Employment law dispatches

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Willans LLP | solicitors

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Welcome back to another issue of Dispatches, where we share the latest case news and updates from the world of employment law.

As always, please get in touch if you need our support. We hope to see many of you at our next webinar taking place on 14 April.

Matthew, Jenny, Hayley & Klara

In this issue:

Case law watch

Bereavement

ACAS (the Advisory, Conciliation and Arbitration Service) has recently published new guidance on how employers should deal with staff who suffer a bereavement. The guidance details the best practice for dealing with this circumstance in a compassionate way.

The death of a loved one usually has a devastating impact on a bereaved person's life, both private and professional. Bereavement is, unfortunately, something everyone will have to face. Experiencing the death of someone close to you, or even supporting an employee going through a bereavement, can have an impact on work.

The legal position varies depending on the relationship with the person who died.

Dependant

Generally, every employee has a right to time off if their 'dependant' dies. This is known as 'bereavement leave'. A dependant can be a spouse, partner or civil partner, parent or child (if over 18), a person in their care, a person who lives in their household or would rely on them for help in the event of an accident, illness or injury (e.g. an elderly neighbour).

The law does not specify the length of time allowed for bereavement leave, however, the time taken off should be reasonable in the circumstances. So, the closer the relationship, the longer the bereavement leave allowed.

There is no legal right to receive pay when on bereavement leave however, some employers might offer this as a part of their own 'compassionate' or 'special' paid leave policy.

Parental bereavement leave

The legal position is slightly different following the loss of a child to stillbirth or miscarriage (after 24 weeks of pregnancy), or if the child dies under the age of 18. In such cases, eligible employees have a right to two weeks' statutory parental bereavement leave, which can be taken at any point in the 52 weeks following the loss of the child.

They may also be entitled to statutory parental bereavement pay of either £156.66 a week or 90% of their average weekly earnings (whichever is lower), if they are an employee or worker.

In addition to the above, an employee who loses a child to stillbirth or miscarriage (after 24 weeks of pregnancy) may also be entitled to a statutory maternity or paternity leave and pay. In these circumstances, birth mothers are entitled to up to 52

weeks' statutory maternity leave and pay, birth fathers up to 2 weeks of paternity leave and pay. Partners of the birth mother, or adopters, are also entitled to up to 2 weeks of parental leave and pay.

Miscarriage in the first 24 weeks

Unfortunately, in cases where the miscarriage occurs in the first 24 weeks of pregnancy, there is no entitlement to statutory maternity/paternity or statutory parental bereavement leave or pay. However, employers should consider offering some support, as a miscarriage is likely to be considered a 'pregnancy-related illness' and therefore can be protected under the Equality Act 2010.

Although there is no right to take a time off unless the person who died was employee's dependant or child under 18, the ACAS guidance emphasise that employers should still be compassionate towards their employees who lose someone outside of these definitions as they are likely to still experience grief and require support.

What should I do?

In light of this new ACAS guidance, businesses should review and update their existing bereavement/compassionate leave policies to ensure that it complies with this guidance, and also ensure that your workers are aware of the support available to them.

If you would like assistance with reviewing your policies, please do not hesitate to get in contact with us. ■

Asking an employee if they are menopausal amounted to harassment

Can asking an employee if she is going through the menopause amount to harassment on the grounds of sex under the Equality Act 2010? This was considered by the tribunal recently in *Best v Embark on Raw Ltd.*

Ms Best worked as a sales assistant in a small team. The relationship between her and her employer became tense following a number of complaints she made in regard to her employer's non-compliance with the government's Covid-19 guidance.

In March 2020, the team had a discussion about the menopause. Although Ms Best made it clear that she did not want to discuss the topic, she was later approached by her male boss who asked her if she was menopausal. This was later followed by a further comment regarding her age.

She subsequently complained about this, but the complaints were not taken seriously. She received a written warning and was dismissed shortly after. Ms Best brought a claim against her employer for harassment on the grounds of her age and sex.

The tribunal found in favour of Ms Best and ruled that the actions of her boss amounted to a harassment, albeit of a 'minor nature', based on Ms Best's age and sex.

What should I do?

When dealing with complaints from employees, employers should be cautious and compassionate, particularly around sensitive subjects such as the menopause.

Discussions on the topic of menopause are becoming much more 'open' and commonplace. It has become a much debated area of discussion of late and employers should therefore be prepared for this. Businesses should consider adopting a menopause policy clarifying any support available to employees experiencing it. Afterall, it will, at some point, affect every woman who works for your business.

For further advice and information contact us, or join us for our webinar taking place in June on this subject - keep an eye out as we will be sharing details soon. ■

The annual increase to awards by the employment tribunal and other amounts payable under employment legislation (eg statutory redundancy pay) will come into force on 6 April 2022, in line with the retail price index ('RPI').

- **The maximum amount of 'week's pay' will increase from £544 to £571.**
- **The limit on amount of compensatory award for unfair dismissal will then increase from £89,493 to £93,878.**
- **The new limits will then apply to dismissals occurring on, or after, 6 April 2022.**

Employee fairly dismissed for refusing Covid-19 vaccination

In response to the COVID-19 global pandemic, compulsory vaccination has become a hot topic. While some countries took a blanket approach of compulsory vaccination, the UK went down a much narrower path and did not make vaccines mandatory. Nevertheless, a number of companies adopted mandatory vaccine policies with the aim of protecting their staff, wider public and to lower the cost incurred due to sickness absence and the then mandatory isolation requirements.

In *Allett v Scarsdale Grange Nursing Home*, the employer (a care home) introduced the requirement for all staff to be vaccinated against COVID19 in early 2021. This was several months prior to the government introducing mandatory vaccines in the healthcare sector.

Ms Allet refused to be vaccinated as she thought the vaccination was unsafe. She also claimed she was immune, having recently recovered from Covid-19. During a subsequent disciplinary hearing she then claimed that the vaccination was against her religious beliefs.

Ms Allet was dismissed for gross misconduct (i.e. refusing to get the vaccine) so she brought a claim against her employer for discrimination on the basis of her religious belief.

The tribunal found in favour of the employer, finding that the real reason Ms Allett refused to be vaccinated was due to a scepticism about the vaccine, not her religious belief. Therefore, no discrimination had occurred. Her refusal to comply with the request, due to her scepticism of the vaccine, amounted to gross misconduct and she was fairly dismissed by the employer.

What should I do?

It is now mandatory for all workers in the care sector to be vaccinated, unless medically exempt. However, on 31 January 2022, the Secretary of State for Health and Social Care, Sajid Javid, announced that the Home Office has launched a consultation into ending mandatory vaccination in the care sector. Therefore, there may be a move away from compulsory vaccination in the coming months.

Employers outside of the care sector who want to enforce compulsory vaccination for their workers should do so with caution. Any such blanket requirement could open you up to potential discrimination claims. As such, there should be a legitimate and objective justification for requiring all staff to be vaccinated and you would be well advised to seek advice before enforcing such a policy.

If you would like assistance with reviewing your policies, please do not hesitate to get in contact with us. ■

The annual increase to National Living Wage (NLW) and National Minimum Wage (NMW) will apply from 1 April 2022.

The NLW (for those aged 23 and over) and NMW (for those of at least school leaving age) will be as follows:

- **The NLW will increase from £8.91 to £9.50**
- **The NMW for workers aged 21-22 will increase from £8.36 to £9.18**
- **The NMW for workers aged 18-20 will increase from £6.56 to £6.83**
- **The NMW for workers aged 16-17 will increase from £4.62 to £4.81**
- **The apprentice rate will increase from £4.30 to £4.81**

Self-employed plumber was actually a 'worker'

In *Pimlico Plumbers Ltd v Smith,* the Supreme Court held that a plumber, engaged by the Pimlico Plumbers and described in the contract as 'self-employed', was in fact a 'worker'.

When working, Mr Smith wore the Pimlico Plumbers' uniform and drove a van with their logo on it. He was contracted to work for 40 hours a week and, although theoretically had an option to do so, he did not work for anyone else. The contract also contained post termination restrictions. However, he could also choose his working hours, reject particular jobs and Pimlico Plumbers was under no obligation to provide him with work if none was available. Mr Smith brought a claim against Pimlico Plumbers, claiming that he was in fact a worker and entitled to holiday pay and other statutory rights.

The Supreme Court found that the contract clearly had elements of tight financial and operational control by Pimlico over Mr Smith; particularly in respect of a non-compete clause and payment conditions. The Supreme Court therefore upheld the previous decisions that Mr Smith was indeed a 'worker' and not self-employed.

What should I do?

Despite the fact that this case is not a typical 'gig economy' case, it still serves as an excellent reminder that every such case needs to be considered on its own facts. Individual circumstances, relevant paperwork, and the reality of the relationship in practice will be under scrutiny when determining the worker status of an individual.

It is therefore important to ensure that you have up-to-date and relevant contracts that reflect the reality of the relationship and 'cut-and-paste' contracts created some time ago can cause your business quite a headache, years later.

As such, we would recommend that you take legal advice when drafting any legally binding documents - get in touch if we can help. ■

The government has announced the increased statutory benefit and pension rates for 2022/2023.

These figures will apply from April 2022.

- **Statutory sick pay (SSP) will increase from £96.35 to £99.35 per week**
- **Statutory maternity pay, maternity allowance, statutory paternity pay, statutory shared parental pay and statutory adoption pay will increase from £151.97 to £156.66 per week**

Our team, we're here to help you

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Employee who went to work despite Covid-19 contact unfairly dismissed

In *Lewis v The Benriach Distillery Company Limited,* Mr Lewis, a forklift truck driver, attended work despite the fact that his son (who he lived with) had informed him he was displaying Covid-19 symptoms (a cough and a loss of smell), and had booked a covid test. Mr Lewis did not believe his son's symptoms were genuine, and thought he just wanted to have time off work. He turned out to be wrong as his son later tested positive.

At this time, government guidance required everyone who lived with someone who displayed Covid-19 symptoms to self-isolate. As such, the employer commenced a disciplinary investigation against Mr Lewis and he was subsequently dismissed for a gross misconduct.

The tribunal found in favour of Mr Lewis and held that he was unfairly dismissed. This was because the employer had failed to consider Mr Lewis' 23 years of good service, previous compliance with Covid-19 guidance, and the fact that Mr Lewis would not have gained any advantage by deciding to attend work.

Nevertheless, the tribunal also found some contributory fault on Mr Lewis' part and reduced his financial award by 25%.

What should I do?

This case is one of the first in a long line of COVID-19 associated cases. It is an excellent example that, even when facing exceptional circumstances, employers need to undertake a full and thorough disciplinary process and consider all mitigating factors when making a disciplinary decision. ■

More news on our website www.willans.co.uk

Contact

For advice on any of the issues covered in this bulletin or any other area of law, please contact these people in the first instance.

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