WORKMATTERS
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NEWSMATTERS

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In This Issue

Changes in the Law:

WELCOME TO THE FINAL NEWSLETTER FOR 2018

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 2018

2) Summary of Tribunal cases in 2018

3) Forthcoming Legislation in 2019

4) Mental Health Information

Our main topic this quarter is about Mental Health which is currently becoming more prevalent and requires very 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 –

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CHANGES IN THE LAW

1 EMPLOYMENT TRIBUNAL STATISTICS 2017-2018

The Ministry of Justice have published Employment Tribunal and Employment Appeal Tribunal Tables 2017 to 2018 which provide a breakdown of the awards made by tribunals for unfair dismissal and the discrimination jurisdictions. The maximum and average awards in that order are as follows:

1. Unfair Dismissal: £415,227 and £15,007;

2. Race Discrimination: £124,979 and £24,322;

3. Sex Discrimination: £36,616 and £13,212;

4. Disability Discrimination: £242,130 and £30,698;

5. Religion or Belief Discrimination: £6,846 and £5,074;

6. Sexual Orientation Discrimination: £24,100 and £12,550; and,

7. Age Discrimination: £10,432 and £6,796.

A breakdown of the awards made at tribunals in 2017/18, compared to the previous year is as follows:-

- There were 109,685 tribunal application claims up to this point in 2017/2018
- Summary of this year

Unfair dismissal	
Number of claims awarded compensation	536
Median award	£8,015
Average (mean) award	£15,007
Race Discrimination jurisdictions	
Number of claims awarded compensation	22
Median award	£11,299
Average (mean) award	£24,322
Sex Discrimination jurisdictions	
Number of claims awarded compensation	39
Median award	£10,638
Average (mean) award	£13,212
Disability Discrimination jurisdictions	
Number of claims awarded compensation	64
Median award	£16,523
Average (mean) award	£30,698
Religious Discrimination jurisdictions	
Number of claims awarded compensation	3
Median award	£5,696
Average (mean) award	£5,074
Sexual Orientation Discrimination jurisdictions	
Number of claims awarded compensation	2
Median award	£12,550
Average (mean) award	£12,550
Age Discrimination jurisdictions	
Number of claims awarded compensation	6
Median award	£6,184
Average (mean) award	£6,796

- The maximum award in 17/18 was £415,227, the median award value was £8,015 and the average award was £15,007.
- Compensation awarded for Racial discrimination, the maximum award was £124,979

The median award was £11,299 and the average award was £24,322

- Compensation awarded for Sexual Discrimination, the maximum award was £36,616. The median award was £10,638, and the average award was £13,212.
- Compensation awarded for Disability Discrimination, the maximum award was £242,130. The median award was £16,523, and the average award was £30,698.
- Compensation awarded for Religion and Belief Discrimination, the maximum award was £6,846. The median award was £5,696, and the average award was £5,074.
- Compensation awarded for Sexual Orientation, the maximum award was £24,100. The median award was £12,550, and the average award was £12,550.
- Compensation awarded for Age Discrimination, the maximum award was £10,432, The median award was £6,184, and the average award was £6,796

Financial Penalties on Employers Who Lose at Tribunal

The Employment Tribunal will be able to order losing employers to pay a penalty on top of any award made to the claimant. These penalties will be payable to the Secretary of State if the tribunal finds the employer has breached the employees' employment rights and has "one or more aggravating feature".

The minimum amount will be £100 and no more than £5,000, the amount shall be 50% of the amount of compensation awarded with a 50% discount for employers who pay within 21 days of the tribunal's decision. The tribunal will look at the employer's ability to pay in deciding whether to order the employer to pay a penalty.

CHANGES IN THE LAW continued...

2 EMPLOYMENT TRIBUNAL DECISIONS IN 2018

Sexual Harassment

Female employee sexually harassed at work settles claim against employer and goes on to be awarded a further £51,022 in compensation (to be paid by the work colleague who harassed her) (Ms H Kone v Mr F Gomis, ET)

In the case of Ms H Kone v Mr F Gomis ET/3200387/15, the Employment Tribunal held that a female employee who was sexually harassed at work was entitled to £51,022 in compensation, to be paid to her by the work colleague who harassed her. This was in addition to a sum of £45,000 paid to her by her employer Thompson Reuters ("TR"), for the sexual discrimination she experienced at work which was settled on the second day of the liability hearing.

The decision of the Employment Tribunal (ET)

Miss Kone settled her case against her employer, TR, for a total of £45,000, on the second day of the original liability hearing.

Ms Kone won her case for sexual discrimination harassment against Mr F Gomis. The Employment Tribunal found that she was psychologically imprisoned and isolated by Mr Gomis' conduct and that she was trapped in an invidious situation. The Employment Tribunal also held that a period of no pay resulted directly from Mr Gomis' conduct towards Ms Kone.

Remedy

The Employment Tribunal awarded Ms Kone £51,022 in compensation, comprised of:

Loss of earnings: £39,622
Injury to feelings: £10,200
Costs for tribunal fees paid: £1,200

Ms Kone's award for injury to feelings (when combined with the sum she received from TR in respect of the same) was in the middle of the top bracket of the Vento/Da'bell bands to reflect the severity and persistence of the sexual harassment Miss Kone experienced during the course of her employment.

When considering the award for loss of earnings, the Employment Tribunal took into account, amongst other things, the effect the EU referendum has had on recruitment. However, they refused to award Ms Kone the 6 month losses she claimed from the date of termination of her employment as there was no medical evidence in support of such a claim. Instead they awarded just 15 weeks. For the same reason they rejected her claim for separate damages for freestanding personal injuries, in addition to the injury to feeling compensation she was awarded.

Lastly, the Employment Tribunal did not make an award for aggravated damages because they did not consider that Mr Gomis' defence to Ms Kone's grievance and Employment Tribunal claim constituted an all out attack on Ms Kone.

Resignation or no Resignation

An employee who gave written notice to her employer had not resigned from her employment. The notice was ambiguous and therefore had to be construed in context.

Facts

In East Kent Hospitals University NHS Foundation Trust v Levy, Ms Levy was employed as an administrator in the hospital's records department. She applied for and was offered a role in the radiology department, subject to pre-engagement checks. The next day, following an incident with a colleague, she handed a letter to the operations manager, Mr Gorton-Davey, which stated "Please accept one month's notice from the above date". Mr Gorton-Davey responded the same day with a letter headed "notice of resignation" accepting Ms Levy's resignation and noting that her last day in the records department would be 8 July.

On 16 June Ms Levy was told that the job offer was being withdrawn due to her poor attendance record. She sought to withdraw her notice but Mr Gorton-Davey refused. He wrote to her on 24 June advising her of the decision and confirming her last day of employment. He informed her that the Trust would look to recover pay for holiday taken in excess of her accrued entitlement. He also completed a staff termination form.

Ms Levy claimed unfair dismissal but the Trust argued that it had not dismissed her. She had resigned.

The employment tribunal ruled that the Trust had dismissed Ms Levy. Her letter of resignation was unclear and ambiguous as it did not identify what she was resigning from (her role in the records department or her employment with the Trust). Given the ambiguity, her words had to be construed in context. Against a background of her unhappiness in her role, a conditional job offer in another department, her being unaware that her employment history might affect her job offer and her need to support her family, a reasonable observer would conclude that she had informed Mr Gorton-Davey of her intention to accept a conditional offer of a new role. It was not a notice of termination.

The tribunal also took into account that Mr Gorton-Davey had not treated Ms Levy's letter as if it was a notice of resignation from the Trust: he referred to her last day in the department, he did not deal with outstanding holiday and he did not complete the staff termination from. This was in contrast to what he did when the Trust decided that she should not be permitted to withdraw her resignation and her employment should cease. The tribunal therefore concluded that when Mr Gorton-Davey received Ms Levy's written notice he did not understand her to be resigning from her employment with the Trust.

The tribunal therefore ruled that Ms Levy had been dismissed by the Trust's letter of 24 June, when it treated her letter as a valid resignation.

The Trust appealed.

CHANGES IN THE LAW continued...

Decision

The Employment Appeal Tribunal dismissed the appeal. It ruled that the employment tribunal had been entitled to conclude that the language used by Ms Levy was unclear and ambiguous and that a reasonable person construing the letter in the special circumstances that existed would not have considered it to be a resignation from employment. The tribunal had also been entitled to conclude that Mr Gorton-Davey had construed the resignation letter as a resignation from the records department and not from employment.

Implications

If there is any ambiguity in an employee's resignation letter an employer should seek to clarify with the employee exactly what they are intending. Case law already indicates that an employer should not take at face value a resignation given orally in the heat of the moment and should instead give the employee a reasonable opportunity to change their mind. The employment tribunal in this case suggested that employers may similarly need to exercise caution where notice is given hastily in writing.

If an employee asks to withdraw their resignation, the employer will first of all need to consider whether it is a valid resignation. If it is, then they are not obliged to agree to the withdrawal. However, where no valid notice is given, there is in effect no notice to withdraw and so a refusal will mean that the employee has been dismissed and will be able to claim unfair dismissal.

Long Term Sick

In Ali v Torrosian and others (t/a Bedford Hill Family Practice), Dr Ali was on long term sick leave following a heart attack. It was accepted that his heart condition was a disability. A medical report indicated that it was unlikely he would ever be able to return to work full-time, but advised he could return on a phased, part-time basis. He was then signed off work for six weeks due to a shoulder injury. On the expiry of that certificate his employer dismissed him on grounds of capability.

He claimed unfair dismissal and discrimination arising from disability. The tribunal found his dismissal was unfair due to the employer's failure to consider a return to work on a part-time basis. However it rejected his discrimination claim, finding that his dismissal was justified by the employer's legitimate aim of ensuring that it provided the best possible care to patients.

Dr Ali appealed to the Employment Appeal Tribunal (EAT) in relation to the rejection of his disability discrimination claim.

Decision

The EAT ruled that the employment tribunal had been wrong to find that dismissal was justified, without considering whether part-time working was a less discriminatory means of the employer achieving its legitimate aim. Having found that the employer's failure to consider part-time working meant his dismissal was unfair, it should have taken this factor into account when considering whether dismissal was proportionate. Although the tests for unfair dismissal and disability discrimination are different, the factors that are relevant for determination are likely to be substantially the same.

At the date of dismissal, Dr Ali's last sick certificate had ended and the medical advice indicated that he should be able to return on a part-time basis. The employment tribunal should therefore have considered whether the employer's failure to consider part-time working as an alternative to dismissal meant that his dismissal was not objectively justified.

It remitted the case to the same tribunal to reconsider this issue.

Implications

It is important to remember that the objective justification test in discrimination cases is in two parts. An employer has to show both that its treatment of the employee achieves a legitimate aim and that its treatment is proportionate. This means that before dismissing for long term sickness absence, employers need to consider whether there are any less discriminatory alternatives which might achieve their objective. Where the medical evidence indicates that the employee is able to return to work on a part-time basis, the employer should consider this. If it rejects this option, it will need to be able to justify this.

An employer is also under a duty to make reasonable adjustments before dismissing a disabled employee. Similar considerations are at play here. A failure to consider part-time working or an alternative role could also mean that the employer is in breach of its duty to make reasonable adjustments.

Zero Hours Contracts

An employee employed on a zero-hours contract as a part-time associate lecturer was entitled to compare himself with a permanent full-time lecturer as they were both employed on the same type of contract.

Background

Under the Part-time Workers Regulations 2000, a part-time worker alleging that they have been treated less favourably than a full-time worker must compare their treatment with that of another worker employed on the same type of contract.

Regulation 2(3) sets out four types of workers that are regarded as being employed on different types of contract:

- Employees employed under a contract that is not a contract of apprenticeship
- Employees employed under a contract of apprenticeship
- Workers who are not employees
- Any other description of worker that it is reasonable for the employer to treat differently on the ground that they have a different type of contract.

CHANGES IN THE LAW continued...

Facts

In Roddis v Sheffield Hallam University, Mr Roddis was employed as a part-time associate lecturer on a zero-hours contract. He brought a claim under the Part-time Workers Regulations seeking to compare himself to a permanent full-time lecturer. At a preliminary hearing, the tribunal ruled that Mr Roddis was an employee employed under a zero hours contract and he could not compare himself with the permanent full-time lecturer as they were not employed on the same type of contract.

Mr Roddis appealed to the Employment Appeal Tribunal (EAT).

Decision

The EAT overturned the employment tribunal's decision. Having found that both Mr Roddis and his comparator were employed under contracts of employment, it followed that they were employed under the same type contract. A zero-hours contract does not of itself constitute a different type of contract as that would result in a zero-hours employee never being able to compare himself with a full-time worker.

The case was remitted to the employment tribunal to determine whether Mr Roddis and his comparator were engaged in the same or broadly similar work and whether any less favourable treatment was objectively justified.

Implications

Zero hours employees can compare their treatment with that of full-time permanent employees when bringing a claim under the Part time Workers Regulations. The different terms of the contract are not a basis for finding that the contracts are of a different type.

Employers should ensure that they do not treat employees employed on zero-hours contracts less favourably than full-time employees where their work is broadly similar, unless this treatment can be objectively justified.

3 FORTHCOMING CHANGES TO EMPLOYMENT LAW IN 2019

This table shows forthcoming changes.

January 2019	**Requirement to annually report the pay ratio between CEOs and average employees introduced for listed organisations with more than 250 employees** On 29 August 2017, the government announced that it would be introducing new laws requiring: listed companies (around 900). to publish and justify annually the pay ratio between their CEO and their average UK worker all companies to publicly explain how their directors take employees' and shareholders' interests into account all large companies to make their 'responsible business arrangements' public. The proposals include setting up a public register by autumn 2017, to be overseen by the Investment Association, of listed companies which have had a fifth of investors objecting to their executive pay packages. The developments follow a government consultation on corporate governance, which closed on 17 February 2017, on improving transparency on executive pay and the extent to which stakeholder/employee views influence board level decision-making. On 5 April 2017 a Parliamentary Select Committee report called for tighter controls on executive pay, greater accountability for remuneration committees, and annual reporting of pay ratios.
March 2019	**UK to leave the EU**
April 2019	**Changes to taxation of termination payments** From April 2018, all payments in lieu of notice (PILONs) will be subject to tax and national insurance contributions (NICs), regardless of whether there is a contractual right to make the payment or not. The government had intended to require employer NICs to be paid on termination payments (for example, settlement agreements) of over £30,000 with effect from the same date, however, this will not now take place until April 2019.
April 2019	**Auto-enrolment minimum contributions increase; employees contributing 5%, employers contributing 3%**
6 April 2019	**Requirement to include total number of hours worked on payslips comes in to force** In response to the Matthew Taylor Review of modern working practices, the government announced they would introduce a requirement for employers to state the number of hours worked on payslips. This would ensure the individual was aware of what they are being paid for. The Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) Order 2018 comes in to force on 6 April 2019. This requires employers to state the total number of hours worked in respect of pay on a payslip where the individual's wage or salary varies depending on how much time is worked. This can either be stated as a single total figure or separate figures where it relates to different types of work or different rates of pay.

CHANGES IN THE LAW continued...

6 April 2019	**New right for workers to receive a pay slip introduced** In response to the Matthew Taylor Review of modern working practices, the government announced they would introduce a new right for workers to receive a pay slip. This would help provide certainty for workers as they would be aware of how much money they are entitled to receive and whether any deductions are being made. The Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) (No. 2) Order 2018 comes in to force on 6 April 2019. This requires employers to provide workers with an itemised pay statement when they pay any salary or wages to workers. Where the employer fails to do this, either in total or because the statement does not comply with the legislation, the worker will have a right to make a reference to an employment tribunal.
2020	**Paid parental bereavement leave to be introduced** A government-backed private members' Bill entitling parents to two weeks' paid statutory bereavement leave has received Royal Assent and is enacted in law. Entitlement to statutory paid leave under the Parental Bereavement (Pay and Leave) Act will be subject to service qualifications and proof of the employee's relationship with the child. The Regulations required to set out exactly how paid parental bereavement leave are expected to be in place by 2020. Under the Employment Rights Act 1996, employees already have a day-one right to take a 'reasonable' amount of unpaid leave in order to deal with an emergency involving a dependant, which could include a child's death. The Department for Business, Energy and Industrial Strategy has said organisations will be able to reclaim the cost of paid statutory bereavement leave. Small organisations will be entitled to reclaim full costs of the leave, with large organisations expected to be entitled to reclaim around 90 per cent of costs.
Mid-2020s	Reforms to automatic enrolment to be introduced
To be confirmed	**New law preventing deductions from 'tips' to be introduced** Prime Minister Theresa May has announced that legislation will be introduced, at the earliest opportunity, to prevent unfair tipping practices by organisations. The aim of the legislation will be to ensure that staff are receiving all tips that relate to their service and outlawing the ability for organisations to make deductions to cover business charges, such as credit card administration fees. Although the new law has been announced, there are no further details as to how this will apply across organisations or any expected implementation date. Tipping is a complex area in itself, and it will have to be confirmed whether the new law will apply to cash tips, gratuities paid through cards and/or service charges automatically applied to restaurant bills.
To be confirmed	**Extension of shared parental leave to grandparents** Detailed proposals and a consultation on the extension of shared parental leave and pay to working grandparents was scheduled for May 2016, but did not materialise. The policy, put forward by the previous Conservative administration, was aimed at supporting the costs of childcare during the first year of a child's life and was intended to take effect by 2018 although this has not yet been confirmed.

Helpful Point

4 MENTAL HEALTH

Mental health problems are estimated to affect one in four people each year, with far-ranging symptoms and conditions impacting each person differently. At any time, it is highly likely an organisation is employing at least one individual whose wellbeing is influenced by mental ill health. Supportive business practices can reduce the length of employee absences, improve morale and promote positive workplace wellbeing.

With 12.5 million working days lost in 2016/17 as a result of stress, depression or anxiety, tackling the stigma around mental health doesn't just make good business sense – it will support a healthier and happier workplace.

What is Mental Health

We all have mental health, just as we all have physical health. Both change throughout our lives, and like our bodies, our minds can become unwell. The World Health Organisation describes mental health as 'a state of well-being in which every individual realises his or her own potential, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to her or his community'. 'There's no health without mental health' was the central and powerful message from the UK's Department of Health in 2011. In 2017 the Government published an independent expert review of mental health and employers, Thriving at Work, to which the CIPD contributed. The reviewers, Lord Stevenson and Paul Farmer CBE, concluded that we are facing a mental health challenge at work that is much larger than they thought.

Mental health issues are a major cause of long-term sickness absence from work and more than three people in ten have experienced mental ill health while in employment. So it's likely that we'll be either affected ourselves by a mental health issue or be supporting someone who is. Research by Centre Forum Commission led by former Health Minister Paul Burstow found that mental health problems cost UK employers £26 billion each year, averaging £1,035 per employee.

Mental ill health can range from anxiety and depression (the most common mental health conditions) to severe mental illnesses such as bipolar disorder or schizophrenia. The websites of organisations such as Mind and Rethink Mental Illness describe the most common physical and psychological aspects of different mental health conditions.

People with the same mental health condition can experience different symptoms, and to a different extent. This means that workplace support needs to be tailored to an individual's specific needs. The Thriving at Work report makes clear that even people with a serious mental health condition can thrive at work if they are given the right support

There's a strong business case for organisations to promote good physical and good mental health for all staff. Actively promoting staff well-being leads to greater staff productivity, morale and retention, and reduced sickness absence and 'presenteeism'.

The Legal Position

Discrimination against those with mental health issues remains widespread, even though a significant proportion of the workforce will face mental health difficulties during their working life.

In the UK, the disability discrimination provisions in the Equality Act 2010 encompass many mental illnesses which can legally be classed as a disability. A range of mental health conditions may qualify a person for protection under the Act providing there is a substantial and long-term effect (for at least a year) on their ability to carry out normal day-to-day tasks. Mental impairments do not need to be clinically well-recognised in order to qualify as a disability.

If an employee has a disability, their organisation has a responsibility to make reasonable adjustments to accommodate their needs – this includes those with mental health conditions. Find out more in our disability in the workplace factsheet. However, even if someone's mental health condition has not been classed as a disability within the definition of the Act, it's still good practice for an employer to make appropriate adjustments to their work or working pattern to support them in employment.

Helpful Point continued...

Supporting Employees' Mental Health at Work

Employers should promote good mental health as well as providing support when an issue emerges.

The culture of the organisation, and the extent of awareness and training around mental health, will affect whether or not employees and line managers have open and supportive conversations. Employers should take the key steps below to better support employees to demonstrate their commitment to promoting positive mental health.

Developing Line Mangers' People Management Skills

Good line management can help manage and prevent stress which can be linked to common mental health conditions such as anxiety and depression. Managers who provide clear objectives, feedback and support to their staff and proactively manage conflict when it occurs can help to create positive working environments which foster employee well-being and resilience.

Managers need to be able to engage staff and prevent burnout, it will often be the case that a manager needs training to identify the signs that an employee is struggling.

Spotting Early Signs of Mental Health Issues

Employers and managers should be alert to the early signs of mental ill health and how to respond, and signpost to support services. Early intervention can help prevent issues from escalating, but employers should not give advice about a mental health issue as they are rarely qualified to do so. The websites of Mind and Rethink Mental Illness give information on potential signs of mental ill health.

Signposting to Support

It's important that line managers have the knowledge and confidence to signpost an employee to more expert sources of support for example, recommending a chat with a GP. A fit note enables the GP to advise on the effects of the mental health condition and any changes the employer could make to help the individual return to work. Various mental health charities also provide helpful resources for individuals, carers and employers.

Increasing Awareness of How to Access Employer-Funded Support

Employers who offer an employee assistance programme or counselling services should ensure employees know how to access them.

Training for Line Managers in Managing and Supporting Mental Health in the Workplace

Training for line managers will help them to spot the early warning signs of mental distress and enhance their confidence to have an effective conversation with employees who may be experiencing a mental health issue.

Review Job Design and Workloads

Research shows that workload is the main cause of work-related stress: providing meaningful work and development opportunities helps employees to feel engaged and satisfied at work which in turn can have a positive impact on their mental health.

Employers should monitor workloads and deadlines to ensure people aren't feeling under excessive pressure. Additionally reviewing an employee's job description regularly to ensure it is a true reflection of their actual role can often highlight areas where employees feel more stressed.

Promote Awareness of Mental Health Issues Across the Workforce

Promoting awareness about mental health can help to reduce the stigma, and replace common myths with facts.

Promote Work-Life Balance

Long-hours working is not a sustainable way of operating and will take its toll on people. Striking the appropriate balance between work and personal life means people remain refreshed and productive. See our factsheet on working hours.

Offer Flexible Working

Offering a more flexible working arrangement can be an adjustment for someone who is returning from work following mental ill health, and it can also help to prevent stress if someone wants a better work-life balance to suit their individual circumstances.

Address the Risk of Suicide

Organisations should also have a strategy to help prevent the risk of suicide as part of their health and well-being programme. Suicide at work is unusual, but it happens and the impact on colleagues can be traumatic, so organisations also need to have a framework in place to support people.

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 2019.

May you have a Happy and Prosperous New Year.

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