KIPPEN CAMPBELL LLP

EMPLOYMENT LAW BULLETIN

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EMPLOYMENT LAW UPDATE

1. Is stress a disability?

This is a question that we are often asked.

To decide whether an employee suffers from a disability there first must be a physical or mental impairment. In this case, the impairment, i.e. stress, must affect the Claimant in the following ways. It must be:

- Substantial
- Long term and
- Have an adverse effect on their ability to carry out normal day to day activities

For it to be substantial the stress would have to be “more than minor or trivial”.

The substantial impairment must also be long term so lasting or expected to last more than twelve months and it must affect the Claimant’s ability to carry out normal day-to-day activities.

In the often quoted case of “Herry v Dudley Metropolitan Council” the Employment Appeal Tribunal (EAT) had to decide whether stress would amount to a disability.

It decided that long term stress does not on its own result in a mental impairment required to amount to a disability.

However, the medical evidence in the case was not all it could have been and if appropriate medical evidence had been led, the outcome might have been different.

The judgement also looked at another case where the difference between stress causing “low mood and anxiety” and stress causing clinical depression

was considered. It decided that the former – low mood and anxiety – would not be an impairment under the act but that the clinical depression clearly was.

The EAT in Herry acknowledged that work related stress could result in an impairment provided that the correct medical evidence was led.

The case is helpful as it emphasised that there is a difference between stress caused by challenging life events, including difficulties at work, on the one hand and depression and anxiety on the other, with the latter likely to be an impairment and the former, without more evidence, not.

If you are going through a process with an employee on this sort of point it is clearly complex and you may wish to take appropriate advice at the earliest stage to ensure an appropriate outcome.

2. ACAS Guidance on Mental Health reasonable adjustments

Every so often ACAS issues or reissues guidance. One particular helpful example of this is their updated and concise guidance **https://www.acas.org.uk/reasonable-adjustments-for-mental-health** on the above.

Within the guidance there are links to disability and the law as well as what to do if a member of staff does require reasonable adjustments to be made due to mental health issues.

3. Further protection for those on Maternity Leave (and beyond) in Redundancy situations

The law for some time has given women who are on maternity leave priority over other employees when in a risk of redundancy situation.

The new legislation comes into force from 6th April 2024. The cover commences when the employer has been notified of the pregnancy and now will end 18 months from the child's date of birth if notified to the employer before the end of maternity leave (or 18 months from the expected week of child birth if not notified).

In effect if an employee takes her full 12 months of statutory maternity leave she will receive an extra 6 months of protection following their return to work.

This means that employers should have robust systems in place to ensure that those with protection are identified and dealt with appropriately. Failure to do so could lead to a claim for automatic unfair dismissal.

4. Holiday pay and entitlement reforms from 1st January 2024

For those of you still struggling through the changes help is at hand!

The government has produced a very detailed guidance note – link below – which includes, amongst other things, a definition of an irregular hours worker and part time worker, holiday entitlement for those workers and how it is accrued/calculated and also covers the issue of carry over of leave and the new principles introduced in relation to that.

https://www.gov.uk/government/publications/simplifying-holiday-entitlement-and-holiday-pay-calculations

5. New paternity leave regulations

As from 6th April 2024 the Government has introduced new regulations in relation to the above which will make the following changes:

- employees will be able to take their two-week paternity leave entitlement as two separate one-week blocks (rather than having to take just one week in total or two consecutive weeks).
- employees will be able to take paternity leave at any time in the 52 weeks after birth (rather than having to take leave in the 56 days following birth).
- employees will only need to give 28 days' notice of their intention to take paternity leave (reduced from the previous position that required notice to be given 15 weeks before the Expected Week of Childbirth (EWC)).

Employers should note and be aware of these changes.

6. Settlement Agreements and settling future claims

A recent case in the Court of Session confirmed that a Settlement Agreement can be used validly to settle future claims which might be unknown at the time under the Equality Act 2010.

In the case in question – Bathgate v Technip Singapore PTE Ltd. the Claimant signed a standard Settlement Agreement and left the Respondent's employment. After the agreement had been signed the Respondent decided that it did not need to make an additional payment to the Claimant which had been agreed under a collective agreement because the Claimant was over the age of 60. The Claimant claimed age discrimination.

Discrimination claims can be settled by a Settlement Agreement provided that the Settlement Agreement relates to the "particular complaint".

The Employment Tribunal found that the age discrimination claim had been settled by the Settlement Agreement even although the alleged age discrimination only happened post the settlement agreement.

However, the Employment Appeal Tribunal disagreed with this and found that future unknown complaints could not be categorised as "particular complaints" as they would not have occurred at the point that the agreement was signed.

The case went to the Court of Session which held that the Claimant's age discrimination claim was indeed validly settled by the Settlement Agreement.

In terms of the standard wording the Settlement Agreement had had the usual wording whereby the Claimant "intimates and asserts" and then mentioned various types of claims, including age discrimination.

There was also the standard wording that "all claims….of whatever nature whether past, present or future" would be discharged.

The Court held that "a future claim of which an employee does not and could not have knowledge, may be covered by a waiver where it is plain and unequivocal that this was intended". Here, the Court held "it was clear that the agreement was intended to cover claims of which the parties were unaware and which had not accrued".

The Claimant therefore failed in his claim and his appeal.

It is worthwhile employers checking their standard Settlement Agreements to ensure that this sort of wording mentioned here is indeed included and for those representing employees, presumably, to try to exclude this wording if that is possible.

Kind Regards

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