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Briefing Note – July 2019

UK: EMPLOYMENT UPDATE

In this month's Briefing we examine some of the recommendations made by the Women and Equalities Committee on the use of non-disclosure agreements to settle harassment claims and a decision on when an employer is entitled to rely on an occupational health report when assessing whether an employee has a disability.

Key issues

- Non-disclosure agreements: further recommendations
- Disability discrimination: relying on an OH report not a rubber-stamping exercise

Non-disclosure agreements: further recommendations

The direction of travel is clear: the way in which employers currently use confidentiality clauses (commonly mislabelled non-disclosure agreements (NDA's)) in settlement agreements is going to change; but how? Whilst the Government consultation on confidentiality clauses closed at the end of April, the timeframe for their response is unknown.

In the interim, the Women and Equalities Committee (WEC) have published a report on "The use of non-disclosure agreements in discrimination cases"; this makes several recommendations aimed at avoiding or reducing the use of NDA's to *'cover up allegations of unlawful harassment'*.

Amongst the WEC recommendations it is suggested that the Government should:

- within the next six months provide guidance on the handling of investigations into allegations of unlawful discrimination and harassment following a settlement agreement if this is agreed before any investigation is completed;
- consider requiring employers to investigate all discrimination and harassment complaints, regardless of whether a settlement is reached;
- extend the time limits for bringing sexual harassment, pregnancy and maternity discrimination claims to six months (from three months);
- legislate within the next two years to permit employment tribunals to award punitive damages with an assumption that employers will normally be required to pay an employee's costs if the employer loses a discrimination case in which sexual harassment has been alleged. It is also suggested that the Vento bands for determining injury to feelings compensation (currently £900 to £44,000) should be increased significantly to take into account the non-financial impact of discrimination;

- legislate to ensure that NDA's cannot prevent signatories from sharing information that may be helpful to a potential discrimination or harassment complaints or claims by another employee;
- should require employers to make a financial contribution sufficient to cover the costs of the worker's legal advice on any settlement agreement proposed by the employer; covering as a minimum, the content and effect of any confidentiality, non-derogatory or similar clauses, and any concerns about the reasonableness or enforceability of those clauses. Where the worker wishes to negotiate the terms of those clauses, further contributions should also be payable by the employer to cover the costs of legal advice and representation for those negotiations. Rather boldly it is suggested that these contributions should be payable regardless of whether the employee signs the agreement;
- legislate within the next two years to ensure that any clause in a settlement agreement that has the effect of controlling what information an individual can share with other people, organisations or bodies should:
  - be clear and specific about what information cannot be shared and with whom;
  - contain agreements about acceptable forms of wording that the signatory can use, for example in job interviews or to respond to queries by colleagues, family and friends;
  - contain clear, plain English explanations of the effect of clauses and their limits, for example in relation to whistleblowing;
  - require the use of standard, plain English, confidentiality, nonderogatory and similar clauses where these are used in settlement agreements;
- provide standard clauses on the damages that can be reclaimed for the breach of confidentiality, non-derogatory and similar clauses;
- provide that non-standard confidentiality and non-derogatory clauses should be legally unenforceable unless the relevant party can show a clear need for alternative clauses;
- require employers to appoint:
  - a named senior manager at board level or similar to oversee anti-discrimination and harassment policies, procedures and training, including learning lessons from how previous cases were handled;
  - a named senior manager at board level or similar to oversee the use of NDAs in discrimination and harassment cases and to ensure that where used in settling discrimination and harassment cases, the use of an NDA is appropriate;
- require employers to:
  - nominate a director to hold responsibility for reviewing settlement sums and monitoring whether these are an appropriate use of company resources.
- require employers to collect data and report annually on:

  - the number and type of discrimination and harassment complaints/ grievances and the outcome of such complaints;
  - the number of settlement agreements containing confidentiality, non-derogation and similar clauses they have agreed, and the type of dispute they relate to;
  - on maternity retention rates.

- impose a mandatory duty on employers to protect workers from harassment and victimisation in the workplace; breach of the duty should be an unlawful act and carry substantial financial penalties.

It also emerged from the report that the EHRC will publish a statutory code of practice on sexual harassment and discrimination at work this month. It will specify the steps employers should take to prevent and respond to harassment and provide guidance on the use of NDA's.

At this stage we do not know which (if any) of the recommendations will be adopted or the timelines involved. In the interim, employers should keep an eye out for the EHRC Code and scrutinise current settlement agreement templates to assess whether they need to be revisited to address the concerns raised in the WEC report.

The WEC Report can be found here.

Disability discrimination: relying on an OH report not a rubber-stamping exercise

An employer that is considering dismissing an employee on the grounds of lack of capability or unsatisfactory attendance due to ill health should exercise caution. Consideration needs to be given to the question of whether the employee has a 'disability' for the purposes of the Equality Act 2010 (EqA). If the employee has a disability, such a dismissal could give rise to a claim of 'discrimination arising from disability'; where the reason for dismissal is the lack of capacity, or, unsatisfactory attendance which has arisen in consequence of the disability. Employers have a defence to such a claim if they can demonstrate that that they had no knowledge of the disability, or if the employer did have knowledge it had a legitimate aim for dismissing and the dismissal was a proportionate means of achieving it.

An employer can be found liable for discrimination arising from disability in circumstances where it is considered to have 'constructive' as opposed to actual knowledge of the employee's disability; i.e. where the employer should have reasonably known about the disability because it has knowledge of the facts constituting the employee's disability.

When will an employer be regarded as having constructive knowledge of an employee's disability?

It is clear from the case law that an employer cannot rely unquestioningly on an occupational health (OH) report on an employee's 'disabled' status; it must form its own view on the matter rather than 'rubber stamping' the OH view. If it simply rubber stamps the OH view an employer runs the risk of being fixed with constructive knowledge of the disability. A recent decision of the Employment Appeal Tribunal (EAT) illustrates when it is acceptable for an employer to rely on an OH assessment.

C worked for R for many years during which his attendance was generally poor, triggering R's attendance policy on several occasions. Towards the end of his employment C had two further periods of absence that culminated in the final stage of the absence policy and ultimately C's dismissal for unsatisfactory attendance. C claimed unfair dismissal and discrimination arising from disability.

The manager who took the decision to dismiss did consider whether C was disabled in the context of four OH reports that said he was not; in addition, neither C nor the trade union representing him asserted that he was disabled.

The final OH report did not simply contain a bare assertion to the effect that C was not disabled; instead it addressed whether C's ability to work was affected; the fact that C's prognosis was good; the fact that there was no indication that C would suffer from a long term impairment, the fact C was asymptomatic and was able to perform his duties without any adjustments. All relevant factors in the statutory test for assessing disability.

The EAT considered that the employer could not be fixed with constructive knowledge of C's disability; it had actively considered whether C had a disability on the detailed information available to it; none of which pointed to a disability.

In practice, where an employer is seeking medical advice about an employee's condition in the context of an ill health dismissal it would be prudent to ask that the report address the issues of: (i) whether there is a physical or mental impairment on the part of the employee; (ii) whether it has a substantial and long term adverse effect on the employee's ability to carry out day to day activities or his work activities; (iii) whether the employee is thought to be disabled for the purposes of the Equality Act 2010; and (iv) what adjustments may be advisable to facilitate the performance of the job. In addition, if there is a long history of previous correspondence and medical reports, this should be considered in an employer's overall assessment; relevance should not be placed exclusively on the latest evidence.

[Kelly v Royal Mail Group Ltd]

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