

## Employment Matters



**Welcome to Employment Matters:** a round-up of the key UK employment law issues affecting your business and our recommendations for managing those issues.

If you have any questions about this update or would like to know more about how we can help you, please feel free to contact [Christopher Hitchins](#) at +44 (0) 207 776 7663 or [Sarah Bull](#) at +44 (0) 207 776 5222.

### Repudiatory breach by raising written concerns with an employee on sick leave

The Employment Appeal Tribunal (EAT) in the case of *Private Medicine Intermediaries Ltd and others v Hodkinson* upheld a tribunal decision that an employee had been constructively unfairly dismissed when her employer wrote to her with a list of concerns whilst the employee was on sick leave. The EAT did, however, rule that the letter didn't extend to disability-related harassment.

Briefly, the employee suffered from a thyroid dysfunction and cardiac arrhythmia, which the employer accepted to mean that she was disabled under the Equality Act 2010. In late 2013, the employee returned to work after a period of sickness, and a number, but not all, of the subsequent recommendations of occupational health were implemented. The employee was then off sick again in October 2013 with work-related depression and anxiety. In November 2013, her employer wrote to her to try and resolve issues of alleged bullying. However the employer also included a list of concerns that it wanted to discuss, which previously had been brought to the employee's attention, some of which had even been resolved already. The employee subsequently resigned. The EAT said that this was constructive unfair dismissal due to a repudiatory breach as the employer should have known it would cause her distress. It was not disability-related harassment, however, as the concerns were genuine and her illness at the time the letter was received wasn't due to her disability.

#### What should employers do next?

This case is a reminder that an employer should take care not to breach the implied term of trust and confidence when communicating with employees who are on sick leave. Communications should remain relevant to managing the sickness absence and whatever disciplinary and performance management processes were going on at the time of the employee's absence in order to lessen the risk of a constructive dismissal claim.

### Supreme court rules on two vicarious liability cases

The Supreme Court has clarified the circumstances in which an employer could have vicarious liability for the actions of its employees. The first such case, *Mohamud v W M Morrison Supermarkets plc*, involved a supermarket petrol station worker violently attacking a customer who had asked if he could print some documents at the petrol station. The employee told the customer to leave the premises and then continued to attack him. The Supreme Court upheld the existing test of asking whether there was a sufficient connection between the activities carried out by the employee for the employer to be liable. In this case, ordering the customer to leave the premises, albeit with violence, was sufficiently connected to the employee's assignment for the supermarket to be held liable.

In the other case, *Cox v Ministry of Justice*, a prison inmate working in a kitchen negligently dropped a bag of rice on a prison employee, injuring her. The prison service was held vicariously liable for the actions of the prisoner despite there being no contract of employment, as the relationship was similar to one between an employer and employee—the prisoner's work was integral to the 'business' of the

prison. The government will publish league tables using the information gathered, but has decided not to impose penalties (such as fines) for non-compliance with the reporting requirements, making the regulations something of a toothless animal. Employers may well choose not to comply with reporting requirements rather than publish statistics that do not cast them in a favourable light.

### **What should employers do next?**

Be aware that employees can cause you liability even if it might appear that they are going off on a frolic of their own. Ensure that employees are clear through training and policies on the standards of behaviour that are expected of them, and ensure that your employment contracts or policies contain comprehensive gross misconduct provisions.

### **Tribunal awards are on the up**

Compensation limits for some employment tribunal awards will increase from 6 April 2016. The current maximum compensatory award for unfair dismissal will increase from £78,335 to £78,962, the maximum limit on a week's pay used for calculating statutory redundancy payments, as well as other awards, will go from £475 to £479 and the minimum basic award for certain cases of unfair dismissals (relating to trade union membership, health and safety duties, pensions scheme trustee duties, amongst others) also will rise from £5,807 to £5,853.

### **What should employers do next?**

Be mindful of the increased maximum downside to losing an employment tribunal claim for unfair dismissal (but note that such claims are still capped at the lower of the new statutory maximum and a year's salary) and calculate statutory redundancy pay based on the new £479 rate for redundancies that are going through now but where the termination date is after 6 April.

### **EHRC produces guidance on recruitment adverts**

The Equality and Human Rights Commission has published new materials which include guidance on advertising jobs in line with current equality law. The materials are in the form of [guidance](#), a good practice [checklist](#) and an [FAQ](#). The guidance stipulates when a job advertisement might be discriminatory, and provides guidance on what job advertisers can and can't say in a job advert from an Equality Act perspective.

### **What should employers do next?**

Employers who place job adverts should review the guidance or check with us if there is a concern that their advertising may be discriminatory. It also would be sensible to review any policies dealing with recruitment to ensure that they are in line with the guidance.

### **The Budget**

Employment law highlights from George Osborne's eighth budget include:

- From April 2018, termination payments that are subject to income tax on amounts over £30,000 also will be subject to employer (but not employee) national insurance contributions. Legislation also will be introduced to ensure that payments in lieu of notice (PILONs) will be taxed as earnings.
- The government is considering restricting salary sacrifice arrangements, with their tax and NIC advantages, to certain benefits, but have confirmed that enhanced employer contributions, childcare benefits and health related benefits will be safe.
- Tax-free childcare will launch in 2017, whilst existing employer-supported childcare voucher schemes will remain open to new entrants until April 2018.
- Company car tax rates will increase from 2019 and the van benefit charge will increase from April 2017.

## What should employers do next?

There is no immediate impact for employers based on the above, but the future changes to the tax treatment of compensation payments and PILONs is noteworthy.

## The case being built against Employment Tribunal fees

Employment Tribunal fees were introduced in 2013, and since then the number of Employment Tribunal claims being brought has sharply declined. Some people feel that the introduction of fees has unlawfully prevented access to justice, particularly for those on a low income. The union Unison has taken up this fight and has now been granted permission by the Supreme Court to appeal the Court of Appeal's decision rejecting a judicial review of Employment Tribunal fees. Unison previously failed as it had started proceedings 'prematurely' without enough evidence of the impact of the fees.

At the same time, the Ministry of Justice is six months into a review of employment tribunal fees. Tribunal fees could be under fire from multiple angles in the near future.

## What should employers do next?

Watch this space! If fees are successfully challenged, cheaper tribunal costs could well result in more claims by employees.

For more information about these issues or if you would like to discuss an employment-related matter, please contact: [Christopher Hitchins](#) at +44 (0) 207 776 7663 or [Sarah Bull](#) at +44 (0) 207 776 5222.

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