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Employment Law Update

This month we talk about:

- EAT considers Perceived Disability Discrimination for the first time
- Protected Conversations
- 18 year olds to be auto-enrolled under new DWP proposals
- Rest breaks
- Tax-free childcare now open to parents of children aged nine and under
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EAT considers Perceived Disability Discrimination for the first time

Chief Constable of Norfolk v Coffey

In this case the Employment Appeals Tribunal (EAT) considered whether a non-disabled job applicant had been discriminated against in circumstances where the potential employer perceived that her medical condition could become a disability in the future.

Under the Equality Act 2010, a person is "disabled" where they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. Additionally, a person will be deemed to have an impairment that has a substantial adverse effect on their normal day-to-day activities, if they suffer from a progressive condition which has some effect on their day-to-day activities and is likely to result in a substantial adverse effect in due course.

The Equality Act 2010 permits claims where the claimant does not have a protected characteristic but the alleged discriminator perceives them as having that protected characteristic.

Mrs Coffey was a serving police offer in Wiltshire Police. She applied for a transfer to Norfolk Police. Mrs Coffey had a degree of hearing loss which meant that she would usually have been ineligible to join Wiltshire Police. However, following national guidance Wiltshire Police arranged a practical functionality test for Mrs Coffey, which she passed. This enabled her to work as a constable without adjustments.

When Mrs Coffey applied to transfer to Norfolk Constabulary, she underwent a hearing test which recorded that she had the same level of hearing loss as previously identified. Norfolk Constabulary nevertheless rejected Mrs Coffey's application on the basis that she did not meet the national standards on hearing. Norfolk Constabulary did not arrange a practical functionality test.

Mrs Coffey issued proceedings in the employment tribunal alleging that Norfolk Constabulary perceived her as having a disability and that the decision to reject her application was direct disability discrimination.

The tribunal upheld the claims. It found that Norfolk Constabulary perceived that Mrs Coffey had an actual or a potential disability which could lead to them having to make adjustments to her role, either now or in the future. The tribunal concluded that this amounted to direct discrimination.

The Norfolk Constabulary appealed to the EAT. The EAT dismissed the appeal. The EAT held that the tribunal had been entitled to conclude that a person with the same abilities as Mrs Coffey, whose condition was not perceived to be likely to deteriorate, would not have been treated as Mrs Coffey was.

Taylor Walton will be running a series of free workshops

during June and July 2018 concerning recent developments in discrimination law. To book a place, please contact events@taylorwalton.co.uk.

Protected Conversations

Basra v BJSS Ltd

In this case the tribunal considered whether it could hear evidence about a "protected conversation" in circumstances where the date of termination of employment is in dispute.

Section 111A of the Employment Rights Act 1996 allows employers and employees to have confidential discussions regarding ending the employment relationship. Those discussions will be inadmissible as evidence in any subsequent employment tribunal proceedings for unfair dismissal (with the exception of automatically unfair dismissal claims) unless there has been improper behaviour. Any such discussions are known as "protected conversations."

Mr Basra was employed by BJSS Ltd as a technical architect from 30 September 2013. In early 2016, BJSS began to have concerns about his performance, following complaints from customers. At a meeting on 29 February 2016, BJSS raised these concerns and Mr Basra suggested that he could resign. Mr Basra was not placed under any pressure to resign at this meeting.

BJSS then sent two letters on 1 March. One invited Mr Basra to a disciplinary hearing, the other, marked "without prejudice subject to contract", offered three months' salary in return for immediate termination under a settlement agreement. The letter required Mr Basra to respond by 7 March and stated that the offer would no longer be available after the disciplinary hearing.

On 3 March, Mr Basra responded by email, disputing BJSS's version of events but accepting the offer. He stated "today will be the last day at BJSS". Mr Basra did not attend work after 3 March and he did not sign a settlement agreement. He subsequently brought employment tribunal proceedings and there was a dispute about the date on which his employment ended.

BJSS argued that Mr Basra's employment ended by mutual agreement on 3 March or, alternatively, that his email dated 3 March amounted to a resignation. Mr Basra claimed that he was dismissed on a later date.

An employment tribunal found that Mr Basra's acceptance email of 3 March amounted to a resignation. He had not been dismissed and his unfair dismissal claim therefore failed. In reaching this conclusion, the tribunal relied on section 111A of the ERA 1996. The tribunal took account of the acceptance email because, in its view, since section 111A only excludes "pre-termination" negotiations, its scope ended when Mr Basra agreed in his email to leave on the terms proposed. The tribunal did not consider the offer made by BJSS which was sent prior to the termination of Mr Basra's employment.

Mr Basra appealed to the EAT.

The EAT allowed the appeal. The EAT stated that the protection offered by section 111A only extends to pre termination negotiations. Where there is a dispute as to whether or not the contract was terminated on a particular date, the tribunal is unable to decide what evidence should be excluded until that dispute is determined. The EAT stated that the tribunal should have determined the termination date before applying section 111A. The tribunal therefore erred in disregarding evidence of negotiations before 3 March even before deciding whether that date was the termination date, in circumstances where there was a clear dispute as to whether the termination date was 3 March or 15 March. If the correct termination date turned out to be 15 March then the acceptance email itself might fall to be excluded.

This case will now return to the same employment tribunal which will have to re-examine its findings. This case is a useful reminder of the importance of approaching "protected conversations" in a careful manner.

18 year olds to be auto-enrolled under new DWP proposals

All 18 year olds will be automatically enrolled onto a workplace pension scheme under new proposals published by the Department for Work and Pensions. According to the policy paper, the current auto-enrolment regime (which requires employers to enrol workers who are at least 22 years old and earn over £10,000) will be extended to "get more people into the habit of saving". The new proposals are due to take effect by 2020 and will see an extra 900,000 workers automatically enrolled in workplace pension schemes.

Rest breaks

Crawford v Network Rail Infrastructure Ltd

In this case the EAT considered whether an employer is able to meet the 20 minute rest break requirement for workers under the Working Time Regulations 1998 by aggregating breaks of a shorter duration.

Regulation 12 of the Working Time Regulations 1998 provides for a rest break of not less than 20 minutes if a worker's daily working time is more than 6 hours. Regulation 21(f) provides that a worker in Railway Transport does not enjoy the protection of Regulation 12. Instead, under Regulation 24(a), the worker is entitled to an equivalent period of compensatory rest.

Mr Crawford worked as a relief cover signalman at various signal boxes in the South East. Although Mr Crawford was not always busy, he was required to continuously monitor and to be on call when trains were going through.

On day shifts it was not possible for Mr Crawford to have a continuous 20 minute break. Mr Crawford could take several five minute breaks throughout his shift which exceeded 20 minutes. The employer argued it could aggregate these shorter periods in order to meet the 20 minute break requirement. Mr Crawford disagreed and brought a claim in the employment tribunal. Mr Crawford's claim was unsuccessful and he appealed to the EAT.

The EAT held that the employer's system was not compliant. As there was no opportunity on Mr Crawford's shifts for a single continuous break from work of 20 minutes, Network Rail were in breach of their obligations under the Working Time Regulations.

This case highlights that, while there are differences between a rest break under regulation 12 and compensatory rest under regulation 24, the essential element crucial to both is that the worker must have an uninterrupted single period of at least 20 minutes' rest.

Tax-free childcare now open to parents of children aged nine and under

HMRC has announced that, with effect from 15 January 2018, the tax-free childcare scheme will be open to parents of children whose youngest child is under nine, or who turned nine on 15 January 2018. The scheme will open to all remaining eligible families with children under 12 on 14 February 2018.

General Data Protection Regulation

The Information Commissioner's Office has published a number of new resources aimed at helping small and medium sized enterprises (SMEs) prepare for the new data protection regime under the GDPR. The publication of the new resources follows the launch of the ICO's advice service for SMEs in November 2017.

During February and March 2018, Taylor Walton will be running a series of free workshops focusing on the practical steps that businesses will need to take to ensure that they are GDPR ready by May 2018. To book a place, please contact events@taylorwalton.co.uk.

If you have any questions about these or other employment issues please call:
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