New Year – New Brand

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We have decided that it is time to refresh our branding to reflect BDBF's leading reputation in the employment law market, its growing

areas of expertise and our sterling team.

To many of you that found ‘Brahams Dutt Badrick French’ a bit of a mouthful, we have listened, and whilst the founding partners (Gareth Brahams, Arpita Dutt, Ruth Gamble (nee Badrick) and Alistair French) remain four of the pillars of our success, we are using our firm’s initials to make life easier for everyone.

So, we are delighted to introduce you to the new ‘BDBF’ website and branding.

2017 saw a growth in our partnership team with Cerys Williams, Polly Rodway, and Nick Wilcox adding their leadership and expertise.

Our newest solicitors are Tom McLaughlin, Clare Brereton and Jamie Barton, bringing our employment team to 15 lawyers, with the support of our Practice Team led by Emma Sell.

In addition to celebrating our success as a go-to firm for senior employees (especially at executive level, in financial services and amongst the medical profession) and partners in professional practices and hedge funds, we hope that you will find our employer ‘Insights Hub’ of interest. We built this to service the increasing number of businesses ranging from entrepreneurs facing the threat of employment disputes, technology companies seeking advice on how to enter the UK market and to grow, and to HR teams of national and global firms seeking day- to- day and strategic advice.

Thank you to all our clients, referrers, suppliers, existing and former employees for enabling us to look forward with verve to the future.

All the best,

BDBF

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Employers can factor into a disciplinary investigation prior incidents even if they went unpunished at the time

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When conducting a disciplinary investigation into an employee’s suspected misconduct, it may be open to an employer to take into account past conduct which had not attracted disciplinary sanctions at the time.

Ms Pillar was a Nurse Practitioner for NHS 24. Her role involved the telephone triage of patients to ensure that they were directed towards care appropriate to their medical priority. Ms Pillar was responsible for two Patient Safety Incidents (also known as PSIs) in August 2010 and July 2012 as a result of her triaging decisions. NHS 24 elected to deal with these PSIs by offering Ms Pillar development plans and additional training rather than by treating them as disciplinary issues.

After a further PSI arose, a disciplinary investigation was commenced regarding Ms Pillar’s conduct. The investigating officer’s report into the most recent PSI made reference to the two earlier PSIs. In December 2013, following a disciplinary hearing, Ms Pillar was summarily dismissed for gross misconduct.

Ms Pillar brought a claim for unfair dismissal, alleging that the investigating officer should not have taken into account previous conduct which had not led to disciplinary action at the time.

The Employment Appeal Tribunal held that Ms Pillar’s dismissal had been fair. The decision to dismiss had been reasonable on the basis of all of the evidence before the decision-maker, and that included the previous PSIs. It was relevant material, so there was no basis on which to conclude that it should not

have been presented to the investigator.

The EAT distinguished between this kind of situation and an expired warning. The expiration of a warning gives an employee a “false expectation” that it would not be determinative in a future disciplinary investigation; Ms Pillar had no such expectation in relation to her previous PSIs. There was no indication of bias, and Ms Pillar had not been denied any opportunities to respond. Therefore, the dismissal was within the range of reasonable responses.

This decision means that it is arguably better to deal with some conduct issues informally to begin with, rather than conducting a disciplinary process and issuing a warning with an expiration date. This seems to leave employers more scope to bring those incidents in as relevant material in future disciplinary investigations to justify findings of gross misconduct.

NHS 24 v Pillar UKEATS/0005/16

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Greek police’s minimum height requirement is indirectly discriminatory

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The Greek police force’s requirement for new applicants to meet a certain minimum height threshold was indirectly discriminatory against women and could not be objectively justified.

Greek national law requires that applicants to police school who wish to train as police officers must be at least 1.7 metres tall without shoes, whether male or female. Ms Kalliri’s application to join the police school was rejected on the basis that she was only 1.68 metres tall. She brought a complaint in the Greek courts, and a referral was made to the European Court of Justice to ask whether the minimum height requirement was compatible with EU equal treatment law.

The European Court of Justice held that the height requirement was indirectly discriminatory on grounds of sex, in that far

more women are likely to be disadvantaged by the minimum threshold than men. Whilst the Greek government did have a legitimate aim in the effective accomplishment of police functions, the height requirement was not a proportionate means of achieving it. This was because not all police roles require physical aptitude and, even if they did, physical aptitude is not necessarily correlated to height.

Other reasons pointed to by the ECJ were that the law had previously required female police applicants to meet the lower threshold of 1.65 metres, and that the minimum height requirement for female applicants to the Greek armed forces, port police and coast guard was only 1.6 metres. Ultimately, if the Greek government wished to ensure the physical aptitude of its police recruits, it should conduct pre-selection aptitude tests rather than applying rigid requirements across the board. For those reasons, the disadvantage caused to women by the height requirement was not objectively justified and amounted to indirect sex discrimination.

Minimum height requirements are probably one of the clearest examples of work-related criteria or policies which have the potential to be indirectly discriminatory. Employers should avoid having any kind of blanket restrictions or requirements unless they are clearly able to show that they are a proportionate means of achieving a legitimate aim.

Esoterikon v Kalliri (C-409/16)

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The importance of risk assessments for breastfeeding workers

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In order to comply with EU law and avoid a finding of direct sex discrimination, employers should conduct individual risk assessments with breastfeeding workers in order to identify the risks that are posed in each worker's particular circumstances.

Ms Ramos was a nurse in the accident and emergency department

of a Spanish hospital. On return from maternity leave, she informed her employer that she was breastfeeding. She stated her belief that her job posed risks to her lactation. In particular, she was concerned about the effects of the shift system; the potential exposure to radiation and infections; and the stress caused by the job itself. In accordance with Spanish law, Ms Ramos asked that her working conditions be adjusted to minimise those risks.

Ms Ramos' employer refused. It stated that her job was not of a category it considered to carry risks to breastfeeding mothers because it was not on the list of risk-based jobs agreed with workers' representatives. On the same grounds, Ms Ramos was refused a financial assistance grant available to at-risk breastfeeding mothers under Spanish law. Ms Ramos' legal challenge of that decision was referred on appeal to the European Court of Justice.

The European Court of Justice held that the failure to assess the risks posed to a breastfeeding worker by reference to that worker's particular circumstances is less favourable treatment on grounds of pregnancy or maternity and constitutes direct sex discrimination. A breastfeeding worker must present evidence capable of showing that such a risk assessment was not carried out. Ms Ramos had evidence from her line manager, who agreed that her job posed risks which the employer had not taken into consideration. It is then for the employer to prove that there has been no discrimination, and Ms Ramos' employer could not do so.

On the basis of this case, employers may want to take a belt-and-braces approach by conducting individual risk assessments for breastfeeding mothers returning to the workplace. However, there is no legal requirement to do so, as UK law prevents women from bringing direct sex discrimination claims on the basis of treatment relating to breastfeeding. Employers who choose to wait it out should watch this space, as UK law could be found to be incompatible with EU law on this point.

Ramos v Servicio Galego de Saude (C-531/15)

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Giving an employee a false reason for dismissal is a breach of the implied term of mutual trust and confidence

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An employer who gives an employee a false reason dismissal may be in breach of the implied term of mutual trust and confidence.

Mr Rawlinson was employed by Brightside Group from December 2014 as its Group Legal Counsel. Shortly after he commenced employment, a new CEO, Mr Wallin, took up office. Mr Wallin soon raised concerns about Mr Rawlinson’s performance, though these were not addressed directly with Mr Rawlinson. By March 2015, Mr Wallin had decided that Mr Rawlinson could not continue; the intention was for Mr Rawlinson to be dismissed on notice in due course and to train his successor during his notice period.

Rather than telling Mr Rawlinson about the concerns over his performance, Brightside led him to believe that that his job was under pressure due to a restructure of the company’s legal services. It told him that they would be shifting towards the use of external legal providers, and that, as a result, his dismissal was effective and that he was expected to work his three months’ notice period.

Mr Rawlinson considered that a TUPE transfer was taking place and asked for confirmation of the name of the firm to which legal services were being outsourced. Brightside refused to inform him; Mr Rawlinson considered this to be breach of contract. He told Brightside he was resigning in response to that breach of contract, thereby freeing himself from his notice period.

Mr Rawlinson brought various claims in the Employment Tribunal including constructive wrongful dismissal (which was worth the balance of his notice pay).

The Employment Appeal Tribunal upheld Mr Rawlinson's claim for constructive wrongful dismissal. It held that the implied term of mutual trust and confidence included a duty not deliberately to mislead. Whilst the employer did not necessarily have to volunteer information, when it chose to do so it had to do it in good faith. In any event, the decision to mislead Mr Rawlinson about the reason for his dismissal was not taken solely to spare his feelings – Brightside was keen for him to work his notice period in order to train his successor. Even though Mr Rawlinson did not rely on the lie as his reason to resign at the time, he could rely on it as justification for having done so once it came to light.

Rawlinson v Brightside Group Ltd UKEAT/0142/17

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Surveillance cameras in university auditorium violated professors' human rights

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A university’s decision to install surveillance cameras in student auditoriums amounted to a breach of their human rights to privacy of the two professors who taught in them.

The University of Montenegro had decided to install surveillance cameras in student auditoriums. It claimed it was doing so for the protection of property and people and in order to monitor teaching. The two affected professors brought claims challenging that decision.

The European Court of Human Rights held that the decision to install the cameras was a breach of the professors’ privacy rights. Although Article 8 of the European Convention on Human Rights bestows the right to respect for private and family life, “private life” should be interpreted broadly to include private social lives. This may also include professional activity which takes place in public.

In addition to teaching, the professors interacted with their

students socially in the auditoriums. It was therefore like any other workplace, so surveillance of it (whether done openly or covertly) constitutes an intrusion into employees' private lives.

In that case, the university's surveillance could only continue if it went no further than is necessary in pursuit of a legitimate aim. Whilst protection of people and property could be a legitimate aim in the abstract, in this case there was no evidence of people or property being at risk. Therefore, the measures could not be justified by reference to that aim. The monitoring of teaching, on the other hand, was not capable of being a legitimate aim.

Antović and Mirković v Montenegro (Application no. 70 838/13) [2017] ECHR 1068

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Morrisons held vicariously liable for its employee's data protection breach

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Morrisons, the supermarket chain, has been held liable for a disgruntled employee’s wilful breach of data protection legislation.

Mr Skelton was employed by Morrisons as a senior IT internal auditor. This role gave him access to sensitive personal data relating to the company’s staff. He also sold a legal slimming drug on the internet in his spare time. In summer 2013, Morrisons subjected Mr Skelton to a disciplinary procedure on the basis that his use of the company’s post room to send the slimming drug had caused alarm when fellow employees thought it was an illicit substance. Mr Skelton remained in his role despite this.

In November 2013, Mr Skelton was asked to send sensitive payroll-related employee data to KPMG (Morrisons’ external auditors). Mr Skelton downloaded the encrypted data on to his work computer before copying it on to a new USB stick for KPMG. He then made a copy for himself on a personal USB stick. In January 2014, using the files he had uploaded to his USB

stick, he posted personal details of 100,000 Morrisons employees on to a file sharing website.

In March 2014, Mr Skelton was arrested and charged with fraud, computer misuse offences and data protection offences. He was convicted and sentenced to eight years' imprisonment.

A group claim was brought against Morrisons by a number of the workers whose personal data had been shared online by Mr Skelton. They argued that not only was Morrisons liable itself for the data breach, but it was also vicariously liable for Mr Skelton's breaches in its capacity as his employer.

The High Court held that Morrisons was not liable itself for breaches of data protection legislation, as it had not been the controller of the data once it left its servers. However, it held that Morrisons was vicariously liable for Mr Skelton's breaches despite his actions seemingly having been deliberate and motivated by spite. There was held to be a sufficient connection between Mr Skelton's actions and his employment with Morrisons, given that his access to the data was obtained through his job – indeed, Morrisons had entrusted him with the data as part of his role, and in doing so, it took the risk that he would misuse it. It was Mr Skelton's duty to disclose the data and he did so, albeit in an unauthorised way. Mr Skelton's motive was not relevant to the finding of vicarious liability.

This judgment appears to be heavily motivated by the policy consideration of ensuring that victims of data protection breaches have a means of redress. Indeed, the High Court acknowledged that Morrisons had a number of appropriate measures in place to protect the data on its servers from misuse, but held it liable in any event.

Various claimants v WM Morrisons Supermarket plc [2017] EWHC 3113

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Holiday entitlements carry over indefinitely if employer refuses to offer holiday pay

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Workers’ entitlements to paid annual leave will carry over indefinitely in circumstances where the employer has refused to offer holiday pay. This means that the accumulated unpaid holiday pay earned throughout the working relationship becomes payable as a lump sum on termination.

Mr King was a salesman for the Sash Window Workshop. For 13 years, he worked on a commission-only basis and was never paid for periods of sickness absence or annual leave. He was at one stage offered an employment contract with the company, but he rejected it. The company terminated Mr King’s contract when he reached the age of 65; in response, he brought claims of age discrimination and unpaid holiday pay.

In relation to his holiday pay claim, Mr King alleged that he had not taken his annual leave entitlement each year because he had been told it would be unpaid.

It having been held that Mr King was a worker (and therefore eligible to receive holiday pay), the remaining question was whether Mr King was entitled to payment in respect of the proportion of annual leave which he had declined to take each year.

The European Court of Justice noted that a worker who is unsure as to whether they will be paid for annual leave (or knows they will not be paid) will not get the full benefit of that annual leave as a period of relaxation, and may be discouraged from taking it altogether. Therefore, the question of whether Mr King had actually put in any holiday requests at any stage was not pertinent.

The ECJ held that, where a worker has not made use of their right to annual leave over a period of years because the employer wrongly denied holiday pay or indicated that it would, that holiday entitlement carries over until termination.

This case creates some potential exposure for employers for large holiday pay payments falling due on termination. Employers may wish to offer paid holiday in future, although in doing so they may risk undermining any claims that such staff are not ‘workers’ or ‘employees’ and not therefore entitled to paid holiday. In any event, offering paid holiday from now onwards would not remove the risk of claims in respect of untaken holiday in the past.

King v The Sash Window Workshop Ltd and another C-214/16

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