TAYLOR WALTON SOLICITORS

# NeTWork

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## Employment Law Update

This month we talk about:

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- Discrimination arising from disability – *Sheikholeslami v University of Edinburgh*
- **Consultation on ethnicity pay reporting**

### Autumn Budget 2018: employment matters

On 29 October 2018 Philip Hammond delivered the Autumn 2018 Budget. The Budget included the following employment related matters:

- The Government will increase the national minimum wage (NMW) from April 2019 to the following rates:
  - The National Living Wage (aged 25 and over) will rise by 4.9% from £7.83 to £8.21 per hour;
  - The NMW for 21 to 24 year olds will rise from £7.38 to £7.70 per hour;
  - The NMW for 18 to 20 year olds will rise from £5.90 to £6.15 per hour;
  - The NMW for 16 to 17 year olds will rise from £4.20 to £4.35 per hour; and
  - For Apprentices, the rise will be from £3.70 to £3.90 per hour.
- The government will meet its commitment to increase the income tax personal allowance to £12,500 and the higher rate threshold (the sum of the personal allowance and the basic rate limit) to £50,000 from April 2019, one year earlier than planned. These thresholds will remain at the same level in 2020-21 and thereafter will rise in line with the consumer prices index.
- From April 2019, businesses liable to pay the apprenticeship levy will be able to invest up to 25% of the levy to support the training of apprentices in their supply chain. For smaller employers who are not liable to pay the apprenticeship levy, the "co-investment rate" for apprenticeship training will be reduced from 10% to 5%. This means that smaller employers will contribute 5% towards the cost of apprenticeship training, and the government will pay the balance.
- The introduction of employer Class 1A National Insurance contributions on termination payments over £30,000 has been delayed until April 2020.
- The public sector off-payroll working rules will be extended to the private sector from 6 April 2020. The off-payroll working rules are in place to make sure that, where an individual would have been an employee if they were providing their services directly, they pay broadly the same tax and National Insurance contributions (NICs) as an employee. The rules will only apply to large and medium-sized businesses, with the existing IR35 rules continuing to apply to small businesses. The government intends to use similar criteria to define small businesses as those found in the Companies Act 2006

## Case on Vicarious Liability - *Bellman v Northampton Recruitment Ltd and WM Morrison Supermarkets plc v Various Claimants*

Vicarious liability of employers has been the subject of two decisions in the Court of Appeal in October, each on a particularly topical issue for employers – the Christmas Party and Data Protection.

Employers will be liable for any wrongdoing committed by an employee under the doctrine of vicarious liability where there is a sufficient connection between the employment and the wrongdoing. There is a two-stage test: (1) Is there a relationship between the primary wrongdoer and the person alleged to be liable which is capable of giving rise to vicarious liability and (2) is the connection between the employment and the wrongful act or omission so close that it would be just and reasonable to impose liability?

In ***Bellman v Northampton Recruitment Ltd*** the Court of Appeal held that the Managing Director was acting in the course of his "employment" at a social event, despite the court finding that in the same circumstances a more junior employee may not be considered so.

In this case, a group of employees of Northampton Recruitment, including the Managing Director, continued to drink at a hotel bar after the Christmas party. When the conversation turned to work, the MD became angry due to a criticism of his professional decisions. The MD gathered the employees to assert his managerial authority and assaulted an employee (Bellman) who challenged him.

Bellman's claim against the Company on the grounds of vicarious liability was rejected by the High Court. It was held that a work-related discussion was not sufficient to constitute the actions being "in the course of employment".

However, the Court of Appeal allowed Bellman's appeal and held that Northampton Recruitment was vicariously liable for the assault due to the gross misuse of the MD's authority and position to berate his staff and attack Bellman. The Court held that he had not simply been another drinker at the time of the assault but had been attempting to exercise managerial control over the staff.

In ***WM Morrison Supermarkets plc v Various Claimants*** the Court of Appeal considered whether Morrisons was vicariously liable for a data breach by a disgruntled ex-employee under the Data Protection Act 1998 (DPA).

In this case, Mr Skelton, a senior IT internal auditor employed by Morrisons, was asked to send data to Morrisons external auditors in order to undertake the annual audit. Instead, Mr Skelton took the personal data of nearly 100,000 other employees home on a USB stick and uploaded this information to the internet using his home computer.

The data included names, addresses, bank details, salary and National Insurance details.

Mr Skelton was convicted of fraud and offences under the Computer Misuse Act 1990 and s55 Data Protection Act 1998 ('DPA') for sharing employees' personal data online and disseminating a copy of that data to three national newspapers, in pursuit of a personal grudge against Morrisons.

The Information Commissioners Office (ICO) had decided at the time that no action should be taken against Morrisons regarding their compliance with the DPA. However, employees of Morrisons sought to hold Morrisons vicariously liable for Mr Skelton's misuse of their private information and breach of confidence and Morrisons personally liable for breach of statutory duty owed under s4(4) of the DPA.

The Court of Appeal upheld the decision of the High Court that Morrisons was vicariously liable. They rejected Morrisons contention that the DPA excluded the vicarious liability of an employer for misuse of private information by an employee and for breach of confidence. On the facts there was a sufficiently close connection between Mr Skelton's employment and his wrongful conduct for it to be just to hold Morrisons liable.

In particular, the Court did not accept that Morrisons could not be vicariously liable where the motive for the employee's actions is to cause financial or reputational damage to the employer, as a result of causing harm to third parties. Accordingly, Mr Skelton's motive in pursuing his actions was deemed irrelevant.

Whilst both of these cases are a useful reminder of the principles of vicarious liability, employers should be particularly mindful of the decision in the Morrisons case. It is clear that employers may now be liable for the misuse of personal data by a rogue employee even if they are otherwise compliant with data protection legislation, and even if the wrongdoing was intended to harm them. In the Morrisons case, the Court suggested that employers should insure against data breaches committed by employees given the large potential liabilities involved.

## Discrimination arising from disability – *Sheikholeslami v University of Edinburgh*

In this case, the Employment Appeal Tribunal considered whether the employment tribunal had properly approached the question of causation in relation to claims for discrimination arising from disability and for failure to make reasonable adjustments.

### Background

Section 15(1) Equality Act 2010 (EqA 2010) provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of his disability (and it is not a proportionate means of achieving a legitimate aim). Causation under section 15(1) involves a two-stage test: (1) Did the claimant's disability cause, have the consequence of, or result in "something"? and (2)Did the employer treat the claimant unfavourably because of that "something"?

An employer's duty to make reasonable adjustments will arise where a provision, criterion or practice (PCP) applied by the employer puts a disabled person at a substantial disadvantage in comparison with those who are not disabled. The employer must take such steps as it is reasonable to take to avoid the disadvantage.

### Facts

Professor Sheikholeslami was appointed Professor and Chair of Chemical Process Engineering at Edinburgh University (the University) in 2007. She was promised the use of a laboratory which would be brought up to the required specification although the refurbishment took longer than expected. Professor Sheikholeslami raised concerns on numerous occasions about the delay and other matters. She compared her position with that of a male colleague. She claimed that this colleague had been given laboratory space and other support from the outset of his employment.

In January 2010, Professor Sheikholeslami was diagnosed with work-related stress and depression and did not return to work. In April 2010, she raised a grievance complaining of sex discrimination. The University conducted a diversity review, which concluded there were cultural problems within the School of Engineering. In January 2011, Professor Sheikholeslami asked to be moved out of the School of Engineering. However, the University wanted her to return to her existing laboratory and no resolution was reached.

In October 2011, the University's HR department began considering whether to extend Professor Sheikholeslami's stay in the UK, since her work permit was due to expire on 12 April 2012. No acceptable options were identified outside the School of Engineering and the University terminated her employment with effect from 12 April 2012, giving the expiry of her work permit as the reason.

She brought various claims in the employment tribunal including a claim that the University had failed to make reasonable adjustments in that she had been disadvantaged by the University's insistence that she return to work at the School of Engineering and a claim of discrimination arising from disability in that her dismissal flowed from her disability-related absence.

The tribunal rejected both claims.

With respect to the section 15 claim, the tribunal noted that the University dismissed Professor Sheikholeslami because it believed that her work permit could not be extended if she was not prepared to return to work in the position for which the permit had been granted. The tribunal accepted that the University had applied a PCP that Professor Sheikholeslami should attend work at the School of Engineering. However, it concluded that while she might have found it difficult to work there because of hostility from her colleagues, there was no evidence that the PCP placed her at a substantial disadvantage "because of her disability".

Professor Sheikholeslami appealed.

### Decision

The EAT allowed the appeal on the issue of reasonable adjustments and disability discrimination. The EAT commented that:

- In respect of reasonable adjustments, in holding that there was no evidence of what the substantial disadvantage was, the tribunal appeared to have overlooked the substantial disadvantage relied on by Professor Sheikholeslami. It was her case that as a disabled person with depression, she was unable to return to work at the School of Engineering and that meant that her future employment was at risk. Non-disabled people who could attend work at the School of Engineering would not be put at that risk. The tribunal held that it was necessary for Professor Sheikholeslami to prove facts from which it could conclude "that she would be placed at a substantial disadvantage by that PCP because of her disability". The EAT considered that this was the wrong approach and that a comparison exercise is required to test whether the PCP had the effect of disadvantaging the disabled person more than trivially in comparison with others who did not have any disability.

- In respect of discrimination arising from disability, the tribunal had erred by concluding that there was no evidence of any link between Professor Sheikholeslami's disability and her absence or refusal to return to her post in the School of Engineering. Section 15 required an investigation of two distinct causative issues: (1) Whether A had treated B unfavourably because of an (identified) something; and (2)Whether that something had arisen in consequence of B's disability.
- Here, the "something" was Professor Sheikholeslami's ongoing absence from her existing post and/or her failure to return to it. The tribunal described the critical question as whether Professor Sheikholeslami's refusal to return to her previous role was "because of her disability or because of some other reason", such as her having been badly treated in the department. However the EAT noted that both reasons might be in play if her disability caused her to experience anxiety and stress and an inability to return to the place where she perceived the mistreatment and hostility to be located, leading to her refusal. The tribunal had therefore applied a causation test that was too strict. The critical question for the tribunal, and which it had failed to ask itself, was whether Professor Sheikholeslami's refusal to return had arisen in "consequence of" (rather than being caused by) her disability. This is a "looser connection" potentially involving more than one link in the chain of consequences.

The EAT's decision follows a line of other cases, the effect of which is to loosen the causal link between the disability and the "something" that arises in consequence of it. As a result, it is not difficult for an employee to establish the causal link thereby shifting the burden to the employer to justify its actions. It is important that employers in these circumstances understand the steps to be taken to establish that such actions can be justified under section 15.

## Consultation on ethnicity pay reporting

In March 2017, an independent review by Baroness McGregor-Smith, Race in the workplace, made a number of recommendations for removing the barriers to workplace progression faced by ethnic minorities. In particular, Baroness McGregor-Smith recommended that the government should legislate to introduce mandatory reporting of ethnicity data by £20,000 pay band. In its response to the report, the government expressed a preference for a voluntary, business-led approach to ethnicity pay.

On 11 October 2018, the government announced a "Race at Work Charter" comprising a series of measures to tackle ethnic disparities in the workplace. A number of high profile employers have already signed up to The Race at Work Charter.

One signatory, Lloyds Banking Group, is the first FTSE 100 company to set a goal to increase representation of ethnic minorities at senior levels.

Alongside the Race at Work Charter, Business in the Community published Race at Work 2018: The McGregor Smith report one year on, based on a survey of 24,000 employees. One of the principal findings of the review is that only 11% of employees reported that their organisation collects data on ethnicity pay. In response to this limited voluntary approach, the government has decided that a mandatory ethnicity pay reporting obligation is necessary to enable employers to identify barriers to workplace progression by ethnic minorities. The government's proposals follow the introduction of mandatory gender pay gap reporting in April 2017

The key elements of the consultation are:

**What ethnicity pay information should be reported?** The Government has suggested some alternative approaches:

- One pay gap figure comparing average hourly earnings of ethnic minority employees as a percentage of white employees.
- Several pay gap figures by ethnicity group. This would compare average hourly earnings of different groups of ethnic minority employees as a percentage of white employees (for example, Asian, Black, Mixed, Unknown).
- By pay band or quartile. This approach would show the proportion of employees from different ethnic groups by £20,000 pay bands or by pay quartiles. Employers would be able to see where ethnic minorities are concentrated in terms of pay and identify any apparent barriers to progression.

**Should an employer that identifies disparities in their ethnicity pay be required to publish an action plan?** Under gender pay gap reporting it is not a mandatory obligation for employers to publish a narrative or action plan against their data. Around 50% of employers published a narrative with some form of action plan in the first year of gender pay gap reporting. The government recognises that for ethnicity pay reporting, narrative plans could be useful to report on the quality of pay reporting.

**How can employers overcome the challenges of collecting data?** There is no legal obligation for individuals to disclose which ethnic group they identify with or on employers to collect ethnicity data. The consultation document seeks comments on the challenges faced by employer taking into account amongst other factors, date protection considerations.

**Which employers should report ethnicity pay information?** The government believes that employers of fewer than 250 employees should not be expected to publish ethnicity pay data.

The consultation closes on 11 January 2019. The government suggests that a trial or phased approach could be used with "early adopters" to test the process before mandatory reporting is required.

As it seems clear that the Government is committed to introducing mandatory reporting in this area, employers who are likely to be affected should begin considering whether their current systems and practices will enable them to comply with any future reporting requirements relating to ethnicity.

If you have any questions about these or other employment issues please call: Heather Cowley (Partner & Head of Employment Law Department) on 01582 731161.
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