarter is about Cyber Bullying which is currently becoming more prevalent and is linked with the Data Protection Act and requires careful managing.

We think you'll find the articles very interesting. Please call us on **01442 870742** to discuss any of these articles and see how we can help you and your business more effectively in the field of Human Resources. Alternatively have a look at our website **www.workmattershr.co.uk** and email us from there or on **carolinebrode@gmail.com**

If you would prefer not to receive any future newsletters from Work Matters (HR) Ltd, please reply to this email with 'unsubscribe' in the title and we will remove you from our list – thank you.

## In This Issue




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# CHANGES IN THE LAW

## Employment tribunal statistics 2017

The Ministry of Justice has published its annual employment tribunal award statistics – of particular interest as in July it was announced that tribunal fees are to be abolished after the Supreme Court ruled them unlawful and a barrier to justice (see below)

Despite fees being in place at the time, the total number of claims in 2016/2017 is up on the previous two years to 88,476 compared to 83,031 in 2015/16 and 61,308 in 2014/2015.

A breakdown of the awards made at tribunals in 2015/16, compared to the previous year is as follows:-

- The highest sum awarded in a tribunal claim was £1.76 million in 2015/16 in a sex discrimination case compared to £557,000 the previous year. The average award last year was £85,662;
- High awards were also made in disability discrimination claims – with the average award last year around £22,000 – however the maximum awards for race and age discrimination were significantly lower than the previous year;
- The highest award for unfair dismissal was £470,865, compared to just over £238,000 the year before;
- The average award for unfair dismissal in 2015/16 was £13,851 up by about £1,500 on the previous year;
- The number of religious or belief discrimination cases has increased with the largest compensation award coming in at £45,490 in 2015/16 with the average award just under £20,000. The number of single ET claims increased by 4%. The total number of multiple claims increased by 7%, however, the number of individual multiple claim cases actually fell by 23%.
- The number of single ET claims disposed of fell by 5%, leading to a 10% increase in the caseload of single cases outstanding.
- The number of multiple claims disposed of fell by 19%.
- The average time until disposal was 29 weeks for single claims (an increase of one week) and 206 weeks for multiple claims (an increase of 20 weeks). 28% of claims disposed of were conciliated by Acas, 11% were withdrawn and 8% were successful at hearing.
- Annual figures from 1 April 2016 to 31 March 2017 show a 1% increase in single claims and an 8% increase in multiple claims compared with the previous year. The disposal of single claims decreased 4% over the year, and the disposal of multiple claims decreased by 11%.
- 63% of remission applications for issue fees were granted, down from 66%.
- 63% of ET issue fee requests were paid outright, while 29% were awarded either full or partial remission. 18% of hearing fee requests were paid outright and 15% were awarded full or partial remission.
- The total caseload outstanding is 272,032, with 96% of these relating to multiple claims.
- The number of ET sitting days has fallen by 15% since 2015/2016. The proportion of sittings by a salaried judge, rather than a fee-paid judge, has increased from 67% in 2013/2014 to 92% in 2016/2017. (In comparison, the average proportion of salaried judicial sittings across all other tribunals within HMCTS is 40%.)

All change on the fees front

What it undoubtedly does mean is that it is more important than ever for employers to consider the risks of claims and make sure they comply with their obligations towards employees and to deal with workplace issues before they escalate.

## Employment tribunal decisions in 2017

Calculating a week's pay

University of Sunderland v Drossou

Case: Numerous employment law payments and remedies are calculated by reference to "a week's pay" under the Employment Rights Act 1996. In University of Sunderland v Drossou, the Employment Appeal Tribunal (EAT) has decided that employer pension contributions count towards the calculation of "a week's pay".

This is contrary to long-standing practice and will increase the value of a week's pay when calculating these payments and remedies, such as statutory redundancy pay, the basic award for unfair dismissal, and compensation for failure to information and consult on TUPE transfers or collective redundancies (although relevant caps will still apply). It could also impact on employer schemes, such as enhanced redundancy payments, which are tied to the statutory definition of "a week's pay".

## Suspension of employee

Agoreyo v London Borough of Lambeth

Case: The High Court has held that the suspension of a teacher accused of having used unreasonable force against children, purportedly to allow for an investigation to be conducted fairly, constituted a repudiatory breach of contract, entitling the teacher to resign and treat herself as constructively dismissed.

It is common practice for employers to suspend employees who are being investigated for alleged misconduct. However, employers should avoid "knee-jerk" suspensions and should consider whether they have reasonable grounds for suspension, and whether there are viable alternatives to suspension.

# CHANGES IN THE LAW continued...

## Vicarious liability

Various Claimants v Barclays Bank

Case: The High Court has ruled that a company can be vicariously liable for sexual assaults committed by a doctor engaged by the company to carry out medical examinations of prospective applicants. The rules on vicarious liability mean that organisations are susceptible to liability for the acts of individuals which are in no way condoned by the organisation itself. Businesses should take appropriate steps to minimise the risk of such wrongdoings occurring in the first place, as well as putting in place appropriate mechanisms (such as insurance and/or indemnities) to deal with any financial liability.

## Worker status

The Taylor Review of Modern Working Practices has now been published.

In his Review, Matthew Taylor sets out seven principles for 'fair and decent work' and makes a number of key recommendations with potential implications for all businesses whose business models rely on engaging workers and self-employed contractors (and not just those in the gig economy).

The next step will be for the government to consider the extent to which it wants to introduce any of these recommendations into law.

Legal update: Good Work: the Taylor Review of Modern Working Practices

The Review identifies seven key policy principles which underpin its recommendations. The seven principles can be summarised as:

- The UK should aim for "good work" for all – a fair balance of rights and responsibilities for employer and individual, with baseline protection for all individuals, while allowing an ability to adapt to innovation and technological change. Consistent taxation is also key to this concept of "good work".
- Genuine two way flexibility offered by platform-based working should be protected whilst ensuring fairness for those who work through platforms.
- The law should help employers to make the right choices and help individuals to know and exercise their rights.
- The best way to achieve better work is responsible corporate governance, good management and strong employee relations.
- Everyone should have attainable ways to develop and strengthen their work prospects.
- We should develop a more proactive approach to workplace health.
- Individuals must not become stuck at the living wage minimum or face insecurity.

## Burden of proof in discrimination claims

Efobi v Royal Mail Group Ltd

Case: The Employment Appeal Tribunal (EAT) has held that the long established rules on the "shifting" burden of proof in discrimination cases are incorrect under the Equality Act 2010. Instead, a tribunal must simply consider all the evidence, from all sources, so as to decide at the end of the hearing whether or not there are facts from which it can infer discrimination. If there are such facts, and no non-discriminatory explanation from the respondent, the tribunal must uphold the complaint.

## Whistleblowing

International Petroleum Limited v Osipov

Case: The Employment Appeal Tribunal has upheld an employment tribunal decision that two non-executive directors were personally liable, jointly and severally with the company, for the award of compensation to a CEO after he was dismissed by reason of the protected disclosures that he made.

# CHANGES IN THE LAW continued...

## Employment status

The question of employment status, particularly in the context of the gig economy, is perhaps the most eagerly anticipated topic considered by the Review. The Review concludes that the current framework works reasonably well, but that it is unnecessarily complicated and that greater clarity would be desirable. Few would disagree with that basic premise, but the difficult question is how to achieve that clarity.

## The Review recommends the following:

- Retaining the current three-tier approach to employment status, but replacing the "worker" category with a new category of "dependent contractors".
- A change in emphasis to the test for determining whether an individual is a "dependent contractor" – the aim being to introduce greater distinction between employees, "dependent contractors" and the self-employed. For example, it would no longer be necessary for someone to perform work "personally" for them to be a "dependent contractor" (which would avoid the situation where an individual is denied basic employment rights simply because they may provide a substitute to do the work) and, instead, greater emphasis should be placed on the question of control (i.e. who determines the "thing" to be done, the way in which it should be done and the means, time and place for doing it).
- Updating legislation to clarify the legal tests for the various forms of employment status, rather than relying on a myriad of case law which is open to interpretation. The Review envisages key principles set out in legislation, with regulations and guidance used to provide supporting detail. It also recommends introducing an online tool to provide an individual with an indication of their employment status.
- The term "worker" is defined differently in different pieces of employment legislation and the Review recommends that these are examined – presumably with a view to achieving greater consistency in the future.
- Aligning the tax framework with the employment law framework so that, for instance, if an individual is an employee for tax purposes, they should also be either an employee or a "dependent contractor" for employment purposes (i.e. not self-employed).

## Whistleblowing and the public interest

Chesterton Global Limited v Mohamed Nurmohamed

Case: The Court of Appeal has set out the factors that will be considered when deciding whether a disclosure is in the public interest. The range of factors include:

- the number of people whose interests the disclosure serves
- the nature of the interests and extent to which they are affected by the wrongdoing disclosed
- the nature of the wrongdoing itself and whether it was deliberate or inadvertent
- and the identity of the wrongdoer (with reference to its size and prominence).

The fact that a disclosure is in the private interests of a worker does not prevent it from also being in the public interest – what matters is whether the worker's (subjective) belief that the disclosure was in the public interest was reasonable.

## Weekly rest periods

Maio Marques da Rosa v Varzim Sol-Turismo, Jogo e Animação

Case: The Advocate General has given an opinion on the timing of the weekly rest period under the Working Time Directive (WTD). In his opinion, the weekly rest period does not have to be taken on the seventh day after six consecutive working days.

The weekly rest period can be given at any time during the period as long as the other requirements of the WTD are satisfied, such as daily rest breaks and maximum weekly working time. If the ECJ follows this opinion, this could mean that an employer would not be in breach of the WTD by granting a weekly rest period at the beginning of one period and at the end of the following period.

# CHANGES IN THE LAW continued...

## Abolishment of tribunal fees

Employment tribunal fees abolished: risk of facing a claim has dramatically increased

For the past four years, to issue an employment tribunal claim against their employer, employees had to pay a fee to file their intention to begin litigation; this varied between an issue fee of Type A £160 and Type B £250 depending on the type of claim. A further hearing fee of either Type A £230 or Type B £950, was then required at a later date before the employment tribunal hearing could take place. The introduction of these fees automatically resulted in a drop in the number of employees presenting claims.

In October 2013 a trade union, UNISON commenced judicial review proceedings arguing on behalf of their members that the fees system was unfair and restricted access to justice. The High Court refused UNISON's challenge twice, and the Court of Appeal denied their appeal.

However, on 26 July 2017 the Supreme Court handed down its judgment in favour of UNISON. Relying to an extent on the Government's January 2017 review into the fees, the Supreme Court held that tribunal fees have prevented access to justice for some, and that the higher costs for discrimination claims may be discriminatory. For these reasons, the fees regime has been held unlawful and abolished with immediate effect. The effect of which meant that employees will no longer have to pay a fee to lodge a claim.

We do not yet know all the ramifications of this judgment, but here are a few of the principal points:

1. For employers, the risk of facing claims has increased, as has the risk of a claimant proceeding to a hearing rather than settling.
2. Note that Acas early conciliation, which has been obligatory since May 2014, remains in place – so for most employment tribunal claims to be valid, the claimant must have first obtained an early conciliation certificate.
3. The Lord Chancellor's Department has already agreed to reimburse all past fee payments.(over the period of the 4 years of fees)
4. Employers may have paid the fee – either having been ordered to having lost a claim, or having agreed to in a settlement agreement. This will raise problems, of bot a theoretical and practical nature. The Employment Tribunal aims to keep you updated on that issue.
5. Employers may also have to worry about past disputes coming back to life. It probably follows from the judgment that if a claim was struck out for non-payment of the fees, the employment tribunal should be prepared to resuscitate that claim. There may also be scope for employees or former employees issuing claims that on the face of it are out of time, as they'll ask for time to be extended. Employment tribunals extend time for unfair dismissal claims if it was not reasonably practicable to bring the claim in time; for discrimination claims, tribunals apply the lower hurdle of whether it would be just and equitable to extend time. It seems to follow from the court's reasoning that for some claims, those tests are passed. We'll also endeavour to let you know as we learn more about these potential effects.
6. This doesn't mean we've seen the end of fees at the employment tribunal – the Supreme Court said that for the fees to be lawful, they must be set at a level that everyone can afford. Assuming the Government hasn't changed its underlying position on the fees, one might expect the Government to draw up an amended regime with lower fees (more in line with those in the county courts) and addressing the discriminatory impact of higher fees for discrimination cases.

The new ruling demonstrates the importance that the Supreme Court places on access to justice, and that it is prepared to make controversial decisions in support of this principal.

# CYBER BULLYING

What is cyber bullying and how can it be dealt with at work?

Content:

- Overview
- Bullying policies
- Reporting incidents of cyber bullying
- Monitoring electronic activity at work

## Overview

The rise of online networking and the use of social media has seen the growth in a new type of bullying. Cyber bullying is any form of bullying, harassment or victimisation online. It can spill from on-screen to off-screen and affect the face-to-face interactions between colleagues at work and away from work.

Cyber bullying can happen in a number of ways: inappropriate photographs may be posted; offensive or threatening comments might be made; or sensitive personal information could be revealed. This could be done accidentally or vindictively.

Cyber bullying can make people feel very distressed, depressed and alone.

Employers need to deal with cyber bullying, as it can be as damaging as any other kind of bullying. If left unchecked or handled badly, it can create serious problems for organisations, individuals and teams such as:

- Poor morale
- Poor employee relations
- Poor performance
- Lost productivity
- Increase in absences
- Resignations
- Loss of respect for managers and supervisors.
- Heightened anxiety
- Increase in turnover
- Negative atmosphere within the workplace

## Bullying policies

An employer should include guidance on the use of social media in bullying or disciplinary policies. They should clearly state what behaviour is unacceptable. This should include the use of offensive or intimidating language to other employees on social networking sites. Ideally a policy should be drawn up in consultation with employee or trade union representatives.

An employer should consider widening its bullying policy to prohibit cyber bullying of staff both inside and outside the workplace. A problem can be that social media networking sites and personal smart phones are used outside of working hours and away from work premises to bully staff.

## Reporting incidents of cyber bullying

Employers should take any complaint seriously and investigate it promptly. It may be possible to rectify matters informally as people may not be aware that their behaviour is unwelcome, and during an informal discussion an agreement may be reached that the behaviour will stop.

If an informal approach is not possible, the employer may decide that the matter is a disciplinary issue, which will need to be dealt with formally. It is important to follow a disciplinary procedure that is fair for both the person making the complaint, and the person being accused.

While it is not legally possible to make a claim solely about bullying to an Employment Tribunal, an employee may be able to bring a claim under laws covering discrimination.

## Monitoring electronic activity at work

An employer can check emails and social networking sites if an employee reports instances of cyber bullying. But, an employer must tell the employees that they are being watched, and they must determine correctly that their reasons are justified under the data protection laws:-

**Monitoring employees – CCTV, telephone calls, emails**

The Data Protection Act will apply if employers are monitoring employees; for example to detect crime or excessive private use of e-mails, internet use etc. However, the act requires that workers should be aware of the nature and reason for any monitoring.

## Monitoring employees – Social Media

There can be confusion over what is acceptable behaviour regarding the use of social media. Some employees believe they should be able to say what they want on their own social media sites, especially if these comments are made outside of work. Often employees don't realise the implications of making derogatory remarks about people they work with or their employer.

The best approach is for an employer to make it clear to employees what online conduct is acceptable, and what is not, and deal with any issues through the same procedures it would deal with any other kind of disciplinary or grievance matters.

Drawing a line between work and home life can be difficult for employers. For example, is an employee using a blog to express personal views or are they acting as a representative of the company? If an employee has a twitter account are they posting tweets on behalf of the company or are their tweets their own views?

Employees sometimes use social networking sites, emails or other forms of social media to air their grievances. For example, an employee may complain about how they are being treated by their line manager at work. These comments could be seen by customers, colleagues and often the line manager. Line managers should avoid knee-jerk reactions by abandoning how they would normally handle a disciplinary issue. Instead, to avoid responding in the heat of the moment they should stick with the proper disciplinary procedure.

Defamation, data protection and privacy – legal risks and considerations

Employees and employers should also be aware that their online behaviour could break defamation, data protection or privacy laws, and in some instances can be classed as Cyber Bullying.

**Thank you for taking the time to read our Newsletter which I hope you found informative An e-newsletter will be sent on a quarterly basis to help keep you up to date with current legislation changes, as well as giving you some helpful hints and tips to help your business run smoothly.**

In the meantime please contact us if we can be of service to you or your company.

Have an enjoyable quarter and we look forward to issuing you with our next newsletter in January 2018.

May you have a Happy and Prosperous New Year.

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