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Employment Law Bulletin – May 2023 – Practical Perspectives

Resignations in the 'heat of the moment'

In the recent case of Mrs Cope v Razzle Dazzle Costumes Ltd Mrs Cope, following a tense discussion at work, said "I'm done" and walked out of the building. She later submitted a sick note. Her employer treated her statement as a resignation and treated her as having resigned from her employment. She brought a claim of unfair dismissal.

The tribunal held that she had not resigned and found in her favour. They looked at the context in which Mrs Cope had said "I'm done" (a tense meeting), her anxious state and the fact that her actions after saying these words (in submitting a sick note) were not consistent with having resigned. This case highlights the care that must be taken by employers before treating an employee as having resigned. Some pointers include:

- Take care to look at the surrounding circumstances, any ambiguity with the words used and whether it could be regarded as being 'in the heat of the moment'.
- If you have concerns that the employee's possible resignation was made in a temper or in the heat of the moment, then the law says you should give the employee a cooling-off period in which to consider their decision before accepting it. This need only be a few days maximum.
- ·If the resignation is clear and unambiguous and has not been prompted by an emotive or highly-charged situation then you are able to accept it immediately. Once you have accepted it the resignation will stand unless you agree to its retraction.

Providing copies of references following an employee request

Employment references are generally sent direct to the prospective new employer of an ex-employee. They are not usually copied to the employee themselves.
If your ex-employee has asked for a copy then you can, if you wish, provide them with one. However, you are not obliged to do so. Employment references are regarded as personal data under the Data Protection Act 2018 and the General Data Protection Regulation (GDPR). Ordinarily, under subject access request rules, you are obliged to provide a copy of it on receipt of a request from the data subject (here, your ex-employee). But the Data Protection Act 2018 includes a specific exemption for confidential references given for the purposes of prospective or actual employment. This means that you do not have to provide a copy of the reference you have given to your ex-employee. The same exemption can also be used to refuse disclosure of references you have received from third parties.

The exemption applies to confidential references so it would be a good idea to mark any references you give as 'confidential' to avoid any argument that they are not caught by this exemption.

Remember, when giving references, that they should be true and accurate. The employee could obtain a copy of the reference by other means. The fact that you don't disclose it does not stop the new employer from disclosing it on request. . It could also later become disclosable as part of any legal proceedings which the ex-employee might bring if they believe that they have suffered loss as a result of the reference.

Shared Parental Leave numbers revealed

The government has published figures showing the number of people who have taken shared parental leave (SPL) since it was introduced. SPL allows parents to share maternity/adoption leave and pay between them.

The figures show that each year, between 2015/16 and 2021/22, the number of people taking SPL steadily increased. For women, the number nearly tripled during this period, from 1,100 to 3,200. For men, the number almost doubled, from 5,100 to 9,800. However, the total number of men and women taking shared parental leave in 2021/22 remains low, at only 13,000.

This is perhaps not surprising given that campaign groups including the TUC and Maternity Action have described the SPL scheme as “deeply flawed”. The government itself conducted consultation on reforms to SPL as long ago as 2019, with the government acknowledging that its complexity may be a barrier to take-up.

However, the government’s findings have not yet been published. As part of its response to the written question on take-up figures it confirmed it was still considering the responses it had received. The slow response from government means that it looks as if the current SPL scheme is here to stay, at least for the time being.

Victimisation claim succeeds where primary claim fails

A recent Employment Appeal Tribunal case serves as a helpful reminder to employers that, where an employee makes a complaint of discrimination, even if the employer does not believe that the complaint has merit, they can still be found liable for victimisation owing to the way in which they handled the complaint.

In the case of McQueen v The General Optical Council, Mr McQueen was disciplined owing to behaviour which he alleged arose out of his disability. His primary claim (of discrimination arising from a disability under s15 Equality Act 2010) failed following an appeal to the EAT on the basis that his behaviour did not ‘arise from’ his disability at all. However, he did succeed in his claim that he had been victimised. Victimisation claims cover the situation where an employee is treated unfavourably because of raising an issue relating to a protected characteristic. In this case, the employer’s mishandling and “passive failure” to do anything about Mr McQueen’s grievance (which related to a protected characteristic: his disability) caused Mr McQueen distress for over a year.

As a result, the tribunal ordered the General Optical Council to pay compensation, mostly for injury to feelings, of £22,680. But some of it was for an ‘Acas uplift’, which is awarded if an employer fails to follow the Acas Code of Practice on Disciplinary and Grievance procedures.

It is fairly common for victimisation claims to succeed even where main claims fail (as here), and the ACAS uplift is an easy ‘win’ for claimants – and a punitive increase in liability for employers. Employers can protect themselves by conducting prompt and thorough grievance and disciplinary investigations in all cases, in line with their policies and the ACAS Codes. Remember that there is often the opportunity to remedy defects in the disciplinary or grievance process on appeal, if there were problems at the first stage.

Statutory redundancy pay – some points that the online calculator doesn't tell you

The statutory redundancy ready reckoner (www.gov.uk/calculate-your-redundancy-pay) is very useful for employers and employees alike when calculating redundancy pay. There are, however, a few pointers that are worth considering when you are making your calculations:

- The statutory minimum notice period is relevant. This is the minimum amount of notice employees are entitled to receive as a matter of law. The employer generally has to give one week's notice for each year of employment up to a maximum of 12 weeks after 12 years.

- If you make an employee redundant and pay them in lieu of notice then they can add on what would have been their statutory minimum notice period to the length of service used to calculate their redundancy pay. If this period of time would mean that they would tip over to an additional year of employment then this needs to be taken into account when looking at the redundancy payment due.

- In a similar way, if you are paying in lieu of notice you also need to take account of any birthdays which might take place between the date of redundancy and the date when the employee's statutory notice entitlement would have expired. The relevant age to input into the redundancy calculator would be the higher age which would have been reached by the end of the statutory minimum notice period.

- If your employees do not have normal working hours so your calculation of a week's pay is based on a 12 week average, remember that any weeks where the employee wasn't paid must be discounted and you will need to look back further to put together 12 weeks to average.

New ACAS guidance on reasonable adjustments for mental health

Acas has launched new guidance on reasonable adjustments for mental health at work for both employers and workers, in conjunction with Affinity Health at Work. The guidance is available on the ACAS website and covers:

- What reasonable adjustments for mental health are
- Examples of reasonable adjustments for mental health
- Requesting reasonable adjustments for mental health
- Responding to reasonable adjustments for mental health requests
- Managing employees with reasonable adjustments for mental health
- Reviewing policies with mental health in mind.

3rd Party harassment – under threat?

The Telegraph has reported that ministers are getting cold feet about the new proposal to introduce the ability to claim against employers for third party harassment under the Worker Protection (Amendment of Equality Act 2010) Bill. Third party harassment is where an employer is held responsible for the acts of somebody, perhaps a customer or supplier, who is not actually their own employee.

There is concern of the potential financial cost to employers should this proposal become law.

Third party harassment has a long history in an employment context. The case of Burton v De Vere Hotels was the historic high-point – where female waiting staff were successful in claiming racial harassment against their employer because of the on-stage behaviour and language of Bernard Manning, which the hotel putting on the event did nothing to stop. However, there have always been problems with the issue of control: how much control can an employer realistically exercise over third parties who may attend their premises or interact with their employees?

Between 2008 and 2013 there was a limited right to claim against the employer for third party harassment based on a '3 strikes' rule: employees had a right to claim if they suffered a third incident of harassment where the employer already knew of two previous incidents.

Under the proposal as it currently stands, liability for harassment by third parties will arise without there needing to be a prior incident, unless the employer can show they took all reasonable steps to prevent the harassment taking place. The test will be similar to that which exists for straightforward harassment by fellow employees. However, it remains to be seen how the concept of 'reasonable steps' will be treated given the inherent lower level of control that employers have over persons who are not their employees.

Regardless of what the future holds for this element of the Bill, there are obviously good employment relations reasons behind not wanting your employees to be exposed to harassment from third parties in the workplace. A poor workplace culture impacts on employee satisfaction and engagement, leading to high staff attrition rates and low productivity. There is also the related health and safety obligation to provide a safe place of work and the implied term of mutual trust and confidence which must be borne in mind in all of your dealings with your staff.

Jury service – 5 things you need to know

Anyone on the electoral register aged between 18 and 70 can be called up for jury service at any time. Jurors are generally asked to serve for 10 working days, although this period can be longer. Here are some things that employers should know about jury service:

- ·Employers cannot refuse to allow an employee time off work to attend jury service. If, however, the employee's absence will seriously damage the business then you can work with the employee to make an application for deferral in the employee's reply form. It is the employee who needs to make this application – which should include alternative dates where they would be available in the next 12 months – but the employer can provide the employee with information regarding business need which they can then send in.

- There is no legal entitlement for employees to be paid their normal wages during jury service.

- ·Employers should check their policies and contracts of employment to see if they have set out any entitlement to pay during jury service.

- ·Employers should also review any informal agreements previously reached to pay wages during jury service – if the practice has become certain and notorious within the business then it may have become a contractual entitlement by custom and practice.

- You are not able to claim additional expenses from the court linked to the need to cover the employee's work whilst they are on jury service.

Ethnicity pay gap recording guidance published

It is already a statutory requirement for employers with at least 250 employees to measure and report gender pay gaps. The government has decided not to introduce a similar legal requirement for employers to publish their ethnicity pay gaps but it has now published guidance for those wishing to report voluntarily.

Analysing ethnicity pay information is one way employers can identify and investigate disparities in the average pay between ethnic groups in their workforce. It helps employers understand whether unjustifiable differences exist between different ethnic groups and in turn, gives them an evidence base from which to develop an action plan. The government guidance sets out a consistent approach to measuring pay differences.

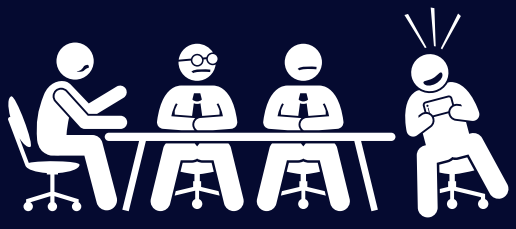
The guidance for employers provides practical advice on how to measure and report on any ethnicity pay differences within their workforce. Much of the guidance – including the methodology for the calculations – mirrors the approach set out in the guidance for gender pay gap reporting. This should help employers to avoid having to run different processes to collect pay data for both sets of calculations. It should mean that published figures from different businesses can be compared easily.

The guidance also suggests that employers may want to consider publishing an action plan that explains how they intend to address any pay gaps in their ethnicity pay figures. A good action plan should name clear, measurable targets that the employer commits to achieving within a chosen timeframe.

Laughing at an employee who fell over not found to be harassment

And finally, the law relating to harassment is a minefield for employers to navigate. The fact that the law focuses on the effect of the conduct, not the nature of the conduct, makes it tricky. However, some comfort is found in the recent Employment tribunal decision in Perera v Stonegate Pub Company Ltd where it was held that an employer who laughed at an employee who fell over at work had not harassed them on racial or religious grounds.

The Judge said that the "slapstick element" of someone falling over was likely to cause laughter. To be regarded as harassment it had to have the purpose or effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee. Applying this test the Judge found that "The conduct itself, objectively, came nowhere near having the proscribed effect, and [the employee's] view of matters was unreasonable." He found that, although the employee's perception had to be taken into account, the test was not satisfied merely because the employee thought it was.



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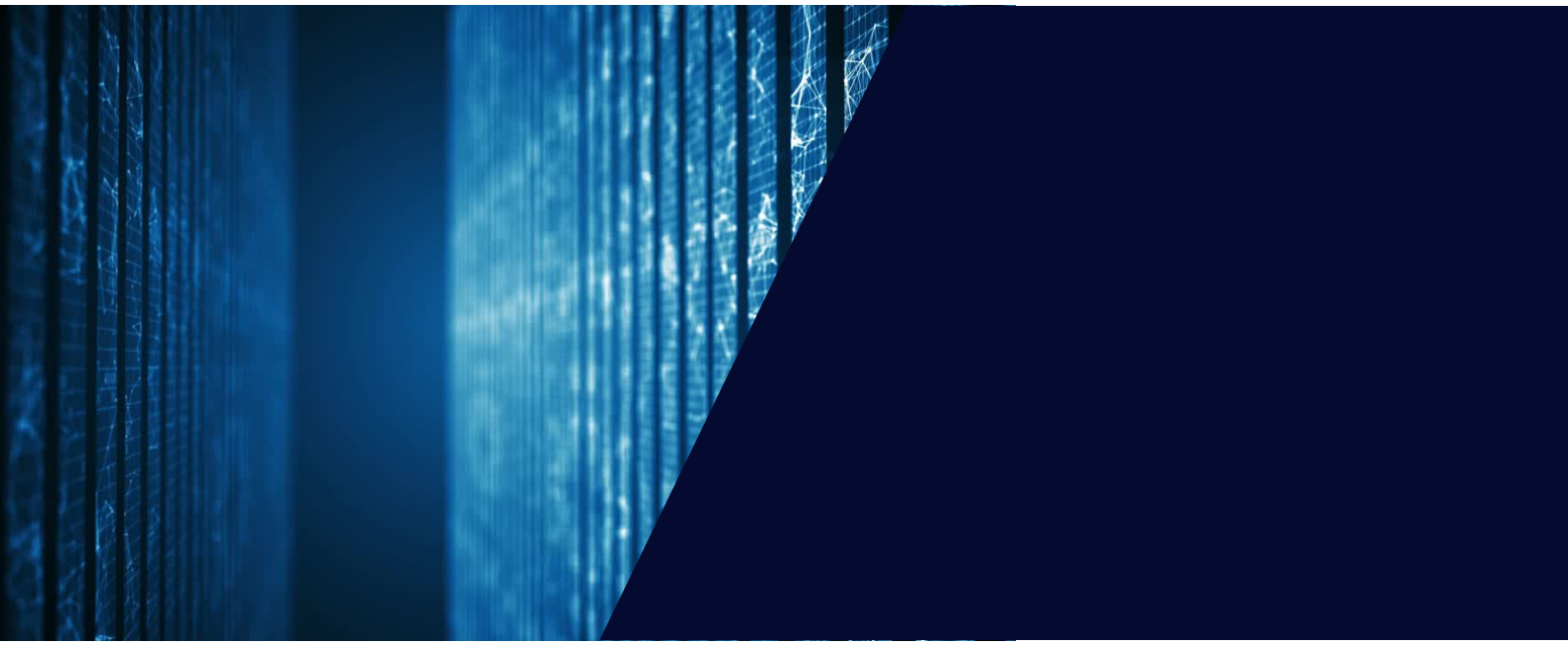

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