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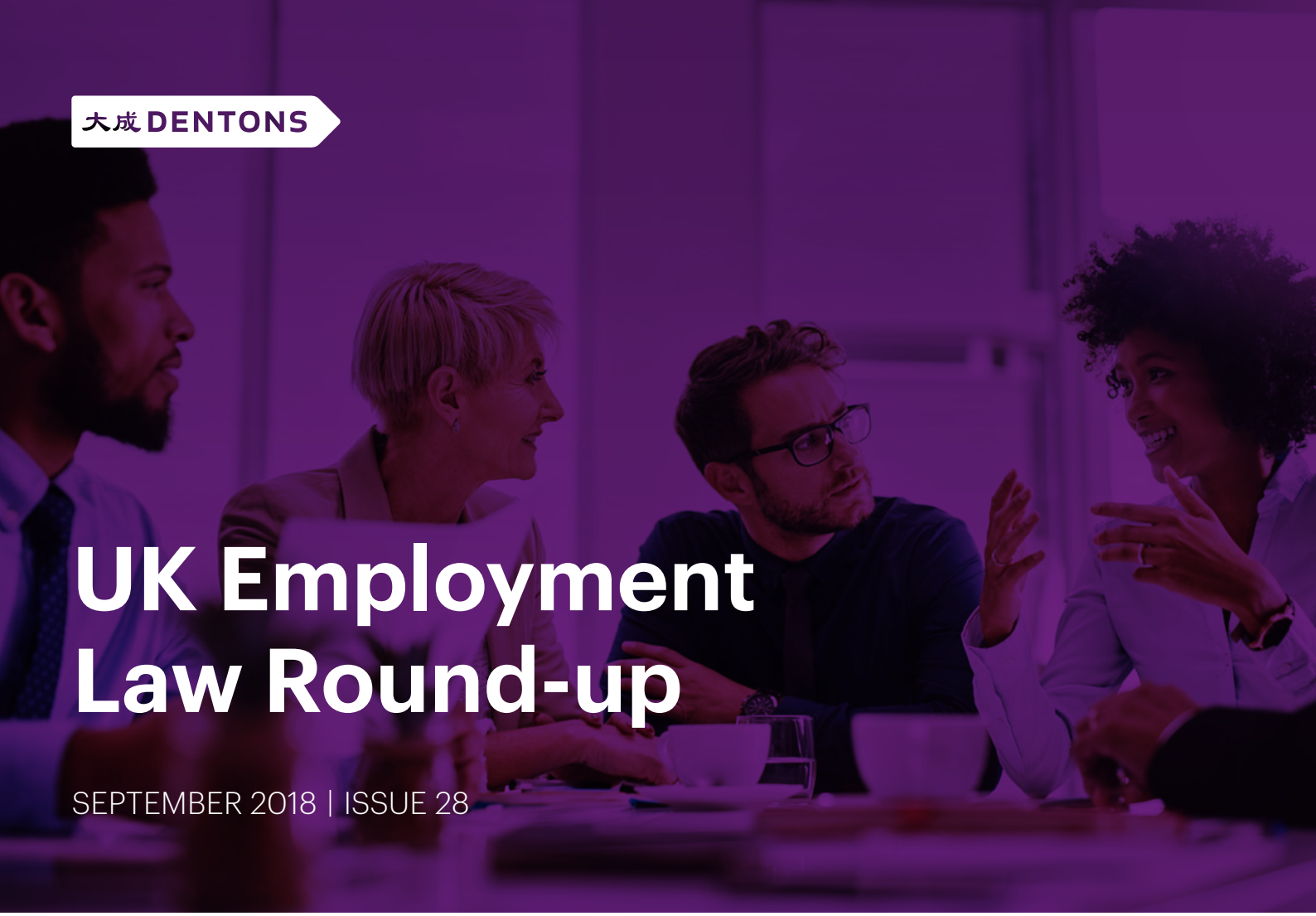


UK Employment Law Round-up

SEPTEMBER 2018 | ISSUE 28

In this issue we look at some of the key employment law developments that have been taking place over the past month. In particular, we take a look at new employment referencing guidelines and the risks of not paying close attention to references obtained from new employees; the seasonal workers visa pilot, intended to be a direct replacement for the Seasonal Agricultural Workers Scheme which was closed at the end of 2013; the potential benefits to employers of enabling their employees to work less as a result of technological advances and finally we consider a recent disability discrimination case containing some practical pointers.

Find out more about our team, read our blog and keep up with the latest developments in UK employment and immigration law and best practice at our UK Employment Hub.

IN THIS ISSUE

ACAS publish new employment referencing guidelines

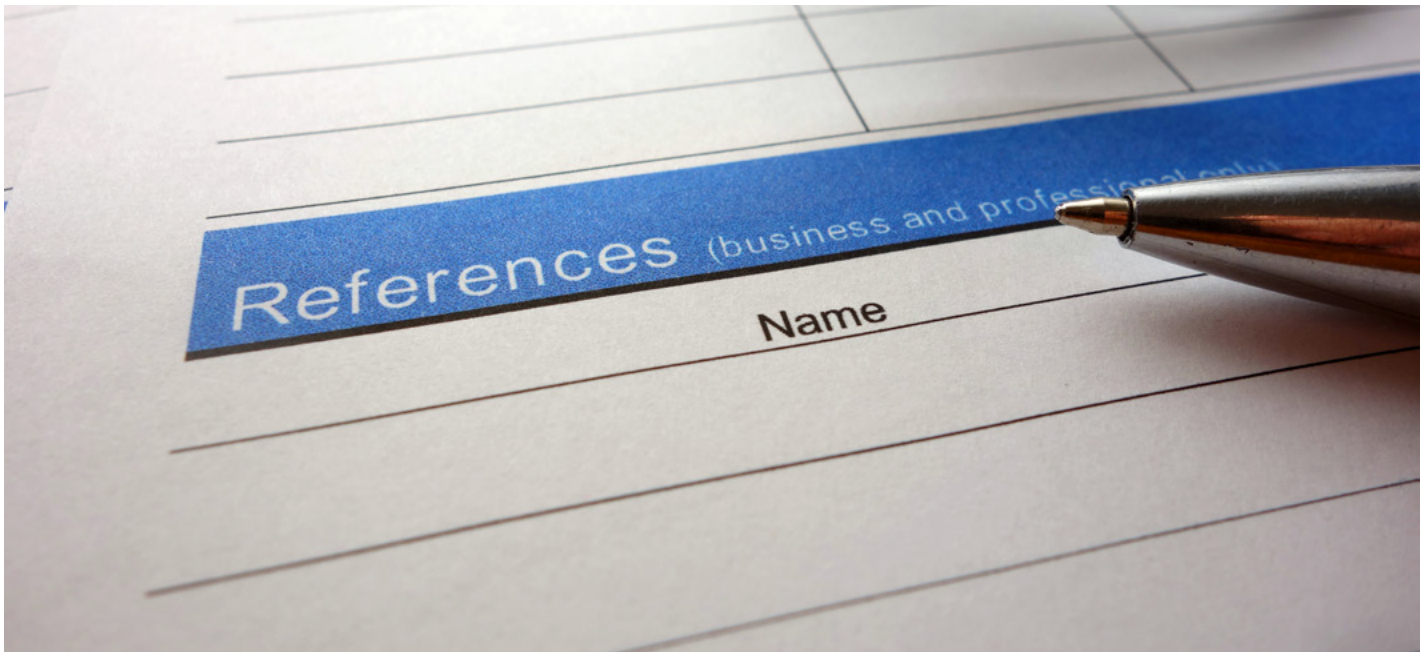
Acas have released new guidance on employment references this month. The guidance covers a wide variety of topics, including what information a reference may include and the circumstances in which a reference might be needed. It also sets out the options open to both employers and job applicants if there is a problem with a reference. The guidance emphasises that those giving references must make them fair and accurate and those asking for them must handle them fairly and consistently. The full guidelines are available online here.

The topic is relevant for many employers, who use employment references as a useful tool when considering job applications. In the recent case of Francis-McGann v. West Atlantic UK Limited, a pilot, who had resigned after it was discovered that he had provided a false reference in a job application, brought a breach of contract claim against his former employer. Mr Francis-McGann had made a number of false representations in his application to West Atlantic, including that he had previously worked as a captain when, in fact, his previous positions had all been at the level of first officer. In addition, the false reference provided by the claimant was stated to be a "Desilijic Tiure" (an alternative name for Jabba the Hutt, a Star Wars character) and addressed from a false email address. Following the discovery of his conduct, Mr Francis-McGann was offered the opportunity to resign and he did so. However, he subsequently brought a claim against his employer for three months' notice pay on the basis that he had resigned with notice. His employer contended that he had resigned without notice and was therefore not entitled to notice pay. Birmingham Employment Tribunal dismissed the claim, finding that, in the circumstances, the airline was well within its rights to treat the pilot's actions as gross misconduct and dismiss him summarily. The tribunal also allowed the airline's counterclaim and ordered the pilot to pay back training costs of £4725.

Michael Bronstein, employment partner at Dentons, told People Management (full article found here) that employers needed to carry out rigorous checks of references:

"I think this case is about recognising the flaws in human nature that we sometimes take what someone says at face value. Employers need to carefully cross-check references because it's your only chance to check what the employee is telling you."

References can be a useful way of verifying information provided in an employment application and can assist potential employers in deciding if an applicant is suitable for a position. There are a number of things to bear in mind when requesting and reviewing references and the new Acas guidance will be of use to employers and job applicants alike.



Seasonal workers visa pilot

On 6 September 2018, the Home Secretary and Environment Secretary announced a new pilot scheme, which will run from next spring until December 2020, enabling non-EU workers to work on UK fruit and vegetable farms for six months. The initiative is a direct replacement for the Seasonal Agricultural Workers Scheme (SAWS) which was closed at the end of 2013. Under SAWS 21,250 workers per year were able to travel to the UK for up to six months to work in fruit and vegetable picking.

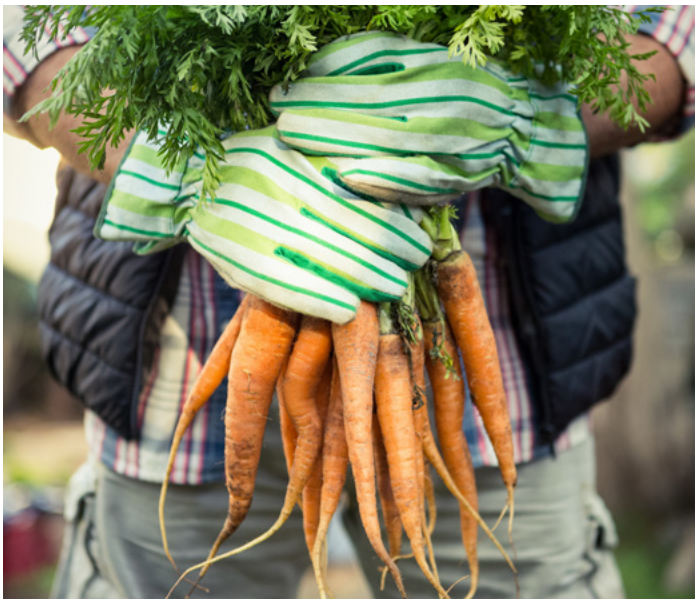
Under the pilot 2,500 workers from outside the EU will be able to enter the UK annually in aims to reduce labour shortages during seasonal peak agricultural periods. The current labour shortage stems from not only a decline in the number of workers from the EU, but also from other EU countries such as Germany making increasing efforts to attract seasonal workers. In addition as the pound has also declined in value, the amount paid to workers when converted into foreign currency is now worth less to workers.

Although the two-year pilot aims to lighten the workload faced by farmers post Brexit, farmers' associations claim the new scheme will barely cover the needs of British fruit and vegetable growers. According to British Summer Fruits, farms are already experiencing labour shortages. Especially during a seasonal peak period, it could be the case where crops are left to rot in fields with such a decrease in labour thereby significantly impacting the industry and the economy.

Although a new pilot scheme aims to address non-EU seasonal agricultural workers post Brexit, EU nationals also make up a large proportion of the food manufacturing (33 per cent) accommodation (19 per cent), warehousing and support for transport (18 per cent) and construction activities (11 per cent) sectors. With Brexit, and the end of free movement fast approaching, these industries and others will be asking whether there will be similar visa schemes available to them.

For example, 10 per cent of all workers in the postal and courier activities sector are made up of EU nationals. However, when looking just at the peak Christmas season, the percentage of EU workers is much higher. Employers in this industry have been able to rely on EU labour during the peak Christmas period, where they have not been able to source workers from the resident labour market. While people may forgive the late delivery of last minute Christmas shopping, the late delivery of official correspondence, for example notice of medical appointments during this time will be more difficult to manage.

A short-term visa to manage seasonal fluctuations in labour market requirements is a positive step for agriculture and farming. However, there are many more industries that will struggle to fill vacancies when free movement ends, and I'm sure they will be keeping a close eye on this pilot, and developments coming out of the Home Office.



IN THE PRESS

In addition to this month's news, please do look at publications we have contributed to:

- The Scotsman – Mark Hamilton reports on how employment-related discrimination legislation has shown it knows no bounds.
- People Management – Michael Bronstein stresses the importance of cross-checking details in employee references.
- Scottish Grocer – Claire McKee discusses the potential pitfalls of dismissals for reasons of misconduct.

If you have an idea of a topic you'd like us to cover in a future round-up or seminar, please provide your comments here.

Rise of the machines: could the increasing use of artificial intelligence, robotics and automation lead to a four-day working week for all?

Technological advances in artificial intelligence, robotics and automation are often blamed for job losses, particularly in the manufacturing industries, where it seems humans are increasingly being replaced by machines. However, according to the Trades Union Congress (TUC), the increases in efficiency brought about by new technology should be used to improve the lives of employees through higher pay and reduced hours. We examine the potential benefits to employers of enabling their employees to work less.

Earlier this month, the TUC called for businesses to "share the wealth from new technology" with their employees. At the organisation's annual conference, Frances O'Grady, the TUC's general secretary, said: "Bosses and shareholders must not be allowed to sweep up all the gains from new tech for themselves. Working people deserve their fair share and that means using the gains from new tech to raise pay and allow more time with their families." Referring to previous campaigns which led to two-day weekends and shorter working hours, Ms O'Grady called for the introduction of a universal four-day working week by the end of the 21st century.

According to a recent TUC report, more than 1.4 million people in Britain work seven days a week and 3.3 million work more than 45 hours a week. Unsurprisingly, a TUC poll identified stress and long hours as workers' biggest concerns, after pay. Employers have a duty to take reasonable care of the health, safety and wellbeing of their employees, but this has not prevented British workers from having the third longest working hours in Europe (behind only Austria and Greece). Mental health charity, Mind, said poor work-life balance could lead to poor mental health in the workplace, which costs the UK economy up to £100 billion per year. Stress can also leave workers unable to concentrate and less motivated. In legal terms, stress causing "substantial and long-term adverse effect on the ability to carry out normal day-to-day activity" is considered a disability and as such can be used to bring a disability discrimination claim.

EDITOR'S TOP PICK OF THE NEWS THIS MONTH

- Is the Apprenticeship Levy failing? – http://www.ukemploymenthub.com/is-the-apprenticeship-levy-failing
- Sex discrimination case flushed out of the Tribunal system with a £25,000 settlement – http://www.ukemploymenthub.com/sex-discrimination-case-flushed-out-of-the-tribunal-system-with-a-25000-settlement
- What can employers take from the latest migration statistics? – http://www.ukemploymenthub.com/what-can-employers-take-from-the-latest-migration-statistics
- Employee status and agency workers; The nature of the work is the key consideration – http://www.ukemploymenthub.com/employee-status-and-agency-workers-the-nature-of-the-work-is-the-key-consideration

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Reducing the number of hours employees are expected to work is likely to have a positive impact on their overall health and wellbeing, which in turn can lead to benefits for employers, such as higher morale and lower absenteeism. If employers welcome such incentives as four-day weeks and flexible working, they could also see a reduction in the number of discrimination claims related to stress.

A four-day working week could bring financial benefits for employers through increased productivity. Marketing agency, Pursuit Marketing, implemented a four-day working week in 2016. Operations Director, Lorraine Gray, said: "The culture in the workplace drives better results, better performance, a happier workforce, so our retention rates are really high and we can attract the best talent to our teams ... I don't ever foresee us moving back to a five-day week." As well as keeping its staff happy, the company is also benefiting financially, with turnover for 2018 predicted to be more than double that of last year.

Welsh company, IndyCube, provides shared workspaces and other services to support freelancers and the self-employed. Eighteen months ago it began to introduce

a four-day week for its employees, without a pay cut. Company founder, Mark Hooper, says: "We felt we had an opportunity to prove something, that you can be as productive in four days as five, and it has been worth it." As well as having happier and more motivated employees, the company is now outputting more and expanding outside Wales.

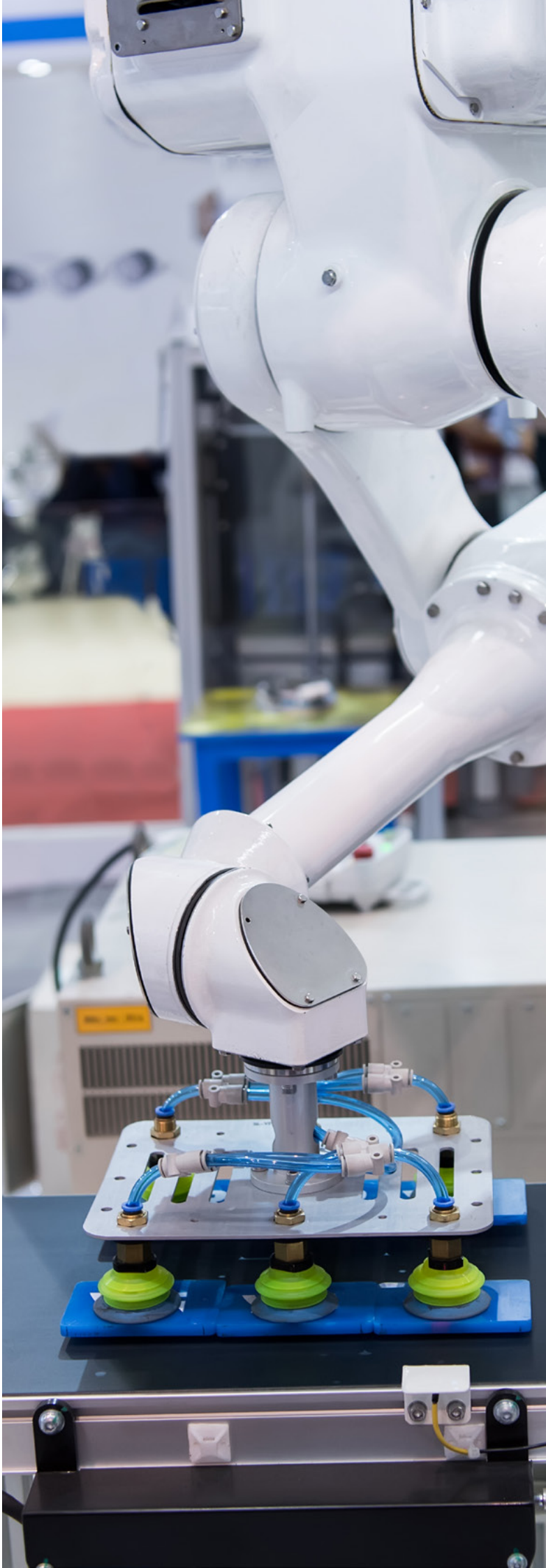
If employers are encouraging employees to work four days and move to part-time working, they should be reminded of the protections part-time workers have in relation to the prevention of less favourable treatment, such as the pro rata approach to benefits and the receipt of the same rates of pay as full-time workers.

With new technology comes the ability to work remotely, wherever and whenever. This has led to an increase in flexible working and a way for employers to get the best out of their workforce. All employees with the requisite service (26 weeks' or more) have the right to request flexible working if the change relates to hours, times or place of work. Employers therefore must be up to speed with the statutory reasons for refusing the request and the need to deal with any request reasonably. As employees become more aware of the options open to them, employers may see the number of flexible working requests increase.

Although the assertion from trade unions is that new technology could reduce hours worked, new technology could also lead to extended hours for employees (for example, where they are responding to emails out of hours). However, employers should remain aware of the impact this will have on

low-paid workers who need to be adequately compensated for the extra work. This could be a particular issue with low paid salaried employees, who are spending more hours working, but not getting remuneration for this work, which could result in their pay dropping below the National Minimum Wage.

Whilst employers should seek to embrace new technology and all the benefits that it brings, in getting the best out of a workforce and moving ahead in their industry, they should also be aware of the implications and rights four-day workers have. If the rise of the machines continues, employers need to ensure that their cognisant employees can continue to thrive alongside them.



Deficiencies of process vs disability discrimination

Various types of conduct related to disability are prohibited under the Equality Act 2010. The distinctions are important and still evolving.

Firstly, and perhaps most obviously, it is unlawful for an employer to discriminate directly by treating a job applicant or employee "less favourably" than others because of disability. The "less favourably than others" part of this test means that a disabled person must be able to compare themselves to a real or hypothetical comparator.

Another form of unlawful conduct is discrimination arising from disability. This prohibits "unfavourable treatment" relating to some consequence of the employee's disability. With the introduction of this new strand of discrimination in 2010 (claims in respect of less favourable treatment could be brought prior to 2010) the government stated that it wanted to "re-establish … an appropriate balance between enabling a disabled person to make out a case of experiencing a detriment which arises because of his or her disability, and providing an opportunity for an employer or other person to defend the treatment". There is no need for an employee to identify a comparator in an unfavourable treatment claim.

It is also unlawful for an employer to discriminate "indirectly" by applying a provision, criterion or practice that disadvantages job applicants or employees with a shared disability, unless the requirement can be objectively justified. These types of claims often concern group disadvantage.

One of the more common claims of disability discrimination brought by employees is a claim for a failure to make reasonable adjustments. Once an employer is aware (or should reasonably be aware) that an employee is disabled, it must make reasonable adjustments to deal with any substantial disadvantage affecting a disabled job applicant or employee.

Also discriminatory on the grounds of disability are harassment, victimisation and the asking of pre-employment health questions outwith very specific circumstances.

In Dunn v. The Secretary of State for Justice & Anor, the Court of Appeal (COA) considered whether a defective ill-health retirement procedure could amount to direct disability discrimination and discrimination arising from disability. The COA considered both the less favourable treatment and the unfavourable treatment tests.

In this case, the employee had been employed by the Ministry of Justice (MOJ) as a prison inspector. He suffered from depression and a heart condition which led him to request ill-health early retirement. Upon his request, the MOJ dealt with the application, but substantial delay ensued resulting in it being drawn out for months on end. The MOJ's position was that the delay (which was admitted) was as a result of a failure of its process to manage the filing of his papers and the obtaining of medical evidence. There was also an acceptance by the MOJ that it had failed to keep Mr Dunn updated or manage his expectations.

The employee brought claims of harassment and direct disability discrimination in the Employment Tribunal (ET) arising out of the way in which he was treated by the MOJ in relation to his illness. He had 16 complaints in total.

At the tribunal, two claims of discrimination involving lack of support from the employee's line manager and another for the way the application was handled

succeeded and the employee was awarded £100,000. The ET found that the claimant had been treated less favourably (i.e. than others who did not have a disability) as well as unfavourably and that the "arcane and unwieldy system" of the MOJ meant that Mr Dunn was subjected to a detriment and less favourable treatment.

The employer appealed to the Employment Appeal Tribunal (EAT) where it was found that the ET had failed to give consideration to the motivation of the decision makers at the MOJ. There was no analysis by the ET as to whether non-disabled people would have been treated in the same way or any consideration as to whether the claimant's disability was in the minds of the managers who dealt with the elongated process. Ultimately, the EAT held that that the evidence did not establish any form of discrimination by the MOJ and all the claims were therefore dismissed.

On appeal to the COA, the employee brought procedural arguments about the way in which the lower courts had handled his claims. However, in relation to his substantive disability discrimination claims the COA ultimately agreed with the EAT that there had been no disability discrimination. It was held that although the ill-health retirement procedure had been defective, this did not automatically mean it was discriminatory. The "but for being disabled, I would not be in this situation" argument put forward by the employee did not constitute direct discrimination. In other words, the process is not automatically discriminatory because the claim involves discrimination. The claimant also has to show that there has been discriminatory motivation on the part of the relevant decision-maker.

The law surrounding discrimination arising from disability is still not entirely settled so we expect further clarifications from the tribunals and courts. Another case has now been appealed to the Supreme Court for further guidance on the distinction in legislation between "less favourable" and "unfavourable".

The decision (albeit that it turned on its own facts) allows employers to conduct ill- health retirement processes for disabled employees without the concern that administrative issues, such as delays or disruptions, will automatically give rise to discrimination claims. Having said that, the final word of the COA was that these types of process, which are by definition applied to people who are to a "greater or lesser extent vulnerable", should be managed without systemic failure and delay. These concluding comments act as a reminder to all employers to ensure that, wherever possible, policies and procedures should operate in such a way as to avoid or at least minimise further stress and anxiety for employees, not add to it.

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