EMPLOYMENT LAW
NEWSLETTER

Welcome to our September newsletter bringing you the latest updates and insights in Employment Law. In this edition we look at two recent cases relating to reasonable adjustments, one relating to job applicants, the other an employee with menopausal symptoms. We also share some recommendations when it comes to pregnancy and maternity in the workplace as well as highlight the Government's intention to triple the value of fines when employers are found to have engaged an illegal worker.

First of all we take the opportunity to say congratulations to Charlotte Coles who qualified as a solicitor into our Employment Team on 2nd September. Congratulations Charlotte!

REASONABLE ADJUSTMENTS IN THE WORKPLACE

The Equality Act 2010 makes it unlawful to discriminate against someone with a disability. There is also a positive duty on employers to make reasonable adjustments to help alleviate or remove any disadvantage faced by disabled workers and job applicants. This duty to make reasonable adjustments has recently been the focus of two employment tribunal claims namely AECOM Ltd v Mr C Mallon and Lynskey v Direct Line Insurance.

What is the duty and when does it arise?

Section 20 of the Equality Act 2010 sets out the duty to make reasonable adjustments. It arises where either an internal practice or policy (provision criteria or practice) or a physical feature of your premises puts a disabled person at a substantial disadvantage compared to a non-disabled person.

If as an employer you know, or ought reasonably to know, that an employee or job applicant is disabled and is likely to be placed at such a disadvantage then you are under an obligation *to take such steps as is reasonable to have to take to avoid the disadvantage*.

There is also a duty to provide auxiliary aids.

What is "*reasonable*" will always be fact specific taking into account a number of factors including whether or not the adjustments would work, cost and any wider implications for the business or its workforce as a whole.

Possible examples include allocating some of the disabled person's duties to another, altering hours or place of work or training and modifying procedures for testing or assessment.

AECOM Ltd v Mr C Mallon

Mr Mallon (Mr M) suffered from dyspraxia, a common disorder that affects movement and co-ordination. He was disabled for the purposes of the Equality Act 2010. His claim was that he wished to apply for a consultant role in AECOM's R & D team. AECOM required job applicants to complete an online application form, firstly requiring the creation of a personal profile including the creation of a username and password. As a result of his dyspraxia Mr M found this difficult.

Mr M emailed AECOM's HR department expressing a desire to apply for the role and attaching his CV. He disclosed his dyspraxia and how it affected people generally before asking "*because of my disability*" to make "*an oral application*".

Email correspondence then followed in which AECOM advised more than once that Mr M would need to complete the online form, and to let them know if he was struggling with any aspect of it. In reply Mr M repeated his preference to make an oral application as a reasonable adjustment, completing the online form over the phone but did not explain what aspect of the online process caused him difficulty, even when asked. Mr M had previously worked for AECOM and so his response was they knew of his difficulty filling in forms.

Needless to say Mr M was not given the option of making an oral application and was not successful in securing the role. A claim for disability discrimination followed.

It was held by the Employment Tribunal, and upheld on appeal, that AECOM had failed to make reasonable adjustments by not allowing him to make an oral application.

Further, and importantly, the fact Mr M was asking to make an oral application put them on notice of potential difficulties with written communications, and as a result AECOM should have telephoned Mr M to obtain the clarification requested as to what elements of the online form he was struggling with.

Interestingly there was a second part to AECOM's appeal which was successful, meaning Mr M's claim will be remitted back to the Employment Tribunal for reconsideration of one specific point. This is, however, unrelated to reasonable adjustments, rather revolving around the question as to whether Mr M was a genuine job applicant, his having failed his probationary period in his earlier similar role with AECOM.

Lynskey v Direct Line Insurance Services Limited

Mrs Lynskey (Mrs L) had worked for Direct Line (DL) since April 2016, until her resignation in May 2022. She was originally employed as a motor sales consultant initially with very good performance ratings. As part of the menopause transition from 2019 Mrs L started to suffer from brain fog, intense anxiety, an inability to retain information, emotional instability and memory problems. These symptoms meant she started to struggle to meet DL's normal performance standards. Unfortunately, HRT was not an option for her, although other medication was prescribed.

In March 2020 Mrs L made DL aware of the profound impact her menopausal symptoms were having on her.

In June 2020 Mrs L was transferred to the telematics team as an alternative to performance management in her current role. Whilst the new role appeared to start well by December 2020 certain issues, including Mrs L's inability to retain information, resulted in a performance rating of "*need for improvement*", with refresher training provided at that time. Unfortunately, this performance rating rendered Mrs L ineligible for a pay rise.

In April 2021 formal performance management action was then instigated. Whilst this was overseen by Mrs L's manager, advice from DL's HR team was firstly sought but Mrs L's disability and menopausal symptoms were not disclosed even when HR asked if there were any underlying conditions. Unfortunately, it appears Mrs L's manager either failed to recognise or take in what Mrs L had advised regarding her menopausal symptoms.

The disciplinary hearing was overseen by Mrs L's manager and despite her re-iterating the symptoms she was suffering from and the fact they were the cause of the performance issues, a first written warning for 12 months was issued with a three month success plan put in place.

Although struggling to sleep as a result of the additional pressure the success plan placed on her, Mrs L continued to attend work and worked hard to try and achieve the improvement required. However, in mid-July and due to unrelated issues at home she was signed off work with the success plan paused at that time. For the first time a referral to occupational health was also made, which suggested that Mrs L would remain unfit to work for a further 6-8 weeks. When fit to return, a phased return on adjusted targets should be implemented, with target adjustments to remain in effect for so long as menopausal symptoms continued.

On 15 September 2021 Mrs L was told her sick pay entitlement would not be continuing despite her having only used up approximately 13 weeks of a potential 26-week discretionary rolling entitlement. It was wrongly considered that Mrs L was not doing enough to help her return, despite the contents of the occupational health report.

In October 2021 and during discussions regarding her return to work Mrs L was then also told that 1-1 refresher training recommended by occupational health could not be provided due to budget constraints, although the phased return was to be implemented and the success plan suspended for the first month.

In November 2021 and remaining unfit to return to work, now due to work related anxiety, Mrs L presented a grievance alleging discrimination and relating to the disciplinary warning, sick pay decision and other matters. Following an appeal, she was awarded 13 week's back-dated sick pay although told the disciplinary warning could not be removed. It was, however, due to expire before her expected return to work. Ultimately, she did not return, instead resigning on 3 May 2022.

Following her resignation Mrs L brought claims for constructive unfair dismissal as well as sex and age discrimination, a failure to make reasonable adjustments and discrimination arising from a disability.

Whilst the claims for constructive unfair dismissal and age/sex discrimination failed, Mrs L's other claims succeeded. DL were found to have failed in their duty to make reasonable adjustments from April 2021 onwards when they first sought to take disciplinary action for performance issues as well as other acts of discrimination arising from Mrs L's disability including DL's actions in withholding sick pay. It was considered that DL could have made adjustments in respect of call time, reduced targets, potential consideration of a non-telephony role as well as abandoning the disciplinary process and accepting Mrs L's mitigation. DL have been ordered to pay Mrs L £64,645.07 in compensation including injury to feelings, aggravated damages, interest and loss of earnings.

Conclusion
Employers should always be alert to the need to make reasonable adjustments, including at the recruitment stage.

Where performance issues arise that may be linked to a disability it is important to consider all mitigating factors and whether, in all the circumstances, it remains appropriate to adopt your usual internal performance management process. In most, if not all, cases some form of adjustment to those processes will be required.

Early advice should also always be taken where performance issues may be linked to a disability or before withdrawing discretionary sick pay where the employee's absence is linked to their disability.

SOME DO'S AND DON'T WHEN IT COMES TO PREGNANCY IN THE WORKPLACE

In a recent survey by the Charity Pregnant then Screwed it remains clear that discrimination against pregnant women continues to be a real issue in the workplace. This does not surprise us given the types of enquiries we often receive from individuals either pregnant or on maternity leave.

The survey suggests over 50% of expectant and/or new mothers face some form of discrimination either whilst pregnant, on maternity leave or when returning to work, with 1 in 5 leaving their job as a result of negative experiences.

What was particularly shocking, however, was the suggestion that potentially 1 in 61 expectant mothers have been told that if they continued with the pregnancy they would be ruining their career! The findings also suggest a large number of women also find themselves on the receiving end of inappropriate or hurtful comments associated with their pregnancy or taking of maternity leave, including in relation to their appearance or insinuations that their pregnancy was affecting their performance.

Under the Equality Act 2010 it is unlawful for an employer to treat an employee unfavourably because they are either pregnant, suffer from a pregnancy-related illness, or are on maternity leave. This liability extends to acts by managers and colleagues even if in clear breach of internal equality policies.

As an employer, it is incumbent on you to protect your staff from unlawful discrimination in the workplace. Accordingly:

DO:

- Make sure you comply with your legal obligations when it comes to carrying out risk assessments both during pregnancy and when the individual returns to work (regardless of whether or not they are breastfeeding);
- Remember that pregnant individuals are entitled to PAID time off to attend ante-natal appointments;
- Remember that when returning from maternity leave employees have the right to return to the same job as before maternity leave. This is unless they take more than 26 weeks leave and, even then, an employer must still allow them to return to the same role unless it is not **reasonably practicable** in which case an alternative role on comparable terms should be offered;
- Agree with employees before they go on maternity leave how it is best to keep them up to date with any important internal developments;
- Ensure you have a suitable space for breastfeeding mothers should they need it. A toilet is not a suitable space!
- Generally make sure your internal equality, diversity and inclusion policies are up to date, and regular training is given to back them up, limiting the risk of inappropriate conduct and claims! (Our March 2021 Newsletter has previously highlighted the importance of training when it comes to protecting your business from discrimination claims)

DON'T:

- Withdraw a job offer, fail someone during their probationary period or generally dismiss someone just because they are pregnant!
- Insist a returning employee can only return back to work if they take a different role on different terms when their original role is still there, even if being undertaken by their maternity cover!
- Refuse a request for flexible working without giving it proper consideration (and reading our October 2021 Newsletter first), and if it really is not feasible discussing potential alternatives with the individual first.
- Generally allow or be seen to condone inappropriate comments or behaviour that could lead to discrimination claims!

RIGHT TO WORK CHECKS

Last month the Government announced its plans to triple the value of fines imposed on employers found to be employing illegal workers. The present fine is £20,000 per illegal worker found, with the plan being to increase this to £60,000 (or from £15,000 to £45,000 for a first offence, so to speak). These fines are in addition to the potential criminal penalties business owners face where they knowingly employ illegal workers.

The Government's announcement also confirmed that almost 5,000 civil sanctions have been issued to employers since 2018, totalling some £88.4 million!

Whilst the obligation on you, as an employer, to carry out right to work checks has existed for some time this proposed increase in fines makes it all the more important to ensure you are carrying out your right to work checks correctly. If it has been some time since you have carried out an audit of your internal processes we recommend you do so.

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 appropriate guidance and support ensuring you comply with your duty to make reasonable adjustments limiting the risk of disability discrimination claims;
- We can help ensure your equality and diversity policies are up to date as well as provide appropriate staff training, helping protect your business from all forms of discrimination claims; and
- We can carry out an audit to ensure you are carrying out appropriate right to work checks.

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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