Employee could not be released from a non-compete clause in shareholders agreement by settlement agreement on termination of employment

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Employee could not be released from a non-compete clause in shareholders’ agreement by settlement agreement on termination of employment

The Commercial Court held that a settlement agreement between an employer and employee had not discharged the employee from a non-compete clause in a shareholders’ agreement to which he was a party.

The Claimant, Mr Herbert, was a senior employee and member of the executive management team for Ideal Standard International BVBA, the main operating company in the Ideal Standard Group. His employment contract contained confidentiality obligations, but no restrictive covenants. Mr Herbert entered into a shareholders' agreement with the five group companies that owned the Group's operating companies, and was allocated a substantial number of shares.

A non-compete clause in the shareholders' agreement stated that for 18 months after termination of employment, Mr Herbert must not "carry on or be engaged in or concerned or interested in any business within the Group's jurisdictions where it would be in competition with the business activities of the Group or any Group company". The agreement provided that a waiver of any term or breach of the agreement had to be in writing and signed by or on behalf of the party granting it.

Mr Herbert was subsequently dismissed and entered into a settlement agreement with his employer, which stated that the parties would have no further obligation to each other, save for what was provided in the settlement agreement itself. A clause provided for a waiver from Mr Herbert of his rights and stated that the employer "ensures that the waiver also applies to other companies and entities of the Group". Mr Herbert thereafter started working for a competitor, but two companies within the Group sought an injunction.

The injunction was granted to restrain breach of the non-compete clause. The court found that the settlement agreement had been signed by the employer, which was the main operating company within the group, but did not constitute a valid waiver of rights under the shareholders' agreement by any of the other parties to it, even though a statement in the settlement agreement made clear it was intended to settle outstanding differences with the employer and/or any other company in the group. The settlement agreement had been expressly signed by an executive "for and on behalf of" the

employing company, not any other company in the group.

Mr Herbert was a senior executive and his shareholding was substantial. He was also integral to the business's relationships with clients, privy to confidential information and had years of working with other employees. Hence, it was held that a serious issue was to be tried as to whether the covenant was reasonable in scope.

Ideal Standard International SA and another v Herbert [2018] EWHC 3326

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Court of appeal holds that Uber drivers have worker status

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Court of appeal holds that Uber drivers have worker status

The Court of Appeal upheld previous decisions confirming that Uber drivers are workers entitled to the national minimum wage and paid holiday.

Despite written documentation to the contrary, the Court of Appeal held that it could not regard Uber as working "for" the drivers as an intermediary. The reality of the relationship between the parties was the opposite. Uber runs a transportation business and drivers provide the skilled labour that enables the business to deliver its services and earn profit. It was found that Uber drivers were to be regarded as working during any period when they were (1) within the territory in which they were authorised to drive, (2) the Uber 'app' was switched on, and (3) they were willing and ready to accept trips. It was acknowledged that drivers were not workers solely when they were engaged in transporting a passenger as an important feature of the business was to maintain a pool of drivers that Uber could call upon as and when a demand for driving services arose. Hence, drivers were considered to be workers during waiting periods for bookings as long as the latter two criteria also applied.

The Court of Appeal has given Uber permission to appeal to the Supreme Court.

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Employment tribunal statistics

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Employment tribunal statistics

From April to June 2018 there was a 165% increase in single claims compared with the same quarter in 2017.

Tribunals have hired 50 more judges and should clear the backlog of claims in due course.

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Government announces

extensive employment law reform following Taylor review Copy

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GOVERNMENT ANNOUNCES EXTENSIVE EMPLOYMENT LAW REFORM FOLLOWING TAYLOR REVIEW

The Government has published the Good Work Plan in its response to the recommendations made by the Taylor Review in 2017. The amendments to current Regulation are due to come into force on 6 April 2020 as follows:

- All workers (not just employees) will have a right to a written statement of terms either before or from day one of employment (rather than within two months of starting employment).
- The reference period for determining an average week’s pay (to calculate holiday pay) will increase from 12 weeks to 52 weeks, or the number of complete weeks for which the worker has been employed.
- The threshold required for a request to set up

information and for a consultation will drop from 10% to 2% of employees, subject to the existing minimum of 15 employees.

- Better protection for agency workers, zero hours workers and others with atypical working arrangements – Repealing the exception in the Agency Workers Regulations, which currently excludes agency workers from the right to equal pay with comparable direct employees if they have an employment contract that guarantees pay between assignments i.e. when they are "on the bench".
- Publishing on gov.uk on a quarterly basis the names of employers who fail to pay tribunal awards within a reasonable time

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A robust approach can be taken to requests for adjournment on medical grounds

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A ROBUST APPROACH CAN BE TAKEN TO REQUESTS FOR ADJOURNMENT ON MEDICAL GROUNDS

The General Medical Council (“the GMC”) brought disciplinary proceedings against the Claimant, Dr Hayat, for amongst other things, feigning a heart attack and related insurance fraud. There had already been three unsuccessful adjournment applications when Dr Hayat was admitted to hospital complaining of chest pains, but the GMC applied to continue the hearing in his absence. They relied on emails from two treating doctors who considered him fit to attend the hearing. However, Dr Hayat submitted a sick note to the tribunal stating that he was unfit for work. As it was concluded that he was voluntarily absent from the hearing, the tribunal proceeded and found against him.

The case went to the Court of Appeal which directed that:

- The original judge had mistakenly found that the sick note trumped the other medical evidence as it post-dated it. The relevance of the note depended on its contents, not date.
- The sick note had stated that Dr Hayat could not work, not that he could not participate in the hearing. The sick note did not consider whether or how the tribunal might have accommodated Dr Hayat.
- The sick note itself was completely insufficient for an adjournment as it did not identify the author, the

medical condition and prognosis, an independent opinion following a full medical examination, or how it prevented attendance.

It was held that the tribunal was entitled to weigh the sick note against other medical evidence and facts, including the three unsuccessful adjournment applications and proceed with the hearing.

General Medical Council v Hayat [2018] EWCA Civ 2796

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Emails about whether to settle litigation had to be disclosed

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EMAILS ABOUT WHETHER TO SETTLE LITIGATION HAD TO BE DISCLOSED

Six emails had been sent between members of a Company's Board, and between the Board and Shareholders. It was claimed that the emails were composed with the dominant purpose of discussing a commercial proposal for settling the parties' dispute at a time when litigation was in reasonable prospect.

On appeal, the court held that:

- Litigation privilege was engaged when adversarial litigation was in reasonable contemplation;
- Once engaged, it covered communications between the parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with the conduct of litigation, provided it was for the sole or dominant purpose of conducting litigation. This included deciding whether to litigate and whether to settle the dispute giving rise to the litigation.
- However, there was no justification or authority for extending the scope of litigation privilege to purely commercial discussions. Documents created with the dominant purpose of discussing a commercial settlement did not fall within the scope of the privilege.

This surprising decision highlights that employers should take great care when recording internal discussions relating to litigation.

WH Holding Ltd and another v E20 Stadium LLP [2018] EWCA Civ 2652

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Employee who admitted to shoplifting held to have a tendency to steal and was prevented from bringing a disability discrimination claim

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EMPLOYEE WHO ADMITTED TO SHOPLIFTING HELD TO HAVE A TENDENCY TO STEAL AND WAS PREVENTED FROM BRINGING A DISABILITY DISCRIMINATION CLAIM

The EAT held that an employment judge had been justified to

find that a Claimant who suffered from severe depression, post-traumatic stress disorder ("PTSD") and associated amnesia, and who had left a shop without paying for his items had a tendency to steal, which is an excluded condition under the Equality Act (Disability) Regulations ("the Disability Regulations"). Given that the excluded condition had been the cause of the Claimant's dismissal, the Claimant was prevented from bringing a disability discrimination claim.

The Disability Regulations outline several conditions that are expressly stated not to be impairments (and hence are not disabilities) for the purposes of the Equality Act, one of which is the 'tendency to steal'.

The Claimant, Mr Wood, formerly a police officer with 16 years service, worked as an anti-social behaviour officer for the Council. The Council's code of conduct required its employees to act with honesty and integrity and provided that breaches of the code (both work and non-work related) were serious and could result in disciplinary action leading to dismissal. The Claimant had left a branch of Boots without paying for several items. When caught, he concealed his Council ID and stated that he worked in security. He also signed an admission that he did not intend to pay for the items and was given a fixed penalty notice for disorder. Mr Wood was obligated to inform both the Council and police about this incident, but failed to do so.

During a vetting and clearance process two months later, Mr Wood's application was refused due to the penalty notice and he was refused entry into any police premises, which meant that he could not do his job. He also denied, when questioned, knowing about anything outside of work about which the Council should have been aware. When the theft incident was raised, Mr Wood recalled the incident, but denied any fault. He was subsequently suspended and thereafter dismissed.

Mr Wood issued a claim for unfair dismissal and disability

discrimination. Joint expert evidence found that he suffered from severe depression, PTSD and associative amnesia.

The EAT dismissed the Claimant's appeal in which he argued that the employment judge had mistakenly found that he had a 'tendency' to steal as the incident was a one-off episode. The EAT held that Mr Wood had, in fact, always put forward his case on the basis that he had a tendency to do 'whatever the correct description is for what happened in Boots…' His case had been that this was not a one-off matter or isolated event, but part of his condition and a manifestation of his PTSD which recurs. Mr Wood's second argument that it was a mistake to find the incident to be stealing rather than forgetfulness without intent or dishonesty was not upheld. The EAT could clearly see why the judge had reached the conclusion that Mr Wood was dishonest, especially as he had signed a statement admitting to the theft of the items, his behaviour in the following days and his self-serving selective memory when discussing the incident with his line manager.

Wood v Durham County Council UKEAT/0099/18

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Employee's dismissal whilst entitled to long-term

disability benefits found to breach implied contractual term

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Employee’s dismissal whilst entitled to long-term disability benefits found to breach implied contractual term.

The EAT held that an employer was not entitled to dismiss an employee on grounds of ‘capability’ given that the employee was contractually entitled to long-term disability benefits (namely, a Permanent Health Insurance Scheme (“PHI”)) and would, therefore, be deprived of the benefits to which they would otherwise be entitled pursuant to the Scheme.

The Claimant, Mr Awan, was employed as a security agent for American Airlines. His employment contract generously provided that he was entitled to full sick pay for six months and if his sickness absence exceeded this period, he benefited from a

long-term disability benefit plan, which would pay two-thirds of his annual base salary until either he returned to work, retired or died. The contract also contained a clause entitling his employer to dismiss on notice.

Mr Awan was subsequently signed off sick with depression. During this time, his employment was transferred to ICTS due to outsourcing of his department. However, the new employers used a different insurance company for long-term disability benefits and the new insurer refused to cover employees who had pre-existing sickness absence when the new policy commenced. The original insurer only agreed to cover the Claimant for a specified amount of time following the TUPE transfer as a gesture of goodwill.

Mr Awan's employment was subsequently terminated by ICTS as he had been on sickness absence for over two years and they believed that there was no prospect of him returning to work.

Mr Awan brought employment tribunal proceedings claiming that his dismissal while he was entitled to long-term disability benefits was unfair and amounted to discrimination arising from disability.

The EAT held that ICTS should not have dismissed Mr Awan for incapability while he was in receipt of long-term disability benefits. Mr Awan had a contractual entitlement to be paid two-thirds of his salary after six months of sick leave. The EAT highlighted that his contract did not refer to an insurance policy or state that his entitlement to disability benefits was dependent on the rules of an insurance policy or the rules of a particular insurance provider. There was also no evidence to show that the original insurance policy was ever provided to employees. It was, therefore, concluded that ICTS's obligation to pay benefits under the disability plan was regardless of whether the insurer paid out under the policy or not.

It was further determined that the whole purpose of PHI and/or other disability benefit schemes would be defeated if an employer could simply end entitlement under the schemes by dismissing employees when they become unfit for work. However, whether or not an employer had a contractual right to do so would be decided on a case by case basis. The express clause to enable termination in Mr Awan's contract was drafted in general terms and it did not expressly deal with incapacity or reserve the right to dismiss without cause. Mr Awan also had the benefit of an express clause entitling him to disability benefits (as outlined above). This clause did not allow for dismissal upon incapacity.

There had been a fundamental contradiction between an employer's right to terminate a contract on notice and the employee's contractual right to disability benefits. A term was, therefore, implied into the contract of employment that the employer could not terminate due to incapacity reasons whilst the employee was entitled to payment of disability income due under the long-term disability plan.

Awan v ICTS UK Ltd UKEAT/0087/18

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Why Is Whistleblowing Still A Risk?

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Why Is Whistleblowing Still A Risk?

Despite being a world leader in the financial markets, the UK falls short of other jurisdictions when it comes to providing protection for whistleblowers. And with the New York Times stating the roots of a major new global financial crisis could already be taking hold in America, whistleblowers can provide an invaluable check on the behaviour of senior decision makers. But despite the Financial Conduct Authority (FCA) increasing its resources to handle complaints from whistleblowers, those brave enough to stick their head above the parapet are still risking having it ruthlessly removed.

Studies show that blowing the whistle poses a risk for the person disclosing the information due to:

1. the psychological prejudice people have towards whistleblowers, and
2. the lack of legal protection

In this article, we will look at these two factors in detail, examine how other jurisdictions regulate for the protection of whistleblowers and look at the proposed changes to UK law which could provide greater safety for those prepared to speak out against conduct from senior officials which is illegal or breaches their fiduciary duty to clients, shareholders, or both.

"No good deed goes unpunished" – Psychological prejudice towards whistleblowers

A forthcoming study, *Post-disclosure Survival Strategies: Transforming whistleblower experiences,* conducted by Professor Marianna Fotaki of Warwick Business School and Professor Kate Kenny of Queen's University Belfast, found that 62% of whistleblowers stated that they had been demoted, and almost all were eventually dismissed or resigned their post. In addition, many whistleblowers find themselves blacklisted by recruitment agencies, and even if they do manage to secure a position, once word of their actions becomes public, many experience unfavourable behaviour in their new workplace.

Studies show that despite rhetoric praising those who have the courage to stand up to an authoritative figure doing wrong, humans have a natural suspicion against 'moral agents'.

"Moral Agents (good or bad) seem tougher than others and better able to endure life's tribulations. This mental schema means that the suffering of heroes is less salient and less demanding of empathy than that of others. When a normal person is punched our heart leaps, but when Superman or Batman gets punched we shrug it off because we expect them to do the same. It's hard to picture Gandhi whimpering over a bruised knee".

Another study confirms we actively reject and resent those who do the 'right thing' because doing so threatens the self-image of those who turned a blind eye.

Legal protection – it is there, but is it robust enough?

The Public Interest Disclosure Act 1998 (PIDA) came into force on 2 July 1999

PIDA provides two levels of protection to whistleblowers who make what PIDA refers to as a "protected disclosure":

1. a dismissal will be deemed automatically unfair if the

reason for that dismissal was that the individual made a protected disclosure, and

1. workers who make a protected disclosure cannot be subjected to detriment for having done so.

The protection against dismissal is also enhanced compared to an 'ordinary' unfair dismissal claim in that there is no requirement to have two years' service with the employer before bringing a claim, and the arbitrary cap on financial compensation (the lower of a year's pay and £83,682) does not apply.

To qualify for protection, a whistleblower must show that:

- They have disclosed information (rather than merely threatening to do so);
- The information must relate to one of six types of 'relevant failure';
- They have a reasonable belief that the information tends to show one of the six types of 'relevant failures';
- They have a reasonable belief the disclosure was made in the public interest; and
- Requirements about the identity of the person to whom the information has been disclosed are met (these are complex, but broadly PIDA encourages disclosures to the employer but does protect disclosures to external third parties in certain circumstances).

Meeting these tests can be a minefield for whistleblowers, which is why seeking legal advice making the disclosure is essential. Whistleblowing claims can be notoriously hard to prove; roughly 4% of Employment Tribunal claims are successful.

How other countries protect whistleblowers

Having taken a hammering in the 2008 financial crisis, it is no surprise that the United States leads the way when it comes

to regulations to encourage and support whistleblowers. The US Securities and Exchange Commission (SEC) is authorised by Congress to provide financial awards to people who come forward with information that leads to a Commission enforcement action in which over $1,000,000 in sanctions is ordered. Awards can be valued at up to 30% of the money collected. The Trump administration shows no signs of rolling back on legislation designed to encourage employees to report wrongdoing, for example, in June 2018, President Trump signed into law the Whistleblower Protection Coordination Act, permanently reinstating the Whistleblower Ombudsman Program.

In Australia, incoming legislation, expected to be in force from January 2019, will force all but the smallest of companies, to put in place a detailed whistleblowing policy and ensure it is communicated to staff. In New Zealand, the State Services Commission recommended changes to the Protected Disclosures Act. Public consultation on the suggestions which would increase whistleblowers' rights have now ended, and decisions will be made in the New Year. And in Canada, The Ontario Securities Commission adopted a whistleblower programme in 2016, which provides rewards of up to $5m.

How the UK can improve whistleblower protection

In May 2018, the CEO of Barclays, Jes Staley, was fined a total of £642,430 by the FCA for trying to uncover the identity of an anonymous whistleblower. However, the penalty attracted significant criticism as it represented only 14% of his total compensation.

Unlike their US counterparts, UK whistleblowers receive no financial incentive for reporting wrongdoing. And because of the lack of clarity in the law, the risks of blowing the whistle are high. For example, if the internal rules of an organisation (based on FCA requirements) are breached, it does not automatically mean there has been a breach of the law. These types of situations can lead to the person making the

disclosure being left without any protection under PIDA.

Lord Godfrey Cromwell, a robust advocate for increasing whistleblowing procedures, has said:

"It is a widely-held misunderstanding that the FCA regulates the whole financial services world. Significant areas – for example bank lending to SMEs – remain unregulated and it comes as a shock to whistleblowers and aggrieved customers alike that the FCA is largely unable to engage in such areas."

In early 2018, the charity Whistleblower UK put forward its proposal for a bill to amend PIDA, to include an independent Office For the Whistleblower. Many leading parliamentarians support the proposal, including Lord Cromwell and Baroness Susan Kramer, along with the Institute of Business Ethics and Public Concern at Work. The organisation is also campaigning to have penalties imposed on those who retaliate against whistleblowers.

BDBF recently acceted for the successful claimant in the landmark Court of Appeal case of *Timis & Sage v Osipov* [2018] EWCA Civ 2321 which held that an employee may bring a claim against a fellow worker for whistleblowing detriment where the detriment is a dismissal. This provides an alternative route for employees who have been dismissed because of whistleblowing in situations where the organisation which employed them becomes insolvent.

However, when it comes to pushing through legislation, or even getting a Bill tabled, at the moment, the great monster of Brexit is standing in the way. Heather Buchanan, director of policy and strategy for the All Party Parliamentary Group on Fair Business Banking and Finance, told *Global Risk Regulator*:

"Everything is about Brexit right now, It is probably the biggest challenge. Everyone says [there is] no time on the floor for this stuff; it does take a very sustained effort. We can look at legislation going through but the space for new

legislation is very difficult right now".

Final words

Blowing the whistle is a risky business and should never be undertaken without legal advice. The price paid by many who have 'done the right thing' has been professional and personal. However, research has shown that those who blow the whistle in their workplaces tend to have a strong moral compass and a desire to confront wrongdoing, therefore, they are left with no choice regarding whether to speak up. The least they can ask for is for the law to provide protection.

BDBF are employment law specialists with particular experience of acting for whistleblowers in the financial services and heal sectors. If you want to find out about making a claim following detriment or dismissal related to whistleblowing, please contact Clare Brereton, Associate (claretaylor@bdbf.co.uk) on 020 3828 0350.

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New Rights For Gig Economy And Zero-Hour Contract Workers

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New Rights For Gig Economy And Zero-Hour Contract Workers

On 17 December 2018, the Government released its Good Work Plan, in which it set out what it states is the biggest package of workplace reforms for 20 years. In presenting its “vision for the future of the UK labour market”, the Government aims to bring employment law into line with changes in technology and the way people now work.

The plan is the result of an independent review of modern employment practices, led by Matthew Taylor, the Chief Executive of the Royal Society of the Arts.

Much of the detail is yet to be clarified, but we’ve set out below what the new rules are likely to mean for employers.

A written statement to be provided to employees and workers from day one of their employment

Under the Employment Rights Act 1996, employers must provide employees (but not “workers”) a written statement of the particulars of employment not later than two months after the employee starts work.

However, the Good Work Plan states that the changing nature of employment relationships and the increase in flexible working

arrangements has left many lacking the information needed to ensure they fully understand their employment terms and conditions. To rectify the lack of clarity, the new legislation will state an employer must provide a written statement of particulars from day one to both employees and workers. Leave entitlements, such as time off for sickness and maternity leave, must be included.

Right to request a stable contract

Under the changes, employees and workers will be given the legislative right to request a predictable and stable contract after 26 weeks of employment. The aim of this is to allow people to benefit from flexible working arrangements but be able to plan for their future and benefit from certainty, for example, to help them apply for a mortgage.

In practice, if a staff member has worked for an employer for 26 weeks or more on a zero hours contract but averaging 25 hours a week, they will have the right to ask their employer for a contract guaranteeing those 25 hours.

Employer will need to put procedures in place for dealing with these requests in line with the statutory framework.

Continuous Service break extended

Because employment rights are earned over time, Matthew Taylor identified that many people struggled to build up continuous service due to intermittent working patterns or working for multiple employers. Under current law, a gap of one week can break the chain of continuous service. New laws will extend the length of the gap to four weeks.

Agency workers

Currently, agency workers can exchange their right to be paid, in the same manner as their permanent counterparts (‘opt-out’ from this part of the Agency Worker Regulations), in return

for a contract with the employment agency guaranteeing pay between assignments. This is known as the "Swedish derogation". However, evidence shows that some agencies use tactics to circumnavigate the need to pay between assignments, for example by contractually stipulating the employee must always be available to work, regardless of the number of hours offered or the location of the job. In addition, in the current climate of full employment, it was identified that agency workers seldom experienced gaps between assignments; however, some agencies continue to use the opt-out as a way of reducing the wage bill.

New legislation will end Swedish derogation and end the ability of agency employers to deny an employee equal pay under the Agency Workers Regulations 2010.

For employers taking on temporary agency workers, this means the agency will need to pay the worker the same rate of pay as the employer would permanent staff. This may lead to an increase in costs, especially for employers who need to take on a number of extra workers over busy periods.

Staff tips

The Plan recognises that gratuities and service charges can be a significant part of staff income. Most employers pass these onto employees; however, it is recognised a small number resist this. Therefore, legislation will be brought in to ban employers from making deductions from staff tips.

Information and consultation arrangements

The Information and Consultation of Employees Regulations, provides the right for employees, in certain circumstances, to request their employer make arrangements to inform or consult them regarding organisational issues.

New legislation will be introduced to lower the threshold required for a request to set up information and consultation

arrangements from 10% to 2% of employees. The 15 employee minimum threshold for initiation of proceedings will remain in place. This change aims to make employees feel more involved in the workplace, thereby improving job satisfaction.

This change will mean employers will need to be prepared to consult more freely and more often.

Increase in Employment Tribunal fines

New laws will increase the maximum fine for employers who deliberately breach employment law or have shown malice, spite, or gross oversight, from £5,000 to £20,000. In addition, employers who repeatedly flout employment law may be subjected to sanctions.

It was noted that the Employment Tribunal do not use their power to fine for aggravated breach as widely as they could; therefore, new guidance will be provided to judges on how current powers can be used. Once the sanctions are in force, obligations will be placed on the Tribunal to consider their use in appropriate circumstances.

Employers should take note of this new 'hard line' against aggravated or repeated breach of employment law and ensure they seek legal advice when undertaking dismissals and other actions which could lead to a claim.

Holiday pay

The report identified that some seasonal and atypical workers (including those participating in the gig economy) faced challenges in benefiting from their full holiday pay entitlement. To ensure the average hours for an entire year are reflected in holiday pay calculations, legislation will be introduced to extend the holiday pay reference period from 12 to 52 weeks.

Employers will need to plan ahead and adjust their payroll

practices accordingly.

Umbrella companies

Umbrella companies, which act as an intermediary between employers and workers are seen to work well in highly-skilled, highly-payed sectors. However, the Taylor Review recognised that although they reduce the cost and administrative burden of managing payrolls, they can fail workers in low-skilled, low-paid roles. One reason for this is the lack of certainty regarding which entity is technically the employer is in situations where an umbrella company is engaged. As such, workers can be unsure who to approach regarding their rights.

To counter this, legislation will be introduced to allow the Employment Agency Standards Inspectorate to cover umbrella companies. They will have the power to investigate complaints and take enforcement action if required. A particular focus will be on situations in which fair pay is not being granted. This will reduce the instances of unfair competition based on unlawful wage reduction.

If you have any questions regarding how these new changes may affect your business, please do not hesitate to call us on 020 3828 0350.

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EAT confirms a loose

causation test in claims for discrimination arising from a disability

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EAT confirms a loose causation test in claims for discrimination arising from a disability

In *Sheikholeslami v University of Edinburgh,* the EAT confirmed that a looser causation test was appropriate in determining whether unfavourable treatment had arisen from the claimant’s disability.

Section 15 of the Equality Act provides that an employer cannot treat an employee unfavourably because of something arising from their disability. By way of example, dismissing an employee with severe depression for appearing unenthusiastic at work could be discrimination arising from a disability. The treatment is not motivated by the depression, it is motivated by the consequences of that depression. An employer may have a defence to discrimination arising from a

disability if they can prove that the unfavourable treatment was a proportionate means of achieving a legitimate aim. If the employer did not know and could not be reasonably expected to know a worker had a disability, then section 15 is not engaged.

in *Sheikholeslami v University of Edinburgh,* the Employment Appeal Tribunal held that whether 'something' arises by consequence of a disability is a loose test, finding that the Employment Tribunal should have considered the links between the claimant's disability and her behaviours and said that there could still be a connection even if there was more than one link in the chain of causation.

The background

In 2007, Ms Sheikholeslami, the claimant, accepted a prestigious position as Professor and Chair of Chemical Process Engineering at the University of Edinburgh. She began to suffer from severe work-related stress and depression and became too ill to attend work.

The claimant raised a grievance for sex discrimination in 2010. A diversity review concluded that there were cultural problems at the School of Engineering. The claimant asked to be transferred from the School of Engineering, but her request was not accepted. The Employment Tribunal ('*ET*') found that the claimant became disliked and distrusted by the School of Engineering, whose staff believed that she had "over-egged" her grievance.

The claimant's health continued to suffer, and in 2012 she was dismissed on the grounds that her work permit had expired. The university had not sought to follow its own dismissal procedures or to extend the work permit on the basis that the claimant was not prepared to return to work.

The section 15 claim

The claimant bought claims for sex discrimination, a failure

to make reasonable adjustments and that the University's failure to extend her work permit, failure to follow its own dismissal procedures and dismissal of the claimant was less favourable treatment arising from her disability.

The ET rejected her claims. The claimant's discrimination arising from a disability claim failed because, whilst the ET accepted that the University had not applied to extend the claimant's work permit because she refused to return to work, in its view, there was insufficient evidence to link her refusal to return to work with her disability (rather than her refusal being linked to the fact that she felt she had been badly treated).

On appeal, the EAT found that the ET had applied too narrow a causation test. The ET did not consider that there may be more than one link in the chain of causation between the reason for the dismissal and 'something' that had been caused by the claimant's disability.

Here it was the claimant's disability that caused her to be absent from the university and the perceived hostility of the claimant's colleagues was linked to the cause of her disability. The EAT found that because the claimant's disability, its cause and effects were all so interlinked, the ET should have considered whether her refusal to return was a consequence of her disability, which was a looser test. The EAT found, applying a looser test, that there was a link between the consequences of the claimant's disability and her dismissal.

What this case means

The case demonstrates that the test for whether an employee has been treated unfavourably as a consequence of their disability is a loose one, particularly where the disability has been triggered by work and employers should think broadly about whether a disability could be linked with a reason for a dismissal.

BDBF are employment law specialists with expertise in claims by university professors. For more information please contact Senior Associate Rolleen McDonnell, (rolleenmcdonnell@bdbf.co.uk) on 020 3828 0350 or Senior Associate Samantha Prosser (samanthaprosser@bdbf.co.uk) on 020 3828 0373.

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Beware the 'curse' of twitter – a warning for regulated professionals

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Beware the ‘curse’ of twitter – a warning for regulated professionals

In recent years the power of regulators has increased dramatically. All regulators are more proactive in taking enforcement action against individuals in breach of rules in previously uncharted areas, for example the personal use of Twitter. In recent months, the Solicitors Regulation Authority (SRA) issued clear communications regarding the high standards of behaviour it expects from law firms and solicitors. For example, a Warning Notice regarding the use of threatening drafting in non-disclosure agreements. The SRA believes this could discourage individuals from making disclosures to regulators and law enforcement agencies. In addition, they issued guidance making it clear that instances of sexual harassment within law firms should be reported to the SRA.

Suspension of a solicitor because of a series of posts on Twitter

An example of enforcement action by the SRA demonstrates the power of regulators extends beyond the office into personal lives. The Solicitors Disciplinary Tribunal suspended Deborah Daniels for 18 months as a result of her activity on Twitter. This case is specific to solicitors, however all regulated individuals should understand how their online activity can affect regulatory status.

Sending offensive and wholly inappropriate tweets

In 2016 and 2017 Ms Daniels, a partner in a firm based in Yorkshire, sent a series of tweets from her personal twitter

account. These tweets were, by her own admission, offensive and wholly inappropriate. In particular they expressed hostility towards and/or a hatred of Islam, Catholicism and Judaism. Similarly, she used the same twitter account to comment on photographs of a woman wearing a niqab and a drag artist/person of transgender in a way that was offensive, wholly inappropriate and/or discriminatory. Consequently, in doing so she breached two of the mandatory principles with which she was expected to comply. Namely 'act with integrity' and 'behave in a way that maintains the trust the public places in you and in the provision of legal services'.

The factor that justified the immediate suspension from practice was the content of one of the twitter posts. In March 2017, Ms Daniels commented on an article about a photograph of a woman wearing a niqab and a drag artist/transgender person sitting together on the New York subway. Disapprovingly, her comment included the words 'they both look stupid and unemployable and therefore pointless'.

Most importantly, the reference to them being 'unemployable' was particularly concerning for the Tribunal. During the hearing, Ms Daniels had been unable to provide reassurance that she did not discriminate based on appearance during recruitment to her firm. Accordingly, it found that there was a need to protect the public and a suspension order was necessary. As a result the Tribunal identified a link between an opinion posted online and the potential to cause harm to the public. Particularly if this opinion manifests itself in the recruitment of individuals into the legal profession.

Personal tweets

Although the tweets were sent from Ms Daniels' personal twitter account, that account clearly identified her as a solicitor and the Tribunal found that they were capable of damaging (and did in this case damage) the trust placed in the legal profession by the public. The Tribunal accepted that

tweets can be drafted and posted spontaneously, without regard for the wider ramifications. However, in this case Ms Daniels' conduct was 'persistent and protracted' and it was 'highly predictable' that such behaviour would cause harm to the legal profession. Moreover, they did not accept the excuse that the 'curse' of twitter (being the ease with which users can post messages) was partly to blame for her actions.

Not paying regard to public opinion

An aggravating factor was that Ms Daniels continued to tweet inappropriate messages despite members of the public raising concerns both about the content of her twitter posts and that they were authored by a solicitor. On more than one occasion a member of the public tagged the SRA in a reply to one of Ms Daniels' tweets, however she still did not cease. Consequently, the Tribunal found this to amount to serious misconduct.

Ramifications of offensive personal tweets

This case serves as a useful reminder to regulated professionals that personal conduct has the ability to impact on their regulatory status, with potentially severe consequences including law enforcement. It is also consistent with case law in the Employment Tribunal. An employer can dismiss an employee fairly for conduct on Twitter and other personal social media accounts where the employer can be identified and therefore there is a risk of damage to its reputation.

BDBF are employment law specialists. If you have any queries about social media policies, please contact Clare Brereton, Associate on claretaylor@bdbf.co.uk or 020 3828 0350.

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