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UK Employment Round-up

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IN THIS ISSUE

In this issue we look at some of the key employment law developments that have taken place over the past month. In particular, we examine: mental health awareness in the workplace; personal liability of directors for breaching the terms of employment contracts; developments in disability discrimination; and preparing your private sector business for changes to off-payroll working.

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Mental health awareness in the workplace – what can employers do?

It was Mental Health Awareness Week from 13 to 19 May 2019. While it is useful to have a dedicated week to highlight mental health awareness, organisations and their staff should be live to mental health issues all year round, not just for one week of the year.

The statistics

Recent research carried out by the Chartered Institute of Personnel and Development has revealed that mental ill-health is now the leading cause of long-term sickness absence for more than one in five organisations in the UK. The Mental Health Foundation has also reported that, each year in the UK, 70 million workdays are lost due to mental ill-health. This covers a wide range of illnesses including depression, anxiety and other stress-related issues.

There is also evidence to suggest that the number of disability discrimination claims brought in the employment tribunals increased by more than 35 per cent between 2017 and 2018, and has increased by 99 per cent since 2013.

One potential reason for this sharp increase might be the abolition of tribunal fees, with more individuals willing to bring discrimination claims. However, a recent analysis has found that discrimination claims have risen eight times faster than the increase in other employment tribunal claims. This could suggest that the rise may be driven by more individuals suffering from greater workplace stress than in previous years.

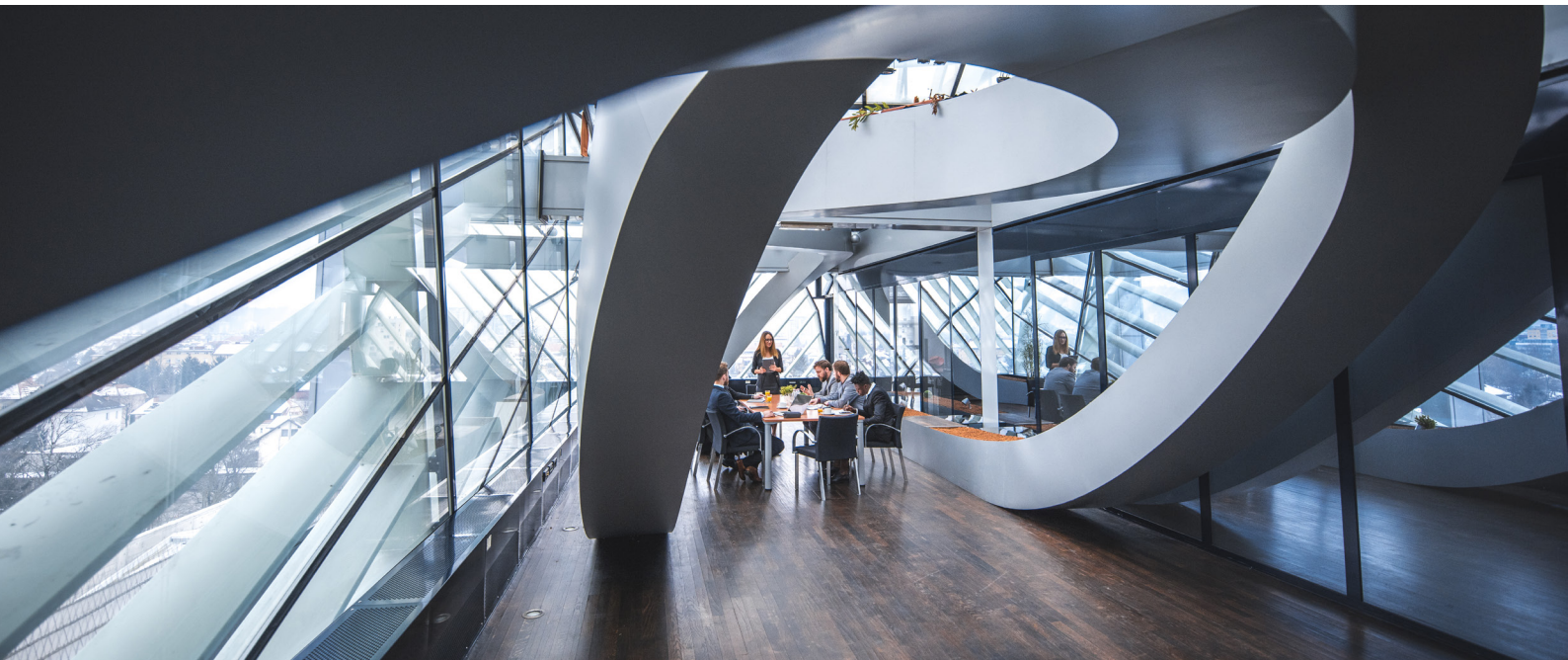
The effect

Unfortunately, many staff are uncomfortable talking about issues with which they are struggling and this applies far more to mental health issues (for fear of looking weak) than physical ones. However, mental health issues, when not dealt with in a coordinated manner, can impact organisations in various ways. They can lead to increased instances of absences and staff turnover, which, in turn, can lead to a loss of productivity, loss of key skills and potential reputational and legal risks. Each of these elements, alone or together, can have material cost consequences for a business.

The law

Employers have a general duty to promote the health, safety and wellbeing of their staff, as far as reasonably practicable. This applies equally to physical and mental health. Without giving this duty proper weight, organisations can be faced with numerous tricky scenarios including extended periods of absence, episodes of poor performance, and allegations of bullying and harassment. Employers should therefore ensure that they give this responsibility due regard by making regular health and safety assessments. In terms of mental health considerations, this could include risk assessments to ascertain whether their staff's workload is appropriate. Breaches of the general duty can result in criminal liability as well as other civil claims.

The most obvious claim that might arise in connection with an individual's mental ill-health is a potential disability discrimination claim under the Equality Act 2010, if the mental ill-health has a substantial, adverse and long-term effect on the individual's ability to carry out day-to-day activities.



Employers must not treat staff less favourably because of their disability or for a reason related to their disability. Employers have a duty to make reasonable adjustments for any employee experiencing a disability under the Equality Act 2010. Reasonable adjustments for an individual with mental health issues could include adjusting their duties, reducing their working time and allowing time off for treatment.

If an employee has been dismissed by reason of incapability due to mental ill-health, this could give rise to claims both for unfair dismissal and for disability discrimination. Capability is a potentially fair reason for dismissal. However, for an organisation to avoid liability, this must be supported (among other things) by a fair process, sufficient medical evidence and a demonstration that alternatives to dismissal have been considered. Remember that compensation for discrimination claims is uncapped.

There is also a risk that, if an individual has had an excessive workload or been bullied and harassed, they might have suffered personal injury as a result. This could expose the organisation to a potential negligence claim.

The recommendations

The Stevenson-Farmer review of mental health and employers, published in October 2017, sets out what employers can do to better support employees, including those with mental health problems, to remain in and thrive through work. The review includes a comprehensive analysis that explores the significant cost of poor mental health to UK businesses and the wider economy. The government has pledged to commit to its 40 recommendations. However, there are many steps that organisations can take now to try to promote positive mental health in their work place.

- **Review policies:** with workplace stress and other mental health issues on the rise in the UK, it is even more important to ensure that organisations review their health and wellbeing related policies to ensure that they are up to date and robust. That will enable managers to be well equipped to tackle the tricky scenarios that can arise from mental health issues.
- **Train line managers:** in order to ensure organisations' policies and procedures are followed correctly, line managers should be given focused training. Often line managers see employees every day. If they are provided with appropriate training, along with support from occupational health, they are more likely to be able to identify early signs of common mental health problems, such as stress and depression. Line managers also have an important role in reassuring employees that mental health issues are as important as physical health issues.
- **Launch or refresh workplace wellbeing schemes:** such schemes can be invaluable in providing staff with a tool to talk openly about their mental health. If new schemes are launched or existing ones refreshed, employees might accept that mental health is not a "taboo" subject and

EDITOR'S TOP PICK OF THE NEWS THIS MONTH

Update – Employer NICs on Termination Awards – http://www.ukemploymenthub.com/update-employer-nics-on-termination-awards

HMRC issues guidance on preparing for changes to off-payroll working in the private sector (IR35) – http://www.ukemploymenthub.com/hmrc-issues-guidance-on-preparing-for-changes-to-off-payroll-working-in-the-private-sector-ir35

Low Pay Commission – minimum wage underpayment on the rise – http://www.ukemploymenthub.com/low-pay-commission-minimum-wage-underpayment-on-the-rise

Women and Equalities Select Committee Response: Consultation on extending redundancy protection for new parents – http://www.ukemploymenthub.com/women-and-equalities-select-committee-response-consultation-on-extending-redundancy-protection-for-new-parents

New report highlights the impact of menopause on working women – http://www.ukemploymenthub.com/new-report-highlights-the-impact-of-menopause-on-working-women

Supreme Court grants Morrisons permission to appeal employee data breach – http://www.ukemploymenthub.com/supreme-court-grants-morrisons-permission-to-appeal-employee-data-breach

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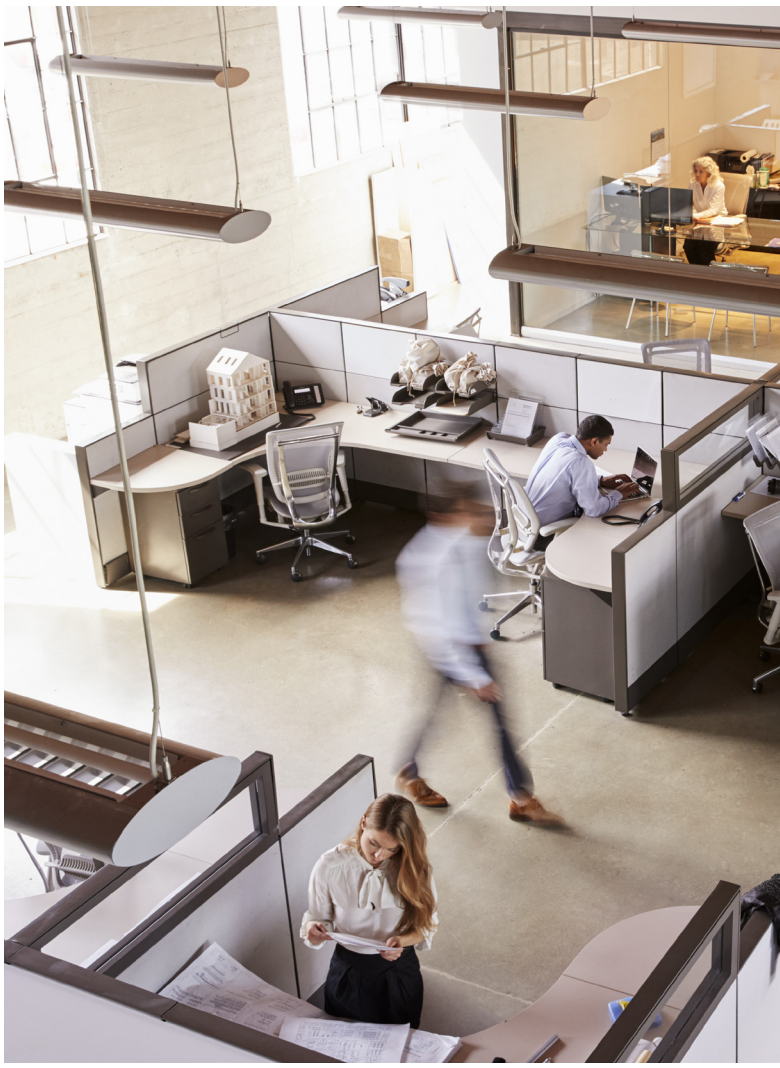
might feel encouraged to seek support before they become overwhelmed by the issues with which they are faced. The effect of encouraging a culture where these points can be discussed openly should not be underestimated.

- **Track absence:** by tracking absence closely, managers can better identify when staff are frequently absent due to sickness, or absent more often than usual. Such patterns could indicate an underlying medical condition that has previously escaped the organisation's awareness, thus tracking absence might assist in providing support at an earlier stage than would otherwise have been the case.
- **Appoint a mental health first aider:** some organisations might decide that the size of their business is such that it is appropriate to introduce mental health first aiders to their workplace. Mental Health First Aid England has helpfully published a guide to provide further details on how to become a certified mental health first aider, the main responsibilities associated with the role and how best to engage with employers in promoting positive mental health.
- **Review and audit strategy:** organisations that have not yet addressed the mental health of their staff should use Mental Health Awareness Week, and the following weeks, as an impetus to review and audit their strategy to ensure that it is meeting the needs of both the business and its staff.
- **Reinforce positive working cultures:** if there is a culture where staff feel they are able to take their full annual leave entitlement or discuss mental health issues as freely as physical health issues, staff will have a proper chance to rest and deal with any issues that might otherwise become amplified.
- **Recognise what works:** where organisations already have robust processes, procedures, schemes and support in place, managers should take time to reflect and recognise which aspects of the measures work. Where a proactive approach already exists, for example offering enhanced annual leave or promoting flexible and agile working, this should be maintained in order to continue the support and preventative steps in place to protect staff.



Personal liability of directors for breaching the terms of employment contracts

Lithuanian workers won an exploitation case against what was sensationally described as "the worst gang master ever" in the case of Antuzis & Ors v. DJ Houghton Catching Services Ltd & Ors. Beyond the modern slavery aspect of the case, the judgment clarifies the circumstances in which a director of a company can be personally liable for a breach of an employment contract, in particular highlighting that directors may be personally liable to pay damages if they cause the company to operate in breach of contractual and regulatory requirements.

Background

The Lithuanian workers were employed by DJ Houghton Chicken Catching Services to work at various farms across the UK as chicken catchers. They were subjected to appalling conditions, paid less than minimum wage and often had pay withheld or docked for unknown reasons. No attempt was made to pay their holiday pay or overtime and they were prevented from taking holidays and bereavement leave. The modern slavery aspect of this case was decided back in June 2016 and the High Court ordered the company to compensate the workers to the tune of £1 million.

Update

Two of the directors of the company have now been held personally liable for breaches of the employment contracts. The High Court concluded that they were personally liable for the company's breaches of contract including statutory claims, in particular in relation to unpaid wages, unlawful deductions and fees and lack of holiday pay.

The court found that the directors knew that their actions were not in the best interests of the company and in breach of their fiduciary duties as directors. They acted outside of their authority and to the detriment of the company. It was found beyond doubt that they did not believe that the employees' pay arrangements were lawful and were therefore found to be personally liable for damages.

As a general rule, a director will not be held personally liable for a breach of contract by the company of which they are a director so long as they are acting within the scope of their authority. To determine whether a director's actions are bona fide, the courts will look to focus on the director's conduct and intention in relation to their duties towards the company – not towards a third party.

Company law also imposes certain duties on directors, among them a duty to promote the success of the company and to exercise reasonable care, skill and diligence.

Comment

While companies can, and often do, indemnify directors to limit the risk associated with director duties, this case is a useful reminder that personal liability of directors cannot be completely excluded in some circumstances.

However, this case highlights that, in order for there to be a risk of personal liability, there must be some unlawful deliberate action which is detrimental to the company.

It should also be noted that, in this case, it was beneficial to the workers to pursue the individual directors because, at the time the claims were brought, the company was in serious financial difficulty and therefore it would potentially have been difficult for the workers to recover any compensation directly from the company. The claims against the individual directors provided an alternative means of securing the financial compensation.

Developments in disability discrimination

Disability is a protected characteristic under the Equality Act 2010 ("the 2010 Act") and therefore individuals with disabilities are protected from discrimination. They can take action via an employment tribunal (ET), if necessary, to enforce their rights. It is unlawful not to offer a job or a promotion, purely on the grounds that someone has a disability. But employers' duties go further than this. They also have a duty to make reasonable adjustments to support disabled employees in carrying out their roles. This duty is extended to job applicants as well. Further it will be direct discrimination if an employer treats an employee unfavourably because of something arising in consequence of an employee's disability.

A reminder of the law

There are three elements to the definition of disability for the purposes of employment law. To be considered a disability for the purposes of the 2010 Act a condition must be: a physical or mental impairment, it must have a substantial adverse effect on the individual's day to day activities and it must be long-term (meaning it must last, or be likely to last, for at least 12 months). That may sound straightforward, but it gives rise to many disputes as those of you who keep an eye on employment case law will be aware.

Some conditions are deemed to be a disability, without the individual having to show that they meet the three elements of the definition set out above.

IN THE PRESS

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

Scottish Grocer – Fiona Gorry explains automatically unfair dismissal

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.

These include blindness, cancer, HIV infection, multiple sclerosis and severe disfigurement.

It is not straightforward to identify whether an employee is "disabled" in terms of the 2010 Act. An employee might tell their employer that they have a long-term health condition but never mention disability. It is not up to the employee or the employer to decide whether the condition qualifies as a disability. Which means sometimes an employee may say they are disabled when they are not, or both parties may think the employee is not disabled, but the law says they are. Ultimately only an ET can make the determination of whether the employee is disabled under the 2010 Act. But employers can – and should – seek medical advice, ideally at an early stage. Occupational Health (OH) specialists are accustomed to giving a view on whether a particular condition is likely to fall within the legal definition of disability.

Knowledge of disability: case study

Unfortunately for employers, there are also situations where they are deemed to have "constructive" knowledge of a disability, because they could reasonably have been expected to know of the disability even if in fact they are completely unaware of it. In one recent case, the fact that an employee told the employer that they suffered from post-traumatic stress disorder (PTSD), along with other information the employer had about her condition, was enough for the Employment Appeal Tribunal (EAT) to conclude that the employer had constructive knowledge that she was disabled.

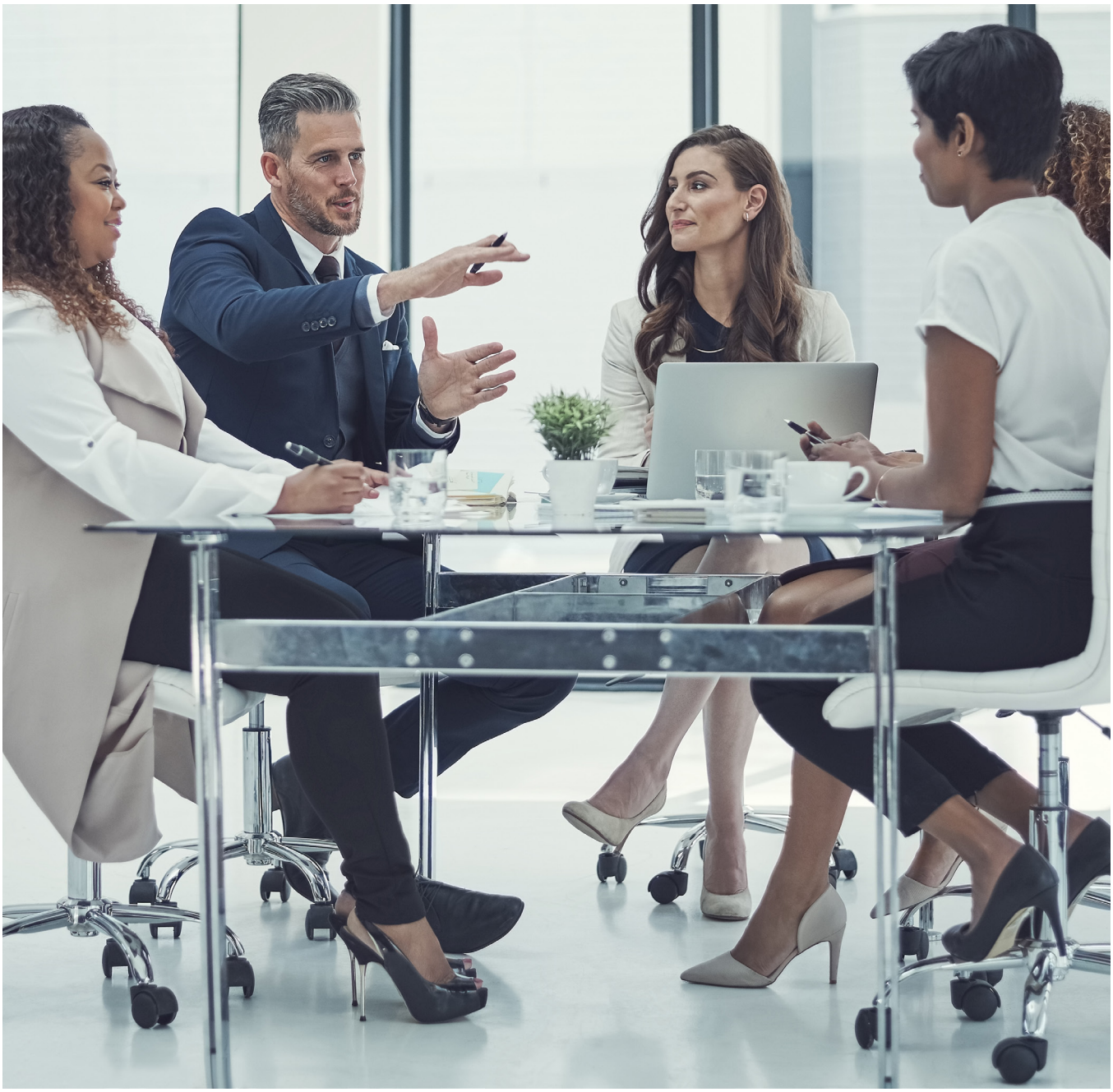
Ms Lamb was a teacher at the Garrard Academy ("the Academy"). She was absent from work from 29 February 2012 suffering from reactive depression and alleged bullying. In March 2012 Ms Lamb raised a grievance against the deputy head complaining about the way the deputy head had handled two incidents involving pupils. After an investigation the head of HR upheld Ms Lamb's grievance but the investigation report was set aside by the chief executive in July 2012.

On 18 July 2012 Ms Lamb informed the chief executive that she was suffering from PTSD. In November 2012 Ms Lamb was assessed by OH. The OH report was submitted to the Academy on 21 November 2012 and concluded that the symptoms of reactive depression probably began in September 2011.

Following the setting aside of the original grievance report, the Academy conducted a new investigation, which rejected her grievance in January 2013.

Ms Lamb brought a claim for a failure to make reasonable adjustments to the ET. One of the primary issues that the tribunal was required to consider was the date from which the Academy had actual or constructive knowledge of Ms Lamb's disability and was therefore obliged to make reasonable adjustments with regard to the investigation process and the investigation report. The tribunal concluded that the Academy had actual knowledge of Ms Lamb's PTSD from 18 July 2012. However, the tribunal found that it did not know that she was disabled until 21 November 2012 (one year after her symptoms had first appeared), which was when the Academy clearly knew that she satisfied the "long-term" test for disability under the Act. Ms Lamb appealed.

The EAT disagreed with the tribunal's findings. It held that the Academy's actual knowledge of PTSD (which is usually a long-term condition) together with other information of Ms Lamb's impairment from July 2012 was "irreconcilable" with the tribunal's findings that the Academy neither knew (actual knowledge) nor could reasonably have known (constructive knowledge) about Ms Lamb's disability until 21 November 2012. The EAT found that the date of constructive knowledge was by early July 2012. This was on the basis that, had the tribunal asked itself the correct question, namely "what would Occupational



Health have reasonably concluded if a referral was made [in July 2012]?", it was highly likely that it would have concluded that Ms Lamb's condition could last until September 2012 (one year after her symptoms had first occurred, as per the OH report). That possibility was sufficient to meet the test of disability. Therefore, the Academy should have known that Ms Lamb was disabled under the 2010 Act from early July 2012.

The case is a useful reminder that employers should not delay referring their employees for medical assessment in the hope that it will defer their duty to make reasonable adjustments. As well as providing a view on whether an employee's condition is likely to qualify as a disability, OH specialists can also provide advice on what adjustments might help in a particular case. Even if the employer does not have "actual knowledge" of a disability, it could still face a claim for a failure to make reasonable adjustments on the basis of "constructive knowledge". Employers should also take into account the following recommendations contained in the EHRC Code of Practice:

"The employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

What kind of adjustments should an employer consider?

The reasons you might need to make adjustments are almost limitless. They can include changes to a physical feature of your premises, providing an auxiliary aid or removing a disadvantage caused by a policy or practice you follow in the workplace. It will depend on the employee's condition and what difficulties that causes for them, their duties and the working arrangements of the employee/the employer. In one case, you might need to consider adjusting the individual's working pattern, in another providing headphones because of a sensitivity to noise in a busy warehouse. In a retail environment, for example, an employee might have difficulty standing for long periods at a counter or lifting stock, so you might need to think about changing the frequency of breaks or reallocating tasks.

Consequences of disability

A developing area of the 2010 Act is the provision that an employer is vulnerable to a finding of direct discrimination if it treats an employee unfavourably because of something arising in consequence of their disability.

A recent case concerning a housing association employer confirms that the "something" only has to have significant influence in causing the unfavourable treatment. It does not have to be the sole or principal cause. In this case the something was inadequate communication with colleagues (which had been one of the reasons for the employee's dismissal). Employers should be aware of the impact of a disability on conduct, behavioural and performance issues as these will often be affected in subtle ways.

The case also dealt with constructive knowledge of disability and whether or not comments made about disability during the dismissal appeal hearing should have been a red flag to the employer. The EAT, in holding that an appeal is an integral part of the decision to dismiss, found that where an employer did not know about an employee's disability at the time of dismissal, but was told about it at the appeal hearing, the dismissal could still be discriminatory.

Perceived disability

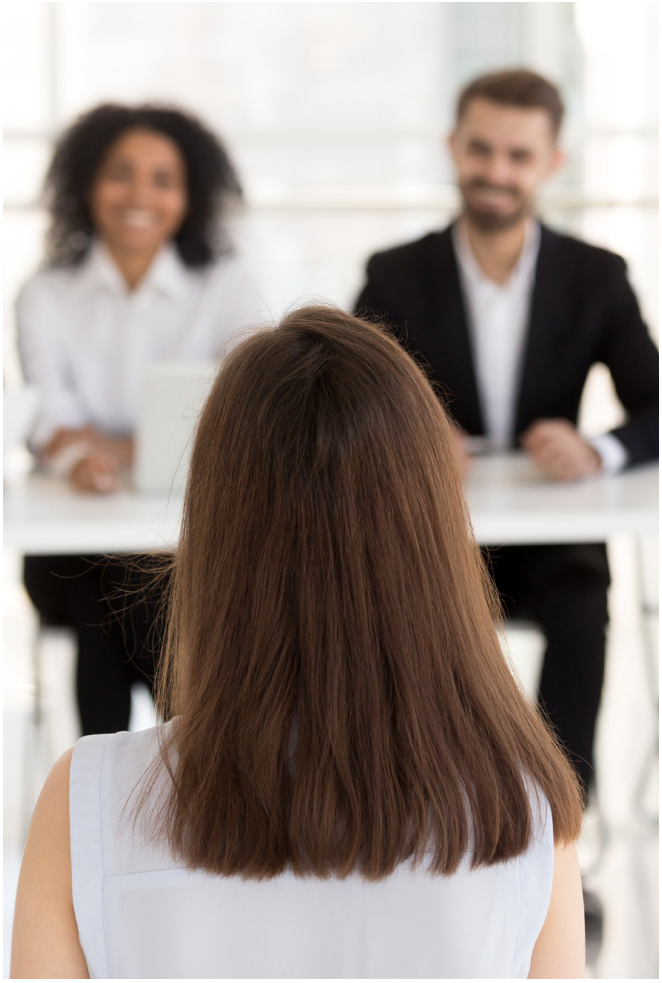
If an employer treats an employee less favourably because they perceive that the employee is disabled this may amount to less favourable treatment "because of" a disability. This is a special category because this gives rise to a claim, regardless of whether the employee is actually disabled. There has been very little case law in this area to date. However a case concerning a police force employer has made its way to the Court of Appeal. The decision is awaited with some interest.

The ET and EAT have to date held that the claimant had an actual or a potential disability (namely hearing loss) which would require the Norfolk Constabulary to make adjustments to her role, either now or in the future. The ET concluded that the decision of the Constabulary to reject an application from the claimant to become a constable because she "might not be fully operational" amounted to direct discrimination on the basis of a perceived disability. The Constabulary had determined that her hearing loss might get worse.

These recent cases show that, nine years on from the enactment of the 2010 Act, employers cannot rest on their laurels when it comes to employees who have, might have, or are perceived to have a disability.

Preparing your private sector business for changes to off-payroll working

Forthcoming changes to the off-payroll working rules (known as IR35) will have a significant impact on the relationship between so-called self-employed consultants and the organisations engaging them. Organisations that engage consultants through personal service companies, or other intermediaries, are likely to be aware already of the proposed changes to how the sums paid to those consultants will be taxed from 6 April 2020. Last month HMRC provided some useful guidance on what organisations to which the new rules will apply (that is, medium and large private sector companies) can be doing to prepare for the changes. On 28 May 2019 the consultation on how the changes to the rules will be implemented closed (with results and draft legislation expected to be published in the summer). Against this backdrop there have also been a number of cases brought against HMRC recently regarding the application of IR35 to individuals in the public eye providing their services through personal service companies (specifically the eye of daytime TV – Lorraine Kelly and Kaye Adams, previously of Loose Women fame). So what can be taken from all of this?



What is IR35 and what's changing?

IR35 is a piece of tax legislation introduced in 2000 to try and prevent individuals engaged as consultants via an intermediary (usually, but not always, a personal service company) from avoiding paying income tax and National Insurance contributions (NICs) by paying themselves in dividends as shareholders of the personal service company. When IR35 was first introduced the intermediary (and so usually the consultant themselves) had responsibility for determining whether IR35 applied to their relationship with the company engaging them and for accounting for income tax and NICs where applicable. This also meant that the intermediary (and so the consultant) bore liability for any penalties imposed by HMRC where their determination was wrong. This remains the case in the private sector. However, since 6 April 2017, where the company engaging the consultant is a public authority it has been for the authority rather than the intermediary to determine whether IR35 applies and, where it does, to make payment to those consultants (via the intermediary) subject to deductions of tax and NICs in the same way as it would do if they were directly employed by the authority. Where payment is through an agency or umbrella company, the authority has the burden of telling that organisation whether it considers the IR35 public sector rules should apply so that it can make the required deduction. HMRC estimates that an additional £550 million in tax has been raised since the public sector changes in 2017.

From 6 April 2020 the public sector changes (or something similar) will come into effect in the private sector. We will have to wait for the outcome of the recent consultation and publication of the draft legislation to see exactly how the changes to IR35 will be implemented in the private sector, but, whatever the outcome, the end result will require private sector companies to bear responsibility for determining whether IR35 applies to their relationships with the consultants they engage and take on the financial liability if they get this assessment wrong.

The difficulty with determining whether IR35 applies

The IR35 rules will apply where:

- an individual personally performs services for a client;
- those services are provided under arrangements involving an intermediary; and
- the circumstances are such that, if the arrangements had been made directly between the individual and the client, the individual would have been regarded as employed by the client for the purposes of either NICs or income tax (or both).

The first two questions will usually be a clear matter of fact. Determining whether IR35 applies is usually therefore dependent on whether the individual would, were they not engaged and paid via an intermediary, have employment status for tax and NICs purposes.

It is worth noting that, just because an individual is assessed as having employment status for the purposes of HMRC, they will not necessarily be an employee for the purposes of gaining employment rights. However, they often will be an employee for the purposes of both analyses and companies would be well advised to consider whether a consultant who is not genuinely self-employed for tax purposes may be, and should be treated as, an employee for the purposes of employment law. Indeed, from the point of view of the individuals to whom IR35 applies post April 2020, if they are going to be treated as employees for tax purposes they may prefer to have employment status.

There have been a number of cases brought against HMRC by intermediaries operating in the private sector over the last 18 months which have highlighted how difficult it can be to determine employment status for tax and NICs purposes. In Christa Ackroyd Media Ltd v. Revenue and Customs Commissioners [2018] the first tier tax tribunal (FTTT) held that a television presenter engaged by the BBC via a personal service company would have been an employee had the personal service company not existed and that IR35 therefore applied to the fees that had been paid to her company (which should have deducted income tax and NICs before making the payment to her). The decision largely turned on a contractual clause which gave the BBC first call on her services and required her to obtain the BBC's permission before providing services to other broadcasters.

However, the outcome of two more recent cases brought against HMRC in relation to television presenters has been quite different. In both Albatel Ltd v. HMRC [2019], a case concerning Lorraine Kelly, and Atholl House Productions Ltd v. HMRC [2019], a case concerning Kaye Adams, the FTTT found in favour of the taxpayers despite some factual similarities with the Christa Ackroyd case. In Ms Kelly's case the FTTT focused on a finding that Ms Kelly, and not ITV, controlled her "brand and personality" and so ITV did not exercise sufficient control to demonstrate that an employment relationship would have existed had it not contracted with her via an intermediary. In Atholl (which concerned Ms Adams' engagement with the BBC) the FTTT considered that, as Ms Adams had the ability to take on engagements with other broadcasters without the BBC's permission, it was clear that she was a freelancer rather than an employee and so IR35 did not apply.

What these cases demonstrate is that the determination of whether a relationship is caught by IR35 can be very difficult and will always turn on its own facts. In the Albatel and Atholl cases HMRC clearly had sufficient conviction that IR35 applied such that it issued tax and NICs bills to Ms Kelly and Ms Adams. If the application of the rules is difficult for HMRC it is clearly going to be difficult for companies too.

Preparing for changes to IR35

Companies should not take the IR35 changes lightly. Failure to get it right may lead to the imposition of penalties by HMRC and make an organisation unattractive to would-be consultants as well as bringing adverse publicity. Even more seriously, if an organisation is found to have been involved in structuring relationships or payments so as to unlawfully avoid tax, it may be subject to criminal penalties under the Criminal Finance Act 2017.

On the direct implementation of IR35 to the public sector, many organisations decided to take a blanket approach to determining whether the rules applied and deduct tax at source from all sums paid to intermediaries through which individuals were engaged to ensure they didn't fall foul of the rules. However, as the recent case law examples have made clear, the determination will always be fact specific. For this reason, a blanket approach is an imperfect solution. The blanket approach initially taken by many public sector organisations proved problematic. Genuinely self-employed

contractors were deterred from engaging with those organisations that took a blanket approach and took their services elsewhere. Private sector organisations will want to avoid this – particularly as, in times of economic uncertainty, they may well be in need of the valuable temporary resource contractors can provide. Organisations should therefore start to think about other approaches they might take to dealing with changes to IR35.

A good starting point is to take heed of HMRC's recent guidance. This recommends that medium and large private sector organisations that will be affected by the changes take the following steps:

- Identify individuals currently providing their services to the organisation through intermediaries.
- Undertake a case-by-case analysis to determine whether IR35 will apply to any contracts that continue past April 2020. HMRC has an online tool which can assist with this analysis.
- Speak to contractors about whether IR35 is likely to apply to them.
- Put processes in place to ensure that the correct rules are applied to future engagements.

Other things organisations might be doing include the following:

- Canvas the views of individual consultants to understand their view of whether IR35 applies to them. Where existing contracts are in place, they may well have taken steps to undertake this analysis and have some formal professional guidance on this.
- Consider outsourcing the IR35 analysis to a third party. Some organisations that make this analysis their business are already out there – and agreements with them should require them to take on the financial liability if their analysis proves wrong.
- Take steps now to ensure that future contracts avoid significant control and mutuality of obligation between the organisation and the intermediary and that this is reflected in reality. HMRC will look at the reality of the situation and not just the contract (and the lessons from case law are clear that the FTTT will take the same approach).

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