Welcome to the RBA Spring 2016 Newsletter.

Two years on from the introduction of mandatory early conciliation before a claimant can bring an Employment Tribunal claim, the initial reported statistics suggest that the scheme has significantly reduced the number claims proceeding to a full hearing. Claims can still be settled after this initial 28 day period, however, employers now have advanced warning of any potential claims arising.

With the "Brexit" vote on the horizon the impact of the resulting decision is perhaps overstated when it comes to UK employment. Whilst much is made of "European red tape" the process of leaving the EU would be completed over a number of years rather than months, with many of the existing rules and regulations remaining in place for some time yet. Commentators have noted that at this point in time the uncertainty is impacting on both employment and purchasing decisions being made by organisations.

On the brighter side, before we know it the holiday season will be with us!

NEWS AND VIEWS

Now employers can be held increasingly liable for criminal acts performed by their employees at work.

The Supreme Court recently ruled that the supermarket chain Morrisons was vicariously liable for the actions of an employee who seriously assaulted a customer.

The Supreme Court upheld the customer's claim that Morrisons were liable for their employees actions even when those acts were personal acts not directly connected to their employment. The County Court and the Court of Appeal had previously found there to be an insufficiently close connection between what Mr Khan was employed to do and his actions against Mr Mohamud.

The customer, Mr Mohamud, was attacked in the forecourt of a Morrisons petrol station by the employee Mr Khan. The attack followed an altercation inside the petrol station when the employee verbally abused (including racist language) the customer when the customer asked if he could print out some documents on a USB device. Mr Khan continued the argument into the forecourt instructing the customer never to return to the petrol station; he then attacked Mr Mohamud, punching and kicking him repeatedly and ignoring attempts by his supervisor to stop the attack.

Prior to this ruling employers could only be held liable for the actions of their employees if the actions are carried out "in the course of their employment", which did not cover wider criminal behaviour. The Supreme Court considered this closely and decided that Mr Khan's attack

followed on directly from his interaction with a customer, and his action of banning Mr Mohamud from returning to the petrol station implied he was acting on behalf of his employer.

This is a ground breaking ruling with a potentially huge impact for employers. It considerably broadens the definition of vicarious liability, making it easier for customers of a business who are assaulted or otherwise affected by staff committing an unlawful act whilst on duty, to hold the business liable. It is also likely to affect cases involving assaults or harassment in the workplace by co-workers.

We would advise clients to look at their induction process and training to ensure that interactions with co-workers, customers and users of services are always beyond reproach. They should also deal swiftly with any issues that do arise.

Consultation on the extension of shared parental leave to grandparents will be launched in May

Shared parental leave was introduced for parents of babies due on or after 5 April 2015, allowing mothers to cut short maternity leave to allow their partner to share their leave.

Under the current legislation, the right to shared parental leave is limited to the mother's partner.

At last year's Conservative party conference, George Osborne announced plans to extend shared parental leave to grandparents from 2018, allowing mothers to share maternity leave with one nominated working grandparent.

Grandparents in Russia and Bulgaria are already able to take parental leave.

Discrimination Employment Claims

While workplace nicknames can be a sign of a healthy and lively workplace, they can also have a sinister undertone if they relate to a protected characteristic. Below are some examples of workplace nicknames that have resulted in discrimination claims against employers.

It can be age discrimination to give an employee a nickname that relates to his or her age. Examples include calling an older worker the "old fogey" or calling a younger worker the "stroppy teenager".

The successful age discrimination claim in *Dove v Brown & Newirth Ltd* is a classic example of an inappropriate age-related nickname in the workplace.

For years, the claimant was referred to by younger colleagues as "Gramps". While he did not complain at the time, following his dismissal he put the nickname forward as strong evidence that his colleagues had ageist attitudes.

The tribunal's view in this case was:

"The respondent accepts that the claimant was referred to by an age-specific nickname of 'Gramps' by one of its own employees. We accept that this was not meant to be offensive, but that does not mean that it was not discriminatory. We have accepted that the claimant found it

disrespectful and hurtful. Such a comment made once or twice might not cause offence but, if used more often, could lead, with justification, to a real detriment. The fact that it was banter does not really assist the respondent."

The tribunal awarded £63,000 for age discrimination.

The employment tribunal in *Nolan v CD Bramall Dealership Ltd t/a Evans Halshaw Motorhouse Worksop* held that the employer discriminated against the claimant by making him redundant because he was close to retirement.

In upholding the age discrimination claim, the tribunal highlighted that evidence of age bias included colleagues nicknaming the claimant "Yoda", the character from *Star Wars*. A key characteristic of Jedi Master Yoda is his extreme age, with Wookieepedia stating that he was 900 years old at the time of his death.

Ruda v Tei Ltd is a classic example of an ill-advised workplace nickname resulting in a successful discrimination claim.

The tribunal upheld a Polish welder's race discrimination claim over the nickname "Borat", on the basis that the name evoked stereotypes about eastern Europeans.

Borat is the name of a Kazakhstani film and television character created by Sacha Baron Cohen.

Giving a worker a nickname based on his or her country of origin, or stereotypes from that part of the world, risks a finding of harassment and direct discrimination.

In *Davies v Remploy*, a wheelchair user brought a workplace disability harassment claim on the basis that a manager nicknamed him "Ironside".

This was a reference to a popular television series about a former police detective who used a wheelchair after a sniper's bullet paralysed him from the waist down.

The tribunal held that the manager's conduct had the effect of violating the claimant's dignity, and upheld the disability harassment claim.

The claim in *Buckle and Mitchell v Brook Daihatsu* involved a particularly unpleasant example of racial abuse.

Two black employees were found to have suffered race discrimination when they were called "Sooty and Sweep" by their colleagues.

The tribunal was "satisfied that those nicknames had a racial connotation" and that they continued even after the employees complained to their employer.

In *Mc Auley v Auto Alloys Foundry Ltd and Taylor* an Irishman working in England was subjected to repeated anti-Irish remarks by colleagues.

Remarks included "typical Irish" when he made a mistake and he was nicknamed "thick Paddy". He was dismissed after complaining to his employer.

The tribunal concluded that the claimant was dismissed "principally because he was an Irishman who would not take Irish jokes lying down".

Workplace nicknames: "it was only banter" is no defence

Clients should remember that time and again tribunals have rejected the notion that a harassment claim can be defended on the basis that the remarks were "only banter". This is because one person's humour can seem like an offensive and degrading comment to another person. The intention of the alleged offender does not matter.

LEGISLATION UPDATE

National Minimum Wage Changes

On 1ST April the new National Living Wage became compulsory, entitling workers aged 25 and over to a wage of £7.20 per hour.

There was no increase to statutory adoption, maternity, paternity or shared parental pay rates in April 2016.

CURRENT RATES

Statutory Sick Pay	**£88.45 p.w.** (from 6th April 2016)	
Statutory Maternity and Adoption Pay	**6 weeks at 90% of average earnings**	
	then 33 weeks at £139.58 p.w. (from 6th April 2016)	
Statutory Paternity Pay	**2 weeks at £139.58 p.w.** (from 6th April 2016)	
Shared Parental Pay	**£139,58 p.w.** (from 6th April 2016)	
Week's pay for statutory redundancy	**£479 p.w.** (from 6th April 2016)	
NI Contributions Lower Earnings Limit	**£112 p.w.** (from 6th April 2016)	
Minimum annual paid holiday	**5.6 weeks (28 days for 5 day week)**	
Guarantee Pay	**£26.00 per day**	
	£130 for 5 workless days (from 6th April 2016)	
Minimum Wage (from 01.10.15)	**Adult**	**£6.70** per hour
	Age 18 – 20	**£5.30** per hour
	Age 16 – 17	**£3.87** per hour
	Apprentices	**£3.30** per hour

RECENT CASES OF INTEREST

- **Case 1. Salary sacrifice childcare voucher schemes are 'remuneration' for maternity leave purposes**

The Employment Appeal Tribunal (EAT) recently handed down its judgment in a case involving the provision of childcare vouchers whilst on maternity leave.

The employer in the case had ruled that those joining the scheme must withdraw from it during any period of maternity leave. However legislation states that women on maternity leave are entitled to benefit from all the terms and conditions of employment which would have applied to them had they been at work, except those relating to 'remuneration'.

An employment tribunal had originally decided in the case that childcare vouchers, in line with HMRC guidance, were not remuneration but 'non-cash benefits' and that the employer's condition for discontinuing the scheme was direct maternity discrimination and indirect sex discrimination.

Tribunal

The tribunal had originally confirmed that the employer had to continue to provide childcare vouchers, via the salary sacrifice scheme, throughout the whole of the employee's maternity leave, including periods of unpaid leave, and for its employees only receiving statutory maternity pay (from which an employer is prohibited from making deductions).

EAT

The EAT overturned the decision and allowed the employer's appeal. The EAT accepted the key question was whether childcare vouchers were 'remuneration'. In its view, the tribunal had misunderstood the nature of such salary sacrifice schemes. The employer did not provide the vouchers to employees in the scheme as a "perk of the job" in addition to their salary, but out of the salaries they had agreed.

In the EAT's view, the HMRC guidance was wrong - it couldn't find any authority for the statement in it that vouchers were non-cash benefits and "must continue to be provided" during maternity leave. It took the view that Parliament could never have intended employers to continue providing childcare vouchers via a salary sacrifice scheme when there was no salary to sacrifice. So the discrimination claim failed.

RBA Viewpoint

Childcare voucher schemes are offered on an entirely voluntary basis by some RBA clients. If the EAT had upheld the tribunal's decision, this would have imposed a cost on those clients of continuing to pay for childcare vouchers during unpaid leave, which may have proved a disincentive for providing the benefit.

Any clients who have followed the HMRC guidance may now wish to review that approach, certainly for new joiners. However, they should proceed with caution for any employees in existing schemes, who may have acquired contractual rights over and above the basic legal obligations clarified by this case.

Although the case provides some specific guidance (assuming it is not appealed again), its impact is limited because a new government tax-free childcare scheme is expected to come into force in early 2017, which will be run centrally, not by employers, so it will not be possible to use salary sacrifice for it.

- **Case 2. Pulling a sickie may justify a misconduct dismissal**

In the case of Metroline West v Ajaj, the Employment Appeal Tribunal (EAT) had to reconsider an employment tribunal ruling which had focused on an employee's injury at work in the context of a 'capability' dismissal. The EAT judge said the tribunal should have considered the real reason for the claimant's dismissal, which related to his conduct.

Ajaj was employed by Metroline West as a bus driver. When he reported that he had slipped on water on the floor of the toilets where he worked and suffered an injury, the employer was concerned about how genuine Ajaj's allegations about of the nature and extent of the injuries were and arranged for covert surveillance. Once the employer received the video footage, it was clear that Ajaj's description of his day to day activities such as walking and shopping were untrue.

Following a disciplinary hearing, Ajaj was summarily dismissed (i.e. without notice) on the grounds that he had fraudulently claimed sick pay, exaggerated his symptoms and made false claims of injury at work. He claimed unfair and wrongful dismissal.

Tribunal

The employment judge agreed that the employee had exaggerated the extent of his injuries, but considered that the question was whether he was fit to carry out his duties as a bus driver, namely sitting for an extended period of time. The judge held that there was no evidence that Ajaj exaggerated his inability to perform his bus driver duties and that his dismissal was unfair and wrongful.

Metroline appealed on the basis that focusing on Ajaj's incapability to do his job was not relevant because his dismissal was for misconduct.

EAT

The EAT allowed the appeal and determined that the employment judge had asked the wrong question: it was not whether Ajaj could sit for an extended period of time, but whether the employer had reasonable grounds to believe, based on a fair investigation, that Ajaj had misrepresented his injury and its effects on him. The EAT held that he had. The EAT judge commented that employees who 'pull a sickie' are stating that they are unable to attend work because of sickness and if they are not sick, "that seems to me to amount to dishonesty and a fundamental breach of trust and confidence that is at the heart of the employer/employee relationship".

RBA Viewpoint

Clients should normally be cautious about sickness dismissals but the guidelines for gross misconduct dismissals are generally clearer: if the client carries out a reasonable investigation which leads to it having reasonable grounds to believe in an employee's misconduct, it can be difficult for a tribunal to interfere in a decision to dismiss the employee.

In this particular case the fact that the employer had arranged for surveillance and obtained an occupational health advisor's opinion helped show that it carried out a proper investigation which gave it reasonable grounds to believe that the employee was not truthful about the extent of his injuries.

This emphasises both the importance of carrying out a thorough investigation and the need to follow a fair process before making any assumptions of misconduct. Having said that, it is also

important to remember that being fit for certain leisure activities does not always mean an employee is fit to carry out his or her job, and assumptions made about what a sick employee can or cannot do are a dangerous basis for sickness dismissals.

Rob Bryan	Chris Manby	Tracey Cater
Mob: 07801 223867	Mob: 07712 484085	Mob: 07469 703889
rob@robertbryan.co.uk	chris@robertbryan.co.uk	tracey@robertbryan.co.uk

Rob Bryan Associates Limited: www.robbryanassociates.org.uk