EMPLOYMENT LAW
NEWSLETTER

We are pleased to share with you the latest edition of our employment law newsletter, which we hope you will find informative. In this issue we look at the little-known concept of interim relief in protected disclosure (whistleblowing) claims, planned changes to the law on flexible working requests, a recent sex discrimination case involving toilet access, plus update you on planned increases to national minimum wage rates and other payments in April.

For any employer potentially affected by the Harpur Trust v Brazel case covered in our last newsletter, the Government has issued a consultation paper due to close on 9 March which you may want to get involved with.

We hope you enjoy the read.

INTERIM RELIEF AND PROTECTED DISCLOSURES

Late last year we came across our first ever application for interim relief in a protected disclosure claim. Whilst such applications are rare, many do not know they exist, they can in certain instances pose real issues for employers, especially where the ex-employee seeks early legal advice or support from a specialist charity.

What is a Protected Disclosure?

A protected disclosure, otherwise known as 'whistleblowing', is where an individual has a reasonable belief that a wrongdoing has or will be committed either by the employer, colleague or a third party, which they disclose or report reasonably believing it to be in the public interest to do so. Examples include reporting a criminal offence or other failure to comply with a legal obligation or disclosing information about someone's health and safety being put at risk. It can also cover concealment of such matters. Employees are protected from day one of their employment if they are either dismissed or suffer a detriment (disadvantage) for making a protected disclosure. Any dismissals will be rendered automatically unfair even if, for example, the individual is still in their probationary period. Workers are also protected.

It is therefore always important to take early legal advice where either an individual claims they are being treated unfairly for raising concerns or where you are looking to dismiss someone because of performance or other issues, including within their probationary period, and you are aware they have raised concerns which could be considered a protected disclosure.

What is Interim Relief?

Interim relief is an award the Employment Tribunal can make when a Judge believes an employee is likely to be able to show they have been unfairly dismissed due to an automatically unfair reason contained in section 128(1) Employment Rights Act 1996. An interim relief award, if made, 'preserves' employment until a final hearing, where a decision will be made on whether the dismissal was fair. If an application for interim relief is granted, one of the following orders will be made:

- Reinstatement order – if the employer agrees, the employee is reinstated in the role they had prior to their dismissal until the final hearing. In this instance the employee will be required to attend work and fulfil their role as normal pending the final hearing.

- Re-engagement order – if the employer agrees and where the employee's original role is no longer available, the employee is re-engaged in a different role until the final hearing.

- Continuation of contract order – where the employer objects to either of the above orders being made then the Tribunal can order that the employee's contract of employment continues as if they had never been dismissed, although there will be no obligation on the employee to physically attend work in this instance! This means the employer must continue to pay the employee's full uncapped salary or wage from the date of dismissal until a final hearing. The employee will also be entitled to holiday pay, pension, benefits, and their period of continuous employment will continue to run. In this instance there will be little incentive for the individual to actively mitigate their loss and seek alternative work.

Employers should note that any salary, wages, pension or other benefits paid to an employee under any of the above orders are **not recoverable at a final hearing**, even if the dismissal is found to be fair and the employer vindicated. The payments would, however, be taken into account and off-set against any award made should the Tribunal find in the ex-employee's favour. Given the current pressures faced by Employment Tribunals and the fact parties could face a long wait until the final hearing employers should be mindful to limit their risk of such an adverse award being made, especially smaller employers or where the individual in question was in a senior, highly paid position prior to dismissal.

Process

An application for interim relief must be submitted to the Employment Tribunal within **seven days** of the employee's last day of employment. Once an application is received, an urgent hearing is listed to hear the interim relief application and decide whether it should be granted or refused, pending final hearing. A final hearing will then be listed after this, regardless of the outcome of the interim relief hearing, to decide whether the employee's dismissal was fair.

As we mention above an interim relief application will be granted if the ex-employee can show *it is likely* that the reason (or principal reason) for dismissal was due to them making the alleged protected disclosure(s), which in turn will show *it is likely* the unfair dismissal claim will succeed at a final hearing. The burden of proof rests with the ex-employee. At this stage the Employment Tribunal will not investigate whether the ex-employee had reasonable belief that the alleged protected disclosures were genuine – this is explored and decided on as part of the unfair dismissal claim at the final hearing.

As to the meaning of the phrase '*it is likely*' the Employment Appeal Tribunal suggested in Taplin v Shippam [1978] that the phrase meant more than a '*reasonable prospect of success*', interpreting it to mean an employee must show they have '*a pretty good chance*' of success. This approach was upheld in the cases of Dandpat v University of Bath [2009] and Ministry of Justice v Sarfraz [2011], with Lord Justice Underhill commenting in Sarfraz [2011] that the phrase implies '*a significantly higher degree of likelihood*'.

Thankfully in our client's case, after considering both parties' bundles of documents, witness statements, skeleton arguments and Counsel's submissions, the Employment Tribunal Judge refused the ex-employee's interim relief application. In their judgment, they reasoned the ex-employee was not likely to be able to show a causal link between the alleged protected disclosures and their dismissal at a final hearing. Furthermore, they were not satisfied the ex-employee would have '*a pretty good chance*' of success at proving their dismissal was unfair.

Points to note for Employers

While interim relief cases are rare, they do occur from time to time and are something employers should be mindful of. When dismissing an employee with any length of service and with a potential protected disclosure in the mix we would strongly recommend employers obtain legal advice on the safest way to execute a dismissal before acting, to minimise the risk of claims.

For best practice, alongside legal advice employers should follow their own internal procedures and take the necessary steps to safely dismiss an employee. Employers should also ensure they retain supporting evidence relating to the process, decisions, and reasoning for dismissals to help dispel any claims if they arise.

If you do not already have one, we also strongly recommend implementing an internal whistleblowing policy for staff.

FLEXIBLE WORKING REQUESTS – WHAT THE FUTURE HOLDS

Following a consultation towards the end of 2021 on flexible working rights, the government has published its response with proposals to amend and improve flexible working rights. For those particularly wishing to read the same in full it can be found here.

We have previously covered flexible working rights in both our October 2021 and January 2022 newsletters. The main changes proposed are:

- Allowing all employees to make a flexible working request regardless of length of service. Currently to make a formal request employees need to have been employed continuously for at least 26 weeks;
- Allowing employees to make up to two rather than one formal flexible working request in any 12-month period;
- Requiring the employer to respond to any formal requests (which usually includes dealing with any appeal) within two months. Currently employers have three months to respond;
- Simplifying the procedure employees need to follow when making their formal request by removing the current requirement for the request to address the effect, if any, it may have on the employer and how that effect could be dealt with. Instead employers will be expected to engage with the employee when considering the request to ensure both sides understand the potential impact; and
- If an employer intends to otherwise reject the request a consultation requirement will arise to encourage both sides to explore potential alternatives before formally rejecting the request.

There is presently no plan to change the eight permitted business reasons an employer can currently rely on to refuse a flexible working request. As also set out in the published response it is important that the legislation '*remains a right to request, not a right to have*', acknowledging there can be no '*one size fits all*' approach and which will clearly be dependent on industry and individual business requirements.

It is important to stress that for these changes to be implemented new legislation will firstly be required, although all bar the first of the proposed changes listed above are already subject to a Private Members Bill the Government is supporting and currently progressing through Parliament. We may therefore not have long to wait and so best to start planning for these changes now!

We will, of course, keep you updated on this front in future newsletters.

HOW TOILET FACILITIES LED TO A CLAIM FOR SEX DISCRIMINATION

In the recent decision of Earl Shilton Town Council and Miller a Council's attempt at converting their men's toilet facilities into unisex facilities resulted in a successful claim for sex discrimination. With the number of unisex facilities potentially on the rise, this case is a helpful guide on what not to do!

The facts

Ms Miller was employed as an Office Clerk by Earl Shilton Town Council, one of their few employees. The Town Council operated from a Methodist Church building, which also hosted a playgroup. The church had two sets of toilets, one male and one female. The female toilets were in that part of the building used by the playgroup, and so used by the children attending the playgroup. The male toilets were in the part of the building used by the Council.

A female wanting to use the toilet had to gain the attention of a playgroup staff member and wait for them to check it was clear of children. This was not always an easy task and for anyone needing to use the toilet urgently far from ideal!

As a result the Town Clerk proposed that female employees also use the men's toilets. These had one cubicle and a urinal, with anyone wanting to use the cubicle having to walk pass the urinal. Initially a sign was provided to place on the door when a female was using the facilities, but this did not always stay in place. This risked a man using the urinal being seen by the woman. There was also no sanitary waste bin. Ms Miller complained and sometime later an internal lock was fitted to the toilet entrance and a sanitary bin provided, although this was only emptied when Ms Miller requested it.

Ms Miller asserted this arrangement amounted to direct sex discrimination.

What is Direct Discrimination?
The Equality Act 2010 provides a variety of protections from discrimination. In accordance with Section 13(1) direct discrimination arises when:

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

In this instance the protected characteristic relied upon by Ms Miller was sex. In particular, the difference of treatment between women and men when it came to the provision of adequate toilet facilities, the men always having access to adequate facilities, unlike Ms Miller and any other females working for the Council.

The Decision
The employment tribunal were in no doubt that Ms Miller had been subjected to a detriment by the arrangements. They commented *"Any reasonable person could reasonably consider not having immediate direct access to toilet facilities, the risk of seeing a person of the opposite sex using toilet facilities … and not having a bin in which to dispose sanitary products as a series of detriments"*.

The Tribunal were also in no doubt that this was a case of *inherent discrimination* because of sex due to the nature of the arrangements. The reasons for the difference in treatment in this instance was therefore irrelevant, as was the fact there were limits as to what the Council could do to rectify the disparity.

Accordingly, the tribunal found in favour of Ms Miller and concluded that the provision of inadequate toilet facilities for women was direct sex discrimination.

The Appeal
The Council appealed unsuccessfully arguing that the less favourable treatment could not be because of sex, as they stemmed from safeguarding requirements associated with the playgroup. Further they argued a man was equally at risk of being seen by a woman when using the urinal, so again this could not be sex discrimination.

The EAT agreed with the Tribunal that Ms Miller has been subjected to less favourable treatment because of the inadequate arrangements including the risk of seeing a man use the urinals. The EAT also commented that just because a man might also be able to argue a claim for direct sex discrimination because they risked being seen by a woman, this was not fatal to Ms Miller's claim. It also did not matter if there were other female employees who had not objected to the arrangements.

Further and in addition whilst the safeguarding concerns were a factor in Ms Miller not being able to use the women's toilets it did not explain the unsatisfactory arrangements put in place when sharing the use of the men's toilets. Very clearly the simplest way forward from the outset would have been adding a lock to the door, a step not taken until some months later!

The moral of the story is if facilities are to be shared make sure they are adequate and cater for all.

CONSULTATION OPENED FOLLOWING HARPUR TRUST V BRAZEL - HOLIDAY ENTITLEMENT FOR TERM TIME WORKERS

In our last newsletter we covered the recent case of Harpur Trust v Brazel and the calculation of holiday entitlement for term time and other part year workers. If you have not already done so and engage anyone on a term time or part year basis it is an important read, as they may presently be entitled to more holiday entitlement than you think!

Following this case the Government has issued a consultation paper given the disparity this case raises, namely that part-year workers are entitled to more holiday than part-time workers working throughout the year. The Government is keen to gather views from employers, workers, representative groups, unions and others representing interests in the labour market.

If you wish to have your say the consultation will close on 9 March, so do not delay!

LOOKING FORWARD TO APRIL – A REMINDER OF INCREASES TO NATIONAL MINIMUM WAGE AND OTHER STATUTORY PAYMENTS

Finally, this newsletter would not be complete without a reminder that with April around the corner there will be changes to both the National Minimum Wage rates as well as other statutory payments.

National Minimum Wage	£10.42 for those aged 23 and above (national living wage), £10.18 for 21-22 years, £7.49 for 18-20 years, £5.28 for those under 18, and apprentices under 19 or during first year of their apprenticeship.
Statutory maternity, paternity, adoption pay, shared parental pay and parental bereavement pay	£172.48 per week* or 90% of employee's average earnings, whichever is lower. * Employee entitled to 90% of their average earnings for the first six weeks of any period of statutory maternity or adoption leave.
Statutory Sick Pay	£109.40 per week, increasing from £99.35 per week.

A week's pay for the purposes of statutory redundancy calculations is also expected to increase, although the new figure is yet to be announced. An online statutory redundancy calculator can be found here.

HOW CAN WE HELP?

We can help you with any employment law needs, but we thought it would be useful to summarise how we can help you if you come across any issues or needs relating to the content of this newsletter so please do get in touch with us if that's the case (contact details below):

1. What to do, and importantly not to do, when someone raises a protected disclosure, as well as helping you implement a whistleblowing policy if you do not already have one;

2. Providing any required advice and assistance should you receive a flexible working request, as well as providing/updating internal policies to ensure they remain legally compliant;

3. Providing advice and support when faced with either an internal grievance or employment tribunal claim raising discrimination complaints by disgruntled workers/former workers.

You should seek legal advice before relying on the content of this newsletter as every situation is different and the law in employment is ever changing.

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