



NeTWork

Employment Law Update

September 2018

This month we talk about:

- Increase in number of employment tribunal claims
- Disability Discrimination - *Mutombo – Mpania v Angard Staffing Solutions Ltd*
- The Parental Bereavement (Leave and Pay) Act 2018
- TUPE: Removal of Travel Allowance not void – *Tabberer v Mears Ltd*
- National Minimum Wage: compliance and enforcement

Increase in number of employment tribunal claims

The Ministry of Justice has published the employment tribunal quarterly statistics for the period April to June 2018.

The statistics show that the number of single claims lodged with the employment tribunal increased by 165% and the number of multiple claims increased by 344%. The increase in multiple claims is largely due to a large multiple claims against an airline.

The sustained rise in claims being lodged since the abolition of employment tribunal fees in July 2017 has also led to an increase in caseloads for the tribunal system. There has been a 130% increase in outstanding case load for single claims and a 34% increase for multiple claims. This is causing significant capacity problems for the employment tribunals system.

Claimants representing themselves at tribunal have also increased. Before the tribunals and EAT, 74% of claimants were represented by a lawyer in 2017/18 compared with 86% in 2016/17. In contrast, 17% of claimants had no representative in 2017/18, up from 9% in 2016/17.

In terms of awards, disability discrimination attracted the highest compensation payments with an average award of £30,700. The largest sum awarded in a discrimination claim in 2017/2018 was £242,000.

Given the significant rise in employment tribunal claims, many employers will be looking for ways to avoid claims for their business.

In November, Taylor Walton will be running a series of free workshops exploring the concept of protected conversations and how such conversations may assist businesses in avoiding costly tribunal claims.

For further information or to book a place please contact the 'Events Team' with the details listed below:

Telephone: 01582 390568

Email: events@taylorwalton.co.uk

The workshops will be held at one of our offices in [Luton and St. Albans](#):

Luton Office:
28-44 Alma Street,
Luton, Beds, LU1 2PL

St Albans Office:
Thornycroft House,
107 Holywell Hill,
St Albans, Herts, AL1 1HQ

Dates:

Tuesday 30 October – Luton

Thursday 8 November – St. Albans

Tuesday 13 November – Luton

Thursday 22 November – St. Albans



Disability Discrimination - *Mutombo – Mpania v Angard Staffing Solutions Ltd*

For the purposes of disability discrimination under the Equality Act 2010, a "disability" is a physical or mental impairment which has a substantial and long-term adverse effect on an individual's ability to carry out normal day-to-day activities. The effect must have lasted for 12 months or be likely to last 12 months. An effect that is likely to recur is treated as continuing for this purpose. In general, an employer must be aware that their employee is disabled in order for a disability discrimination claim to succeed. Knowledge can be actual or constructive.

In this case, the Employment Appeal Tribunal (EAT) found that an employee had failed to establish that he was disabled or that his employer was aware of his disability.

The Claimant worked for a business providing casual staff to the Royal Mail Group. When completing the Respondent's application form and health forms he did not indicate that he had a disability. In late 2016, the Claimant failed to attend work on 4 occasions and stated that his "health condition" prevented him from working night shifts.

The Claimant suffered from hypertension. He took medications but still suffered from headaches, fatigue and breathing difficulties.

The Claimant was eventually advised that his services were not required. He brought various claims in the employment tribunal including disability discrimination. A preliminary hearing took place to determine whether the Claimant was disabled and whether the Respondent was aware of his disability.

The tribunal noted that it is for the Claimant to establish that his medical condition has a substantial adverse effect on his day to day activities. The Claimant did not discharge the burden of proof, although he had referred to a desire not to work night shifts, he produced no evidence (medical or otherwise) of the functional impact of his impairment on his ability to carry out such activities.

In considering whether the Respondent knew about the Claimant's disability, the Respondent did not have actual knowledge given that the Claimant had indicated in various forms that he was not disabled. As regards constructive knowledge, although the Claimant had referred to a health condition that prevented him from doing night shifts this was not enough to establish constructive knowledge. The employment tribunal considered that the Respondent should have asked further questions about the Claimant's condition but also took into account that he Claimant had worked night shifts before and had denied being disabled.

The Claimant's appeal was dismissed by the EAT and the tribunal's decision was upheld.

Whilst this case is a useful reminder that it is for the employee to establish that they are disabled, it is also raises issues about what enquiries employers should be making once an employee indicates that they have a medical condition which affects their work. In this case, the Respondent was able to refer to recruitments forms to assist its arguments regarding knowledge but this will not always be possible and employers should remain alert to circumstances which may put them on notice of disability related issues.

During October and November, Taylor Walton will be running a series of free seminars which includes a presentation on disability discrimination.

For further information or to book a place please contact the 'Events Team' with the details listed below:

Telephone: 01582 390568

Email: events@taylorwalton.co.uk

The seminars will be held at [Beales Hotel - Comet Way, Hatfield, Herts, AL10 9NG](#)

Dates:

Thursday 18 October

Thursday 15 November

The Parental Bereavement (Leave and Pay) Act 2018

The Parental Bereavement (Leave and Pay) Bill has received Royal Assent, becoming the Parental Bereavement (Leave and Pay) Act 2018. The Act will give all employed parents a statutory right to two weeks' leave if they lose a child under the age of 18, or suffer a stillbirth from 24 weeks of pregnancy. Employed parents will also be able to claim statutory parental bereavement pay for this period, if they meet the relevant eligibility criteria, which are similar to the eligibility criteria for statutory paternity pay.

The Act was introduced as a private member's bill but was supported by the government and meets a Conservative party manifesto commitment. The final text of the Act has not yet been published. However, it is expected that the new rights will come into force in 2020, once regulations have been made setting out the detail of how parental bereavement leave will be taken. Such regulations will provide that the leave must be taken within 56 days of the child's death.



TUPE: Removal of Travel Allowance not void – *Tabberer v Mears Ltd*

Regulation 4(4) of TUPE provides that any changes that are made to employees' terms and conditions of employment as a result of a TUPE transfer are void. In the recent case of *Tabberer and others v Mears Ltd and others*, the Employment Appeal Tribunal (EAT) considered whether the withdrawal of an outdated travel allowance was void as it followed a TUPE transfer.

In this case, the Claimants were electricians formerly employed by the local authority. The Claimants received a Travel Time Allowance (the allowance) as part of their terms of conditions of employment. The allowance had been introduced in 1958 and at this time the electricians were required to travel between various depots, most of which had closed over time.

The electricians were subject to a number of TUPE transfers and, although their new working practices obviated the need for allowance, they continued to receive it. In 2006, managers questioned the payment of the allowance but it continued to be paid because it was considered to be a legal requirement.

Following a further TUPE transfer, the Claimants were told that their contracts of employment were to be varied to remove the allowance. The Respondent described the allowance as "outdated and unjustified". The Claimants argued that the variation of their contracts of employment were void under TUPE 2006 on the basis that the change was connected with the transfer.

The tribunal rejected the Claimant's claims. The tribunal held that the removal of the allowance was not connected with the transfer but because it was outdated. The EAT considered that the tribunal was entitled to find that the removal of the allowance was not connected with the transfer.

The EAT noted that although issues relating to the allowance has arisen following the TUPE transfer, it was an issue which would have confronted management regardless of any transfer.

This case is a useful example of a permitted change to terms and conditions following a TUPE transfer and is likely to be welcomed by employers faced with similar circumstances. What is important is that employers can establish that the reason for the change would have applied regardless of the transfer.

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

Heather Cowley (Partner & Head of Employment Law Department) on **01582 731161**.

Alternatively you can contact Heather via email at heather.cowley@taylorwalton.co.uk

Taylor Walton will be running a series of free workshops focusing on TUPE issues during 2019.

For further information or to book a place please contact the 'Events Team' - **details listed above**.

National Minimum Wage: compliance and enforcement

The government has published a report on the national minimum wage (NMW) detailing evidence on compliance and enforcement in 2017/18. It notes that the government has been increasing efforts to ensure compliance, highlighting the following, for example:

- The government identified a record £15.6 million of underpayments, benefitting over 200,000 workers.
- This year the government prioritised the social care, retail, commercial warehousing and gig economy sectors for targeted enforcement, alongside employment agencies, apprentices and migrant workers.
- In the period August 2017 to July 2018, 678 employers were identified in the government's "naming and shaming" scheme for NMW underpayment.
- HMRC ran a pilot Assisted Self Correction scheme under which employers volunteered for self review, which led to £246,000 in arrears being identified for 689 employees. HMRC are reviewing the outcomes of the scheme and considering the options going forward.

The report can be accessed on the [GOV.uk](https://www.gov.uk) website.