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|   | Important developments in the employment field |   |
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|   | *25 September 2018* |   |
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This is the first edition of an electronic newsletter from the Employment Team at Five Paper. The newsletter will provide our clients with a brief summary of any important court decisions or statutory developments in the employment field. Please feel free to contact us for further information about the summary or to discuss the issues that concern you. The next edition of the newsletter will appear in December 2018 and thereafter on a quarterly basis.Disability discriminationThere are a number of recent decisions, including:***Dunn v the Secretary of State for Justice*** [2018] EWCA Civ 1998 (Judgement delivered on 4 September 2018).Significant because it reminds tribunals that a direct discrimination claim involves giving consideration to the motivations of the relevant decision-makers (i.e. whether the fact of the relevant disability operated on their minds so as to cause them to act, or fail to act, in the manner complained of).Also important for general guidance on ill health retirement schemes, and as a reminder that incompetent and defective policies are not necessarily discriminatory.***X v Y Limited***(UKEAT/0261/17 - Judgement delivered on 9 August 2018).Significant because it shows that not all emails from lawyers are privileged and because it shows that employers take a big risk if they try to disguise or spin the reasons for a dismissal. Privilege cannot be claimed if advice is given for the purpose of facilitating an iniquity. Giving advice on how to cloak what would otherwise be a disability discrimination dismissal as a dismissal for redundancy is capable of facilitating an iniquity.***Watkins v HSBC*** (UKEAT/008/18/DA – Judgment delivered on 4 July 2018).Significant because it shows that failing to monitor work activity and work-flow is capable of being a “step” for a reasonable adjustments claim even though it is generally accepted that a failure to consider adjustments is not the same as the statutory need to make them.The EAT found that monitoring could be a preventative measure which it was reasonable for the Respondent to have to take before the Claimant got into further difficulty. It was a matter of providing management support rather than mere assessment or consultation. The disability was epilepsy.Also important because it shows that an adjustment may be required where there is a need to prevent the recurrence of a difficulty and not just where there is a need to alleviate a current difficulty. An employer should not ignore recommendations for active management support to prevent recurrence or concerns about the risk of deterioration in the future.PayApart from the lessons to be learnt from the recent decisions referred to below, employers should be aware that all NMW liabilities will be enforced against a transferee as of 2 July 2018 (including penalties for any arrears that may have accrued before the transfer). This highlights the importance of obtaining an indemnity from the transferor to cover these potential liabilities.**Royal Mencap Society v Tomlinson-Blake and Shannon v Rampersad**[2018] EWCA Civ 1641 (Judgement delivered on 13 July 2018).Significant because the Court of Appeal held that only time spent awake and working should be included in the calculation of National Minimum Wage payments. The case concerned care workers who were required to sleep at, or near, their workplace and be available to provide assistance if required. The court considered and applied the exclusion in Regulation 32 of the National Minimum Wage Regulations 2015 (which specifies that the National Minimum Wage is only payable during hours when the worker is awake for the purpose of working, as opposed to available for work, even if facilities for sleeping are provided by the employer).Whilst the case helps to clarify the position, it still leaves some issues to be resolved. For example, the extent to which an employee is able to sleep (or expected to be woken to work) determines whether there is “actual work” or a period of being “available for work”. The Judgment suggests that most night security staff would be on the "actual work" side of the line because they have regular, if intermittent, patrolling or monitoring duties throughout the night.***Agarwal v Cardiff University & Anor*** [2018] EWCA Civ 1434 (Judgement delivered on 7 June 2018).Significant because the Court of Appeal held that an employment tribunal has the jurisdiction to consider an unlawful deductions claim even where it involves a question of contractual interpretation.  Employment statusThis is very much in the public eye and the Employment Team at Five Paper has considerable expertise in this issue. Please ask us for links to the various articles we have written on this subject, including articles about the Taylor Review of Modern Working Practices and the Supreme Court decision in ***Pimlico Plumbers v Smith***[2018] UKSC 29. We advise public bodies and companies about employment status and connected issues such as workers’ rights, self-employment, immigration, consultancy agreements, the gig economy and zero hour contracts. There have been various recent tribunal decisions on employment status but the only appeal case of any note since ***Pimlico Plumbers***is ***Morrison v Aberdein Considine & Co***(UKEATS/0018/17 – Judgement delivered on 29 August 2018). This case reminds legal firms and other partnerships that someone described as a salaried partner might still have employee status. The consultation process on employment status has now finished and further editions of this newsletter will consider the government’s response.Other recent appeal cases***Patel v Folkestone Nursing Home***[2018] EWCA Civ 1689 (Judgement given on 17 July 2018) is a significant case because it serves as a warning to employers that even a successful appeal against dismissal can lead to a claim of constructive dismissal on the grounds that there has nevertheless been a breach of the implied term of trust and confidence. An employee may be entitled to resign where the appeal reinstates him but does not deal adequately with all the relevant issues.**The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd**[2018] EWCA Civ 2006 (Judgment given on 5 September 2018) is a significant case because it shows that notes of interviews with employees and others for the purpose of investigating a whistleblower’s allegations can be protected by litigation privilege. The employer's purpose in preparing the documents was a necessary part of resisting or avoiding litigation and therefore satisfied the dominant purpose test. Documents prepared in order to avoid or settle contemplated litigation are also covered by litigation privilege.*The Employment Team at Five Paper provides a full range of advocacy and advisory services. We also provide seminars and training sessions on employment related issues. Our members regularly contribute articles to professional journals and online websites. Please contact David Portch, our Senior Clerk, on* *davidportch@fivepaper.com* *or 0207 815 3200 for further details.* |  |

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