

Employment Law Update

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This month's newsletter looks at the giving of notice, new laws in relation to bereavement leave, disability discrimination and ACAS guides on giving references.

Disability Discrimination

The law surrounding Disability Discrimination is clear that an employer either has to know or reasonably to know from facts that are adduced by the Claimant, that the Claimant is indeed disabled before they can be accused of discriminating against them on grounds of that disability.

In the case of *Mutombo-Mpania v Angard Staffing Solutions Limited*, the Claimant sought to rely on a condition of essential hypertension to avoid working night shifts. These symptoms included headaches, fatigue, breathing difficulties and lack of confidence. However, at the Employment Tribunal the Claimant provided no evidence for the actual impact that these symptoms had on his normal day to day activities. The Equality Act is clear that the Claimant has to demonstrate the substantial adverse effect that the disability has on him in order to succeed in a claim.

In this claim, the Claimant did not adduce such evidence and whilst an employer may have vague knowledge of a health condition, he is under no obligation or duty to ask questions about it and this did not therefore constitute constructive knowledge.

Further the employee in this case has previously worked a night shift and therefore knowledge could not be implied of a disability.

Notice

In the case of *East Kent Hospitals University NHS Foundation Trust v Levy*, the Employment Appeal Tribunal was asked to consider whether the giving of notice amounted to an unambiguous act of resignation. The Claimant had received a conditional offer of a move from the Trusts record department to the radiology department. She sent a letter to the records department saying "please accept one month's notice from the above date".

Subsequently the conditional offer was withdrawn and the Claimant sought to retract her notice of resignation. The NHS Trust refused and the Claimant's employment was brought to an end. The Claimant brought a claim against the NHS Trust for unfair dismissal.

At the original hearing the Employment Tribunal held that the Claimant's notice was ambiguous and did not necessarily amount to a resignation. The Employment Appeal Tribunal upheld that conclusion stating that an objective analysis of the letter and the words used was required. It made a finding that the Employment Tribunal was entitled to conclude that the Respondent had understood the words to simply mean a move from the records department to the radiology department and that that was a reasonable interpretation. It did not necessarily mean that it was a notice of resignation.

The Respondent in the case sought to rely on the retraction letter, which stated retraction of notice of resignation, however the Employment Appeal Tribunal cautioned against looking at subsequent events unless the first event could not be adequately interpreted.

There is a warning here that when an employee does resign, particularly if the resignation is desirable that it is made absolutely clear that the person is indeed resigning from their employment and secondly that that resignation is accepted in writing by the employer.

Parental Bereavement Leave

This legislation, as it stands currently, has not yet come into force and any details are relatively scarce. However, the Parental Bereavement (Leave and Pay) Act 2008 has now received the royal assent. It provides a right for parents to take two weeks away from work in the event of the death of a child under the age of 18.

Details, such as how much remuneration would be payable to a parent in this distressing situation, have not yet been released but regulations are expected when the Act comes fully into force in April 2020.

ACAS Guidance on References

ACAS have now released new guidance which can be found on their website, in relation to the giving of references. Generally speaking a reference must be honest and fair. Having now read the guidance, I would be cautious about some of the advice, including that which talks about giving information about absences. Dwelling too much on the number of absences could in some circumstances prevent an employee from moving on to a new career and be regarded as discriminatory if the absences were related to a disability. That aside, the guidance does give some useful tips on how to deal with problem references and job offers and references. It is therefore worth having a quick read.

More on Disability Discrimination

In the case of *Dunn v The Secretary State for Justice and Anor*, the Court of Appeal was asked to determine whether a poorly handled ill health retirement procedure could amount to disability discrimination? The Claimant in the case was a prison inspector employed by the Ministry of Justice. He suffered with depression and a serious health condition. He made an application to be permitted to retire on the ill health program. Unfortunately, the retirement application process was long and delayed. The Claimant asserted that this delay caused him distress. He went further to say that this distress amounted to discrimination on the grounds of his disability.

The Court of Appeal disagreed. Although they recognise that the process for applying for ill health retirement was unnecessarily bureaucratic, it concluded there was no disability discrimination. The Court of Appeal considered that there was no motivation on the part of the decision makers to discriminate against the Claimant and that the decision maker had not behaved in the way it had because of the Claimant's disability which as a requirement for disability discrimination under section 14 of the Equality Act. Therefore, whilst the process was unwieldy and in some cases defective, it was not discriminatory.

And finally.....

We hope that the information provided in this newsletter as always is useful but should any questions arise as a consequence then please do not hesitate to call me.

Bye for now.

Lynsey and the team.

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