EMPLOYMENT NEWS HEADLINES JAN-FEB 2017 ISSUE 7

THE LINE BETWEEN "NORMAL" STRESS AND A DISABILITY – HERRY V DUDLEY METROPOLITIAN COUNCIL (EAT)

This is an interesting Employment Appeal Tribunal case on where the line falls between what can be determined as a disability under the Equality Act and what is merely work related stress.

Mr Herry was a design and technology teacher and suffered from dyslexia. He worked as a teacher since 2008 and had not flagged to his employers that he had dyslexia nor had he requested that adjustments be made to take account of this. During a period starting in 2010, Mr Herry was off sick over a considerable time. His sickness certificates stated the cause as 'stress' or 'work-related' stress. Mr Herry brought a claim against his employers for unfair treatment. The tribunal found he was not disabled at the time of the claim based on the following:

- Mr Herry had never flagged his dyslexia as a problem or at all until the time of the tribunal;
- His extensive sickness certificates and documents indicated his sickness as stress related and at no time mentioned depression;
- Although Mr Herry's dyslexia may have been exacerbated with stress he was not able to show it had a substantial (i.e., more than minor or trivial) and long term adverse effect on his normal day-to-day activities and he was able to process information, documents and instructions with time in his professional life;
- The tribunal drew on the guidance of current case law distinguishing between stress due to adverse life events such as work stress that did not result in mental impairment (not a disability) and clinical depression and anxiety (likely to be a disability).

This is a helpful and reassuring outcome for employers but highlights the need for employers to make the distinction between a person's general unhappiness with work decisions, life in general or their inability to compromise and an adverse situation where there may be a mental impairment which is the cause of the stress.

THE NATIONAL LIVING WAGE – NEW RATES

In Issue 1 of Maxlaw Global employment news we reported on the introduction of the new National Living Wage. The draft legislation has now been published for the new hourly rates due to come into force from 1 April 2017 as follows:

- Workers aged 25 and over: £7.50 up from £7.20
- Workers aged 21 to 24: £7.05 up from £6.95

- Workers aged 18 to 20: £5.60 up from £5.55
- Young workers aged under 18 but above compulsory school age who are not apprentices: £4.05 up from £4.00
- Apprenticeship rate: £3.50 up from £3.40.

EMPLOYMENT STATUS IN THE GIG ECONOMY - CONTINUED

In the last issue of Maxlaw Global's employment newsletter (Issue 6), we reported on the case brought by Uber drivers and the finding by the Tribunal that the drivers were in fact workers and not self-employed contractors. Although that finding is being appealed, as suspected, this decision has given rise to additional legal actions concerning CitySprint, Deliveroo and the delivery firm, Hermes.

The need for employment laws and HMRC guidance to keep up with the fluid and rapidly changing 'gig' economy, has resulted in the Government setting up an inquiry into the working conditions and rights of these non-traditional employee roles in *Future World of Work and Rights of Workers* and also an independent review of *Employment Practices in the Modern Economy*.

It is hoped that this will bring more clarity in the future, however, the tests employers need to currently apply to determine the "employment" status of its staff are well established and summarised below:

- Is there an obligation for the employer to provide the individual with a certain level of work and for the individual to accept it?
- Must the individual perform the work personally themselves or do they have the right to substitute another person in their place? How often is this right exercised in practice where it exists?
- How is the individual paid and how do they account for their social security and tax liabilities?
- Does the individual enjoy certain benefits such as sick pay, holiday pay, family friendly leave etc.,?
- How "integrated" is the individual into the employer's work structure? Do the company policies apply to him or her?
- How long has the individual worked for the employer?
- How much control does the employer have over how, when, where and with what the individual performs the service/task?
- Does the individual take on any personal benefits or liability in terms of loss or financial profitability?

Workers will have more rights than the self-employed such as rights to annual paid leave, national minimum wage, protection from unlawful deduction of wages and whistle-blower protection but will not have the full employment protections of traditional employees, significantly, the right not to be unfairly dismissed.

The rise of the 'gig' economy means it will not only be organisations such as delivery companies Uber, CitySprint, Deliveroo or Hermes that are affected but also other sectors which rely on a more flexible workforce such as healthcare and the construction industry. Employment Tribunals have looked at the reality of the situation rather than rely on the contractual documentation in place in determining the true nature of the relationship between the employer and the individual. Getting this wrong could not only lead to tribunal claims but also liabilities for tax and national insurance in addition to fines and penalties from HMRC.

THE TRADE UNION ACT 2016

The key provisions of the Trade Union Act 2016 are due to come into effect on 1st March 2017. Full details of the Act can be found here *Trade Union Act 2016 (Commencement No. 3 and Transitional) Regulations 2017*. The provisions of these new rules will apply to any ballots for industrial action which are open on or after the effective date. A few highlights of note for employers that do have a unionised workforce are:

- A clear definition of "important public services" where there will be a requirement of 40% of those entitled to vote needing to support the industrial action;
- A requirement for there to be at least 50% turnout of members for all industrial action ballots;
- A change to the details that must be included on the ballot forms including details of issue(s) in dispute, actions short of strike action that are available to members, timing of industrial action if voting requirements are satisfied;
- Notice of industrial action required to be given to employers has been extended from one week to two weeks; and
- The expiry of an industrial action mandate after six months from the ballot has elapsed.

A review of whether electronic balloting should be introduced is also expected by the end of 2017.

PENSION AUTO-ENROLMENT – FURTHER CONSULTATION FOR NEW EMPLOYERS

There is to be further consultation by the Department of Work and Pensions on pension auto-enrolment requirements for employers set up after 1 April 2017 (new employers). At present the requirement is that compliance begins for new employers on the first day that PAYE income is paid to the worker. This consultation relates to the proposal that this date will change to when the worker is first employed. Currently there is no deferral period for auto-enrolment for new employers but it may be possible, under these consultations, for deferral of up to three months. Much will depend on the outcome of the consultations.

For further details see: *https://www.gov.uk/government/consultations/automatic-enrolment-technical-changes-2017*

THE NEW APPRENTICESHIP LEVY

Apprenticeships and the new apprentice levy has continued to receive a fair amount of media coverage in recent months. The Government is a strong advocate of employers supporting apprenticeships and is keen to expand the use of them with a target of increasing apprenticeships to 3 million by 2020.

As of 6th April 2017 all employers in the UK who have an annual pay bill of more than £3 million will be required to pay an "apprenticeship levy". This has been seen as controversial in the current economic climate and has been criticized as another form of employment tax to burden employers. Whatever the view, apprenticeships and the new levy scheme looks like it's here to stay for the time being.

The levy will:

- Be a sum which is 0.5% of the employers annual pay bill;
- Apply to the employer regardless of whether or not the employer has apprentices;

- Apply whether or not the employer already pays into an existing industry specific levy scheme.

Employers will receive a "levy allowance" in the sum of £15,000 per employer which will reduce the levy amount payable. Employers will also receive a Government "top-up" of up to the equivalent of 10% of the employer's apprenticeship levy contribution. These allowances will be administered by HMRC through the PAYE system via each employer's electronic account known as the digital apprenticeship service (DAS).

Employers will be able to choose and pay for the type of apprenticeship training they want on condition it is via approved providers. It will also be possible for employers to transfer up to 10% of training funds to other employers (e.g., suppliers) in order not to lose money that remains in the DAS after 24 months.

Employers new to apprenticeship schemes should be aware that although the use of apprenticeships extends a long way in history there are different forms of apprenticeships from the older non statutory forms under apprenticeship contracts, to the more recent statutory forms of apprenticeships under approved English apprenticeship agreements governed by the *Apprenticeships, Skills, Children and Learning Act, 2009 (ASCLA)*.

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