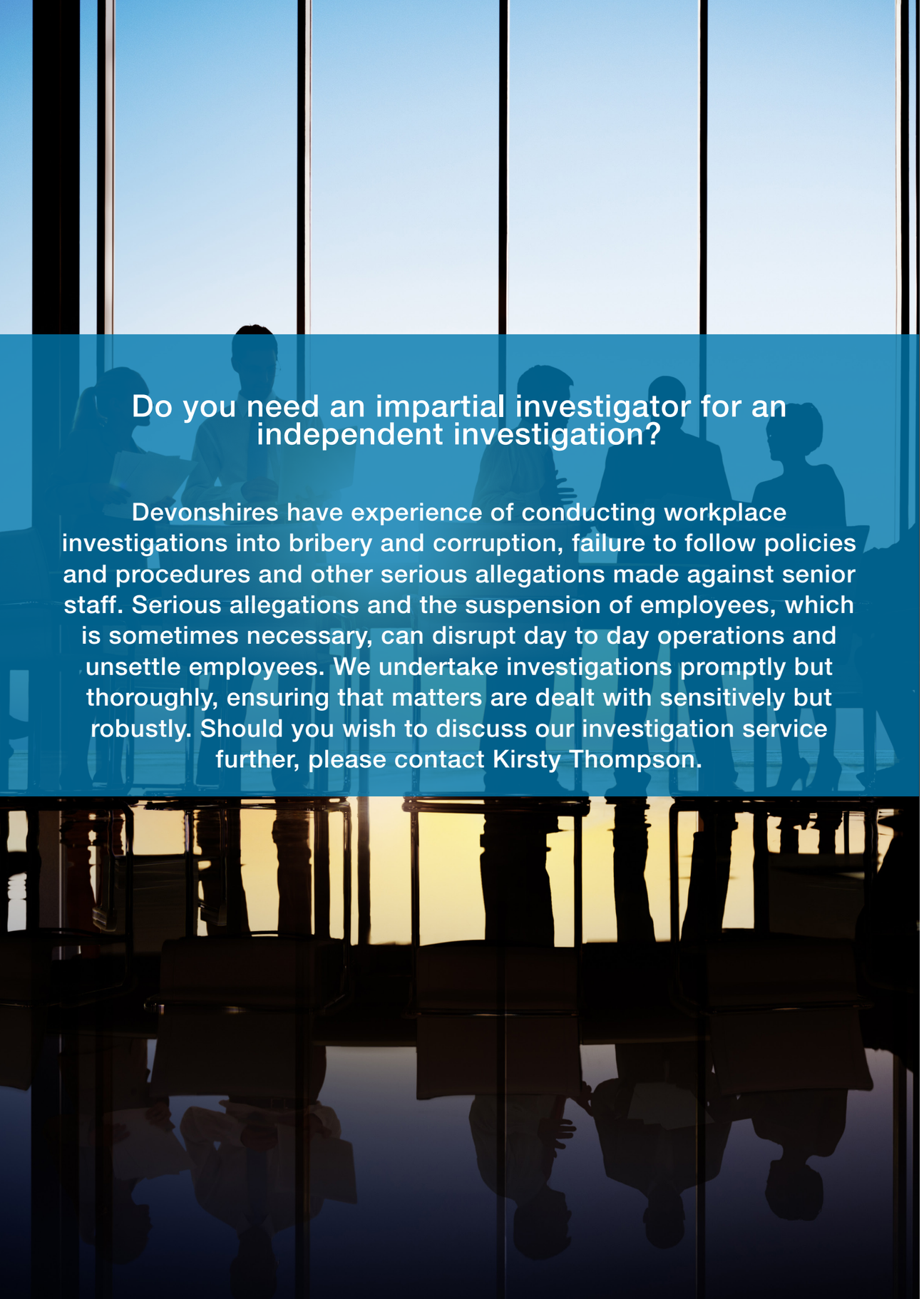
Devonshires

Employment Brief 2019



Do you need an impartial investigator for an independent investigation?

Devonshires have experience of conducting workplace investigations into bribery and corruption, failure to follow policies and procedures and other serious allegations made against senior staff. Serious allegations and the suspension of employees, which is sometimes necessary, can disrupt day to day operations and unsettle employees. We undertake investigations promptly but thoroughly, ensuring that matters are dealt with sensitively but robustly. Should you wish to discuss our investigation service further, please contact Kirsty Thompson.

Devonshires

Welcome

Welcome to our 2019 round up of the latest employment law cases and developments. In this edition we consider the use of non-disclosure agreements (NDAs) and why there is so much controversy about them; whether an employee's mistaken belief can give rise to disability discrimination; six top tips for dealing with data subject access requests; and the extended reach of vicarious liability. We also discuss the options for employers who are still striving for a diverse workforce and the consultation over exit payments in the LGPS, which would allow greater flexibility in the treatment of pension liabilities.

Please contact a member of the employment team if you require further information on any of the articles included in this edition.

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Consultation on exit payment flexibility in the LGPS

Following hot on the heels of a Local Government Pension Scheme (LGPS) consultation earlier this year around risk sharing, the Government has opened a further LGPS consultation on, amongst other things, flexibility around exit payments. This will be good news to those employers who participate in the LGPS and have dwindling membership numbers under their admission agreements.

As most admitted employers will be all too aware, the LGPS Regulations 2013 (the Regulations) state that if an organisation ceases to be a scheme employer (including ceasing to be an admission body participating in the scheme) they become "an exiting employer" in relation to the relevant Fund, and are liable to pay an exit payment.

This means that when the last active member leaves under a specific admission agreement - even if that admitted employer has another admission agreement with the Fund which does have active members - they will be treated as an exiting employer. The impact of this is that the Fund's actuary will carry out an exit valuation on a gilts basis under Regulation 64.

From here, the Fund will issue a rates and adjustments certificate setting out the exit payment, which is immediately payable by the exiting employer. The crystallisation of LGPS liabilities in this way can have an adverse impact on admitted employers. These range from leaving smaller employers teetering on the edge of the red or registered providers of social housing being restricted in their ability to develop and build houses, something this country is still desperately short of.

We have found a number of LGPS Funds are willing to adopt a pragmatic approach to exit management and have been negotiating varying forms of agreement on clients' behalves to avoid this "cliff edge" scenario since around 2014. Our experience of dealing with different Funds in this respect varies considerably.

To put this in context, the LGPS consists of nearly 100 different Funds across the UK. Each is administered differently and with different legal advisers. As such, whilst the ability to manage exit payments has been on the table for several years with certain Funds, admitted employers have become increasingly frustrated with the different approaches that can be taken by different Funds, some of which are just a matter of miles away from each other.

In order to procure a more universal approach, the Government is consulting on amending the Regulations to permit the flexibility set out above.

Recognising that whilst there is a need to protect the ongoing participating employers, this needs to be balanced against the impact the current Regulation 64 is having on departing employers. The Government also feels that the LGPS needs to keep up with the changes to private sector pension schemes, what are known as deferred debt arrangements.

The consultation proposes two alternatives to the current Regulation 64 regime.

The first is to enable Funds to agree to spreading an exit debt over a considered reasonable time. However, in our experience, this has not helped clients manage their liability as the full exit payment would still go through their balance sheet in one year, regardless of the payments being spread over a longer period.

The second alternative is more akin to the funding agreement model we have negotiated with various Funds. When the employer ceases to have any active members, they would remain in the Fund and be treated as if they were still an admitted employer. They would make ongoing contributions and remain on the hook to the Fund, until the time the agreement ends.

The Government proposes to refer to these former admitted employers as "deferred employers". They propose that before agreeing to this a Fund would need to be satisfied that the deferred employer has a sufficient covenant not to place the Fund under undue risk. Whilst the Government has considered whether this should mean the deferred employer's assets and liabilities need to be funded above a prescribed level to be eligible, they have discounted this as the sole criteria.

Rather the funding position would need to be considered alongside other factors to determine the admitted employer's overall strength and covenant and thus the potential impact of the arrangement on the Fund.

As with the funding agreements we have negotiated, the Government proposes that certain events would trigger a termination of the arrangement, meaning the deferred employer status ceases and the full cessation liability would be payable. These trigger events are as you would expect them to be: deterioration of the covenant, agreement to terminate the agreement or breach by the deferred employer.

The proposed flexibilities for exiting employers will be welcomed by admitted employers who are seeking to proactively manage their LGPS liabilities. In particular we consider amendments to the Regulations to provide exit payment flexibility are important to ensure a more universal approach across LGPS Funds.

The consultation document also seeks responses on a proposal to change the valuation of LGPS Funds from triennial to quadrennial and if so, how this should be implemented. It also looks at Funds having the ability to carry out interim valuations outside of that cycle, as well as exit credits in the Fund. The consultation runs for 12 weeks from 8 May 2019 to 31 July 2019 and we would urge any interested parties to submit a response.

The consultation document can be downloaded from the government website:-

https://www.gov.uk/government/consultations/local-government-pension-scheme-changes-to-the-local-valuation-cycle-and-management-of-employer-risk

How far does the principle of vicarious liability extend?

It is a well-known principle that employers can be held vicariously liable for the actions of their employees in the workplace. The test is whether or not those acts are closely connected with the employment. The Court of Appeal considered this issue in the case of *Bellman v Northampton Recruitment Limited*.

The Facts

Northampton Recruitment Ltd (the Company) held a Christmas party for its staff and their partners. Mr Major was the Managing Director of the Company and also attended the party. At the end of the party a number of the guests, including Mr Major and Mr Bellman, were staying at the same hotel and roughly half the employees attended an "impromptu drinks" party at the hotel.

The drinking session continued into the early hours of the morning and the discussions centred around social and non-work related topics.

However, an argument arose around the terms and conditions of a new employee. Mr Major lectured the employees present about how he owned the Company and he was ultimately responsible for any decisions made in order to end the argument. Mr Bellman challenged Mr Major which resulted in Mr Major punching Mr Bellman twice, with the consequence of Mr Bellman suffering brain damage.

Mr Bellman brought a claim against the Company claiming that it was liable for the actions of Mr Major. The High Court found that the Company was not vicariously liable for the actions of Mr Major because:-

- The "impromptu drinks" were separate from the Christmas Party itself and at a separate location;

- The attendees of the drinks party made a decision to attend based on personal choices and it was entirely voluntarily whether or not they wished to take part in the drinking session; and

- There was insufficient connection between the actions of Mr Major as Managing Director of the Company and the assault.

Decision of the Court of Appeal

Mr Bellman appealed to the Court of Appeal and the Court allowed the appeal.

The Court of Appeal found that the Christmas party and the after drinks party should not be seen as separate events as they both took place on the same night. Mr Major also acted in his capacity as Managing Director when he delivered his lecture about how he made all the decisions at the Company.

The Court took the view that Mr Major had misused his position as Managing Director by trying to assert his authority at the drinks party which meant the participants at the drinks party were effectively attending as employees. Given the senior position of Mr Major, this allowed him to assert his authority as and when he wanted to. In view of this, the Court held that there was a sufficient connection between Mr Major's role and the assault for it to be considered an act in the course of his employment.

Conclusion

This is a reminder that employers may be vicariously liable for the actions of their employees during an after party not officially organised by the employer. Employers may wish to ensure that there are policies in place reminding employees about expected standards of behaviour inside and outside of the workplace.

What next for NDAs?

For many employers, a confidentiality clause or non-disclosure agreement (NDA) is considered a standard part of a settlement agreed with an employee. In return for an enhanced termination payment and perhaps an agreed reference, the employee is required not to disclose the existence of the agreement or its terms except in certain restricted circumstances.

However, over the past year there has been growing debate about the use of NDAs in settlement agreements and calls to reform their use. For example a recent BBC investigation, which claimed 96 universities had spent around £87million on 4,000 settlement agreements including NDAs since 2017, led to the sector facing criticism for "gagging" employees.

What are NDAs?

NDA clauses within settlement agreements restrict the information that the parties can share about the terms of that agreement and the circumstances in which the agreement is being signed. Typically an employee is not prevented from talking about the agreement to their close family or professional advisers, but they do agree not to discuss the matter with third parties such as on social media or to the press.

There are clear and legitimate benefits for employers in using such clauses. They can protect the employer from reputational damage, and avoid commercial or otherwise confidential information being shared inappropriately. However, they are open to abuse.

Controversial Uses

The use of NDAs has been increasingly scrutinised over the past year due to cases where they have been used in order to avoid allegations of sexual harassment coming to light. There is a perception that such "gagging" clauses are being used in some instances to pay "hush" money to conceal incidents of discrimination and harassment by high profile individuals or repeat offenders.

As part of its inquiry into sexual harassment in the workplace - which was launched in the wake of the #metoo movement - the Government's Women and Equalities Committee (WEC) found that NDAs were used in some circumstances to prevent victims of sexual harassment from making reports to the police or other bodies such as regulators.

Whilst in reality it is not possible for a settlement agreement to remove the right of an individual to whistleblow or report a crime to the police, such clauses can clearly have the effect of discouraging employees from doing so. This is particularly the case when they have not received clear advice as to what they can and cannot do within their NDA.

Proposals for Change

The recommendations of the WEC inquiry included a requirement for confidentiality clauses to be clear and in plain English, and for the misuse of such clauses to be made an offence.

In March 2019 the Department for Business, Energy & Industrial Strategy announced that the rules on NDAs are due to be "tightened" in order to prevent their unethical use. They opened a consultation on the following proposals:

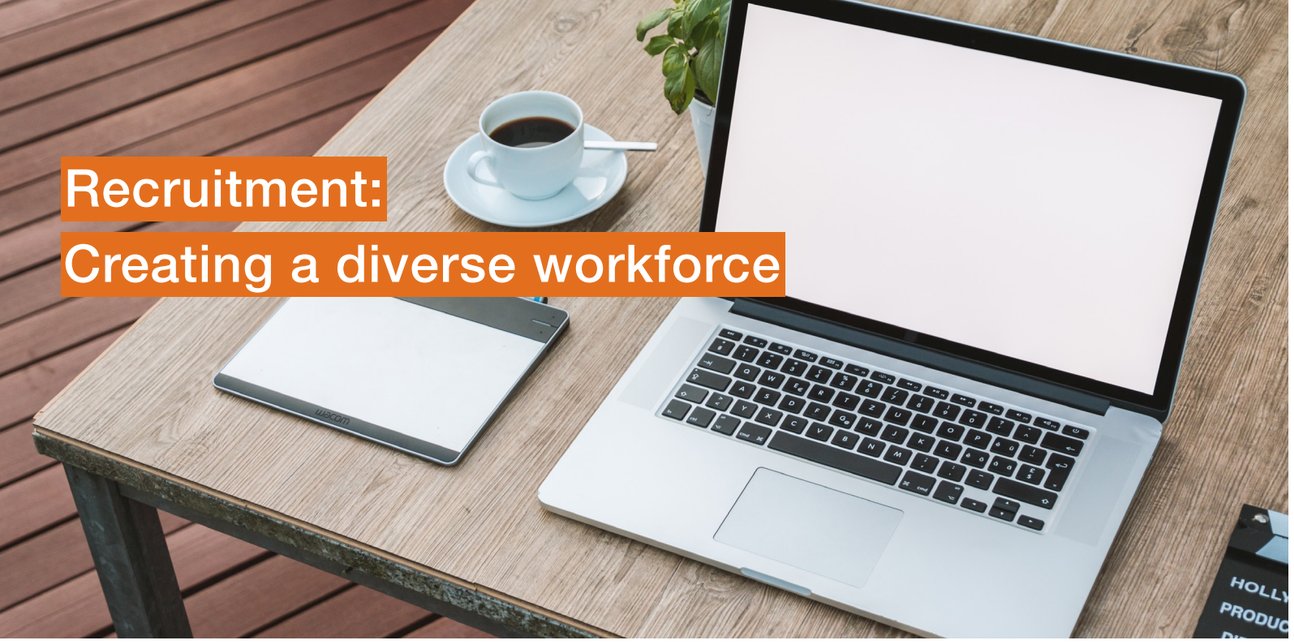
- Confirming in law that confidentiality clauses cannot prevent people from speaking to the police or reporting a crime;

- Introducing a legal requirement for employees to be provided with a clear, written description of rights before a settlement agreement or contract of employment is entered into; and,

- Extending the law so that an employee agreeing to a settlement agreement receives independent advice, covering the limit of any confidentiality clauses to avoid employees being "duped" into signing up to such clauses.

The consultation closed at the end of April, with the outcome yet to be announced. Further inquiry by the WEC examining whether NDAs should be restricted or banned in cases of harassment or discrimination has also yet to publish its findings. In the meantime, ministers have continued to take a tough line regarding NDAs with health minister, Matt Hancock, arguing that the NHS should be banned from using NDAs in settlement agreements where an employee is a whistleblower.

In the current climate, it seems likely that changes in some form to restrict or modify the use of NDAs will be introduced. We would recommend that employers seek advice whenever considering entering a settlement agreement with an employee and should avoid using overly restrictive NDAs. This becomes particularly important where an employee has made sensitive allegations such as harassment or discrimination.



Recruitment: Creating a diverse workforce

Creating an inclusive and diverse workforce is still one of the biggest challenges facing companies. There are many reasons why a diverse workforce is beneficial for organisations. Research has found that profitability and efficiency increases with a diverse workforce because the organisation may draw upon the experiences and knowledge of people from different backgrounds who are able to give different perspectives. This in turn will allow the company to respond to a wider range of customer needs.

Companies with a diverse workforce also attract a wider range of candidates because working in a diverse company is important to all candidates regardless of their background or ethic origin. Organisations also wish to reflect the diversity of their customers at every level within the organisation and in order to achieve this the starting point is recruitment.

There are a number of steps employers may adopt to increase diversity:-

Advertising

If an organisation does not have a diverse workforce then advertising on the same websites, publications and using the same recruitment agencies is unlikely to attract candidates from different backgrounds. Employers should consider advertising on a wide variety of websites and publications to attract a wider range of candidates.

It is also useful to include "positive cues" in adverts such as stating that the organisation is an equal opportunities employer. Or you may wish to consider joining the Disability Confident scheme.

Eliminating the unconscious bias

Everyone has unconscious bias, as people naturally gravitate towards people who share the same values as they do. Although unconscious thoughts are unintended, they can be based on stereotypes and prejudices (which we may not even be aware of) and this can affect decision making.

Some employers have adopted the approach of redacting all personal information from an application form for short listing purposes. This can include redacting names, gender, nationality, age and even the University the candidate attended. This approach ensures that shortlisting is based purely on qualifications and experience, mitigating against the risk of unconscious thoughts affecting the recruitment process.

Interview

The interview panel should be formed of at least 2 people to avoid any unintended bias. All candidates should be asked the same questions so they can be assessed by the same criteria. Managers should be given training on conducting interviews prior to allowing them to interview candidates.

Companies may also wish to consider asking candidates what they thought about the recruitment process and if they have any recommendations on how it could be improved.

Positive Action

Under the Equality Act 2010 employers are permitted to take steps to train or encourage under-represented groups to apply for jobs, but also to overcome a perceived disadvantage or to meet specific needs based on a protected characteristic. Positive Action in recruitment and promotion allows an employer faced with making a choice between two or more candidates who are of equal merit to take into consideration whether one is from a group that is disproportionately under-represented or otherwise disadvantaged within the workforce.

However employers are reluctant to use positive action with recruitment, as the law is often difficult to interpret. There are always concerns about claims from the other candidate who is not from an under-represented group in the workforce.

The Rooney Rule

This is an American concept named after the owner of an American football team. Dan Rooney raised concerns that black coaches were unrepresented in his organisation and significantly less likely to be hired. The rule means that at least one Black, Asian and Minority Ethnic (BAME) applicant will be interviewed for a position. It is important to note that the Rooney Rule does not create a quota or preference in the hiring of BAME candidates.

In 2018 the English Football Association adopted the "Rooney Rule" for coaching positions from youth level up to senior teams. However, the Rooney rule has now also been adopted by some Registered Providers. Both London & Quadrant Housing Trust and Peabody have adopted the Rooney Rule when shortlisting for all senior leadership positions.

Training, Policies and Procedures

All staff should receive training on equality and diversity as part of their induction. This training should be provided on a regular basis in order to increase awareness and tackle the issues that bias can cause. It is also important to have policies and procedures in place which are regularly reviewed and updated.

Conclusion

There are many ways to increase diversity in the workplace but if you decide to take steps to address this, it is important to measure the impact of those actions. A comparison of the results year on year will allow you to see if the measures are making a difference in the diversity of your organisation. This is of crucial importance if you are using positive action as employees with a particular protected characteristic may no longer be under-represented if your measures are working.

Discrimination arising from a disability – mistaken belief

Discrimination arising from a disability takes place when an employer treats an employee less favourably, not because of their disability, but because of "something" arising in consequence of the employee's disability.

The most common example is where an employer dismisses a disabled employee for long term sickness absence. The less favourable treatment is the dismissal because of the absences (the something) which resulted from the disability.

In *iForce Ltd v Wood UKEAT/0167/18* the Tribunal had to consider whether an employee's mistaken belief could give rise to a claim of discrimination arising from a disability.

The Facts

Ms Wood worked for iForce Ltd in a warehouse and suffered from osteoarthritis which worsened in cold and damp weather. iForce asked Ms Wood to move work stations in the warehouse to the benches closest to the loading doors.

Ms Wood refused claiming the area near the loading doors in the warehouse was colder and damper compared to the rest of the warehouse and this would exacerbate her osteoarthritis.

iForce carried out a number of tests in the warehouse and found that there was no material difference in temperature or humidity throughout the warehouse. However, Ms Wood still refused to move workstations.

iForce issued Ms Wood with a final written warning for refusing to follow a reasonable management request (downgraded to a written warning on appeal).

Ms Wood issued a discrimination arising from a disability claim against iForce, claiming that the written warning was less favourable treatment, which arose because of "something" (the refusal to move benches) which resulted from her disability.

The Employment Tribunal agreed with Ms Wood and found that the written warning was issued because of her refusal to follow a reasonable management request which was because it would exacerbate her osteoarthritis. Even though Ms Wood's belief was misplaced the Tribunal still found in her favour. iForce appealed.

Decision of the EAT

The Employment Appeal Tribunal disagreed with the Tribunal and allowed the appeal. The EAT found that there had to be a connection between the "something" (the refusal to move) and Ms Wood's disability. iForce were not asking Ms Wood to work in colder or damper conditions (which would impact on her disability). Ms Wood was incorrect in her belief that the conditions at the loading doors were colder and damper.

There was no evidence to suggest that Ms Wood's mistaken belief was a consequence of her disability and therefore the appeal was allowed. Although this case is useful for employers, the decision could have been very different if Ms Wood had presented her claim in another way.

If Ms Wood had alleged that her judgement had been impaired as a result of her pain and suffering as a consequence of her osteoarthritis, then she might have been able to argue that there was a clear connection between the less favourable treatment and her disability.

Conclusion

This case gives guidance that an employee's perception that there is a connection between the unfavourable treatment and the "something arising" will not be enough for a claim to succeed. However, if the perception of the employee was a result of pain and stress (which impaired her judgment) arising from her disability, it is possible a tribunal will consider that there is a sufficient link between the disability and the "something" for the claim to succeed.

6 Tips for Dealing with Employee Data Subject Access Requests

A huge amount of personal data is collected by employers about employees during the course of their employment, which means that dealing with a Data Subject Access Request (DSAR) made by an employee can be a time-consuming task. However, following our tips below, the process can be made far less painful.

1. Give yourself time…

Under the General Data Protection Regulation (GDPR) the time limit for responding to DSARs has been reduced from 40 days to one month. However, it is possible to extend this deadline by a further two months where the request is particularly complex, giving a total time of 3 months to comply.

Given that a large volume of data will be held on employees, which will need to be retrieved from a number of IT systems, an extension will very often be appropriate. It is important to note the time limit can only be extended during that first month so if you miss the deadline, not only will you be in breach of the GDPR but you will be unable to extend for extra time. You should therefore consider if an extension is appropriate as soon as the request is received.

2. …but don't delay

Whilst 3 months may appear at first to be a significant window of time, it is easy to underestimate how long the process will take. Depending on the employee's length of service and how wide the employee's request is, many thousands of documents may need to be reviewed and redacted before being disclosed to the employee.

It is therefore essential that employers begin the process of dealing with a DSAR as soon as possible, ideally from the first day it is received. Having a clear procedure will help avoid unnecessary delays, which should ideally include an agreed protocol with your IT team so searches of electronic systems can be set up efficiently and with clear parameters.

3. Ask the employee what they want…

Many employees will raise a DSAR because they are looking for information relating to a specific issue, for example because they believe comments have been made about them by members of staff during the course of dealing with a grievance they raised.

This information may be specified in the original request, but if it is not, it is a good idea to ask the employee if the information they are seeking relates to a particular individual, specific time frame or type of file such as emails. Having this information can significantly narrow the searches you need to carry out and therefore reduce the amount of documents you will need to review.

4. …but be prepared to search all systems

Although often employees will be willing to specify what they want from their request, there is no requirement for employees to specify what information they are looking for. Your processes should therefore be set up to enable you to gather and provide all personal data processed about the employee.

In such cases, employers are expected to make genuine and extensive efforts to gather together the relevant personal data. This will include searching beyond the employee's HR file through all electronic systems such as emails and any databases where employee data is held, along with archived items where they are easily accessible given the resources and expertise of the employer. The general principle is that the search must be reasonable and proportionate, though the courts have generally placed a high bar as to what is considered proportionate.

5. Disclose data not documents…

Once you have identified the data, you will need to consider in what form this should be disclosed to the employee. In doing so, it is useful to remember that data subjects are only entitled to the personal data itself and not the documents it is contained within. This means that if the personal data appears within only one paragraph of a much larger report, you could provide this paragraph alone as an extract of the report.

Equally, where the same type of personal data appears in the same way in a large number of documents, such as a monthly HR report listing names and NI numbers, it is also acceptable to provide a schedule confirming the personal data included in these documents and the titles of the documents in which this appears.

6. … and only what the employee is entitled to

Data subjects are not entitled to personal data about third parties or non-personal data so this data should be redacted from the documents which are disclosed.

There are also some circumstances where the employee will not be entitled to the data even if it is personal data relating to them. This will include:

- Personal data which is covered by legal professional privilege;
- References given or received about the employee;
- Personal data which is being processed for the purposes of management forecasting or planning where revealing that data could prejudice the business (e.g details of a staff redundancy programme which has not yet been announced); and,
- Records of intentions in relation to negotiations with the employee, where revealing these records would prejudice the negotiations (e.g internal discussions about a termination payment offer).

Determining what data is and isn't disclosable can sometimes be complex and we suggest you obtain legal advice if you are unsure whether an employee is entitled to a specific piece of information.

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