Welcome to the RBA Autumn 2018 Newsletter

At the time of compiling our Autumn Newsletter we say goodbye to one of the hottest summers on record. In this edition we include details of a couple of cases where employers acted "in the heat of the moment", and whilst ordinarily they may have been able to justify the employee's dismissal, a lack of process and procedure resulted in costly outcomes.

After the publicity surrounding the Harvey Weinstein sexual harassment scandal in October 2017 and the emergence of the #MeToo Campaign, a spotlight has been cast upon how a misuse of power can lead to criminal acts and unacceptable behaviour. On Facebook, the hashtag was used by more than 4.7 million people in 12 million posts during the first 24 hours. Similarly, there were more than 500,000 tweets of the hashtag. A UK parliamentary committee has published a report on its findings into UK sexual harassment and the initial recommendations are contained in the News and Views section.

At 2300 on the 29th of March – that's 210 days away, (or 5039 hours for the optimists!) The UK will leave the EU. It's official, see below. Wholesale legislative changes, if any political party had a mandate for them, would take some time to come into force, with or without an agreed transition phase. The immediate impact for employers will be issues surrounding visa applications where employees are working on current visas or being hired in the UK for the first time. Over the last 6 months, employers seeking to recruit overseas workers have found the numbers restricted every month. A worker who would have gained entry on £30,000 per year would now need earnings of around £50,000 for entry into that same role. The restriction on overseas doctors was lifted as key positions failed to be filled. More details on the government's immigration toolkit can be found below.

Happy reading. As ever, if any of the topics below highlight hot issues for you and your team or give rise to concerns, your friendly consultant will be happy to talk to you.

NEWS AND VIEWS

BREXIT AND EMPLOYMENT LAW

On the 26th June 2018 the European Union (Withdrawal) Act 2018 received Royal Assent. The Act will repeal the European Communities Act 1972 and preserve the effect of all EU laws as it stands at the point of the UK's exit from the EU on 29th March 2019.

It does not extend to allow the UK to make substantive amendments to the law and therefore it follows that no EU based law will be repealed. This means that TUPE, the Working Time

Regulations, collective consultation requirements and much of our discrimination legislation will not be amended when we leave the EU. There is still no reliable indication of the Government's plans for employment law in a post-Brexit world.

One of the areas of concern for employers is the rights of EU citizens working in the UK and their right to remain and continue to work.

If you employ EU nationals, you'll be relieved to know that the government has published a Brexit toolkit. It provides a framework for transitioning EU nationals to their post-Brexit immigration status. It also includes all the communication tools (flyers, videos etc.) you'll require to let them know what they need to do. These will be translated into 23 languages.

The new immigration status will depend on how long an EU national has resided in the UK. If they'll have been resident for five or more years by 31 December 2020 they can apply for settled status. Those residing here for less time can apply for pre-settled status. There will be phased applications for the new statuses until March 2019, when it will be fully open, and it closes on 30 June 2021. This toolkit is available on the government website: https://www.gov.uk/government/publications/eu-settlement-scheme-employer-toolkit

WHAT DOES THE EU SETTLEMENT SCHEME MEAN FOR EMPLOYERS?

You have a duty not to discriminate against EU citizens in light of the UK's decision to leave the EU as both a prospective and current employer.

Current 'right to work' checks (e.g. EU passport and/or national ID card) apply until the end of 2020.

There will be no change to the rights and status of EU citizens living in the UK until 2021.

You are not expected to pay/support the cost of the EU Settlement Scheme application for your EU citizen employees. You are welcome to do so at your discretion.

There is no legal obligation for you to communicate the EU Settlement Scheme, however you may wish to signpost the information that the Government is providing.

You do not have to interpret information provided by the Government and you must be careful not to provide immigration advice.

REPORT ON SEXUAL HARASSMENT IN THE WORKPLACE

The Equality and Human Rights Commission (EHRC) have published new recommendations, on Sexual Harassment in the workplace, having found that existing obligations and guidance for employers are not protecting workers from sexual harassment.

The recommendations aim to change workplace culture with employers taking more responsibility for preventing harassment, promote greater transparency about incidents of harassment, and strengthen protection for harassment victims by recommending new laws.

Some of the more notable recommendations are:

- That the UK government introduces a mandatory duty on employers to take reasonable steps to protect workers. To enforce the seriousness of this, any breach of the mandatory duty should be made unlawful and punishable by fines

- Re-introducing third party harassment, so that employers are liable if they have failed to take reasonable steps to prevent others harassing their staff

- Extending sexual harassment protection for interns and volunteers

- Extension of the time limit for bringing a claim to six months with the clock paused while any internal grievance process is going on

- Limiting the ability to use confidentiality clauses in settlement agreements to "government approved" standard clauses.

- Employers having to pay the employee's legal costs if it loses a sexual harassment case

It remains to be seen what the Government will make of these recommendations. However, the Women and Equalities Committee held an evidence session on 28 March 2018 on its inquiry into sexual harassment in workplaces, so it is certainly timely.

SICKNESS ABSENCE DROPPED TO RECORD LOW IN 2017

The average number of sick days taken fell to an all-time low last year. Figures released by the Office for National Statistics showed that employees took an average of 4.1 days off sick in 2017 – almost half the 7.2 days taken in 1993, when records began.

The proportion of working hours lost to sickness absence dropped to 1.9% in 2017 (2016: 2%). Absence in the private sector (1.7% of working hours lost) was lower than the time lost in the public sector (2.6%).

Minor illnesses, such as coughs and colds, accounted for 34.5% of working hours lost in 2017.

Musculoskeletal problems represented 17.7% of absences, and stress, depression or anxiety were given as the reason for 7.6% of absences.

Musculoskeletal issues were more common among older workers and were behind 20.8% of working time lost by 50-64 year olds and 18.7% of hours lost by 35-49 year olds.

There had been an increase in the number of workers aged 25-34 who attributed their absence to mental health conditions. This proportion increased from 7.2% in 2009 to 9.6% in 2017.

The CIPD, said it was difficult to determine the exact reasons behind the decline in sickness absence, but presenteeism could "definitely be one factor".

"If people feel the need to show up to work when sick that's not the sign of a healthy workplace, which isn't good for them or the organisation,".

"Unmanageable workloads and a long hours culture are partly to blame for this trend.

"When people are genuinely unwell, they will not be productive at work and organisations need to have an attendance management culture that supports people when they are ill and discourages unhealthy behaviour like presenteeism."

If you have any issues with managing your sickness levels then please contact your consultant to discuss this further.

MENOPAUSE CLASSED AS A DISABILITY

A menopausal court officer sacked in a medicine row has won her job back and a £19,000 pay out. This is the first menopause-related tribunal that we know of to have been won on the grounds of disability discrimination.

Mandy Davies' condition was deemed a disability and a judge ruled she was discriminated against over it. She was sacked last year from the Scottish Court and Tribunal Service, but had held an impeccable record for 20 years.

The 45-year-old will get £14,000 in lost pay and £5,000 for "injury to feelings" - and the legal victory is a rare one, with the menopause rarely recognised as a disability.

She had brought legal action against the service claiming she had been discriminated against after suffering a painful and disruptive menopause.

The tribunal ruling found she was suffering from a host of menopause-related symptoms and had been prescribed medication for cystisis brought on by the menopause.

The tribunal heard that before she was let go, she came in to work to find two men drinking a jug of water she thought she had poured her medicine in.

She warned the men what may have happened - but one of them was said to have become furious and accused her of attempting to poison them and make him "grow boobs".

Ms Davies was then dismissed over claims of gross misconduct, after a health and safety meeting found there hadn't been any medication in the water. A health and safety probe was launched, followed by a disciplinary investigation. Ms Davies was then dismissed for gross misconduct for "lying" about the water jug.

The Judge found she had been unfairly dismissed and ordered she should get her job back. The tribunal's ruling was that the claimant was unfairly dismissed and subjected to disability discrimination. The tribunal ordered reinstatement to her post, £14,000 to compensate her for lost pay between the period of dismissal and reinstatement, plus £5,000 in respect of injury to feelings.

This decision is now being appealed.

NEW GUIDANCE ON OVERTIME RIGHTS

The new Acas guidance on overtime explains the different types of overtime available; the relationship between overtime and pay (including holiday pay); and how overtime interacts with other legislation which protects part-time workers and working time.

The guidance sets out three categories of overtime:

- **Voluntary:** where there is no contractual obligation for the employer to offer overtime or for the employee to accept it. This might arise if there is a sudden, unplanned staff shortage, for example;
- **Compulsory and guaranteed:** where the employer is contractually obliged to offer overtime and which the employee is contractually obliged to accept. This may be necessary where an employer knows it will need extra staff every quarter, for example, to cover a regular increase in orders from a client;
- **Compulsory but non-guaranteed:** where the employer may or may not offer overtime but if it does, the employee must accept it. For example, farm workers may need to put in extra hours over the summer but the exact timing of it will be dependent on the weather.

It is important to identify the type of overtime that is in place, and this should be clearly set out in the employment contract. This also helps an employer deal with an employee who refuses to work overtime.

The guidance covers the Working Time Regulations 1998, which sets out the statutory limits on how much overtime is worked, as follows:

a) must not work more than 48 hours per week on average, though a worker may choose to "opt-out"
b) must be allowed at one day off each week or two days off in a fortnight
c) should have 11 hours uninterrupted rest in a 24 hour period
d) is given at least a 20 minute break if their shift lasts more than six hour

The situation differs if the worker is below 18, as they cannot sign any “opt-out” agreement, must have two days off per week, and cannot work over 8 hours a day or 40 hours a week total.

The guidance expressly states that “*there is no legal right to receive an additional payment or be paid at a higher rate for any overtime worked*”. However, some employers do offer increased rates of pay in order to incentivise employees, this should be clearly set out in terms and conditions or contracts of employment.

It may be that employers offer time off in lieu to employees instead of additional pay, which allows them to take off time from work in addition to their usual entitlement to annual leave. Employers that do not pay for overtime at all should be careful that this is in line with their contracts of employment and that any additional hours do not take staff below the National Minimum Wage.

Employers should ensure that part-time workers engaging in overtime are not treated any less favourably than full time workers. If increased rates of pay for overtime are offered to full time workers then the same should also be given to any part-time workers, provided they have

worked the same amount of hours as their full time counterpart. If the part-time worker does not meet this threshold, then there is no obligation to pay the same enhanced rate of pay for overtime.

Working overtime may also affect holiday pay calculations. Recent court decisions have indicated that all overtime payments should be included when calculating the first four weeks of a worker's statutory holiday pay (basic entitlement). The only exception to this is voluntary overtime worked on a genuinely infrequent basis.

Working overtime involves trust and honesty on both sides, and employers need to be careful not to inadvertently breach legislation or employees' contractual rights. Clear contracts and policies should be in place to minimise risk. If you have any queries about overtime, please contact your consultant who will be happy to help.

LEGISLATION UPDATE

Please note the following rates effective from April 2018

CURRENT RATES

Statutory Sick Pay	**£92.05 p.w.**
Statutory Maternity and Adoption Pay	**6 weeks at 90% of average earnings** **then 33 weeks at £145.18 pw**
Statutory Paternity Pay	**2 weeks at £145.18 p.w.**
Shared Parental Pay	**£145.18 p.w.**
Week's pay for statutory redundancy	**£508 p.w.**
NI Contributions Lower Earnings Limit	**£116 p.w.**
Minimum annual paid holiday	**5.6 weeks (28 days for 5 day week)**
Guarantee Pay	**£28.00 per day** **£140 for 5 workless days**
Minimum Wage	**Age 21 – 24** **£7.38** per hour **Age 18 – 20** **£5.90** per hour **Age 16 – 17** **£4.20** per hour **Apprentices** **£3.70** per hour
National Living Wage	**Aged 25+** **£7.83** per hour

RECENT CASES OF INTEREST

Flying instructor whose employer threw a cup of tea at him wins tribunal claim

Phil Jones worked as a flying instructor at Flylight Airsports in Northamptonshire from 2006 up to his dismissal in 2017.

He left his job following an argument that erupted in August 2017, after discovering that the aircraft he usually flew had not been serviced.

Jones booked an alternative aircraft to get on with the lesson he was due to take but, after bumping into company director Ben Ashman, his line manager, he made what Ashman interpreted to be a sarcastic comment about the unprepared aircraft. Ashman retaliated, and voices were raised.

Evidence given to the tribunal was not completely clear, but it was determined that as Jones walked towards the airfield to conduct his lesson, followed by Ashman, he called Ashman a "t**t". Ashman retaliated by stating: "B******s, Phil, don't call me a t**t." He then threw a cup of tea at Jones, which missed.

After a further exchange, Ashman reportedly told Jones: "Right, I don't want you flying in my aircraft. Pack your stuff and leave." Believing he had been dismissed, Jones left, saying he would "see [Ashman] in court". Jones did not return to work following the incident.

The date of Jones's dismissal was disputed at tribunal, as he claimed he had been summarily dismissed on the day of the incident, 1 August, with no reason given or hearing held. Ashman stated that Jones was dismissed for alleged gross misconduct and serious insubordination following a disciplinary hearing on 21 August, which Jones did not attend after describing the process as a "sham".

A letter confirming the outcome of the hearing was sent to Jones on 21 August, confirming the summary dismissal and giving him the right of appeal.

The employment judge noted the size and capabilities of the employer, stating: "The respondent is a small business, with no experience of disciplinary proceedings and limited HR support."

However, he found that Jones had been summarily dismissed on 1 August 2017 without a disciplinary process, as he had not been contacted to say he had not been fired following the "pack your stuff" comment.

While Jones was found guilty of gross misconduct, because a fair procedure was not followed in dealing with the matter the dismissal was unfair. Bearing in mind his 11 years' service and clean disciplinary record, the judge determined that following a correct procedure would have given a 25% chance of a fair dismissal from the small flying school following the incident.

The dismissal was also found to be wrongful, as the misconduct was not severe enough to repudiate Jones's contract of employment.

Jones was awarded £18,210.77 in compensation for wrongful dismissal with additional notice pay, after he was found to have contributed to his dismissal by 50 per cent by calling Ashman a "t**t" and threatening to hit him. He received a total sum of £19,017.62.

RBA Viewpoint

Despite the size of the company and its limited managerial capabilities that resulted in a minor reduction to the compensation awarded, all employers need to ensure that they are aware of and follow due process in dealing with disciplinary matters. Acting in the heat of the moment is never likely to result in a fair dismissal.

Victory at tribunal for employee accused of faking anxiety and depression

James started at recruitment agency, Capital Care Services, as a credit controller in October 2016. From March 2017, she was off work diagnosed with symptoms of anxiety and depression.

Between April and May 2017, James began receiving treatment from a specialist counsellor by the name of Moody. James had given her boss, Ali, permission to speak with Moody about a grievance she had raised at work, which she said had contributed significantly to her condition.

When Moody told her Ali had questioned the truthfulness of her condition, she suffered a panic attack and felt unable to breathe for some considerable time. Afterwards, she cried uncontrollably, which triggered a further panic attack.

The tribunal accepted James was still suffering from anxiety, depression and panic attacks at the time of the hearing. She said Ali's comments had aggravated her condition and that afterwards, she felt unable to leave the house. She did not return to work.

James told the tribunal that she felt deeply insulted by Ali's suggestion that she was a liar. The judge noted James was visibly distressed in the tribunal when recalling what her manager had said.

The judge added: "Mr Ali's words had a profoundly exacerbating effect on the claimant's feelings of depression and anxiety. [James] was a vulnerable person and the words were particularly wounding and detrimental to her."

The ruling also found the circumstances of Ali's comments made a "painful process" more acute for James: "They [the comments] were made pursuant to a grievance process in which [James] had been hoping to secure redress but, in fact, experienced the opposite when she became aware of Mr Ali's reaction to her grievance."

James claimed victimisation and was awarded £8,147 for injury to feelings. She was unsuccessful in an additional claim for loss of earnings, because she had already been unable to work before Ali actually made the comments.

The tribunal heard James was now well enough to work again and had been offered new employment elsewhere. The tribunal and Capital Care Services granted James's request for her former employer to provide her with a positive reference.

RBA Viewpoint

This case demonstrates that employers need to be sensitive around the ever-increasing number of cases involving mental ill-health.

Employers should know how to deal with such issues appropriately and take care to avoid making inappropriate comments that could cause further distress to employees in similar situations.

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