Government confirms wide-ranging changes to the Working Time Regulations and TUPE from 1 January 2024

Earlier this year, the Government published a consultation paper which proposed a number of reforms in the areas of working time, paid holiday rights and rights upon the transfer of a business or an outsourcing (the Consultation). On 8 November 2023, the Government published its response to the Consultation, setting out which reforms will be taken forward (the Response), together with a draft Statutory Instrument intended to bring the changes into effect. In this briefing, we remind you of the Government's proposals and explain what is and is not being taken forward.

1. Record-keeping requirements

In 2019, the ECJ ruled that the Working Time Directive (**WTD**) required employers to have a system in place to measure the daily working time of all workers. Importantly, that system had to go beyond merely recording overtime hours or drawing upon other sources of information which could be pieced together to identify daily working hours. The system of recording daily hours had to be objective, reliable and accessible.

The Consultation proposed to legislate to clarify that businesses would no longer have to keep a record of daily working hours of their workers.

The Government has decided to take this proposal forward. Regulation 9 of the Working Time Regulations (**WTR**) will be amended to clarify that businesses do not have to keep a separate record of the daily working hours of workers provided that they are able to *“demonstrate compliance without doing so.”*

2. One vs two pots of annual leave

The WTR provides that workers are entitled to 5.6 weeks’ annual leave per year. However, this holiday entitlement is split into two allocations:

- 4 weeks’ leave as required by the WTD (**Regulation 13 leave**); and
- 1.6 weeks’ leave which was granted by the UK Government on top of the minimum WTD requirement (**Regulation 13A leave**).

Different rules about pay apply to Regulation 13 leave and Regulation 13A leave. ECJ caselaw has made it clear that workers must be paid their “normal pay” for Regulation 13 leave. This may include things like commission, allowances and some types of overtime payment. In contrast, workers are only entitled to be paid basic pay for their Regulation 13A leave (although employers may elect to pay normal pay for Regulation 13A leave if they wish and, indeed, many do).

The Consultation proposed to replace Regulation 13 leave and Regulation 13A leave with a single leave entitlement of 5.6 weeks and sought views on what the applicable rate of pay should be.

The Government has decided not to take this proposal forward and, instead, will retain the two distinct pots of leave and their associated rates of pay. However, the WTR will be amended to spell out which types of payments count when determining pay for Regulation 13 leave. These are:

- payments, including commission payments, which are intrinsically linked to the performance of tasks which a worker is obliged to carry out under the terms of their contract;
- payments for professional or personal status relating to length of service, seniority or professional qualifications; and/or
- other payments, such as overtime payments, which have been regularly paid to a worker in the 52 weeks preceding the calculation date (it does not expressly state whether *voluntary* overtime payments should be included, however, if they are "regularly paid" to a worker then we think they will probably count).

This change is designed to reflect the existing rulings of the ECJ on this issue in our domestic legislation for the first time (and necessitated by Brexit). Employers should have already incorporated these types of payments into their calculation of Regulation 13 holiday pay. However, where this has not yet been done, action should be taken to regularise the position now.

3. Accrual of annual leave

On the accrual of leave the Consultation proposed that workers should accrue their annual leave entitlement at the end of each "pay period" until the end of the first year of their employment.   The aim was to provide workers with a steady amount of holiday entitlement as they work and to simplify the calculation of holiday entitlement for employers.

The Government has decided to change the position on accrual of leave for "irregular hours workers" and "part-year workers" only (and there will be new legal definitions of both categories of workers). Further, the new position will apply throughout the employment relationship, not just in the first year as originally proposed. There will be nochange to the accrual of leave for other workers, who will continue to accrue their 5.6 weeks' leave at the beginning of the leave year, save for in the first year of employment.

Under the new system, irregular hours and part year workers will accrue annual leave at the end each pay period at a rate of 12.07% of the number of hours worked in that pay period, up to a maximum of 28 days per year.   Special rules will apply if the worker is on sick leave or family leave. Importantly, this new system will nullify the effect of the Supreme Court's decision in Harpur Trust v Brazel, which said that the holiday entitlement of part-year workers could not be pro-rated below 5.6 weeks' per year, no matter how many weeks they had actually worked each year. The new system means that the annual leave entitlement of such workers will be proportionate to the number of hours they have actually worked.

The new accrual system for irregular hours and part-year workers will apply to leave years commencing on or after 1 April 2024 only. Employers will need to decide whether it will allow such workers to book and take more holiday than they have accrued under the new "accrue-as-you-go" system. Where this is to be permitted, employers should ensure that they have a right to make deductions in respect of any holiday taken but not accrued when the employment relationship terminates.

4. Carry-over of annual leave

On the carry-over of unused leave the Consultation proposed to remove the regulations which permitted workers to carry over their Regulation 13 leave into the following two annual leave years where it was not reasonably practicable to take it during the coronavirus pandemic. The Consultation noted that those regulations were no longer needed.

The Government has decided to take forward this proposal. This means that from 1 January 2024, workers will not be able to carry over any accrued Covid-related Regulation

13 leave. Workers will have until 31 March 2024 to use up any Covid-related leave that was accrued before 1 January 2024.

On top of this, the Government has decided to amend the WTR to clarify when workers may carry over accrued leave in other circumstances. This change is designed to reflect the existing rulings of the ECJ on this issue in our domestic legislation for the first time (and necessitated by Brexit). The WTR will specify that workers may carry forward their accrued but untaken leave as set out in the table below.

Circumstances?	**What leave can be carried over?**	**For how long may the leave be carried over?**
Worker does not take annual leave (or takes it, but it is not paid) because the employer: denies the worker's right to paid annual leave (e.g. they maintain that the individual does not have worker status);does not give the worker a reasonable opportunity to take leave or encourage them to do so; ordoes not warn the worker that they will lose their leave if they do not use it by the end of the leave year.	Regulation 13 leave	Until the end of the first full leave year in which the employer is no longer at fault.

Worker unable to take the leave due to absence on sick leave.	Regulation 13 leave	18 months from the end of the holiday year in which the leave arose.
Workers unable to take the leave due to absence on maternity, adoption, shared parental, parental, paternity or parental bereavement leave.	Regulation 13 and 13A leave	12 months from the end of the holiday year in which the leave arose.

5. Introduction of rolled-up holiday pay

“Rolled-up” holiday pay is a system whereby no holiday pay is paid during the weeks that a worker takes their annual leave entitlement, and, instead, their pay is enhanced during periods of work. In other words, the enhanced pay represents a payment in lieu of holiday pay. In 2006, the ECJ ruled that the practice of rolled-up holiday pay was unlawful and that workers should be paid holiday pay at the time that their annual leave was taken.

The Consultation proposed that rolled-up holiday pay be introduced as an option for all workers. It also proposed that the default enhancement rate be set at 12.07% of the worker’s pay (which is the result of 5.6 weeks’ annual leave divided by 46.4 working weeks of the year).

The Government has decided to take this proposal forward but only for irregular hours and part-year workers (and, as above, there will be new legal definitions of both categories). Rolled-up holiday pay will not be permitted for other types of workers. Where an employer elects to pay rolled-up holiday pay to an eligible worker, it must be:

- calculated at 12.07% of the worker’s pay;
- paid at the same time as pay for work done; and
- itemised separately on the payslip.

Special rules will apply if the worker is on sick leave or family leave. Rolled-up holiday pay will be permitted for leave years commencing on or after 1 April 2024 only.

6. Changes to TUPE consultation requirements

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**) protect employees’ rights when the business or undertaking for which they work transfers to a new employer, either when the business changes owner or a service transfers to a new provider. Currently, before such a transfer, the outgoing employer must inform and consult with representatives of the affected employees. These can be existing representatives (e.g. trade union representatives) or ones that are elected just for this purpose. However, outgoing employers with up to nine employees may inform and consult with affected employees *directly* where there are no existing representatives in place.

The Consultation proposed that the option of consulting with affected employees directly should be extended to businesses:

- with up to 49 employees; and
- with any number of employees where a transfer of up to nine employees is proposed.

However, this option would only be available where there were no existing representatives.

The Government has decided to take this proposal forward in the form originally proposed.

What are the next steps?

As above, these reforms are due to come into force on 1 January 2024, save for the changes affecting irregular hours and part-year workers, which will apply to holiday years commencing on or after 1 April 2024. Some of these changes are fiddly and may necessitate to changes to employment contracts and Staff Handbooks, for example, clarifying when leave may be carried over and for how long, or introducing rolled-up holiday pay. We would recommend that employers conduct an audit of their existing holiday pay arrangements and then identify any necessary and desirable changes to be made. It is always a good idea to seek legal advice before making major changes to holiday arrangements.

[Retained EU Law – Government Response, 8 November 2023]

[The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023]

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Equality Act 2010 to be amended to reflect EU discrimination law principles.

On 1 January 2024, the Equality Act 2010 will be amended to reflect certain EU discrimination law principles which would otherwise have been lost as a result of Brexit. In this

briefing, we explain the current position and how the legislation will change next year.

What's the background?

A large proportion of the UK's legal framework – including its employment law framework – was underpinned by the law of the European Union, primarily a type of law known as a "directive". EU directives had to be implemented into UK law, either as an Act of Parliament or a statutory instrument. Certain other forms of EU law were directly applicable in the UK without the need for any implementing laws – for example, the rights set out in EU Treaties had what is known as "direct effect". Decisions of the Court of Justice of the European Union were also binding on the UK.

Brexit required changes to be made to this legal framework. Acts of Parliament implementing EU directives remained in place. However, all the relevant statutory instruments were due to automatically fall away once the European Communities Act 1972 was repealed. To avoid legal chaos when Brexit happened, the Government decided to retain these statutory instruments and transfer them into UK law. It also chose to retain directly applicable EU law and decisions of the Court of Justice of the European Union made on or before 31 December 2020. Together, these laws and decisions were referred to as "Retained EU Law".

However, the Government decided that the time was right to look again at whether Retained EU Law should be kept or repealed, and the Retained EU Law (Revocation and Reform) Act

2023 was passed this year to implement further change. The Act provides that Retained EU Law contained in around 600 statutory instruments and all directly applicable Retained EU Law will expire on 31 December 2023. On top of this, the Act makes a number of other provisions which are aimed at downgrading the continued impact of EU law on UK law, for example, by making it easier for the Court of Appeal and Supreme Court to depart from previous ECJ decisions and domestic decisions that have been influenced by ECJ decisions.

What does this mean for discrimination law in the UK?

UK discrimination law was not affected by the loss of Retained EU Law contained in certain statutory instruments. In fact, as far as employment law is concerned, only a handful of somewhat niche statutory instruments will be lost (you can read more about this in our briefing here). However, the loss of directly applicable rights and case law principles *would* have an impact on discrimination law.

To avoid uncertainty, the Government has taken action to ensure that existing EU discrimination law rights and principles are reflected in the Equality Act 2010 from 1 January 2024. Therefore, it is the form rather than the substance of the law that will change. Having these principles written down in the Equality Act 2010 should provide clarity to both employers and employees.

However, it is important to remember that EU law principles on discrimination law will continue to develop after 1 January 2024 and those new principles will *not* apply in the UK, nor be reflected in the Equality Act 2010. Therefore, a point will come where UK discrimination law begins to diverge from the position in EU member states.

What changes will be made to the Equality Act 2010?

The table below summarises the changes that will be made to the Equality Act 2010 on 1 January 2024:

Area	EU discrimination law principles to written into the Equality Act 2010
Pregnancy, childbirth and maternity – special treatment (s. 13(6)(b))	Currently, the Equality Act 2010 provides that special treatment may be afforded to women in connection with pregnancy and childbirth and this will not amount to discrimination against men. This will be amended so that special treatment may be afforded to women in connection with pregnancy, childbirth and maternity.

Pregnancy, childbirth and maternity – unfavourable treatment after the protected period (s.18(2))	Currently, the Equality Act 2010 provides that protection from pregnancy and maternity discrimination extends beyond the end of the "protected period" only where the treatment relates to the implementation of a decision taken *during* the protected period. It does not extend to protection from unfavourable treatment which occurs after the protected period, but which is because of the pregnancy or pregnancy-related illness and relates to the protected period. This will be amended so that women are also protected from unfavourable treatment after they return from maternity leave where that treatment is related to the pregnancy or a pregnancy-related illness occurring before their return.

Pregnancy, childbirth and maternity – protection during maternity leave under equivalent schemes (s.18(6) and new 18(6A))	Currently, where a woman who does not have a statutory entitlement to maternity leave but has an entitlement to maternity leave which is equivalent to compulsory, ordinary and/or additional maternity leave arising in law, the protected period during which she is protected from pregnancy and maternity discrimination is limited to two weeks (e.g. an LLP member who is entitled to 52 weeks' maternity leave under the LLP Members' Agreement). This will be amended so that the protected period covers the whole of the equivalent maternity leave period.
Breastfeeding mothers (deletion of s.13(7))	Currently, the Equality Act 2010 does not protect breastfeeding women from less favourable treatment at work (and, in fact, expressly excludes it). This will be amended so that less favourable treatment at work because a woman is breastfeeding may constitute direct sex discrimination.

Indirect discrimination – same disadvantage (new s.19A)	Currently, the Equality Act 2010 states that a claimant wishing to bring an indirect discrimination claim must possess the relevant protected characteristic. This will be amended so that a claimant wishing to bring an indirect discrimination claim does not need to possess the protected characteristic, provided they can show that they suffered the same disadvantage arising from a discriminatory provision, criterion or practice as a person who has the protected characteristic.
Discriminatory statements (new s.60A)	Currently, the Equality Act 2010 does not make provision for discrimination to occur outside an active recruitment process and requires there to be an identifiable victim. This will be amended so that a statement about not wanting to recruit people with certain protected characteristics may give rise to a direct discrimination claim, even if there is no active recruitment process ongoing. The new section also provides that an employer may be vicariously liable for statements made by someone who is not its employee or agent where there are reasonable grounds for the public to believe that they are capable of influencing the making of a recruitment decision by the employer.

Equal pay claims (new s.79(4A) and s.79(4B))	Currently, the Equality Act 2010 allows for comparisons with someone employed by the same or an associated employer either at the same establishment or at a different establishment where common terms apply.This will be amended so that an employee may compare their pay with an employee working for a different employer, where their terms of employment are attributable to a “single source” responsible for setting or continuing the pay inequality and which can restore equal treatment (or where the terms are governed by the same collective agreement).

Definition of “disability” (Schedule 1, new paragraph 5A)	When evaluating “normal day-to-day activities”, the Equality Act 2010 definition of disability refers only to work-related activities which are general, common and frequent (e.g. sending emails, interacting with colleagues). This will be amended so that a person’s ability to participate fully and effectively in working life on an equal basis with other workers must be considered when deciding what is a “normal day-to-day activity”. This will encompass activities which are infrequent (e.g. applying for a job or sitting an examination for promotion) as well as activities which are not common to the majority of jobs, but which are common across different types of employment (e.g. heavy lifting or night working).

The Equality Act 2010 (Amendment) Regulations 2023

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Holding an employee to a "heat of the moment" resignation may amount to a dismissal

In *Omar v Epping Forest District Citizens Advice* the EAT has set out detailed guidance on how resignations should be assessed and whether they bind the employee. Here, the EAT said the Employment Tribunal had been wrong to conclude that an employee who had resigned in anger for the third time in three weeks really intended to resign.

What happened in this case?

Mr Omar worked as an Advice Session Supervisor for the Epping Forest District Citizen's Advice Centre. On 3 February 2020, the CEO of the Advice Centre wrote to Mr Omar regarding his timekeeping. Mr Omar was unhappy with the letter and verbally resigned to his line manager, Ms Skinner. Ms Skinner told him to calm down and that she would not accept his resignation. On 5 February 2020, Mr Omar became angry about something else and resigned for a second time. Again, Ms Skinner advised him to calm down and said she would not accept this resignation.

On 19 February 2020, Ms Skinner questioned holiday dates that Mr Omar believed he had booked, but which were not showing up on the staff leave database. Mr Omar responded by shouting that Ms Skinner knew full well that he had booked leave. He then said he was *"done with the organisation"* and that Ms

Skinner should *“tell who you need to but I’m off because I’ve had enough”.* Ms Skinner reported that he also said: *“these are fucking bullshit* [sic]*….that’s it, from today a month’s notice”.*

Later that day, Ms Anyanwu, the CEO of the Advice Centre, met with Mr Omar and Ms Skinner to discuss what had happened. Mr Omar said he had “blown up” because he was still upset about the timekeeping letter and because he was under pressure outside work, helping to care for his mother who had dementia. Mr Omar alleged that Ms Anyanwu had asked whether he and Ms Skinner could continue working together and that she had offered him an alternative role (implying that his resignation had not been accepted). The Advice Centre’s account of that meeting was that Ms Anyanwu had asked the pair whether they could continue to work together over Mr Omar’s notice period only. Further, it said no alternative role was offered. It was noted that Mr Omar was emotional in the meeting, but he did not attempt to withdraw his resignation.

On 21 February 2020, Mr Omar met with Ms Anyanwu again. She told him that Ms Skinner had confirmed that she could no longer work with him. Mr Omar said he was then told that, therefore, his resignation would stand. The Advice Centre’s case was that Mr Omar said in response that he could not work with Ms Skinner either and that, therefore, his resignation would stand. In any event, at this meeting Mr Omar agreed to put his resignation in writing. However, Mr Omar did not do that. Instead, on 23 February 2020 he sent an email to Ms Anyanwu stating that he wished to retract his resignation as it was given in the “heat of the moment”. He suggested that they allocate him to work from a different office. The Advice Centre refused to accept the retraction of the resignation and treated his employment as having terminated on 19 March 2020, one month from the resignation date.

Mr Omar claimed that he had been unfairly dismissed. The Employment Tribunal decision was very brief and concluded that Mr Omar *had* resigned, and that the Advice Centre had not offered him an alternative role. As he had resigned, there was no dismissal and the claim failed. Mr Omar appealed to the EAT.

What was decided?

The EAT overturned the Tribunal's decision, finding that it was *"substantially flawed"*. It had failed to make the necessary findings of fact to support its decision. Further, it had not applied the correct legal principles to the case, although this was *"understandable"* because no previous cases had drawn together all the principles governing the interpretation of resignation statements.

That being the case, the EAT reviewed all the legal authorities and set out a comprehensive statement of the principles governing notices of resignations (and, importantly, which apply in the same way to notices of dismissal given by an employer):

1. There are no "special cases" where the principles do not apply. The same rules apply in all cases where notice of resignation given in the employment context.
2. A notice of resignation cannot be unilaterally retracted by the employee.
3. Words of resignation (or words which potentially

constitute words of resignation) must be construed objectively in light of all the circumstances and should be judged from the position of a “reasonable bystander” in the position of the employer.

4. The uncommunicated subjective intention of the employee is *not* relevant (i.e. it does not matter what was going through their mind when they said the words) – what matters is what was said. However, if they later tell the employer what their intention was, this may be a relevant factor to be taken into account when assessing whether they had really meant to resign.

5. What the employer understood by the resignation words *is* relevant (as it suggests what a reasonable bystander would have thought), but it is not determinative.

6. All of the circumstances that the parties knew, or ought to have known, may be taken into account when construing the words of resignation.

7. What must be apparent to the reasonable bystander is that the words of resignation or notice of resignation were intended to have *immediate* effect – an employee should not be taken to have resigned where he or she merely expresses an intention to resign in the future.

8. It must also be apparent to the reasonable bystander that the employee genuinely intended to resign and that they were in their right mind when they did so. That does not mean the resignation has to have been a reasonable thing to do. A resignation will be effective if it is unreasonable but genuinely intended. However, if the employee is behaving irrationally then this would

suggest that the words were not really intended.

9. The assessment of whether the words were genuinely intended should be made at the time that they were said. However, evidence about what happened *afterwards* may cast light on whether the resignation was really intended at the time. That evidence may lead to the conclusion that the resignation was not really intended – if so it will not be effective. On the other hand, such evidence may suggest that the resignation*was* really intended, but the employee has simply had a change of heart – in which case the resignation will stand. The distinction between these two situations *"is likely to be very fine"* and it is a matter for Tribunals to decide on the particular facts.

10. There is no limit on the period of time after the resignation which may be considered but the longer the time that elapses, the more likely it is that the evidence will be evidence of the employee's change of heart.

11. The sorts of circumstances that might suggest a resignation was not really intended include where the employee is angry, is behaving out of character, has a relevant mental impairment, is immature or is under extreme pressure from another party. Although none of these factors will necessarily mean that the employee did not intend to resign. Again, this is something for a Tribunal to decide on the facts.

12. These rules apply to written notices of resignation in the same way as verbal notices. However, a written notice will usually indicate a degree of thought and

care by the employee which would make it less likely that a reasonable bystander would conclude that the employee did not mean to resign.

The EAT remitted the case to a fresh Employment Tribunal for a full rehearing, noting that it was a *“finely balanced case”.*

What does this mean for employers?

Where a resignation is given in a calm and measured way, and not in response to something which has angered or upset the employee, employers will usually be safe to take it at face value. However, where an employee blurts out words of resignation in a pressured situation, for example, after an argument with a colleague, during a disciplinary process or after a flexible working request has been rejected, employers should pause to assess whether it is reasonable to rely on the resignation.

In these situations, the line manager who received the resignation should make a note of precisely what was said and what they understood by those words. An employer may wish to ask anyone who witnessed the resignation to make a statement of what they saw and understood to have taken place. In some cases, the safest course of action may be to ask the employee to take some time to reflect and, if they still wish to resign, to provide written notice of the same.

Where an employee seeks to retract a heat of the moment resignation, an employer should have regard to the comprehensive guidelines issued by the EAT in this case and seek advice if necessary. Even where it is concluded that a resignation is *not* effective, an employer may still be able to fairly dismiss the employee for their conduct in connection with the “resignation”. For example, in this case, Mr Omar’s repeated threats of resignation and the fact that he shouted and swore at his line manager would have justified disciplinary action, potentially up to dismissal.

Omar v Epping Forest District Citizens Advice

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Employee who was anxious about performing part of her role was disabled.

In the recent case of Williams v Newport City Council, the EAT concluded that an employee who was severely anxious about performing one part of her job role was disabled. Although the part of the role in question was not a normal day-to-day activity, her anxiety about it substantially and adversely affected her ability to perform her other normal day-to-day

activities.

What happened in this case?

Ms Williams worked as a senior social worker in the Council's Fostering Team. The Fostering Team was responsible for assessing the suitability of a person to foster a child. These "viability assessments" were open to challenge in the Family Court. In practice, Ms Williams did not carry out viability assessments, but other members within her team did. However, in January 2015 she was asked by her manager to attend a Family Court hearing concerning a viability assessment which had been conducted by another team member. Ms Williams was unable to answer the Judge's questions which led to the Judge being deeply critical of her. Indeed, Ms Williams recorded that one of the barristers had described her as having been treated like *"a human punch bag".*

After this incident, Ms Williams carried on with her role and did not attend Court again. However, in March 2017, her manager retired, and she was told that she would now need to carry out viability assessments and attend Court if they were challenged. Ms Williams was upset at this prospect given what had happened in 2015. She was signed off sick with stress and remained off sick for 18 months. While she was absent, several occupational health reports were obtained, all of which said she was unfit to work. By July 2018, she was feeling much better, and she submitted a Fit Note from her GP which said she would be fit to return subject to a phased return and the removal of Court work from her role. The Council refused and told her that, in the circumstances, she should obtain another Fit Note to certify her further sickness absence.

The Council then launched a capability process. At the hearing, the Council confirmed it did not consider that it was reasonable to remove the Court work from her role and that it had been unable to identify any alternative roles. The Council said that her absence could not be sustained, and it terminated her employment with effect from 24 September 2018. Ms Williams brought claims of unfair dismissal, discrimination arising from disability, indirect disability discrimination and failure to make reasonable adjustments. However, the Council did not concede that Ms Williams was disabled. The disability status question was considered by the Employment Tribunal at the outset of the hearing of her claims.

The Tribunal upheld Ms Williams' unfair dismissal claim but dismissed her disability discrimination claims on the basis that she was not disabled. The Tribunal found that she had a mental impairment (i.e. anxiety) from when she went off sick up to the dismissal decision. However, when the Tribunal came to look at the question of substantial impact on her normal day-to day-activities, it found that by the time of the dismissal she was able to undertake the normal day-to-day activities relevant to her professional life (e.g. getting ready for work, travelling to work, moving around premises, interacting with people, dealing with paperwork, using a computer etc). The one activity that she could *not* do was attend Court hearings. However, this was a specialised activity and not a day-to-day activity (whether in connection with her particular job role or in general) and, therefore, it was out of scope.

Ms Williams appealed to the Employment Appeal Tribunal.

What was decided?

The EAT held that the Tribunal had failed to consider the implications of its own findings that Ms Williams was still off sick when she was dismissed, and this was because the Council had rejected the suggestion of removing the Court work from her role. In other words, she continued to be unable to work because of her intense anxiety about having to return to a job which required her to attend Court. All of this was supported by medical evidence, and the Council had said it did not doubt the genuineness of her absence.

Furthermore, in the successful unfair dismissal claim, the Tribunal had observed that the employer had not really engaged with the question of whether it could have removed the Court work. Essentially, that claim had succeeded because the Tribunal considered that a reasonable employer would have removed the requirement and that would have enabled Ms Williams to have returned to work. In other words, unless and until it was removed, Ms Williams remained affected by anxiety to such a degree that she was unable to return to work at all.

Accordingly, the Tribunal should have concluded that Ms Williams' anxiety did substantially affect her normal day-to-day activities at the relevant time and that it was sufficiently long term.

Although the appeal had succeeded on this basis, the EAT went on to consider the question of whether attending Court should itself have been treated as a normal day-to-day activity. Ms Williams had argued that it was normal thing to do in a range of roles and was not specialised. The EAT accepted that attending Court was not unique to social workers but said that it did not necessarily follow that it was a "normal" activity. The EAT said the Tribunal was entitled to conclude that such a requirement was not so commonly found among a range of other work situations as to meet that test (although it is possible that another Employment Tribunal might take a different view).

The EAT also said that it was not possible to approach the question by looking at the tasks involved in attending Court in isolation (e.g. reading documents, travel, public speaking, answering questions), which, by themselves, *would* be normal day-to-day activities. The EAT rejected this approach on the basis that *"such a reductive analysis would fail to capture the distinctive nature of the task…specifically in the context of contested litigation over an inherently highly-charged subject, in person to a judge in a Court hearing."*

The case was remitted to the Employment Tribunal to hear the disability discrimination claims.

What does it mean for employers?

The temptation for an employer in this situation is to assume that if an employee cannot perform a core part of their job role then a dismissal will be justified. In many cases, this will be right. However, where an employee is disabled, employers must pause to consider reasonable adjustments before moving to dismiss.

For example, could the problematic part of the job role be removed, whether on a temporary or permanent basis? Indeed, the EHRC's Employment Statutory Code of Practice states that altering a disabled person's duties, perhaps by transferring them to another employee, might be a reasonable adjustment. In this case, Ms Williams had performed her role for around seven years and had only been asked to attend Court once, which suggests that it would have been reasonably possible to adjust the role in the way that she wanted. In another recent case – Churchman v Frazier & Deeter UK LLP – a depressed employee was dismissed after she had asked for direct client contact to be removed from her role on a temporary basis. The Employment Tribunal said the dismissal amounted to discrimination arising out of her disability, which could not be justified. Furthermore, the request was a request for a reasonable adjustment and a protected act, meaning that the dismissal was also held to be an act of victimisation.

Alternatively, it might be reasonable to redeploy a disabled employee to fill an existing vacancy, even if they are not the best candidate. Or it might be reasonable to create a new role for them altogether, although whether this is reasonable or not will be fact-specific. In one case, it was held that it would have been a reasonable adjustment where the employer effectively had a *"blank sheet of paper"* so far as job specifications were concerned. In another case, it was held that swapping a disabled employee's role with that of a non-disabled employee was a reasonable adjustment, even where the non-disabled employee was happy doing his job.

The key take-away is not to assume that dismissal is safe in this situation. Reasonable adjustments must be considered first and may require you to go further than you might think. This will be fact-dependent, and it is always a good idea to seek legal advice in this situation. Once reasonable adjustments have been exhausted, then a fair dismissal should usually be possible, but a fair disciplinary/capability process should always be followed prior to dismissal.

Williams v Newport City Council

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.