RMI Employment Law Bulletin
Spring 2023

Welcome to the Spring Edition of the RMI Employment law email bulletin. As it is once again Spring there are a number of changes coming in this April.

National Minimum Wage Rates 2023

From April 2023 the national living wage (NLW) and national minimum wage rates (NMW) will increase. The new rates will be as follows:

- For those aged 23 & over – NLW rises to **£10.42 per hour** (Note this used to apply to only those aged 25 and over)
- For 21 and 22-year-olds the rate will be **£10.18 per hour**
- For those aged 18 – 20 it will be **£7.49 per hour**
- For those under 18 it will be **£5.28 per hour**
- The apprentice rate will rise to **£5.28 per hour.**

Other statutory rates from April 2023

The rate for statutory maternity, paternity, adoption, shared parental and parental bereavement pay will increase to **£172.48** per week. The rate for statutory sick pay (SSP) will increase to **£109.40** per week.

Case Law Update

- Dismissing Disabled Employees (*Preston v E.on Energy Solutions Ltd*)
- Without Prejudice Correspondence (*Meaker v Cyxtera Technology UK Ltd*)
- Disciplining Disabled Employees (*McQueen v The General Optical Council*)

Dismissing Disabled Employees

- (*Preston v E.on Energy Solutions Ltd*)

Employers are sometimes faced with the dilemma of having to manage a seriously ill employee in circumstances where they are unable or unwilling to return to work. What do you do where you have engaged and made reasonable adjustments but the employee continues to refuse to return?

The recent case of *Preston v E.on Energy Solutions Ltd*, is a good example of not only how important it is for employers to correctly engage with employees who have a disability, but also the limitations that apply to protections under the Equality Act 2010.

What Is a Claim of Discrimination Arising from Disability?

Under section 15 of the Equality Act 2010, a person will discriminate against a disabled person if they treat the disabled person unfavourably because of something arising in consequence of their disability. However, a claim will not succeed if:

- The treatment can be objectively justified.
- The person did not know, and could not reasonably have been expected to know, about the disability.

In the case in question, Mr Preston was employed as a Complaints Manager by E.on. It was accepted by the court that he suffered from a disability (Primary Reading Epilepsy) that gave rise to a significant risk of disadvantage within the workplace because it increased this risk of seizures when reading. However, Mr Preston had not disclosed his condition to his employer until after he went off sick with an unrelated stress condition.

His employer tried to engage with Mr Preston and reasonable adjustments were considered and put in place. However, Mr Preston remained absent from work due to his conditions and refused to engage with the measures put in place for him. After a lengthy period of illness, he was dismissed.

It was found by the Employment Tribunal that whilst the Primary Reading Epilepsy was indeed a disability, as it had not been disclosed to the employer and they could not reasonably have become aware of the condition until after he was off sick, there was no duty to make reasonable adjustments *before* Mr Prestons' absence.

It was further found that, whilst it was true Mr Preston was disabled, he had not been dismissed because of his disability but as a result of his refusal to engage with the employer and the reasonable adjustments put in place.

The case was referred to the EAT, who dismissed the appeal, finding that:

- There was nothing disclosed by Mr Preston which could mean the employer knew or ought reasonably to have known of the disability before he went on sick leave.
- The employer was entitled to find that Mr Preston's absence due to stress was unrelated to his disability.
- Mr Preston's dismissal was a proportionate means of achieving the employer's legitimate aim as Mr Preston had continued to refuse to respond to the reasonable managerial requests to return to work in circumstances where all the reasonable adjustments had been made to enable him to return to work and he had been found by an independent expert to be fit to return to work.

In conclusion

The key to this case is that the employer had engaged with the employee to consider reasonable adjustments as soon as they were aware of his condition. They had obtained a medical report from an occupational health specialist and put all reasonable adjustments in place. The employee was only dismissed after he continued to refuse to return to work despite the independent specialist concluding he was fit to return.

Without Prejudice Correspondence in Employment Matters

- *(Meaker v Cyxtera Technology UK Ltd)*

A common problem employers face is dealing with employees who are off sick or in breach of contract. As the management of such issues can be onerous, employers can at times seek to circumvent the necessary processes in order to reach an amicable solution with the employee. Whilst there is nothing wrong with that per se, recent case law highlights how important it is that an employer only seeks to circumvent due process with care.

Facts

In the case of *Meaker v Cyxtera Technology UK Ltd* the employee held a manual role that involved heavy lifting and lone working on night shifts. Unfortunately, the employee suffered a back injury resulting in an extended period of time off work. As part of managing the period off work the employer obtained occupational health reports where it was agreed that the injuries were such that they were likely to be permanent and would impact on carrying out weight bearing work.

After receiving the reports, the employer was considering terminating the employment and the HR manager had a 'conversation' with the employee to discuss the 'possibility' and to discuss a settlement agreement. A second conversation was held where the HR manager made it clear that the employer believed that all alternate roles had been considered and exhausted and a 'without prejudice' letter was sent to the employee on 05 February; and received 07 February, stating that the parties had mutually agreed to the termination on the grounds of capability and offered the employee an additional payment over his contractual entitlements on condition that he signed a settlement agreement. Unfortunately, there was no mutual agreement, and the employee did not agree to the terms. When the offer was rejected, the employee was terminated anyway by letter dated 14 February and the employee brought ET Proceedings.

The question for the court was whether the employee was terminated by the first letter dated 07 February or by the second letter dated 14 February.

Both the ET and the EAT held that the first letter could be considered by the court despite it being marked 'without prejudice' and that the terms of the letter were sufficiently clear that the employer had unilaterally terminated the employment contract despite the mistaken belief of agreement between the parties.

In Conclusion

Whilst in the current case the employee's claim was out of time, the findings by the court that a 'without prejudice' letter can correctly be considered as a termination letter will have a chilling effect.

Many employers have protected conversations with employees and use 'without prejudice' letters to initiate pre-termination negotiations on the assumption that the contents cannot be referred to or disclosed in subsequent tribunal proceedings. The fact that the EAT in this case held that the letter could be read in two parts, and that any without prejudice markings only applied to the part concerning the proposed settlement should be noted.

It is vital going forward that care is taken to ensure such letters are not only properly drafted to ensure they have protected status and are compliant with the ACAS Code of Practice on Settlement Agreements, but that any wordings do not give rise to an unintended or premature dismissal. Any failure to do so could result in a fair disciplinary/capability process becoming not only unfair, but discriminatory.

Disciplining Disabled Employees

- (*McQueen v The General Optical Council*)

One of the common difficulties within the workplace is managing employees with significant medical conditions. Employers are often reluctant to take disciplinary steps for fear of overstepping the mark. This in turn can lead to an employee's negative behaviour going unchecked.

Whilst it is right and proper that employers make reasonable adjustments for disabled employees, the recent case of *McQueen v The General Optical Council* provides some general guidance for employers where a disabled employee is disciplined for something that is unrelated to their disability.

Facts

In the case of *McQueen v The General Optical Council*, the Claimant was employed as a registration officer. It was agreed and accepted that he had a disability for the purposes of the Equalities Act as he suffered from dyslexia, Asperger's, neurodiversity and hearing loss. Whilst employed there were two incidents referred to as meltdowns, which led to the Claimant being dismissed. The Claimant argued that his dismissal was due to his disabilities. The Employment Tribunal found that the Clamant was dismissed due to his short temper and resentment at being told what to do, and not his medical conditions. The Claimant was unsuccessful as the Claimant's disability was not the cause of the termination.

On appeal the Claimant argued,

1. that the Tribunal should have considered whether any disabilities had been a factor in the Claimant's conduct.
2. that the disability does not necessarily need to be the sole or even main reason, any link need only be trivial for protection to arise.

The EAT rejected this. Where it is found that the effects of the disabilities did not play any part in the Claimant's conduct, there was no need to consider if the treatment was partly because of disabilities.

The EAT gave further guidance on how to consider such cases going forward, suggesting four questions to consider:

(i) What are the disabilities?
(ii) What are their effects?
(iii) What unfavourable treatment is alleged in time and proved? and
(iv) Was that unfavourable treatment "because of" an effect or effects of the disabilities?

In Conclusion

Whilst employers can be intimidated by disabilities within the workplace, this case provides useful guidance in how to approach such conditions. It reinforces the position that such employees can still be effectively managed, provided care is taken and the correct processes are put in place.

Case Studies

Dismissing new employees for absence/illness

> *"I have recently taken on an employee, about a month ago, but she isn't proving to be very reliable. She is a receptionist but has already had 5 days off with a variety of medical complaints. What do I do? I don't want to be unfair to her, but I've got a business to run and it is very difficult to cope without the receptionist taking the calls?"*

Many employers believe that it is more difficult to dismiss an employee who is ill than one who has committed an act of misconduct. Provided the employee has well under 2 years' service (and note that normal unfair dismissal rights actually apply a week *below* two years) that is not necessarily the case.

When dealing with employees with under 2 years' service, an employer is perfectly entitled to dismiss an employee if their illness/absence creates difficulties and is not always necessary to go through the full disciplinary procedure in terms of medical evidence and written warnings before taking that decision.

There are however caveats to that general advice. Absence issues can sometimes give rise to claims, and the most common 'banana skins' for employers when dismissing employees with short service who are absent, are as follows:

1. The risk that any absence could be related to a long-term condition, so as to satisfy a disability under the Equality Act 2010. To qualify as a disability the condition has to be long term and have a substantial adverse effect on day-to-day activities. It is sometimes possible that (even if they appear to be short term issues) absences are linked to some longer-term condition. Clearly if they are coughs, colds or other minor issues that is unlikely.

2. Be careful also that any absences are not related to pregnancy related illness or similar issues, as that can give rise to claims for sex and pregnancy discrimination.

In the scenario described above therefore if the employer had satisfied itself that those risks do not apply then the next step is very much at the employer's discretion. It could of course be sympathetic, give a warning and try to improve the issues, but if it is too disruptive it could take a view and invite the employee to a meeting to consider dismissal on the grounds of absence.

If the employer decides to proceed, it is usually advisable to lay a basic paper trail, involving a written invite to a hearing to consider dismissal on the grounds of absence, a minuted discussion regarding the issue and a decision letter, ideally with the right of appeal. Although not following that procedure wouldn't necessarily give rise to claims, by doing so the employer lays the foundation of a defence in the Tribunal, if the employee should try to claim that they were dismissed for any automatically unfair reason (most commonly discrimination, whistle-blowing or asserting statutory rights) for which length of service is not required to bring claims in the Tribunal.

Redundancy Calculation

> *"We are in the process of making an employee redundant. What is the correct calculation date for a calculating a week's pay for the purposes of redundancy pay? How is a week's pay calculated for an employee on a zero-hour contract and if the employee has been working fewer hours during the period leading up to termination will that affect their statutory redundancy payment?"*

Calculating statutory redundancy pay

Under Section 162 of the Employment Rights Act 1996 (ERA 1996), a statutory redundancy payment is calculated by:-

- determining the employee's number of complete years of continuous employment ending with the 'relevant date'; and
- allowing the appropriate number of weeks for each year;
- multiplying that total number of allowed weeks by the current figure for a week's pay, calculated in the usual way, subject to the statutory cap, which is £571 per week from 6 April 2022 (new limits on statutory redundancy pay will come into force on 6 April 2023 – amount to be confirmed).

The relevant date

As a general rule, the 'relevant date' for these purposes will be the date on which employment is effectively terminated, except:-

- where the employee dies before notice given by the employer expires, in which case the relevant date is the date of the employee's death; or
- where the employer terminates the employment contract and failed to give the required statutory minimum period of notice, in which case a later date will apply for two specific purposes only, namely:
  - calculating the two years' qualifying period for a statutory redundancy payment; and
  - computing the length of service in calculating the amount of the redundancy payment.

A week's pay

For these purposes a week's pay is calculated in accordance with s220-229 ERA 1996. The method of calculation varies depending on whether the employee has normal working hours or no normal working hours.

In the case of an employee on a zero hours contract who has no normal working hours, a week's pay for these purposes is the amount of the employee's average weekly remuneration in the period of 12 weeks ending:

- where the calculation date is the last day of a week, with that week; and
- otherwise, with the last complete week before the calculation date.

Weeks in which no remuneration is earned (e.g., because the employee does not work every week or has been away on unpaid leave) do not count for the purposes of this calculation. Instead, it is necessary to count only those weeks in which remuneration is earned, until 12 such weeks are taken into account. Weeks during which the employee was on maternity leave or other types of family-related leave and received less remuneration to be disregarded.

Employing Apprentices

Apprenticeships are common within the motor industry and can be very beneficial for both apprentice and master. However as with all staffing decisions you do need to understand them in order to ensure they are right for you and your business.

What is an apprenticeship?

An apprenticeship is a work-based training programme which leads to nationally recognised qualifications. It usually permits the apprentice to attend day release training whilst combining attending the workplace and working alongside experienced employees/workers. It can either be for a fixed term period or until a level of qualification is reached.

Forms of apprenticeship

In 2011 the Apprenticeships, Skills Children and Learning Act 2009 (ASCLA 2009) came into force in England and Wales which provides broadly two legal forms of apprenticeship:

- a Contract of Apprenticeship; and
- an Apprenticeship Agreement.

The apprentice will be an employee under both forms of apprenticeship, but the employer will have certain additional responsibilities for an apprentice employed under a Contract of Apprenticeship, particularly relating to terminating the apprenticeship.

Contract of Apprenticeship

Prior to the introduction of ASCLA 2009, the status of an apprenticeship was governed by case law, with the Court of Appeal finding a modern apprenticeship could still constitute a common law contract of apprenticeship as long as it satisfied traditional criteria relating to the duration of the contract and the employer's obligations under it.

As a general rule, a Contract of Apprenticeship is the default legal position, and this will exist where you and an apprentice entered into a work-based training programme but no, or no ASCLA approved written agreement is entered into.

Under a Contract of Apprenticeship, you are required to employ an apprentice until they have been trained to the agreed level. It is particularly difficult for employers to fairly terminate the apprenticeship prior to reaching the required qualification. Managing apprentices is made more difficult as the court guidance on when a Contract of Apprenticeship can be terminated lawfully is very restrictive, i.e., an employer has to show that it is virtually impossible for an apprentice to complete their apprenticeship. Unlike employees who can potentially be lawfully dismissed for matters such as capability, conduct, gross misconduct or redundancy, it is not straightforward to dismiss someone under a contract of apprenticeship for such reasons.

In the event of a wrongful termination, an apprentice may have a claim for damages arising from breach of the apprenticeship contract (for how much longer the apprenticeship should have run until its normal end) plus potentially a claim for enhanced damages due to a loss of career prospects. Note an apprentice can also bring a claim in the County Court for up to 6 years from termination (as opposed to 3 months in an employment tribunal).

Approved English Apprenticeship Agreement

A traditional contract of apprenticeship is a contract under which the apprentice is bound to the employer in order to learn a trade, and the employer agrees to teach and instruct him. In an attempt to improve training for employment, the government first introduced a statutory scheme of apprenticeship agreements in 2011 under the Apprenticeships, Skills, Children and Learning Act 2009 (ASCLA 2009). A simplified scheme was introduced from 26 May 2015, but the old scheme continues to operate under transitional provisions.

This form of apprenticeship seeks to balance the needs of the apprentice with the needs of the employer. Within this framework an apprentice has normal Employment Law rights as the contract is deemed to be a contract of employment (and therefore the apprentice will have the status of employee) rather than a contract of apprenticeship. However, the agreement must satisfy certain conditions under ASCLA 2009 and be in a prescribed form.

There are a number of conditions required to qualify as an apprenticeship agreement which are:

- The agreement must provide for the apprentice to work for an employer for reward in a sector for which 'an approved apprenticeship standard' has been published;
- The agreement must provide for the apprentice to receiving training in order to assist them to achieve the approved apprenticeship standard in the work done under the agreement;
- The agreement must specify the amount of time to be spent on off-the-job training;
- The employer must agree a practical period (i.e., the period for which the apprentice is expected to work and receive training under the agreement) which takes into account:-
    - the apprentice's knowledge and skills,
    - whether the work and training are to be undertaken by the apprentice on a full-time or part-time basis, and
    - the relevant apprenticeship standard.
- The practical period must be not less than 12 months (unless the apprentice has been made redundant in the last year of another approved English apprenticeship working towards the same apprenticeship standard, in which case the new agreement can finish on the same day as the old one would have); and
- The agreement must specify the practical period.

If any agreement is not in the correct format, the protections of the ASCLA will not apply. The position in Wales is slightly different in terms of the requirements under ASCLA. Clearly, we would also not advise employers to simply issue terms and conditions with the above bullet points and would strongly advise members to use the correct template of the ASCLA compliant agreement. Members of the RMIF have access to template agreements on the RMIF website, so we would strongly suggest that you use one of the approved formats in addition to any training agreements when taking on an apprentice.

Employers will still need to take care when dismissing apprentices under this type of apprenticeship where those apprentices have acquired sufficient continuous service for Employment Law rights. Once the apprentice has acquired two years' employment then the employer will need to be able to demonstrate that both a fair disciplinary process was followed and a fair reason for dismissal existed.

We would certainly recommend that all apprentices are placed on an apprenticeship agreement.

Note the ASCLA does not apply to Scotland and Northern Ireland. The situation therefore terminating apprenticeships in Scotland and Northern Ireland remains riskier for the employer as they cannot avail themselves of the protection that the individual is treated as an employee (not an apprentice) if they are on the correct form of template agreement.

Training agreements

When employing an apprentice an employer can either arrange training programme themselves or enlist the aid of a third-party service who can assist with funding and arranging college courses. However, it is arranged, most colleges will look to enter into a training agreement between the college the employer and the apprentice.

It should be noted that this is designed to govern the training requirements of the apprenticeship. It is not a replacement for an apprenticeship agreement between the employer an apprentice.

Again, members of the RMIF are strongly advised to utilise the template agreements on the RMIF website in addition to any training agreements.

Wages

Since 1st October 2010 apprentices have been entitled to a national minimum wage rate. Due to the apprentice's reduced skill this rate is proportionately lower. The current apprentice rate as of April 2022 is £4.81 and applies where the apprentice is under 19 or over 19 and in the first year of their apprenticeship. From April 2023 this will go up to £5.28.

It should be noted that as the employer, you will be liable for pay whilst the apprentice is at college.

Conclusion

Apprenticeships are a common and useful tool and allow employers to provide training and pass on their knowledge to the next generation. However, you will still need to take care when considering an apprenticeship. How an apprenticeship is set up will determine how easily it is

to manage the apprentice, the training and if necessary, any disciplinary actions including dismissal.

We strongly advise that you do not take on any apprentices without a written apprenticeship agreement that complies with the ASCLA requirements.

Neither the training agreement between you, the college and the apprentice, nor any standard employment contracts are sufficient. Failing to do put an ASCLA written apprenticeship agreement in place will significantly affect your ability to manage the apprentice and prevent you from dismissing them until they are fully trained. The RMI provides standard templates of apprenticeship agreements for England, Northern Ireland, Scotland and Wales for free.

In Conclusion

Please note: In this bulletin we aim to keep you up-to-date on some of the latest developments in employment law and although the bulletin is not intended to provide a comprehensive summary of all the changes to the law, we hope to highlight some key areas of change for motor industry employers. Any advice contained in the above is general in nature and will need to be tailored to any one particular situation. As an RMI member you have access to the RMI Legal advice line, as well as a number of industry experts for your assistance. Should you find yourself in the situation above, contact us at any stage for advice and assistance as appropriate.

Motor Industry Legal Services

Motor Industry Legal Services provides fully comprehensive legal advice and representation to UK motor retailers for one annual fee. It is the only law firm in the UK which specialises in motor law and motor trade law. MILS currently advises over 1,000 individual businesses within the sector as well as the Retail Motor Industry Federation (RMI) and its members.