EMPLOYMENT LAW
NEWSLETTER

Welcome to the latest edition of our quarterly Employment law newsletter. In this edition we highlight the recently updated guidance issued by ACAS on reasonable adjustments for mental health, an important read and not just because it is Mental Health Awareness Week the 15-21 May. We also look at two recent appeal decisions. The first is Mones v Lisa Franklin Limited, a claim asserting underpayment of furlough pay. The second is Meaker v Cyxtera Technology UK Ltd, a case finding that a "without prejudice" letter intended to and did terminate Mr Meaker's employment.

At the end of the newsletter, we highlight potential employment law changes making their way through parliament, plus increases to the calculation of statutory redundancy payments and tribunal compensation awards introduced in April.

We are also pleased to announce that with effect from 1 May our Head of Employment, Louise Nunn, has also been promoted to Partner.

MENTAL HEALTH AND REASONABLE ADJUSTMENTS

As a society we now have much more awareness when it comes to mental health conditions and their potential impact on those affected. Gradually more people are willing to discuss their mental health concerns and public perceptions are improving. The 15 to 23 May is also mental health awareness week, with this year's theme being anxiety.

ACAS also last month issued updated guidance on reasonable adjustments specifically in relation to matters of mental health, which can be found here.

By issuing this updated guidance ACAS aims to help employers better understand how they can support those in their workforce presently experiencing mental health issues. It highlights both the benefits to the business, as well as the individual, in doing so.

The guidance includes example adjustments as well as providing helpful guidance on how to approach these all important discussions with employees.

It also provides a helpful template and guidance for employees wishing to make a request for reasonable adjustments.

Importantly the guidance also recommends employers review internal policies with mental health in mind.

What are reasonable adjustments and when does this obligation arise?
Reasonable adjustments are changes made by employers to help remove or reduce a "substantial disadvantage" faced by disabled employees in the workplace.

The legal duty to make reasonable adjustments arises where is it known (or ought reasonably to be known) that an employee or worker, certain contractors, or job applicant is "disabled" for the purposes of the Equality Act 2010. Section 6 of the Equality Act 2010 confirms that a disability is:

A physical or mental impairment which has a substantial and long-term adverse effect on the ability to carry out normal day to day activities.

Accordingly, when it comes to mental health conditions, whether they amount to a disability will clearly depend on individual circumstances with long-term mental health conditions more likely to be classed as a disability, in comparison to short term stress caused by a work-related or personal event.

However, employers should still always consider reasonable adjustments regardless of whether the individual would be classed as disabled. Indeed, ACAS expressly suggest in their guidance that *"Employers should try to make reasonable adjustments even if the issue is not a disability"*. In most instances such adjustments are likely to be simple changes yet will bring with them benefits for both individual and business alike, including better productivity, reduced sickness absence and generally creating a healthy and positive working environment.

Whilst many employers generally now offer a variety of health and wellbeing packages as standard it remains important for both employer and employee to discuss and work together on identifying and agreeing potential adjustments. As per the ACAS guidance it should also be borne in mind that every employee is different, as is their experience of mental health. These conditions can also change over time, so any adjustments in place may need to monitored and, if required, updated.

WAS THERE AN UNDERPAYMENT OF FURLOUGH PAY?

At the end of April the Employment Appeal Tribunal handed down the decision in Mones v Lisa Franklin Limited, a case concerning the calculation of furlough pay.

The Coronavirus Job Retention Scheme (CJRS)
As everyone is aware, during the Covid pandemic the Government introduced the CJRS, a grant scheme to save jobs, funded through HMRC covering wages, employer NI and pension contributions, subject to certain upper limits.

Relevant here, when it came to employees on variable hours, reimbursement would be up to 80% of the individual employee's "reference salary" (subject to a £2,500 monthly cap) which would be the greater of:

(a) Their average earnings during the tax year 2019-2020 (or, if less, their period of employment) before furlough began; or

(b) The actual amount paid to the employee in the corresponding calendar period in the previous year.

The Facts
Ms Mones started working for Lisa Franklin Ltd in November 2018 working 9 hours a week on a Saturday. From January 2020 Ms Mones changed to variable hours, mainly working 6 hours on a Friday. In addition to her regular shifts, she would sometimes work other ad hoc hours. Her monthly pay would therefore vary.

On 30 March 2020, at the start of the pandemic, the employer wrote to Ms Mones proposing to place her on furlough from 3 April 2020. The letter provided that under the CJRS HMRC would cover 80% of Ms Mones regular wage. As she had changed her working pattern less than a year ago, they would calculate Ms Mones average earnings based on her 2020 earnings only, ignoring all earlier earnings when working increased hours.

Ms Mones initially queried this. In response her employer advised they had taken advice on this point and believed their position to be correct. Ms Mones did not challenge or query matters further, with furlough commencing on 3 April and ending on 7 September 2020. Whilst on furlough Ms Mones was paid in accordance with the furlough letter terms. This ultimately meant Ms Mones received less than her employer could have potentially claimed as "reference earnings" under the CJRS. Ms Mones' employment subsequently ended 17 September 2020.

In addition to a claim for unfair dismissal Ms Mones also asserted various unlawful deductions from wages. This included a claim for underpaid furlough pay, asserting that her furlough pay should have been calculated in accordance with the CJRS.

The Decision

Whilst Ms Mones furlough pay had not been calculated in accordance with the "reference salary" formula the Government had set out for the CJRS, there had been no unlawful deductions from wages and the claim failed. This decision was upheld on appeal.

The Tribunal concluded that Ms Mones had agreed to being placed on furlough in accordance with the terms of the furlough letter issued. This was accepted by her when furlough leave started without further protest. She had been paid in accordance with the terms of the furlough letter.

The CJRS and associated Treasury Directions did not create statutory or contractual obligations between employer and employee. Nor did they impose any obligations on an employer to adopt the calculations set out within the scheme, rather they confirmed the maximum sums the employer could lawfully reclaim, dependent on the actual amounts paid to furloughed employees.

Whilst the CJRS ended in September 2021, this case will clearly render any similar claims or appeals yet to be heard difficult to pursue.

WITHOUT PREJUDICE LETTER WAS EFFECTIVE NOTICE OF TERMINATION

Whilst the question on appeal in the case of Meaker v Cyxtera Technology UK Limited was primarily concerned with calculating time limits for the purposes of bringing a claim for unfair dismissal, this case is an interesting one, due to the question arising as to whether a letter issued by the Employer, and marked "without prejudice" had the effect of terminating Mr Meaker's employment, despite his not taking up the settlement terms set out.

The Facts

Mr Meaker had been employed by Cyxtera Technology UK Ltd (Cyxtera). His role involved lone working at night with heavy lifting. In August 2016 Mr Meaker suffered back injuries at work and was off for a period, whilst he recovered. In November 2018 he injured his back again whilst at work. Following this second injury Mr Meaker remained off work. Various occupational health assessments were undertaken with the parties ultimately concluding that the physical limitations caused by the second injury were likely to be permanent. Mr Meaker was therefore unable to return to lone night shift work. Whilst it appears there was some form of income protection policy in place, Mr Meaker's application for payments under it was refused.

Two separate conversations then followed between Mr Meaker and Cyxtera regarding the future of his employment, which included mention of the company considering potential termination and even the possibility of a settlement agreement.

Following the second of these meetings Mr Meaker wrongly believed Cyxtera were still looking at potential alternative roles for him, when this search had in fact already been concluded. The Employment Tribunal found that this had not, unfortunately, been made clear to Mr Meaker.

Just over two weeks later Cyxtera wrote a "without prejudice" letter to Mr Meaker. This letter confirmed the fact it was no longer possible for Mr Meaker to return to his existing role due to the injuries sustained, before going onto say:

As a result, we have agreed that your employment with the Company will terminate by mutual agreement by reason of capability.

The letter went on to state when Mr Meaker's last day would be and what he would be paid, including in relation to notice and holiday pay.

Further on, the letter included an offer of an ex-gratia payment as a gesture of goodwill subject to the signing of a settlement agreement, which was enclosed for Mr Meaker to take legal advice on.

Mr Meaker responded rejecting the offer. Despite this the company continued to make payment of notice and holiday pay on the 14 February, treating his employment as at an end. A complaint for unfair dismissal and disability discrimination followed.

The question for the Employment Tribunal and, ultimately, also on appeal was when did the dismissal take effect? Was this when Mr Meaker received the "without prejudice" letter, with the letter effectively constituting notice of dismissal despite the erroneous reference to mutual agreement (7 February), or was it when he was subsequently paid his notice and holiday pay (14 February)?

The employer argued the effective date of termination was the 7 February and Mr Meaker's claims were presented out of time. Mr Meaker sought to argue that the without prejudice letter was not a letter of termination and that, even if it was, it amounted to a breach of the employment contract which he had not accepted. Therefore, from a common law point of view he argued the employment contract and relationship continued. He argued the termination date was the 14 February when he was paid his notice and holiday pay.

The consensus was that, whilst there was no "mutual" agreement to terminate, the intention to terminate Mr Meaker's employment in the "without prejudice" letter was nonetheless clear, including the date Mr Meaker's employment would end. There was no indication it was a matter of discussion or negotiation. The offer of an ex-gratia payment on signing of the settlement agreement was separately set out with no suggestion termination would only take effect on the settlement agreement being signed and returned. For statutory purposes when calculating time limits for tribunal proceedings Mr Meaker's last day of employment was therefore the 7 February.

Comment

This case clearly turns on its own facts. However, it is nonetheless always important when terminating employment to ensure that both the intent to terminate, and date of termination is clear, to avoid similar disputes arising.

As a matter of best practice, we also recommend that if you are intending to offer settlement terms on a without prejudice or protected basis then these should also be set out separate to any notice of termination, if the intent is to terminate regardless of the signing of any settlement agreement.

Appropriate legal advice should also always be taken before any decision to dismiss is made, especially when you are considering terminating an individual's employment on health grounds, to ensure a fair process is followed and to help protect your business from unfair dismissal and discrimination claims.

CHANGES TO STATUTORY REDUNDANCY PAYMENTS AND TRIBUNAL AWARDS

In our February newsletter we announced changes to certain statutory payments from April.

As expected, in March the Government also announced increases to a week's pay for the purposes of statutory redundancy calculations which is now £643. An online statutory redundancy calculator can be found here.

In addition, the amount individuals can potentially recover via Employment Tribunal proceedings has also increased as follows:
Basic award (dismissals taking place on or after 6 April 2023):
This is calculated using the same formula as statutory redundancy payments (see above).

Compensatory award (unfair dismissal claims where dismissal takes place on or after 6 April 2023):
Where the statutory cap applies[1] this will be 52 gross weeks' pay or £105,707, whichever is the lower figure.

Injury to feelings (discrimination claims) where the claim is issued on or after 6 April 2023:
·Lower band (least serious cases) - £1,100 - £11,200
·Middle band - £11,200 - £33,700
·Upper band (most serious cases) - £33,700 - £56,200[2]

[1]The statutory cap does not apply where the reason for the dismissal is related to discrimination, protected disclosures, pregnancy or health and safety.
[2] There is an ability in the most exceptional of cases to exceed this upper band.

OTHER POTENTIAL LEGAL CHANGES EMPLOYERS NEED TO BE AWARE OF

Our February newsletter covered potential changes to statutory flexible working requests.

There are presently several other bills also making their way through parliament and which, if they come into force, will provide additional employment law rights and protections. Some of these include:

- Protection from Redundancy (Pregnancy and Family Leave) Bill. This bill seeks to give the Secretary of State power to extend current protections for pregnant women and those on maternity leave in redundancy situations. The Government has previously committed to extending the protection period to the date the employer is made aware of the pregnancy up to six months following the employee's return to work from statutory leave.

- Worker Protection (amendment of Equality Act 2010) Bill. If introduced this will increase current protections in place against sexual harassment. The changes will impose a positive duty on employers to prevent and eliminate sexual harassment in the workplace, with the risk of potential compensation uplifts of up to 25% if tribunal proceedings follow. It also seeks to reintroduce liability for harassment by third parties.

- Carer's Leave Bill. This seeks to introduce a right to one week's unpaid leave a year to deal with caring responsibilities.

- Workers (Predictable Terms and Conditions) Bill: If passed this would give both workers and agency workers the right to request more predictable terms and conditions of work, including the right to request predictable working patterns.

- Neonatal Care (Leave and Pay) Bill. This bill seeks to introduce a right for both parents to take statutory neonatal leave (potentially up to 12 weeks) and receive statutory payments during leave, subject to certain qualifying requirements being met. It is expected that this change, if it becomes law, could take 18 months to implement.

Ultimately any such legislative changes will likely require adjustments to existing employee handbooks or other internal employment policies. Regular reviews of your HR policies are always recommended.

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):

- We can provide up to date and legally compliant employee handbook/ suite of internal employment policies to suit your needs. Please also speak to us about potential retainer packages including updated policies in the event of legislative changes.
- We can provide appropriate advice and support if you are unsure about your legal obligations when it comes to making reasonable adjustments relating to either physical or mental health concerns.
- We can also help ensure you follow a fair process, limiting risks of claims, should you need to consider terminating someone's employment on health grounds or for any other reason.

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.

INVITATION!

PLEASE SEE THE FOLLOWING PAGE FOR FULL DETAILS

Managing the Menopause

Lightfoots SOLICITORS

MENOPAUSE IN THE WORKPLACE

KNOW YOUR RIGHTS AND OBLIGATIONS

Wednesday 14th June

12.30 - 1.30pm

Please join us for a lunchtime webinar as we demystify menopause in the workplace!

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Please join us for a lunchtime webinar as we demystify menopause in the workplace!

This 1 hour webinar will cover:

- perimenopause, menopause and postmenopause - what is the difference?
- overview of common and lesser known symptoms
- why this is a key workplace issue and how it might be impacting employees at work
- why workplace adjustments don't need to be complicated
- building menopause in to your wellbeing and DEI strategy

Emma Thomas
Emma's twin passions are coaching and supporting others through the menopause transition.

Having produced the successful Middling Along podcast, she brings her knowledge of all things midlife and menopause to Managing the Menopause.

Louise Nunn
Louise is a Partner and Head of Employment at Lightfoots Solicitors.

She manages the employment law team providing services both for employers and employees in this specialist area.

RSVP TO RESERVE YOUR PLACE

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