Welcome

We have all heard tales of the retriever that sits obediently at the foot of the desk of the boss. Apparently as many as 8% of employers allow dogs at work. This is a surprisingly large number - 1 in 12. You might want to be prepared for 23 June 2017. This is, apparently, 'Bring your dog to work day'. Dogs reduce stress and improve morale. Undoubtedly. But it might be sensible to insist on staff also bringing canine faecal removal bags. I have a dog. I love my dog. But...! (I am not convinced, as you see!)

Paul Housego
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Psychometric Testing was Discriminatory
The Government Legal Service v Brookes

Psychometric testing has long been a way of assessing the aptitude of job applicants. But this tick-box test, marked by computers, doesn't necessarily provide a level playing field.

Ms Brookes has Asperger's Syndrome. She applied for a job as a trainee lawyer in the Government Legal Services (GLS). The first stage of the recruitment process was a multiple-choice test, known as a Situational Judgment Test (SJT). Ms Brookes asked if she could respond by giving short narrative written answers. (The tribunal went on to find that, as a person with Asperger's, she lacked social imagination and would have difficulties in imaginative and counter-factual reasoning in hypothetical scenarios.) GLS refused.

Ms Brookes took the test but didn't do well enough to move on to the next stage of the recruitment process.

The EAT upheld the tribunal's decision that she had been indirectly discriminated against. The ‘provision, criterion or practice’ (PCP) that all applicants in the trainee recruitment scheme take and pass the online SJT put people such as Ms Brookes at a disadvantage compared to those who didn't have Asperger's. That discrimination could not be justified. While the PCP served a legitimate aim (to test fundamental competencies), the means of achieving that aim were not proportionate.

It was also found that GLS had failed in its duty to make reasonable adjustments. Ms Brookes had been treated unfavourably because of something arising in consequence of her disability.

About Us

Beers LLP has a national reputation and is recognised and named in the Chambers and Partners and Legal 500 directories for expertise in employment law. From our offices in the South West of England our specialist solicitors provide advice, representation and training on all aspects of employment law.

We advise strategically and tactically on how to resolve problems and disputes arising from HR issues. We look to you for your intended outcome, agree a way forward and implement it. We work with you to solve problems in a constructive and cost effective manner.

We are experienced at dealing with unfair dismissal, capability, misconduct, discrimination, union related issues, redundancy exercises and ex-employee problems.

We will represent you cost effectively in the Employment tribunals and the County Court.

We will provide you with up to date employment contracts for your staff; update your policies and procedures handbook and provide training for your managers to help you maintain best practice throughout your organisation.

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The big message here is to build some flexibility into your recruitment process to deal with people who may be disadvantaged by your ‘standard’ procedure. Even if the medical evidence on this isn't conclusive, the safest course would be to implement some other way of evaluating the applicants' capabilities. That applies even if no other person with that disability has asked for the adjustment; different people may be affected in different ways.

The touchtone is always to think about what people can do, and not tell them what they must do. Then you can form an unbiased opinion about whether they have the abilities needed for the job that needs to be done.

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**Are ‘On-Call’ Workers Working?**

*Focus Care Agency v Roberts*

Certain industries, perhaps most notably the care industry, rely on workers being on-call; sometimes even sleeping at work so that they're on site and available to help if needed. The perennial question, for employment law purposes, is whether these workers are ‘working’ – and entitled to the rights that go with that (not least the National Minimum Wage) - for the entire time, and not just when they are awake and attending to duties.

That issue presented itself to the EAT in Focus Care Agency v Roberts, one of three cases heard together. Sadly, it didn't lead to a definitive answer on whether or not workers who sleep-in are entitled to the National Minimum Wage. But here are some of the factors that the EAT said should be taken into account in these cases:

- Why the worker must be present during the times they're sleeping. Is it a regulatory or contractual requirement to have someone there at those times?
- The extent to which the worker's activities are restricted by their having to be there and at their employer's disposal. What happens if the worker goes off-site; would they be disciplined?
- How much responsibility the worker takes on. Is it, for instance, to be on-site in order to help deal with an emergency, or is it to personally care for a disabled person in their home (in which case there may be a greater level of personal responsibility involved in the duties)?
- How much responsibility the worker holds in the case of an emergency. Are they the person who takes the decision to act, or are they assisting another worker whose responsibility it is to intervene?

None of these factors is, by itself, conclusive. This calls for an examination of the facts and an overall assessment of whether being at work means ‘working’.

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**Employers’ Role in Suicide Prevention**

A new resource has been launched to help employers play their part in reducing incidences of suicide among workers in the UK.

The Suicide Prevention toolkit has been put together by Public Health England (PHE), The Samaritans and Business in the Community. It is aimed at encouraging working cultures in which good mental and physical health is promoted, and helping employers understand how best to support those in need.

This comes at a time of heightened awareness of mental health issues. According to figures from the Office for National Statistics, workers in certain industries may be more at risk than others. Here are some of the results of the analysis commissioned by PHE:

- Men working in the lowest-skilled occupations had a 44% higher risk of suicide than the male national average
- In skilled trades, the highest risk occupation for men was building finishing trades – plasterers, painters, decorators in particular
- The culture, media and sport industry posed a 20% higher than male average risk and a 69% higher than female average risk
- The risk of suicide among female health professionals was 24% higher than the female national average
- The risk for male and female carers was nearly twice the national average

The survey also revealed that the lowest risk of suicide was among the highest paid occupation group; those working as managers, directors and senior officials. But one of the points made in the report is that suicide risk may be less about the actual occupation and more about features of the job – which include pay and job security.

If you're interested in reading the report in full, you'll find it here: https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/articles/suicidebyoccupation
enland2011to2015#why-do-some-occupations-have-a-high-risk-of-suicide

You can find the toolkit here: http://wellbeing.bitc.org.uk/all-resources/toolkits/suicide-prevention-toolkit

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**Employer’s Hefty Bill For Pensions Failures**

The footwear chain Johnsons Shoes Company has turned a £400 fixed penalty notice into a bill for £42,000, according to The Pensions Regulator.

The initial amount was payable after it was found that the company hadn't complied with its auto-enrolment responsibilities. Johnsons paid the bill but, despite reminders and warnings, didn't then become compliant. That meant that it incurred a fine of £2,500 for each day that it didn't meet its responsibilities. It wasn't until that figure reached £40,000 that the business became compliant and eventually agreed to pay £40,000 plus £2,000 in court costs.

The Pensions Regulator has issued a stark warning: “…fail to comply with the law and you may be fined. Fail to pay your fine and we may take you to court.”

Unsure about your pensions duties? The duties-checker a good starting point.

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**Protected Disclosure Test is Objective**

*Beatt v Croydon Health Services NHS Trust*

For a person to be protected by whistleblowing legislation they must have made a protected disclosure. A key part of this is conveying certain information that they believe is in the public interest (this replaces the old requirement that the disclosure be made ‘in good faith’). Dismissing someone because they made a protected disclosure is automatically unfair.

Dr Beatt was dismissed from his job as a consultant cardiologist. In the lead-up, he had made a series of disclosures relating to the safety and staffing of the department in which he worked. This was sparked by the suspension of a nurse, whom he held in high esteem, during the working day. He believed that her absence contributed to the death of a patient. The Trust concluded that Dr Beatt’s allegations were ‘entirely without merit…and gratuitous in nature’ and, all in all, he was guilty of gross misconduct.

Unfair dismissal, the tribunal said. The main reason for the dismissal was the protected disclosures, and it is automatically unfair to dismiss on that basis. One of the issues for the Court of Appeal concerned an employer’s thought process. If an employer didn't believe that the disclosures were protected (because they were either made in bad faith or were not in the public interest), could it still face liability?
Yes, because whether or not a disclosure meets the statutory test to qualify as a protected disclosure is objective; it is what it is. If the disclosure ticks the whistleblowing boxes and is the reason for the dismissal, then it doesn't matter that the employer didn't think it was a protected disclosure.

The Court of Appeal upheld the unfair dismissal decision. It also made some interesting observations, including this one:

“...[I]t is all too easy for an employer to allow its view of a whistleblower as a difficult colleague or an awkward personality (as whistleblowers sometimes are) to cloud its judgement about whether the disclosures in question do in fact have a reasonable basis or are made (under the old law) in good faith or (under the new law) in the public interest.

The most difficult colleague may, at the bottom of it, have a point. The moral is not to miss the message because of the messenger.

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Restriction on Holiday Pay Claims Reinforced
Fulton v Bear Scotland

Issues around holiday pay seem to have been rumbling on for a lifetime.

The latest is that the EAT has now confirmed one important principle in respect of claims: a gap of three months or more is enough to break the series of deductions.

So, where an employee has been underpaid, or has not been paid any of their holiday pay, they are entitled to bring a claim against their employer – as they would in respect of other wage deductions. But where there has been a gap of at least three months between these underpayments or non-payments, that effectively cuts off their claim; the gap prevents them from claiming further back in time.

It's an important affirmation of the EAT's earlier decision in the dispute between these parties. The three-month cut-off was established at a previous hearing, but it was then argued that that point wasn't binding. This latest decision simply firms up on the rule that employees will only be able to claim back as far as the 'series of deductions' continued without a break of more than three months. It's a significant detail in favour of employers because it reduces the scope for backdated claims.

And Finally...

Sickies – A Thing Of the Past?

If you're a fan of the Peter Kay show, Car Share, you'll have seen the perfect sickie in the making. John's car share buddy, Kayleigh, calls into work. She feigns a stomach bug with great aplomb, while John looks on. It's all part of her plan to lure John, who happens to be the assistant manager in the store where they both work, to the safari park for the day.

The chance of that precise scenario happening in real life may be slim, and even slimmer these days, since it appears that fewer workers are taking sickies. According to the Office for National Statistics, when records began in 1993 7.2 days were lost per worker. In 2016 that figure fell to 4.3 days.

It seems that more of us will soldier on, rather than sink under the duvet, when we feel unwell. The Aviva Working Lives Report 2017 has revealed that 69% of employees surveyed said that they'd gone into work when they should have been off sick. Forty-one per cent said that if they take time off sick, the work just piles up. Twenty-three per cent said that they had taken a day off sick when they weren't unwell.
No employer wants workers pulling sickies. But do you really want people in work when they’re not up to it? It’s not just about the spread of germs (although the domino effect of workers being struck down is always unwelcome). Someone who’s not firing on all cylinders can be a liability. Perhaps above all, a worker who really is unwell should feel able to stay at home to recover.

There’s definitely a balance to be struck. But, contrary to what some employers may believe, a culture of ‘presenteeism’ isn’t all it’s cracked up to be.

It all goes to show that what the employment relationship needs is trust, both ways. Time spent by employers building that is rarely wasted.

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