Welcome to the RBA December 2019 Newsletter

At the time of writing, we are about to have our first Winter General Election since 1923. It's been dubbed the 'Brexit Election'. We can either 'get the thing done', call the whole thing off or have another look at it now we know what's on offer. (I think that's got it covered!)

For employment, we face possibly the most radical ideas and promises. Full employment rights from day one, a points-based migration system with reduced targets, a £10 minimum wage, compulsory employee shared ownership, flexible working for all jobs from day one, 12 months maternity pay, 6 weeks paid paternity leave. For every voting group there's something for you.

The only thing that is certain is there will be more uncertainty. For now, we must work with what we have. RBA will be here to help, support and guide, whatever the outcome.

NEWS AND VIEWS

An Employee with Anxiety and Depression – when does this become a disability?

An illness only becomes a disability if an employee meets the legal definition of disability contained in the Equality Act 2010. With the number of disability discrimination tribunal cases growing eight times faster than any other kind, employers should be careful when handling allegations of stress-related discrimination. Stress is not a disability, but anxiety or depression caused by stress could be. This is regardless of whether the source of stress is at work or in the employee's personal life.

A person is disabled within the meaning of Section 6 the Equality Act if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to do day-to-day activities.

Your employee more than likely has a mental impairment if they have anxiety and depression. Any mental health impairment can be a disability provided it meets the legal test.

Normal day-to-day activities include things people do on a regular or daily basis, such as shopping, reading and writing, getting washed and dressed, doing household jobs and taking part in social activities. Normal day-to-day activities can include work-related activities. If your employee is currently off work, it looks like the impairment is having some adverse effect on their ability to do day-to-day things such as going to work.

Substantial means 'more than minor or trivial' which isn't a particularly high hurdle for an employee to scale. It's worth noting that an effect can be considered 'substantial', even if it isn't substantial currently, if it is likely to recur. Conditions like anxiety and depression could fall into this category of recurring conditions because they can be episodic in nature.

Medical treatment is relevant too. If medication helps or stops the symptoms, but the substantial effect would return if the employee stopped taking it, then the condition will still be considered 'substantial'. This might be relevant if your employee is prescribed anti-depressants or other treatment which helps the symptoms and allows them to return to work. The fact that treatment resolves their symptoms doesn't mean they are not disabled.

To find out about the severity of your employee's condition you need to talk to them. Expert medical evidence is also helpful to obtain to get an overall picture.

However, the Employment Appeal Tribunal has said being signed off work by a GP can be evidence of a substantial adverse effect on day to day activities because day-to-day activities include going to work. If your employee has been signed off by her doctor, you might assume that they meet this part of the test too.

An impairment will be long term if it has lasted, or is likely to last, at least 12 months. A condition will be 'deemed' substantial throughout dormant periods in recurring conditions such as depression, so the whole period (including any periods between episodes) will be relevant.

Just because someone's impairment hasn't lasted 12 months yet does not mean they do not meet the disability test. You need to try and establish a longer-term prognosis at the time when you are considering your employee's absence.

You should start a dialogue with the employee as your aim is to try and get them back to work. Talk openly with your employee. How are they doing? What, if anything, can you do to make things easier for them and to help their return? Is anything at work affecting them negatively?

Depending on the outcome of these conversations, and/or if absence continues, that is the time to start asking about whether the employee meets the disability definition. An occupational health report is often helpful at this stage, to advise on prognosis, adjustments and timescales.

Another thing to consider is if the employee has linked their condition to work in anyway. That will be something to explore in your conversations. Adjusting workloads or other workplace issues might be something that can be resolved relatively easily and quickly and enable a return to work.

It is important to remember that when handling stress at work matters Employers have a duty to take reasonable care to ensure their employees do not suffer injury, including psychiatric injury, at work. A breach can lead to a negligence claim against the employer if the injury was reasonably foreseeable. If an employee alerts their manager to raised stress levels, it will be more likely that any subsequent psychiatric injury they suffer was reasonably foreseeable.

While stress isn't an illness in its own right, it can lead to conditions such as anxiety or depression, and physical illnesses such as migraines. Stress can also exacerbate underlying illnesses such as diabetes. Employers should approach mental health issues the same way they would physical illnesses.

Stress-related illnesses can also manifest as poor performance or misconduct. An employee may have a claim for unfair dismissal if they are dismissed for misconduct when their

behaviour was caused by their illness or even by the medication they are taking for that illness.

If an employee is absent due to stress, upon their return it is important not to expose them to the same working environment that caused the stress previously. For example, if nothing is done to improve the situation, it will be easier for the employee to say that a second breakdown after returning to work was reasonably foreseeable.

Employers should hold a return to work meeting soon after an employee resumes work. The meeting should make the employee feel welcome back, check they are well enough to work and confirm any adjustments to their working arrangements, whether temporary or permanent.

Employers can guard against liability for stress claims by managing an employee's stress proactively and sensitively. Improving mental health awareness in the workplace; subscribing to an employee assistance programme; and monitoring workplace stress will help reduce the likelihood of claims.

What IR35 Means to Private Sector Employers

From April 2020 the rules for engaging individuals through personal service companies are changing. The responsibility for determining whether the off-payroll working rules (known as IR35) apply will move to the organisation receiving an individual's services. They are aimed at ensuring that where a contractor who provides their services through an intermediary (often their own limited company) would be considered to be an employee if that intermediary were not used, that contractor is subject to broadly the same tax and National Insurance contributions (NICs) as employees.

In 2017, the government changed the IR35 rules for the public sector, introducing new off-payroll tax provisions. As of 6 April 2020, the changes extend to certain private sector organisations.

If yours is a medium or large-sized company that uses contractors, responsibility for properly labelling the relationship will lie with you as the client. If the contractor is a deemed employee, the 'fee-payer' will need to account for NICs and make payroll deductions. The fee-payer is whoever pays the intermediary; it could be you as the client, or it could be another party such as a recruitment agency.

Note that third sector organisations, such as charities will be covered by the April 2020 changes. Small companies are outside the scope so responsibility for deciding worker status and the application of the rules will stay with the intermediary.

The rules apply to all public sector clients and private sector companies that meet 2 or more of the following conditions:

- you have an annual turnover of more than £10.2 million
- you have a balance sheet total of more than £5.1 million
- you have more than 50 employees

If that sounds like your business, and you engage contractors via an intermediary, then from 6 April 2020 you will have to decide if the off-payroll working rules apply to each individual arrangement.

A simplified test also applies to some clients and considers annual turnover. You must apply the rules if you have an annual turnover of more than £10.2 million and are not:

- a company
- a limited liability partnership
- an unregistered company
- an overseas company

There are also rules which cover connected and associated companies. If the parent of a group is medium or large, their subsidiaries will also have to apply the off-payroll working rules.

In basic terms, a person will be considered to be an employee if he/ she looks like an employee. Relevant factors include:

• Personal service (the work will be done by the individual, and there is no power to provide a substitute)

• The control exercised by the client

• Who provides the tools and other equipment

• Subject to the employer's disciplinary procedures

• Financial risk assumed by the contractor

• Integration into the employer's business.

You could leave that determination up to HMRC's CEST (check employment status for tax) tool. It lets you input the relevant information and, as long as that has all been above board the answer you are given will be binding.

You'll need to decide the employment status of a worker, you must do this for every contract you agree with an agency or worker. You'll need to:

- pass your determination and the reasons for the determination to the worker and the person or organisation you contract with
- make sure you keep detailed records of your employment status determinations, including the reasons for the determination and fees paid
- have processes in place to deal with any disagreements that arise from your determination

Do this whether your determination shows that the off-payroll working rules will apply or not. If you are also the fee-payer and the off-payroll working rules apply, you will need to deduct and pay tax and National Insurance contributions to HMRC.

You must provide reasons for your determination. You will hold the liability for tax and National Insurance contributions until you tell the worker, and the person you contract with, of your determination and the reasons for it.

A status determination statement issued before 6 April 2020 is valid under the new rules, if it contains the reasons for the conclusion reached. If the working practices of the engagement change or you negotiate a new contract with the worker, you need to make sure that you re-check the rules to see if they still apply.

A worker or the agency paying the worker's intermediary may disagree with the employment status determination you reached.

If this happens you will need to:

- consider the reasons for disagreeing given to you by the worker or agency paying their intermediary
- decide whether to maintain the determination if you feel it is correct and give reasons why - or provide a new the determination because you feel it was wrong
- keep a record of your determinations and the reasons for them, as well as records of representations made to you

You must provide a response within 45 days of receiving notification that the worker or agency disagrees with your employment status determination. During this time you should continue to apply the rules in line with your original determination.

- Tell the worker if the determination has not changed.
- Tell the fee-payer and the worker if the determination has changed.
- Failure to respond within 45 days will result in the worker's tax and National Insurance contributions becoming your responsibility.

In preparation of this change you should begin to audit your workers and engage with your contractors. Discuss with them whether the off-payroll rules apply to their role. You will also need to prepare for future engagements and put in place processes for determining whether the rules apply to new arrangements with contractors.

LEGISLATION UPDATE

Please note the following rates effective from April 2019

CURRENT RATES

Statutory Sick Pay	**£94.25 pw**
Statutory Maternity and Adoption Pay	**6 weeks at 90% of average earnings then 33 weeks at £148.68 pw**
Statutory Paternity Pay	**2 weeks at £148.68 pw**
Shared Parental Pay	**£148.68 pw**
Week's pay for statutory redundancy	**£525 pw**
NI Contributions Lower Earnings Limit	**£118 pw**

EMPLOYMENT UPDATE – December 2019

Minimum annual paid holiday	**5.6 weeks (28 days for 5 day week)**	
Guarantee Pay	**£29.00 per day**	
	£145 for 5 workless days	
Minimum Wage	**Age 21 – 24**	**£7.70** per hour
	Age 18 – 20	**£6.15** per hour
	Age 16 – 17	**£4.35** per hour
	Apprentices	**£3.90** per hour
National Living Wage	**Aged 25+**	**£8.21** per hour

RECENT CASES OF INTEREST

Manager Ordered to Pay Compensation Following Alleged Racist Remark

Two employees at Capita Retail Finance Services Ltd brought a claim of racial harassment against their employer and their manager, Mr J Woodhouse, following an alleged comment made by him about a staff member's skin colour.

The two claimants, Miss S Kaur and Miss S Rehman both worked for Capita Retail Financial Services. They were both of Asian ethnicity and worked with Woodhouse as their immediate manager.

The tribunal heard that in January 2019, Woodhouse had been walking past the claimants' cluster of desks, where a white employee was sitting in a seat usually occupied by a black member of staff called Mattar. He allegedly said to the white employee in the earshot of others: "Has Mattar been dipped and had his head shaved?"

Kaur told the tribunal there was an awkward silence following the comment, and that Woodhouse "seemed to find the comment funny". Both her and Rehman reported being shocked by what he had said.

When asked by the tribunal whether she considered Woodhouse's comment to be racist, Rehman said that she had, and that the employees present were all shocked about the comment. She said that they all discussed the comment between themselves and asked each other whether it had really occurred.

Throughout the whole proceedings Woodhouse denied having made the comment.

The tribunal heard that sometime prior to the incident, Woodhouse's working relationship with Kaur had gradually broken down. As a result of this and shortly before the incident, Kaur had requested a shift change but she also admitted to the tribunal that she did not believe his treatment of her to this point was connected to race.

Soon after the alleged comment, Kaur raised a written grievance, citing primarily her previous issues with Woodhouse, which she described as bullying and harassment, and at the end of the grievance letter also raised the issue of the alleged comment.

A full and thorough investigation into the grievance was then undertaken by Capita and when Woodhouse himself was interviewed about the incident, he again denied having made the comment.

While the internal investigation didn't eventually uphold any of Kaur's claims of bullying and harassment by Woodhouse, the manager carrying out the investigation concluded that, on the balance of probabilities, Woodhouse was likely to have made the comment.

Capita suspended Woodhouse pending a disciplinary investigation. Woodhouse has since been absent from work due to sickness, and hasn't yet returned, therefore the disciplinary procedure has still not taken place.

Kaur was subsequently assigned to a different manager and, following further requests, both she and Rehman were moved to an alternative shift pattern. Despite this action by Capita, Kaur and Rahman proceeded to make a claim to the employment tribunal regarding their treatment.

The tribunal described the evidence made by the claimants as clear and convincing, and concluded that the incident did happen.

It was found that, while the comment fell short of gross misconduct, as it was a one-off incident and out of character for Woodhouse, it clearly amounted to "unwanted conduct related to race". The tribunal ordered Woodhouse to pay each of the claimants a sum of £1,321.15, which included £1,250 to compensate for injured feelings, plus £71.15 in interest.

However, the tribunal also found that the employer had taken all reasonable steps to prevent the incident and was therefore not liable for any act of unlawful harassment. The tribunal ruled that Capita not only had comprehensive policies in place, it also communicated them, trained all employees on them and updated that training annually. If therefore found that Capita was not liable for any act of unlawful harassment.

RBA Viewpoint

This case brings out several interesting points as a result of what the manager considered and intended to be a light-hearted remark, which was not aimed directly at either of the subsequent tribunal claimants. In most cases, if an employee carries out an act of a similar nature, the employer is held vicariously liable for the actions of that employee. In this particular case, because of the employer's robust internal procedures, the full and thorough investigation that took place and the training that was given to its employees on such matters, it was exonerated of blame and the manager in question ultimately 'carried the can'.

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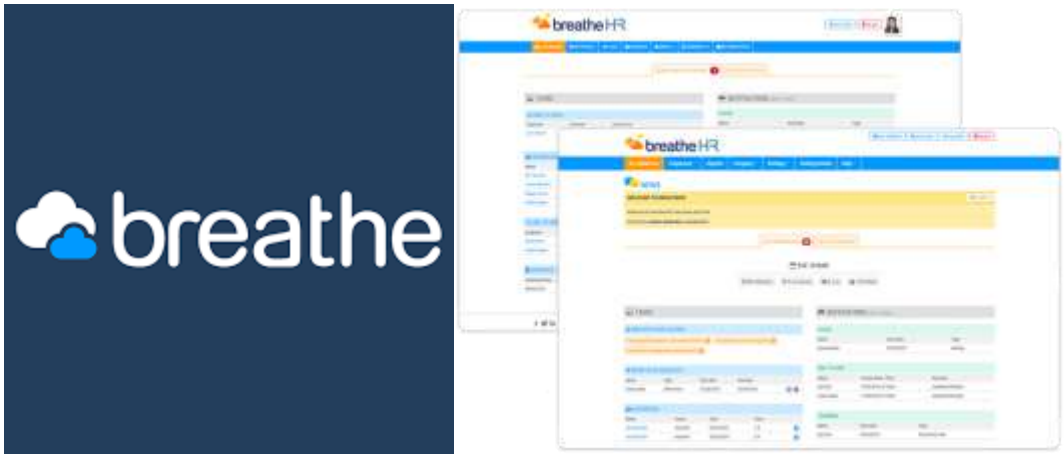

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