Disabilities in the workplace – Lunchtime Webinar – Wednesday, 11 October 2023

In this 1-hour webinar, BDBF Partner Clare Brereton and Associate Anthony Nzegwu explore what constitutes a disability and, where a disability is identified, discuss what obligations employers may have. This webinar was originally delivered on 11 October 2023 and reflects our understanding as of that date. Do get in contact with either of the speakers if you would like to discuss any of the issues raised.

To view the PDF webinar slides please click on the image below, or view the recording of the webinar:



https://www.youtube.com/watch?v=OZLZVE7rvJA

Please contact Clare Brereton (ClareBrereton@bdbf.co.uk), Anthony Nzegwu (AnthonyNzegwu@bdbf.co.uk) or your usual BDBF contact, for further advice.

Divorce and the workplace: what can employers do to support employees?

It is widely acknowledged that divorce is one of the most stressful life events that a person can ever go through. Given that most of those who divorce are of working age, employers should take care to understand the needs of divorcing employees and the potential risk areas. In this article, we consider the ways in which divorce may affect an employee at work and what employers can do to help.

Why exactly is divorce so difficult?

Divorce sets in motion a host of extremely challenging issues which usually have to be dealt with at the same time. This could include some, or all, of the following:

- Dealing with the emotional distress of the relationship ending (accentuated where the relationship was abusive) and also helping any children deal with the change.

- Adjusting to the loss of the family unit and managing loneliness and uncertainty.

- Leaving the marital home and living in insecure accommodation for a period of time.

- Worsening of both the immediate and long-term financial situation.

- Having to establish arrangements for shared contact with any children and potentially having increased responsibility for childcare arrangements.

- Losing established support networks (e.g. spouse's family and mutual friends).

- Coping with disapproval from family, friends and/or a religious community.

On top of all of this, in most cases, legal assistance will be required to formalise the divorce and the post-divorce arrangements regarding finances and/or children. This can involve significant legal fees at a time when finances are already stretched. The average cost of a divorce in the UK in 2021 was £14,651.

In acrimonious divorces, the legal process is likely to become protracted and involve costly Court battles to divide up the marital assets and determine issues such as maintenance payments, child custody and contact arrangements. In relationships where abuse was present, the process is even

more high stakes, with a fact-finding hearing to determine the allegations of abuse likely to be needed, together with an assessment by Cafcass – the Children and Family Court Advisory and Support Service.

Even the most resilient amongst us would be knocked off course by these challenges.

How might divorce affect your employee at work?

At the very least, a divorcing employee will feel preoccupied by the process – it is time consuming, and they will face lots of practical changes. However, the increased emotional and financial stress, combined with the loss of support, may also lead to anxiety, depression and/or lead to substance abuse. In a 2023 survey conducted by the Positive Parenting Alliance (**PPA**), 95% of respondents reported that their mental health suffered when divorcing.

This is not just a personal problem for the employee – it creates the risk of the following workplace problems arising:

- **Performance**. Your employee may find it hard to focus on work and get through their workload in the usual way. There may also be a dip in the quality of work produced.

- **Conduct**. The increased stress could manifest in various ways, with one employee becoming more short-tempered or abrupt than usual, while another may become upset and tearful easily. Where the person's spouse also works for

you (or mutual friends of the divorcing couple do) the risk of cold shouldering or arguments at work is raised.

- **Sickness absence**. Another major risk is sickness absence. The PPA survey reported that 39% of divorcing employees had to take either sick leave or unpaid leave. Yet the loss of one of the remaining sources of stability in an employee's life (i.e. their work routine) could well serve to compound the stress they are under. In serious cases, the employee's ill health may mean they are regarded as disabled for the purposes of the Equality Act 2010.

What can you do to support an employee going through a divorce?

In the PPA survey, just 9% reported that their employers had policies or support in place to help them through their divorce. However, things are changing. Earlier this year, the PPA worked alongside several major UK employers (namely, Asda, Tesco, NatWest, Metrobank, Unilever, Vodafone and PwC), to embed policies and support for staff going through a divorce or separation.

So, what steps can employers take to help employees through one of the most difficult times of their lives?

The starting point is to be compassionate and patient. Accept that this is an extraordinary time in the employee's life, and they will come out the other end. In the meantime, there is no

getting away from the fact it will be a difficult time for them.

Where work conduct or capability is affected to a degree which you cannot overlook, consider what you can do to help the employee turn things around before jumping to instigate a formal process (which will likely only worsen their situation). A combination of the following things could make a difference:

- **Offer additional paid and/or unpaid absence**. Divorce eats up time. Could you offer them additional paid and/or unpaid leave to deal with particular flash points such as Court hearings, moving house or settling children into new schools?

- **Offer to change the employee's working pattern**. Could you offer a flexible working arrangement to help the employee accommodate things such as legal appointments, child pick-ups or counselling sessions? Could you allow them to take more frequent breaks during the working day if they feel overwhelmed or need to make a personal call?

- **Offer to change the type of work the employee has to do**. Think of ways that you can reduce the burden on an employee suffering with stress. Could you reallocate some of the employee's duties for a period of time? Could you redeploy them to a more straightforward role on a temporary basis? It is important to remember here

that any changes to a person's job role should be agreed with them and not imposed unilaterally.

- **Offer wellbeing support**. There are a wide variety of things you can do to help support an employee's wellbeing. Offer regular check-ins with a line manager to help the employee prioritise their workload and identify any particular pressure points (e.g. Court hearing dates or moving house). Do you have mental health first aiders in place that the employee can confide in at crisis points? Do you have an employee assistance programme that includes counselling support? If not, would you be prepared to pay for a private counsellor service? Do you have a quiet space in the workplace where they can retreat to when feeling overwhelmed?

- **Offer practical support**. Could you set up an internal network for people in a similar situation, and bring in relevant experts to speak to the group, for example, a family lawyer, child psychologist or financial advisor specialising in post-divorce matters? If you have an employee assistance programme, does it include the provision of legal assistance?

- **Offer financial support and benefits**. Divorce is likely to place the employee under significant financial pressure. Consider whether you can do anything to help ease this. Could you bring forward a pay rise or bonus, or make a one-off hardship payment? Could you offer an interest free loan or suspend or cancel repayments on any existing loan? Could you commit to improving your

pension contributions to help rebuild a pension which will be split in the divorce proceedings? Do you have benefits available which the employee had not previously accessed, but which could now be helpful to them (e.g. a workplace nursery or childcare vouchers)? Explore with them what you have available.

- **Consider reasonable adjustments**. If the employee is suffering with mental health difficulties, it would be wise to consider whether they are disabled. Seek advice from their GP and occupational health and explore whether any reasonable adjustments can be made to remove any disadvantage caused by any working practices. Acas has recently published guidance on making reasonable adjustments for mental health – you can read more about this in our briefing here.

In cases of a serious deterioration in performance or conduct, or a very lengthy absence, you may have no option but to start a formal process, but do still make allowances for the situation the employee is in. Consider the issue within the context of the employee's overall employment record. Offer support and give them a reasonable opportunity to rectify the issue or return to work.

If they are disabled, don't forget to consider adjustments – including to the relevant process itself. For example, it may be reasonable to allow an employee who is feeling vulnerable to be accompanied to a hearing by a friend or family member rather than a colleague. Or it may be reasonable to allow the employee more time than you ordinarily would to improve their performance or return from a period of sickness absence.

Final thoughts

Be compassionate and remember that the acutely difficult phase will not last forever. Show patience and proactively offer your support. This will help your employee get to a "new normal" sooner rather than later and it is something that they are unlikely to forget.

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.

World Menopause Day Breakfast Reception – Wednesday, 18 October 2023

On World Menopause Day, BDBF Partner Polly Rodway and Principal Knowledge Lawyer Amanda Steadman will be attending a breakfast reception at the House of Lords to launch the APPG's 'Manifesto for Menopause'.



How do you help an employee you suspect is the victim of

domestic abuse?

This week marks National Work Life Week, an annual campaign to highlight the importance of balancing work and personal life. From our perspective we often see issues arise where an employee's personal circumstances begin to impact their work. Some of these personal issues can be relatively harmless, but what if they are more serious? For example, what if you suspect that someone at work is being subjected to domestic abuse at home?

Most employers are aware of their obligations to prevent abuse and violence in the workplace, but since the increase of home working with lines blurring between the home and the office, should employers support those suffering at home?

During the lockdown periods, there was a significant surge in victims seeking support for domestic abuse. Indeed, in January 2021 Business Minister Paul Scully MP wrote an open letter to all employers urging them to consider what can be done to help survivors of domestic abuse. The open letter rightly pointed out that domestic abuse is still a taboo subject, and few employers have any coherent workplace policy or support framework to deal with the possibility that its workers could be victims of domestic abuse.

Given the strides forward so far as mental health at work is concerned, why shouldn't the same apply in relation to domestic abuse? Employers wishing to develop a workplace policy and support framework should consult the guidance on managing and supporting employees experiencing domestic abuse published by the Chartered Institute of Personnel Development (**CIPD**) and the Equality and Human Rights Commission (**EHRC**) in 2020 (the **Guidance**).

The Guidance sets out tips on how to develop a workplace domestic abuse policy setting out useful guidance and information on how to access support. In addition to a policy, employers should consider offering training to staff to help them spot the signs and know what to do if they suspect a colleague is being subjected to domestic abuse. More generally, employers should send a clear message that all staff should feel comfortable raising these issues and in doing so that they will be supported. A poster, email or information on the intranet, with details of support groups is a great start. Small things can make a big difference.

As far as developing a support framework is concerned, the Guidance recommends that the following four key steps are taken.

Recognise the problem

Employers are in a unique position to identify changes in their employees' behaviour which could indicate abuse. For example, if an employee is suddenly more withdrawn, overly critical of themselves and their work, there is an unexpected dip in their performance or change in the way they dress, for example, excessive clothing on hot days. These cues may be subtle to begin with, but, over time, may build to reveal the reality of incredibly difficult personal circumstances.

If an employee makes indirect references to their partner's (or other family member's) abusive or controlling behaviour, it is important to respond by asking open and empathetic questions to try to get them to open up further about what is happening. However, extra care should be taken when raising things with people working from home, as the abuser might be monitoring the employee, which might trigger further abuse.

It is also important not to make assumptions. Domestic abuse can happen to anyone – it can happen to men and it can arise in same-sex relationships. Abuse can also take many different forms including: coercive control, economic abuse, online or digital abuse, harassment and stalking, psychological and sexual abuse.

Respond appropriately to a disclosure

Where an employee makes a disclosure that they are a victim of domestic abuse, it is important to listen, show empathy and compassion and take care not to place blame on the victim. Acknowledge how brave it is to talk about domestic abuse.

The next step is to reassure the employee that the organisation understands how domestic abuse may affect their work performance and outline the support that can be offered.

Provide support

But it is not just about offering a shoulder to cry on, there are many practical ways for employers to offer help too, including taking the following steps.

- Ask line managers to check in frequently with employees so that they can raise any concerns or worries and offer support to them.
- Offer flexibility to enable an employee to sort out financial, housing, legal and childcare issues. This could even extend to offering a period of paid leave.

- Offer a private space for employees to make calls or do other administrative tasks that they may not be able to freely do at home.
- Be mindful of the employee's safety at work. Divert phone calls and email messages and change a phone extension if an employee is receiving harassing calls. Look at how non-employees access the building. Ensure the employee does not work alone or in an isolated area and check that arrangements are in place for getting safely to and from work.
- Consider whether you can offer financial support, such as providing interest-free loans to cover immediate financial costs. Ask if the employee would like salary payments to be made to a different bank account.

Refer to the appropriate help

Domestic abuse is a sensitive and complex issue. It is important to be clear on the role and responsibilities of HR and line managers and set boundaries to protect their own wellbeing. HR and line managers are not experts, nor are they counsellors. However, they should be able to signpost employees to specialist help.

Put together a list of national and local domestic abuse support services which can be given to employees when needed. Some national organisations that offer support and resources are listed below. These organisations can also provide advice and guidance to HR and line managers who are supporting domestic survivors.

Conclusion

Dealing with the possibility that an employee may be the subject of domestic abuse is a terrifying prospect and most employers would be fearful of getting it wrong. The primary way to begin tackling this deeply complex and frightening situation is by raising awareness, offering an open and trustworthy environment for victims and offering meaningful support.

Further support can be found here:

National Domestic Abuse Helpline: 0808 200 0247 or visit https://www.nationaldahelpline.org.uk/

Women's Aid: www.womensaid.org.uk

Rights of Women: www.rightsofwomen.org.uk

Men's Advice Line: 0808 801 0327 or visit www.mensadviceline.org.uk/

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BDBF further expands its offering with senior hire

Top-ranked, specialist employment law firm BDBF is delighted to announce the recent appointment of senior associate, Yulia Chizh.

Yulia joins with a wealth of employment law experience from her years at a full service international law firm, in house and at a workplace consultancy business. Her appointment brings the firm's headcount to six partners and 14 associates, in addition to its practice team.

BDBF's ability to attract high calibre talent is testament to the quality of its client base, the complex and interesting work the team does, and the collaborative approach it fosters.

BDBF has been top ranked by the leading independent directories for acting for senior executives for the last eight years consecutively. BDBF also has a growing practice acting for employers.

Gareth Brahams, Managing Partner of BDBF said, "As we approach the 11-year anniversary of BDBF, I am delighted to welcome Yulia to our growing team. I am confident she will contribute to the firm continuing to deliver great outcomes for our clients."

Yulia Chizh said, "I am very excited to be joining BDBF's top-ranked employment practice. The firm's high quality of work, its strong reputation for client service and its emphasis on teamwork and collaboration are particular draws for me. I look forward to getting involved in the interesting and complex work that defines BDBF's caseload."



BDBF retains long-standing ranking as a top tier firm in The Legal 500 UK 2024

We are pleased to announce that we have again been ranked as a top tier firm by The Legal 500 UK 2024.

Please see below the comments made about our team.

Employment: Senior Executives – Tier 1

The team:

Recognised for its ‘willingness to litigate new points of law for clients and take risks’, the team at Brahams Dutt Badrick French LLP specialises in both contentious and non-contentious work. The firm advises prominent individuals in financial companies, various retailers, and media companies on appointments and departures. Gareth Brahams spearheads the practice with a ‘tactical nous that it unmatched anywhere in the City,’ leading on cases concerning whistleblowing, unfair dismissal and sexual misconduct. Specialising in employment law, Claire Dawson handles cross-jurisdictional disability discrimination cases. Other key team members include Paula Chan, who is ‘strategically astute, meticulous and attuned to the client’s needs’, and regularly handles high-value disability discrimination and victimisation cases, and Polly Rodway, who leads on public sector appointments and departures as well as general team moves. Nick Wilcox, whose forte is regulatory work, is noted for his ‘outstanding strategic direction’. Clare Brereton, who made partner in March 2023, specialises in harassment and whistleblowing cases. Managing associate Samantha Prosser is also commended.

Individual rankings:

- Gareth Brahams – Hall of Fame
- Claire Dawson – Next Generation Partners
- Polly Rodway – Next Generation Partners
- Nick Wilcox – Next Generation Partners
- Clare Brereton – Next Generation Partners
- Paula Chan – Key Lawyer
- Samantha Prosser – Rising Star

Testimonials:

‘The team at BDBF is highly respected – they have a hands-on approach to serving their clients that delivers excellent results. The quality of service is consistently high throughout the team and there is strength in depth. They are a

responsive, well organised and very user-friendly team.'

'Paula Chan is a stand-out individual – she is strategically astute, meticulous and attuned to the client's needs.'

'BDBF has boutique DNA with established-firm resources and experience with a willingness to litigate new points of law for clients and take risks. One of the best and most innovative firms out there.'

'Nick Wilcox is hard working and remains cool under pressure. Outstanding strategic direction and client-handling skills.'

'Nick Wilcox is very experienced, with strong client relationships.'

'Gareth Brahams is a titan of the employment law world. Combines an encyclopedic knowledge of key employment law principles with a tactical nous that it unmatched anywhere in the City. A formidable negotiator.'

'Claire Dawson is top notch. Able to process and digest vast volumes of material in order to pull out the key issues in a case. Her judgement is impeccable.'

Employers – Tier 6

The team:

Brahams Dutt Badrick French LLP has a strong focus on the financial services and insurance industries and other regulated sectors, often advising on the intersection of the regulatory environment with employment law. Practice head Gareth Brahams is frequently engaged in defending tribunal litigation, particularly in claims involving employee competition and executive severances. Tom McLaughlin, Claire Dawson and Polly Rodway are further key names to note.

Testimonials:

‘They have an impressive team of highly knowledgeable and committed lawyers.’

‘I have found working with BDBF to be a collaborative and enjoyable experience.’

‘Exceptional employment law boutique BDBF provides pragmatic and efficient advice that is always focused on a commercial solution.’

‘Tom McLaughlin and Gareth Brahams are my go to employment law gurus. I mostly work with Tom and having him as the consistent point of contact for all our employment law issues really helps to ensure a consistent approach from one mandate to the next.’

‘Very responsive, clear and easy to understand, always available to help/advise’

‘Tom McLaughlin – enormously pragmatic, commercial and responsive. Gareth Brahams – it really feels like there is nothing that phases him.’

‘Very knowledgeable and insightful.’

‘Responsiveness, quality of work, service’

Thank you to our clients, referrers and employment law colleagues for the incredible feedback.

If you would like to discuss your employment law needs please contact your usual BDBF contact, email us at info@bdbf.co.uk or call us on 0203 828 0350.

Managing Grief and Loss at Work

Most people will suffer a bereavement at some point in their working life. Every relationship and working situation is different, so there is no one particular way to handle the impact of bereavement on your work. However, there are some legal entitlements and best practice guidance to assist you in managing this difficult time.

Do I have a right to time off?

If you are an employee, you have a right to take a reasonable amount of time off work following the death of your dependent.

A “dependent” is classified as:

- your husband, wife, civil partner or partner;
- your child (see below if the child is under 18);
- your parent;
- a person who lives in your household but is not a tenant, lodger or employee; and
- a person who relies on you, for example an elderly neighbour.

Following the death of one of these dependents, the law does

not specify how much time off you are entitled to, just that you are entitled to “reasonable” time off. What is reasonable is inevitably a fact specific question but is likely to, at a minimum, enable you to take time off to arrange and attend the funeral. If you need to take more time off, for example to make further practical arrangements or to take some time to come to terms with your loss, you should speak to your employer and seek to agree how much time you can take.

If you are an employee and your child is stillborn after 24 weeks of pregnancy or dies under the age of 18, you are permitted to take up to two weeks Parental Bereavement Leave. This leave is available in addition to maternity and paternity leave in the case of stillbirths. There is a separate two week period of leave available for each child.

In these circumstances, you will be the child’s parent if you are their biological parent, adoptive parent, prospective adopter, intended parent under a surrogacy arrangement, a parent “in fact” (i.e. you have been looking after the child in your own home for the past four weeks), or that person’s partner, but not a paid carer.

The two weeks’ leave can be taken in one or two week blocks at any time in the 56 weeks after the stillbirth or death of your child. During the first eight weeks you only need to inform your employer that you intend to take Parental Bereavement Leave before the first day of absence. However, in weeks 9 to 56 you must give at least one week’s notice.

If the person who has died does not meet the definition of dependent, then you do not have a legal right to take time off. However, many employers now recognise that families and relationships come in many different forms and so your employer may have a compassionate leave policy, under which

you can take time off following the bereavement of other members of your family or your friends.

If your employer does not have a compassionate leave policy, in the first instance you should speak with your line manager or HR to discuss your need for time off and seek to agree how much you can take.

If I take time off, do I have the right to be paid?

There is no right to take paid time off following a bereavement other than if you are taking Parental Bereavement Leave. Therefore, whether you will be paid is a matter of discretion for your employer. In the first instance you should check your Staff Handbook to see whether there is a policy setting out your entitlement to pay. If there isn't a policy, speak to your line manager or HR about what has been done in the past or what may be agreed for you given your circumstances.

If you are taking Parental Bereavement Leave, you may also be entitled to receive Statutory Parental Bereavement Pay. You will be eligible if you satisfy the definition of parent set out above, have been employed for at least 26 weeks prior to the week in which your child died, remain in employment on the date your child died and have been paid at least the lower weekly earnings limit in the eight weeks prior to your child's death.

Statutory Parental Bereavement Pay is paid at the prescribed rate for other types of family leave, which in the tax year 2023-2024 is £172.48.

What happens when I return to work?

Underlying all employment relationships is a duty of mutual trust and confidence. This means that your employer should offer support to you following a bereavement. However, it is important that you tell your employer what you need.

Some things to consider are:

- What do you want your colleagues and clients to be told about your bereavement?
- Do you have any religious or cultural requirements or traditions that you need to respect which will have an impact on your ability to work?
- How much do you want to talk about your bereavement following your return to work?
- Are there any particular practical challenges that you need help with going forwards, for example do you now have increased childcare or other caring responsibilities?
- Are you going to need more time off in the future to deal with the probate or other practical matters?
- Do you have any particular vulnerabilities or medical conditions that could be exacerbated by the stress of bereavement?
- Does your employer have an Employee Assistance Programme that can offer you support?

Grief is an ongoing process which will affect everyone differently. There is no time limit on grief and it may have an ongoing impact on you. If this is the case, discuss this with your line manager and/or HR on an ongoing basis so that they can support you. At the end of the performance year, explain in your self-assessment the impact that your bereavement has had on you so that this can be taken into account in your performance assessments.

As grief is not linear, it will affect you differently at different times. If you feel comfortable doing so, tell your line manager or HR when an anniversary is approaching and let them know what type of additional support you will need around that time.

While this is the case in most employment scenarios, but especially following bereavements, communication is key. Most employers want to support their staff in difficult times, but first they have to know what you want and need.

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What would a Labour

Government mean for employment law?

Earlier this month, the Labour Party published a Green Paper entitled *A New Deal for Working People*, setting out its proposals for changes in workplace rights. The ambitious document sets out over 50 proposals for change across a range of areas. In this briefing we discuss five key aspects of the Green Paper that have the potential to lead to a major shake-up of employment law.

Creation of a single worker status

Currently, we have a three-tier approach to employment status in the UK: "employee", "worker" and "self-employed". Worker status covers both employees and a wider group of workers who are engaged under a contract where: (i) they are required to work personally; and (ii) the employer cannot be described as a client of the individual's own business. Therefore, all employees are workers, but not all workers are employees.

The Green Paper argues that secure and safe work is jeopardised by certain employers exploiting the complexity in this three-tier system. Moreover, it is difficult for individuals to know where they stand, and, as a result, they often do not know their basic legal rights. To resolve this problem, the Labour Party proposes that a single employment status of "worker" should apply to all but the genuinely self-employed. It is not clear whether the existing worker status test will be retained, or whether a brand-new test will be introduced.

All workers will be afforded the same basic employment rights, for example, sick pay, holiday pay, parental leave, protection against unfair dismissal *"and more".* The practical result is that those who qualify as workers under the existing system will receive a fairly significant upgrade in their employment rights, including the right to claim unfair dismissal. The position for employees will not change as a result of the merger of status, save that they will be known as workers, rather than employees.

Strengthening unfair dismissal protection and other employment rights

Currently, only employees are protected from unfair dismissal, and they will usually need two years' continuous service to bring a claim. The exception to this is where the principal reason for the dismissal is "automatically unfair" (e.g. because the employee has blown the whistle or because the employee is on maternity leave). In automatically unfair dismissal claims, there is no need for the employee to have accrued two years' service – it is a Day 1 right.

Prior to April 2012, the qualifying period to bring an unfair dismissal was one year, and many commentators expected the Labour Party to bring back this threshold if it came to power. However, the Green Paper takes a more radical approach, promising to abolish the service requirement altogether and make unfair dismissal a Day 1 right for all workers.

Coupled with this, the Green Paper also promises to remove the caps which limit compensation in employment claims, with the result that *"workers* [will] *receive full compensation without*

statutory limit if they suffer loss because of employers' breaches of the law". It is not entirely clear whether the intention is to remove the caps on compensation on some, or all, statutory employment claims (and if not all, whether unfair dismissal will be covered).

However, assuming that the cap on compensation for unfair dismissal *is* to be removed, then the end result of these proposals would be to put an unfair dismissal claim on a par with a discrimination claim in the sense that it would be Day 1 right available to all workers offering unlimited compensation. If this comes to pass, dismissal will become more dangerous territory for employers as the prospect of getting it wrong risks more claims and higher compensation awards.

On top of this, the Green Paper also promises to remove qualifying periods for other basic rights such as sick pay and parental leave. Promises are also made to strengthen other employment rights including for pregnant workers, whistleblowers, those facing a redundancy, and those being transferred to a new employer – although it has to be said these promises are light on detail.

And, finally, tucked away towards the end of the Green Paper, is the brief statement that time limits for Employment Tribunal claims will be extended. Again, the detail is light, and we don't know whether this will apply to all claims or just a certain class of claims, or what the new time limits will be. Currently, the time limits for the majority of statutory employment claims is three months less one day from the cause of action (albeit that this may be extended by the Acas Early Conciliation process). A six-month time limit has been mooted in the past for pregnancy (and other)

discrimination claims.

Discrimination and inequality

The Green Paper promises to require employers to create and maintain workplaces and working conditions free from harassment, including by third parties. Currently, employers are not strictly obliged to take steps to prevent harassment at work and workers are not protected from harassment by third parties. The Worker Protection (Amendment of Equality Act 2010) Bill is on its passage through Parliament and will introduce a legal requirement for employers to take reasonable steps to prevent sexual harassment at work (but not harassment related to other protected characteristics). The Bill had originally sought to introduce protection from third party harassment, but this was recently dropped from the Bill. Therefore, Labour's proposals go further by introducing a duty to prevent harassment across the board and by introducing protection from third party harassment.

As far as pay transparency is concerned, employers with 250+ staff will be required to report on their ethnicity pay gaps – a proposal that was mothballed by the Conservative Government. In addition, Labour are seeking to drive efforts to close pay gaps by forcing employers to not only report on their gender and ethnicity pay gaps, but to devise and implement plans to eradicate any such pay gaps. Gender pay reporting was introduced in 2017 under the mantra *"what gets measured gets managed".* But after years of disappointing gender pay gap results, with little movement in the right direction, it is apparent that mere reporting is not enough. The requirement to take concrete action should be welcomed, although it remains to be seen what the consequences will be for failing to succeed in closing a pay gap.

Better family friendly rights

The Green Paper makes a host of promises to improve the position for working families including:

- extending maternity and paternity leave (nothing is said about adoption leave);
- reviewing the “failed” shared parental leave system;
- introducing a new right to bereavement leave;
- strengthening the rights of workers to respond to family emergencies with paid family and carer’s leave; and
- making it unlawful to dismiss a woman whilst pregnant or for six months after her return from maternity leave, save in certain circumstances (which are not specified).

Again, we must await the detail of how these rights will be enhanced, but if these changes come to pass, employers will need to be ready to rewrite Staff Handbooks and revisit any enhanced pay offerings. What can be said with some certainty is that most employers (and employees) would welcome an overhaul of the cumbersome shared parental leave system.

Labour also promise to make the right to request flexible

working a Day 1 right. The Conservative Government have promised to do the same and has said legislation will be introduced in July 2024.

Right to disconnect and protection from surveillance

Several EU member states have introduced domestic legislation or guidance on the right to disconnect, including France, Italy, Spain, Belgium, Ireland and Portugal. In 2021, a House of Lords Select Committee called upon the UK Government to introduce a right to disconnect law. However, currently, there is no legal right to disconnect in the UK.

The Green Paper states that Labour will give workers a right to disconnect from work outside their normal working hours and not be contacted by their employers. It is not yet clear what, if any, exceptions will be made to this new right and what the consequences for breach will be.

Labour also promises to protect workers from surveillance by employers by requiring proposals to introduce surveillance to be subject to consultation and the agreement of either trade unions or elected staff representatives.

What else?

There are many more proposals in the Green Paper covering a wide range of areas including:

- banning zero hours contracts and introducing greater security in working patterns for workers;
- outlawing the practice of fire and rehire;
- raising the minimum wage to at least £10 per hour for all workers and assessing how to raise the National Living Wage;
- a suite of measures to strengthen the role of trade unions; and
- introducing a single enforcement body to enforce workers' rights.

The proposals in the Green Paper are to be debated at the Labour Party conference in October 2023. We can expect those that pass muster to make their way into the Labour Party's Manifesto for the imminent General Election. And with the bookies' money on the next Government being a Labour Government, it may not be long before some of these proposals become law.

The Labour Party: A New Deal for Working People

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New law passed giving workers the right to request more predictable working patterns

On 18 September 2023 the Workers (Predictable Terms and Conditions) Act 2023 received Royal Assent and became law. The Act gives workers (and agency workers) a statutory right to request more "predictable" working patterns. Our briefing explains what the new right involves and the steps that employers will need to take to prepare.

When will a worker be able to make a request?

It is expected that workers will need six months' service in order to be eligible to make a request, although this will not need to be continuous service. The service requirement will be set out in regulations which have yet to be published.

Where eligible, workers will be able to request a more predictable working pattern where their current work pattern lacks certainty in terms of hours, days and/or times worked. "Work pattern" also covers the length of the contract, and a presumption is made that a fixed-term contract of under 12 months lacks predictability. The purpose of the request must be to achieve a more predictable working pattern.

Are there any rules on how such requests must be made?

A request will need to be made in writing, state that it is a request for a more predictable working pattern and set out the proposed change and the date on which the worker wants it to take effect. Further regulations may be made about the precise form that such applications must take.

Up to two applications may be made in a 12-month period, although these may not be made concurrently. It is worth noting that this limit includes any similar requests made under the separate flexible working regime (i.e. where the flexible working request is for a change that would have the effect of delivering a more predictable contract).

What duties will an employer have in relation to such requests?

Employers must deal with such requests in a "reasonable manner", although this is not defined in the Act. Acas are set to publish a new statutory Code of Practice which will provide further guidance on how employers should handle such requests. We expect that employers will be asked to hold a meeting with the worker and give them the opportunity to make representations in support of their application.

The employer must notify the worker of its decision within one month of receiving the application. If the employer grants the request, the employer then has a further two weeks to offer the worker a new contract with terms and conditions that, overall, are not less favourable than the original contract and reflect the change that has been agreed.

However, employers do not have to accept requests. Requests

may be rejected on one or more of the following grounds:

- The burden of additional costs.
- Detrimental effect on ability to meet customer demand.
- Detrimental impact on the recruitment of staff.
- Detrimental impact on other aspects of the employer’s business.
- Insufficiency of work during the periods the worker proposes to work.
- Planned structural changes.
- Such other grounds as specified in regulations.

If the worker’s contract is terminated during the one-month decision period the employer is still required to respond to the request, however, additional grounds for rejecting the request will then be available (namely, that the worker has resigned or been dismissed for a qualifying reason).

Employers are not obliged to offer a right of appeal but may choose to do so (and if they do, there are limits on how the appeal process should be run).

What rights will a worker have if something goes wrong?

If an employer fails to follow the statutory procedure for considering requests, or it rejects a request based on incorrect facts, then the worker will have three months to present a complaint to an Employment Tribunal.

The Tribunal may order the employer to reconsider the application and/or pay compensation to the worker of an amount it considers to be just and equitable. The maximum amount of compensation may be capped in regulations – we would expect this to mirror the maximum compensation available under the flexible working regime (i.e. 8 weeks' pay).

Workers will also be protected from detriment and/or dismissal for having requested a predictable working pattern or bringing proceedings to enforce the right to make such a request.

What should employers do now?

Employers do not need to take action just yet. Although the Act has passed into law, its provisions have not come into force straight away. The Government's press release indicates that the Act (and accompanying regulations) will come into force in Autumn 2024.

The draft Acas Code of Practice is due to be published shortly and will be subject to a public consultation. Once finalised, employers will be in a position to prepare policies setting out how such requests may be made and whether, for example, there will be a right of appeal. Employers will also need to

devise processes for handling requests (noting the tight timetable for responding to them) and be ready to amend contracts where requests are accepted.

Although we think these preparations will be relatively straightforward, it is worth remembering that several other employment bills have recently passed into law and each will require employers to take preparatory steps over the next 18 months, namely the:

- **Carer's Leave Act 2023 – expected to take effect in April 2024. Read more** here**.**

- **Employment Relations (Flexible Working) Act 2023** – expected to take effect in July 2024. Read more here.

- **Worker Protection (Amendment of Equality Act 2010) Bill – expected to pass into law shortly and take effect in Autumn 2024. Read more** here**.**

- **Protection from Redundancy (Pregnancy and Family Leave) Act 2023 – expected to take effect by January 2025. Read more** here**.**

- **Neonatal Care (Leave and Pay) Bill – expected to take effect in April 2025. Read more here.**

Workers (Predictable Terms and Conditions) Act 2023

BDBF is a leading law firm based at Bank in the City of London specialising in employment law. 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.

Menopause and disability discrimination: a tale of caution when addressing the performance of an employee suffering from menopausal symptoms.

In the recent case of Lynskey v Direct Line Insurance Ltd, the Employment Tribunal decided that poor appraisal ratings, a written warning and ceasing enhanced sick pay were all discrimination arising from Ms Lynskey's disability of menopause.

What happened in this case?

Ms Lynskey began working for Direct Line as a motor sales consultant in 2016. In 2019, she began to experience menopausal symptoms, which included mood swings, poor concentration and memory loss. In March 2020, she was diagnosed with a hormone imbalance and depression and was prescribed antidepressants by her GP. Before the onset of these symptoms, Ms Lynskey had been model employee, well-liked and had received good performance ratings.

In June 2020, Ms Lynskey had a difficult phone call with a customer and concerns were raised about her conduct during this call. She went off sick with work-related stress for a period of two weeks and, during this period, she was offered a different role in the telematics team. As the new role did not involve direct sales, it was thought to be less stressful and more suitable for Ms Lynskey. She willingly agreed to the new role, and things started off well. She also came off her antidepressants. However, two customer complaints were received, alleging that Ms Lynskey had been rude during calls. She received coaching but was also told that this should not happen again and, if it did, it could result in disciplinary action.

During Ms Lynskey's annual appraisal in 2020, she was graded as "needing improvement" for the first time. As a direct consequence of this rating, she did not receive a pay rise. There was no direct mention of her menopausal symptoms, but her manager noted that it seemed she was *"struggling to retain information".*

There were further difficult calls and in April 2021 her

manager decided to sit in on some of her calls. Her manager then sought advice from HR who, without knowing about her menopausal symptoms, recommended disciplinary action be taken. During the disciplinary meeting, Ms Lynskey raised her menopausal symptoms as a mitigating factor, however, this was not accepted by Direct Line. As a result, Ms Lynskey received a 12-month written warning, together with a "success plan" (i.e. a performance improvement plan). Her mental health deteriorated following the written warning, but she continued to try to work.

In July 2021, Ms Lynskey went off sick due to stress at home. An Occupational Health report was obtained, which recommended that Ms Lynskey have a phased return to work and stated that it was "likely" that she was disabled under the Equality Act 2010. In addition, it was suggested that her targets be removed until her symptoms improved. During this period, Ms Lynskey received enhanced sick pay. She was entitled to receive this benefit for up to 26 weeks, however, Direct Line chose to withdraw it after only 13 weeks.

Upset by the outcome of the disciplinary and the decision to remove her enhanced sick pay, Ms Lynskey challenged these decisions by raising a grievance in November 2021. Her enhanced sick pay was reinstated, but the disciplinary warning was not reversed. She remained off sick. In May 2022, Ms Lynskey resigned as result of the above treatment and brought claims in the Employment Tribunal for constructive unfair dismissal, disability, age and sex discrimination.

What was decided?

Given the length of time that had passed between the events

complained about and Ms Lynskey's resignation, the Tribunal rejected the claim of constructive dismissal. It also rejected the sex and age discrimination claims but found that there had been disability discrimination.

The Tribunal agreed that Ms Lynskey's menopausal symptoms amounted to a disability under the Equality Act 2010 as her symptoms had a significant impact on her day-to-day activities and her ability to perform at work. In particular, it concluded that Ms Lynskey was treated unfavourably because of something arising out of her disability in three instances, namely the appraisal rating, the written warning and the decision to withdraw the enhanced sick pay (even though this was eventually reversed).

Appraisal rating

As regards the appraisal rating, it was found that the rating did not take into account the fact that Ms Lynskey was performing at the best of her ability in light of her symptoms. The Tribunal was also critical of the link between the appraisal rating and Ms Lynskey's pay award. It noted that *"need for improvement is inherently unfavourable if the person, through disability, cannot, in fact, improve, or meet the required standards"*. Whilst Direct Line identified high quality customer service as a legitimate aim, it failed to provide any evidence showing how linking pay awards to appraisal ratings achieved this aim. The Tribunal took into account Ms Lynskey's previously good appraisal ratings and the fact that she had informed Direct Line that she was struggling as a result of her menopausal symptoms.

Written warning

Turning to the written warning, the Tribunal applied the same analysis as above and explained that the disciplinary process and written warning were unfavourable treatment because of something arising in consequence of Ms Lynskey's disability. In addition to the substantive unfairness, both the disciplinary investigation and meeting had been conducted by Ms Lynskey's manager, falling foul of the Acas Code on Disciplinary and Grievance Procedures, and ignoring Direct Line's internal policies which stated that managers ought not to be involved. The manager also failed to consider Ms Lynskey's symptoms as mitigating factors when deciding on the appropriate sanction.

Withdrawal of enhanced sick pay

The Tribunal also concluded that the decision to withdraw Ms Lynskey's enhanced sick pay after 13 weeks was unfavourable treatment. This decision was made by her manager because it was considered that she was not doing enough to return to work and withdrawing sick pay would force a return. This was despite the medical evidence available, and Ms Lynskey regularly engaging with her GP and occupational health.

Finally, the Tribunal decided that Direct Line ought to have referred Ms Lynskey to occupational health at the onset of her symptoms to ensure that she was supported and that reasonable adjustments were made at an early stage. Further, they had failed to make adjustments to the telematics role that would have helped her manage her symptoms.

The Employment Tribunal awarded Ms Lynskey compensation in the amount of £64,645. This included compensation for loss of earnings as well as an award for injury to feelings due to the

impact of the loss of her job. Unusually, an aggravated damages award was made due to Direct Line's failure to concede Ms Lynskey's disability status earlier on in the Tribunal process – it was only during the final hearing that Direct Line conceded that it knew, or ought to have known, about her disability.

What does this mean for employers?

Employers are under a duty to make reasonable adjustments for disabled employees and to ensure that such employees are not subjected to unfavourable or less favourable treatment. This extends to all aspects of work, including performance. This case is a sobering reminder that it can be challenging to deal with performance issues which intersect with disability.

If performance issues arise where an employee is struggling with menopausal symptoms or other symptoms which could amount to a disability, it is important to seek early legal advice to avoid any pitfalls. Remember to engage your occupational health services early on if appropriate and consider and implement the recommendations made in any occupational health report.

This decision also highlights the need for continued awareness around the menopause. Frequent training for managers is vital to ensure they are equipped to handle such matters and also to ensure that employees who are suffering with symptoms are treated fairly and supported.

Lynskey v Direct Line Insurance Ltd

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues arising out of this decision please contact Blair Wassman

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Employment relationship was terminated by mutual agreement despite employer stating that the employee had been "dismissed"

In the recent case of Riley v Direct Line Insurance, the EAT held that an Employment Tribunal was entitled to reject an unfair dismissal claim on the basis that the termination of employment came about by the free mutual consent of both parties, despite the fact the employer's termination letter referred to the "dismissal" of the employee.

What happened in this case?

Mr Riley was employed by Direct Line as a home claims advisor from March 2012. He was disabled by reason of Autism Spectrum Disorder (**ASD**), anxiety and depression. Between 2014 and

2017, Mr Riley was off work primarily due to anxiety and depression. Direct Line made a series of reasonable adjustments to facilitate his return to work. However, these were unsuccessful and, ultimately, a medical assessment indicated that he would never be able to return to work.

In August 2018, Direct Line proposed the option of ceasing employment while continuing to receive benefits under the company's permanent health insurance (**PHI**) scheme. Mr Riley was happy with the proposal. On 19 September 2018 a final meeting took place to confirm the termination of the employment relationship. During the meeting, Mr Riley asked to have it put in writing that he was no longer employed. On 25 September 2018, Direct Line wrote to him, stating that he had been *dismissed* with effect from the 19 September 2018 on the grounds of capability due to ill health. As a result, Mr Riley brought various Employment Tribunal claims , including for unfair dismissal and failure to make reasonable adjustments.

The Tribunal dismissed all of Mr Riley's claims. It found that he had not been dismissed but had proactively pursued the option of the PHI scheme and agreed to the termination of his employment to take advantage of it. He had understood the proposal and was not put under pressure to agree, nor tricked into doing so.

On the reasonable adjustments claim, the Tribunal found that Direct Line had failed to make two adjustments, namely, a failure to provide Mr Riley with noise cancelling headphones and a failure to roll out management training on awareness of Asperger's syndrome. However, because Mr Riley was unfit to work from 25 May 2018 , these adjustments would have made no difference to his ability to return to work. Therefore, any

claim had to be brought within three months (less one day) of that date, unless it was just and equitable to grant an extension of time, which the Tribunal decided it was not. The fact that Mr Riley had changed his mind about the termination of his employment was not a good enough reason to extend time.

Mr Riley appealed to the EAT.

What was decided?

The EAT dismissed the appeal.

The EAT acknowledged that, on its face, the letter was entirely consistent with a straightforward dismissal letter. However, the Tribunal had correctly considered the substance of the termination, rather than the terminology used in the letter. The decision that the termination was by mutual consent, and that Mr Riley understood the nature of it, was upheld. The EAT clarified that a consensual termination, agreed upon freely by both parties, does *not* constitute a dismissal.

In examining whether the Tribunal had erred in refusing to extend the time limit, the EAT also upheld the decision that Mr Riley's change of heart about the agreement to terminate his employment by mutual consent was not a ground for a just and equitable grounds extension of time.

What does this mean for employers?

This decision highlights that the terminology used in employment documents and agreements can have serious consequences. Here, the incorrect use of the term "dismissal" appears to have triggered the employee to launch Tribunal claims.

However, even where the wrong terminology is used, this decision demonstrates that Tribunals will look at the substance of the termination to assess whether it amounts to a dismissal or a consensual parting of the ways. Where both parties have freely agreed to end the employment relationship, the termination will not be regarded as a dismissal. In this case, the fact that Direct Line kept detailed records throughout the process was key to them successfully defending the claim. Therefore, confirming with an employee that they fully understand what they are agreeing to and documenting everything in writing will help to prevent misunderstandings and potential disputes down the line.

Being careful of terminology and adopting a considerate approach when dealing with terminations, especially involving employees with disabilities, will mean employers are more likely to achieve legal compliance, reduce the risk of legal disputes, and maintain good employee relations in the process.

Riley v Direct Line Insurance Group Plc

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Amanda Steadman participating in ABA webinar, Menopause: The Newest Protected Status?

On 28 September 2023, BDBF's Principal Knowledge Lawyer Amanda Steadman will be taking part in the American Bar Association (ABA) webinar, Menopause: The Newest Protected Status? Alongside her fellow panellists, Amanda will examine how the UK is moving to expand protections for employees experiencing menopause.

Register here.

