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UK Employment Law Round Up: 2011 Learning Points and How we Can Help in 2012



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Welcome



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This booklet provides a useful source of background information about two areas of employment practice on which McDermott's London Employment Team is frequently asked for advice. It is provided as an accompaniment to our January 2012 client event.

We will be reflecting on key learning points from 2011 and thinking practically about what to look forward to as an employer in the UK in 2012.

As with all the work we undertake for our clients, we have approached these topics in a commercial and practical way in order to achieve the best and most efficient solutions for you.

We look forward to working with you over the coming months and assisting you with the various challenges you face; protecting your business whilst ensuring that your obligations to your employees are met.

Alison Wetherfield

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January 2012

Was 2011 the End of an Era for Very High Value Employment Tribunal Claims in the UK?

What happened?

A lot.

The UK Government announced in May 2011 that it would review the level of discrimination awards to try to assist business stakeholders who fear uncertain tribunal costs and awards. Claims for discrimination or whistleblowing often lead to publicity about huge future loss claims (even if the ultimate awards or settlements are likely to be a fraction of the amounts mentioned in the press).

Realising that European law prevents putting a fixed cap on discrimination awards (unlike unfair dismissal law, which is domestic only), the UK Government launched a consultation on 14 December 2011 (which will end on 6 March 2012) on a new fee (*i.e.*, charges for use) regime for Tribunal claimants. The consultation suggests two alternative schemes: one would charge discrimination and whistleblowing claimants £250 to file a claim and £1,250 to have a hearing; the other would charge a one-off fee of £600 for discrimination/whistleblowing claims asserted to be worth under £30,000, and £1,750 for discrimination/whistleblowing claims asserted to be worth over £30,000, with a prohibition against an award higher than the fee level chosen.

The Court of Appeal was also concerned by the multiplicity of different approaches taken in Tribunal cases to the calculation of alleged future loss by successful discrimination claimants. The Court decided that, as soon as it is more likely than not that the claimant would have mitigated loss, no further award should be made and that only "exceptionally" should loss be assessed for the rest of the claimant's working life.

What does that mean for you?

Watch this space. Tribunal fees are certainly coming (for standard unfair dismissal claims too), and both options under consideration may affect claimant attitudes to filing. Actually the highest discrimination award as at early 2011 for the prior 12 months was (only!) £289,167 and only 7% of all awards are over £30,000. That said, our own experience, as specialists in complex discrimination litigation, is that eye-wateringly high schedules of loss are still common and that settlements still run, in difficult cases often involving alleged psychiatric injury, into very high numbers.

For example, one NHS case involving a discriminatory dismissal of a consultant hospital doctor (aged 53) resulted in a Tribunal award in December 2011 of nearly £4.5 million compensation for future loss (*Michalak v Mid Yorkshire Hospitals NHS Trust and others*). Looking forward however, both the prospect of upfront Tribunal fees and the Court of Appeal decision referred to above should bring some new negotiating power to employers.

We expect to go on facing career-long loss cases where a claimant asserts illness (particularly stress-related) owing to both discrimination and litigation. Claimants rarely, perhaps unsurprisingly, "recover" until they have won, or settled for an amount they consider to include a large element of future loss. We have a number of strategies in such cases and work with our clients to win, or, where appropriate, to settle well.

How We Can Help in 2012

- We expect legislative change in 2012; the recent £4.5 million NHS award can be expected to be appealed and UK governmental interest to be at an all time high. We can advise you on how to counter UK claimant approaches based on this award.
- We have very deep expertise in fighting and settling (at a fraction of claimed or publicised amounts) some of the most difficult discrimination claims. Unusually for City firms, we are experienced in dealing with personal injury elements as well as more standard high value discrimination claims.

Holiday Pay and Sickness

What happened?

The issue of how much paid holiday workers are entitled to accrue, and take, during extended periods of sick leave has, in recent years, been the cause of a considerable headache for UK employers.

2011 brought a number of cases in which the issue was discussed further, but these failed ultimately to resolve many of the outstanding questions.

So, where are we? We know from case law that

- Workers continue to accrue holiday rights while on sick leave.
- If they cannot take leave due to illness they must be allowed to take it on their return to work or be paid *in lieu* of it on the termination of employment.
- Paid holiday *may* be taken during sick leave. But workers cannot be *compelled* to take holiday whilst on sick leave if they do not wish to.
- If a worker becomes sick during a period of pre-arranged holiday, he/she must be permitted to take that holiday at later date (even if it means carrying it over to another holiday year).
- The right to carry forward holiday might be dependent on the worker asking for it, but this may be overturned by the Court of Appeal in 2012.
- Limits may be set on the number of continuous years' sick leave in respect of which holiday may be accrued and carried forward to subsequent holiday years. Once that limit has been passed, holiday that has been accrued but not taken will be forfeit, even though the worker has not had an opportunity to take it.

The UK Working Time Regulations 1998 (WTR), are at odds with a number of the principles set out above as they expressly prohibit the carry forward of holiday. The principles above have been derived largely from European law, but UK Courts and Tribunals are obliged to interpret the WTR in line with the European law wherever possible. This has led to a number of decisions in which the above principles have been applied, despite the current conflict with the WTR. The current, unclear, position is unsatisfactory. However, the UK Government appears to be cognisant of the difficulties currently faced by employers and has proposed to amend the WTR in 2012 to address these.

What does this mean for you?

There are two main areas of concern for UK employers:

The cost of pay in lieu of holiday on the termination of employment of a worker who has been on long term sick leave

To date, most employers have been paying workers who have spent an extended period of time on sick leave, *in lieu* of all accrued but untaken holiday as at the termination of employment.

The recent finding (referred to above), that there is a potential limit on such accrual, does however mean that, going into 2012, employers may be able to pull back their position. The remaining grey area is precisely where this limit lies. The only guidance we have to date from the European Court of Justice (the ECJ) is that

(a) The carry forward period must

- Take into consideration the specific circumstances of the individual worker.
- Be "substantially longer" than the period over which it was accrued (*i.e.*, if holiday is accrued over a one year period, it must be possible for a worker to carry it forward for substantially longer than one year).
- Protect the employer from the risk that a worker will accrue too much holiday.

Holiday Pay and Sickness

(b) In the case it considered, the ECJ approved the loss of carried forward holiday 15 months after the end of the year in which the holiday was originally accrued. The maximum period is likely to be 18 months after the end of such time.

Taking these points together, it seems that the likely acceptable carry-forward period will be in excess of 12 months, but no more than 18 months after the end of the relevant holiday year. Employers wishing to implement this should amend contractual documentation appropriately, not least to give workers due notice that they may, as an alternative, take their holiday while on sick leave. For employers whose workforce has not raised the issue however, discretion may be the better course if the workforce expects payment only of leave accrued in the year of termination.

The management of employees asking to re-schedule their holiday because they fell sick during their holiday.

The inter-relationship between (short term) sickness and holiday can be managed through the addition to holiday policies of wording that requires the employee to produce medical certificates, or similar, as evidence of illness before the holiday may be re-scheduled.

How We Can Help in 2012

- Assist you with queries that arise in relation to the accrual, and forfeiture, of holiday entitlement for employees who are on long term sick leave, or whose employment is being terminated following a period of long term sick leave.
- Review and amend your existing documentation to enable you to implement a limit on accrual of holiday during periods of extended sickness absence.
- Help you to manage and, where appropriate, implement new policies and/or contractual terms to address short term sickness during pre-arranged holiday.
- Keep you updated about developments in this area, e.g., from the Court of Appeal on the requirement for a worker to request holiday in order for it to be carried forward and on any governmental proposals involving amendments to the WTR

Abolition of Default Retirement Age

What happened?

2011 saw the phasing out of the UK statutory retirement procedures, which had previously allowed employers to retire employees at age 65 or above.

Since 6 April 2011, employers have not been able to issue new notifications of retirement under the old regime. The “duty to consider” and “right to request” procedures have been scrapped.

What does this mean for you?

This does not mean that an employer can never compulsorily retire an employee. But, it does mean that the employer is required to consider whether it is appropriate to do so.

Compulsory retirement may potentially fall foul of the prohibition against age discrimination. However, age discrimination may be objectively justified.

Therefore, the question employers must ask themselves is: Can the automatic ending of employment solely on the grounds of age be objectively justified as a proportionate means of meeting a legitimate aim in my business, and if it were put to the test, could I support my rationale with hard evidence?

In 2011 we had some assistance from European and domestic case law with what may be considered (depending on the particular circumstances) to be adequate rationale for justification:

- Achieving a supportive culture by avoiding the need to confront older, under-performing, partners.
- Ensuring the availability of career progression opportunities.
- Creating a balanced workforce.

The Supreme Court of England and Wales is due to consider whether the improvement of promotion prospects for less senior employees is adequate justification for a compulsory retirement age of 65.

We also await a decision from the Court of Appeal which we anticipate will shed light on whether an argument based on costs alone may objectively justify the imposition of a default retirement age. The current position is that it will not.

As a result of the uncertainty about what may, and may not, amount to objective justification, many employers have chosen to push back a few years any decision about whether to have a compulsory retirement age and wait for further guidance from the judiciary.

Any employer wishing to dismiss an older employee, whether or not they are seeking to rely on an automatic retirement provision, will now need to rely on the other established potentially fair reasons for dismissal, (which include some other substantial reason, capability, conduct, or redundancy) and follow a fair procedure to dismiss in the usual way.

For employers wishing to continue to retire employees, the process should include meetings with the employee and consideration of whether it might be appropriate to allow the individual to continue working beyond the retirement age if they wish to do so. The ACAS booklet *Working Without the Default Retirement Age* suggests that workplace discussions about aims and aspirations may also prove useful for succession planning. However, given that nothing said in these meetings will be binding and the employer will not know an employee's plans for certain until notice is given, they will not provide the complete answer in every case. It is possible that the current UK Government's proposals for “protected conversations” (the details of which have not been published) may prove more useful.

Abolition of Default Retirement Age

For employers without a retirement age, having robust performance management procedures in place and following them will be important, although such procedures would need to be implemented across the entire workforce to avoid allegations of age discrimination.

Employers who retired employees on or before 5 April 2011 using the old regime may be interested to note that an appeal against a surprising Employment Appeal Tribunal (EAT) decision regarding the “right to request” is to be heard by the Court of Appeal. The EAT held that, in order to have adequately notified an employee of his or her right to request to continue working, an employer must have referred expressly to the relevant provisions in the legislation. Although we have not seen an increase in speculative claims from retired employees who received “defective” notices, some practitioners are predicting a surge in claims as a result of this appeal.

How We Can Help in 2012

- Work with you to ensure that, if your business is retaining a normal retirement age, it can be justified with robust rationale and evidence, in line with the latest case law.
- Review your performance management procedures to ensure that effective appraisal systems are in place.
- Train managers responsible for implementing performance management procedures to ensure consistent standards are implemented across all areas of the workforce.
- Assist you with the dismissal of older employees, both by reason of retirement (using a normal retirement age), or for a reason other than retirement (where a normal retirement age is not in place).
- Continue to keep you updated regarding the latest developments in this fast-evolving area of the law.

The Blurring of Status in 2011

What has happened?

2011 saw atypical workers receive, on the whole, greater protection in the United Kingdom than they had enjoyed previously.

The Agency Workers Regulations 2010 (the Regulations) came into force on 1 October 2011. The following are the key points:

- For workers engaged on or after 1 October 2011, the right to equality with employed staff of certain key terms, including those relating to pay, took effect on 24 December 2011.
- The UK Government's stated purpose for the Regulations was to ensure the appropriate protection of temporary agency workers through the application of the principle of equal treatment. However, the timing of the implementation of the Regulations during the economic downturn was unfortunate. Compliance with the obligations imposed by the Regulations has necessitated additional administrative and incidental expense being incurred by the users of agency workers. Businesses believe that this was not the right time to impose such an additional financial burden on them.
- As a result, those who can use alternatives to agency workers, such as the genuinely self-employed, managed service contracts, and in-house temporary staff banks, are doing so. The Swedish Derogation arrangements that provide for workers to remain employed by the agency between assignments, in return for which the equality of terms provision does not apply, are being implemented by agencies so as to minimise any protection the equality of terms provision might have afforded. In light of this, it is to be wondered whether the agency workers are in fact deriving the security and protection promised by the European Directive and the UK Regulations.
- We have yet to see any litigation on the interpretation of the Regulations but we suspect that will come in 2012. It would be particularly useful to have greater clarity on the equal treatment principles applicable to private sector performance bonuses. In the meantime, end users should continue to exert their strong bargaining positions to obtain indemnity protection from the agencies.

For workers who fall outside of the protection of the Regulations, there has also been considerable support from case law.

In July 2011, the Supreme Court found that a number of car valets who were engaged under contracts that emphatically stated they were not employees or workers, and included clauses that were indicative of an independent contractor relationship, such as a right of substitution, were in fact "workers" rather than independent contractors, and therefore were entitled to receive minimum wage and paid leave.

The Supreme Court recognised that there is often an inequality of bargaining power in an employment context, and that written terms tend to be dictated by an employer on a "take it or leave it" basis. This means that the worker has no option but to accept the terms offered, even though they may not reflect the true relationship between the parties. If focus was placed on the written terms alone, rather than the true, factual position, the Court said that "armies of lawyers" would simply draft contracts in such a way as to prevent the recognition of an employer/employee relationship.

As a result, the Supreme Court held that "the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed. In addition, the true agreement will often have to be gleaned from all the circumstances of the case, *of which the written agreement is only a part*" (our emphasis).

However, it was not all good news for atypical workers in 2011. Volunteers were found not to be workers or to have the right to sue for discrimination.

The Blurring of Status in 2011

What does this mean for you?

When determining status, Tribunals will be more willing going forward to look beyond the written terms of a contract to examine the true, factual position.

Employers will need to demonstrate that the written terms of a contract reflect the true position of the parties, *e.g.*, by ensuring that substitution does in fact take place from time to time.

Companies that engage self-employed contractors should be aware that this judgment may encourage contractors to claim employment rights (such as unfair dismissal) based on employment status.

How We Can Help in 2012

- Examine the status of any existing contractual relationships you have with self-employed contractors and assist with any areas of concern.
- Advise you in relation to the Agency Worker Regulations, draft appropriate temporary worker agency contracts and assist with negotiation of appropriate indemnities.
- Ensure that terms for volunteers, particularly unpaid interns, reflect the expectations of both parties and do not expose you to claims for minimum wage.

Recessionary Times

What has happened?

As UK companies face the continuing economic downturn, the numbers of employees being made redundant has continued to rise. In 2011 there were a number of key developments in relation to redundancies.

- **Special treatment afforded to pregnant employees:** favouring pregnant employees should not be extended beyond what is reasonably necessary to compensate them for any disadvantage arising from their condition. Employers need to consider the least discriminatory way to remedy in selection criteria any potential disadvantage to pregnant employees or those absent on maternity leave. To do otherwise may constitute sex discrimination against any other employees who are adversely affected.
- **Determining suitable vacancies:** those on maternity/paternity/adoption leave have special statutory rights in relation to redundancy, but only where suitable alternative work exists. There is no obligation to offer alternative employment to employees on maternity/paternity/adoption leave unless the particular position is "suitable" by virtue of the employees' personal circumstances and work experience. The decision is ultimately one for the employer, who knows about the employee and the position.
- **Agency workers:** the new Agency Workers Regulations provide that during collective redundancy procedures employers should provide details to representatives of the numbers of agency workers, the nature of their work, and the parts of the company where such workers are present.
- **Redundancy process procedural issues:** the EAT held that the failure by an employer to provide meeting notes should not, by itself, render an otherwise thorough and careful redundancy process unfair. In addition, the EAT decided that the employer is under no obligation to provide an employee with documents where the employee has not supported the request with justification.

What does this mean for you?

- Making those on maternity leave redundant continues to require real thought, but the guidance given by the courts in 2011 has been very useful in crystallising those legal principles that had been uncertain and over which lawyers could squabble.
- An employer faced with a claimant who seeks to highlight minor procedural issues in order to strengthen his or her bargaining position should feel more confident in being able to respond robustly. The focus is on the fairness of the process as a whole rather than on standalone issues.

In 2012 the ECJ is due to hear a reference from the Court of Appeal regarding the scope of an employer's collective consultation obligations. The question before the ECJ, which frequently arises in practice, is whether an obligation to consult arises when an employer *proposes* to make a business or operational decision, or only *after* the commercial decision itself has been made.

How We Can Help in 2012

- Assist you with designing a suitable performance management and appraisal framework.
- Help you in identifying effective selection criteria during a redundancy process.
- Provide advice on how to conduct a fair and thorough redundancy process.

When is a Belief the Right Kind of Belief for Protection in the United Kingdom?

What has happened?

In 2010, the EAT provided guidance as to what constitutes a “belief” for the purposes of the religion or belief provisions of discrimination law. To be protected

- A belief must be genuinely held.
- It must be a belief and not an opinion or viewpoint based on the present state of information available.
- It must be a belief as to a weighty and substantial aspect of human life and behaviour.
- It must attain a certain level of cogency, seriousness, cohesion, and importance.
- It must be worthy of respect in a democratic society, not be incompatible with human dignity, and not conflict with the fundamental rights of others.

The EAT applied these factors to conclude that a belief that “mankind is heading towards catastrophic climate change, and that we must all live in such a way so as to mitigate that catastrophe” was capable of amounting to a protected belief.

In 2011, we saw a steady stream of cases requiring Tribunals to apply that guidance to a wider variety of cases. The following are beliefs that Tribunals have now found to be capable of protection under discrimination laws:

- A general belief in the sanctity of all life extending to a passionate belief in anti-fox hunting and anti-hare coursing.
- A belief in spiritualism, life after death, and the ability of mediums to contact the dead.
- A belief in the “higher purpose” of public service broadcasting to encourage debate and citizenship in a public space.

Conversely, the following beliefs have been found not to be protected:

- A belief that the 9/11 and 7/7 terrorist attacks were “false flag operations” and part of a conspiracy by the UK and US governments (found to lack coherence and cohesion).
- A belief that “we should pay our respects to those who have given their lives for us by wearing a poppy from All Souls’ Day on 2 November to Remembrance Sunday” (found to lack cogency, cohesion, and importance and did not, in the Tribunal’s view, relate to a weighty and substantial aspect of human life and behaviour).
- Marxist/Trotskyist political beliefs (were not deemed worthy of respect in a democratic society, although this is being appealed).

What does this mean for you?

The answer to the question “what beliefs are protected by UK discrimination legislation?” continues to depend very much on the facts of each particular case.

It is now clear however that protection under the religion or belief legislation is potentially much broader than many employers may have thought previously.

In 2012, we look forward to receiving the EAT’s judgment in the Marxist/Trotskyist case which, if found in favour of the claimants, could for the first time expressly broaden protection to political beliefs.

How We Can Help in 2012

- Assist you in assessing whether a particular employee’s belief is protected. It is likely that employees will continue to test the boundaries of what beliefs are capable of protection.
- Support you in responding appropriately to requests to accommodate employee beliefs in the workplace in order to minimise your exposure to indirect discrimination claims. Requests for changes to hours of work, dress code and/or job duties are being made commonly on the grounds of religion and belief.

Did the Bribery Act Mean the End of the “Jolly” in 2011?

What has happened?

The UK Bribery Act 2010 (the Act) came into force on 1 July 2011. It has been described as the toughest anti-corruption legislation in the world and led to fears that it would represent the end of corporate hospitality.

However, such fears were partly dispelled by the long-awaited official guidance (the Guidance) issued by the Government in April 2011. The Guidance made clear that the Act did not intend to criminalise the provision of *bona fide* hospitality or expenditure intended to improve the image of an organisation or to establish cordial relations, which are recognised as an established and important part of doing business.

Nevertheless, employers do now need to be aware that excessive hospitality and promotional expenditure could form the basis of four offences under the Act:

- **Bribing another person**, which requires an intention to induce conduct that amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust judged by the standard of a reasonable person in the UK.
- **Being bribed by another person**, as in the circumstances described above.
- **Bribing a foreign public official** is a specific offence, which requires an intention to influence the foreign public official in his or her official role and thereby retain business, obtain new business, or obtain a business advantage, and there is a sufficient connection between the act of influence and the advantage obtained.
- **Failing to prevent a bribe**, although a defence to this will be having in place adequate procedures to prevent it.

If a company does not have in place appropriate preventative procedures, it will be committing an offence under the Act if an “associated person” (including, for example, employees, consultants, agency workers, and volunteers) performing services on its behalf bribes another person to obtain or retain either business or a business advantage for the company, irrespective of whether the transaction is in fact completed.

Notably, the Act provides for an unlimited fine for commercial organisations and an unlimited fine or a maximum penalty of ten years’ imprisonment for offences committed by individuals. In particular, “senior officers” (broadly defined and including directors) can be convicted of an offence where they are deemed to have given their consent or connivance (whether by action or inaction) to giving or receiving a bribe, or bribing a foreign public official. A director convicted of a bribery offence is also likely to be disqualified from holding a directorship for up to 15 years.

In deciding whether to prosecute, the full circumstances of each case will be considered. These will include the lavishness of the hospitality or expenditure, the standard or norms applying in a particular industry, and whether the hospitality or expenditure was concealed or clearly connected with legitimate business activity. Ultimately, prosecutors will carefully consider whether prosecution is in the public interest.

The first conviction under the Act involved a former magistrates’ court administrative officer, who admitted accepting a £500 bribe to “get rid of a speeding charge”. He was sentenced to six years for misconduct in a public office, to be served concurrently with a three year sentence for bribery.

What does this mean for you?

Employers and lawyers alike are still very much feeling their way as to exactly how the Act will be applied. Notably, we are yet to see a test case on the application of the Guidance in relation to the corporate offence of failing to prevent a bribe. Such a case will be of great interest to employers.

In the meantime, it now seems clear that routine business development, which is reasonable and proportionate and within the norms for your particular industry, and which does not involve public officials, is highly unlikely to be caught by the Act.

Did the Bribery Act Mean the End of the “Jolly” in 2011?

However, the following steps may be helpful in both preventing bribery taking place and establishing a defence to “failing to prevent”:

- Creating and/or updating policies
- Publishing a policy statement
- Issuing internal guidance
- Regular monitoring, review, and evaluation of the adequacy of internal procedures and compliance with them
- Providing appropriate training and supervision to employees.

How We Can Help in 2012

- Review your existing policies, staff handbooks and contracts of employment to ensure that they deal expressly with bribery issues.
- Advise in relation to appropriate investigative procedures and, if necessary, disciplinary action should any alleged or suspected bribery issues arise.

Online and Out of Bounds? What Can We Do in the United Kingdom About Employee Misuse of Social Media?

What has happened?

2011 was the first year during which we have really started to see a steady run of cases dealing with dismissals for misuse of social media. These cases have helped shed light on when Tribunals are likely to find such dismissals to be fair.

Dismissals that have been found to be *fair* include

- A bar manager who started a Facebook discussion containing offensive comments about customers that, notwithstanding the employee's purported privacy settings, made their way back to the customers concerned.
- An employee who worked with drug users in prisons who forwarded to a colleague a racist and sexist chain email that subsequently found its way into the workplace (notwithstanding that the action took place outside working hours, using personal email accounts on the individuals' personal computing devices).

Dismissals that were found to be *unfair* included

- A call centre team leader who made a number of "relatively mild" Facebook comments in circumstances where there was no evidence of any resulting reputational damage to the employer.
- A supermarket worker who took part in a video, which was subsequently posted on YouTube, larking around in the warehouse dressed in company uniform. The video was viewed only eight times (five of which purportedly by the managers investigating the incident).
- A deputy store manager who created a Facebook page disclosing confidential information revealed during workplace reorganisation consultation meetings. The employee had a previously clean disciplinary record, had taken the page down within two days after consulting the employers social networking policy and learning that it was a potential disciplinary offence, and had apologised for his actions at the disciplinary hearing.

What does this mean for you?

Employers can take comfort from the fact that the law in this area is not new, it is just being applied to our newest forms of communication. The case law to date suggests that Tribunals are willing to uphold dismissals of employees for misuse of social media although, as with all dismissals, they will continue to turn on their facts. There are a number of steps employers can take to bolster their position:

- Existing policies, staff handbooks and contracts of employment should be reviewed to ensure they deal expressly with social media issues. Relevant policies should then be communicated widely to employees and enforced consistently.
- Care should be taken in categorising any alleged or suspected misconduct and a proper investigation should always be undertaken.

It is clear that it will not be enough to say simply that your reputation may be damaged, it is necessary to show evidence of actual damage. This is particularly so where online acts take place outside the workplace and/or in the course of an individual's personal life.

How We Can Help in 2012

- Review your existing policies, staff handbooks, and contracts of employment to ensure that they deal expressly with social media issues in a manner that is appropriate to your organisation and industry.
- Advise you as potential disciplinary issues arise on the acceptable limits for investigating and disciplining an employee for misuse of social media. We can assist particularly with situations that fall into the grey area between an individual's professional and private lives.

UK Disability Discrimination

What has happened?

There have been a few Employment Appeal Tribunal (EAT) decisions on disability discrimination this year that are of interest. The EAT held in 2011 that

- When considering whether an adjustment was a reasonable step for an employer to have taken, a Tribunal must consider the extent to which the adjustment would have prevented the disadvantage in question. A “chance” that it would do so may not be enough. Conversely the prospect of success does not have to meet the standard of being “good” or “real”.
- An employer's failure to facilitate a disabled employee's application for ill-health retirement was not a breach of its duty to make reasonable adjustments. The EAT said that reasonable adjustments are steps that make it possible for disabled employees to remain in employment, not steps that enable them to leave employment on more favourable terms.
- The duty to make reasonable adjustments is not a duty to make adjustments at any cost. It found that the UK Government did not directly discriminate against a deaf senior diplomat, nor breach its duty to make reasonable adjustments, when it withdrew an offer of a post in Kazakhstan because of the cost of providing lipspeaker support. The EAT said that, rather than an objective test, tribunals should use their judgment and do what is “right and just” when considering whether there has been a breach of the duty.

What does this mean for you?

Employees often suggest adjustments that might make life easier for them but do not achieve the purpose of getting them back to work. The EAT has been clear that the employer is not obliged to implement such adjustments.

You should be cautious of placing too much reliance on the Government case referred to above. The cost of the adjustment in that case was *circa* £250,000 annually. Moderate expenditure will not be treated the same way.

How We Can Help in 2012

- Keeping you up-to-date with all pertinent disability decisions.
- Helping you steer a safe course through the difficult issue of what is, and what is not, a reasonable adjustment.

What Does 2012 Hold in Store?

1 FEBRUARY 2012	<p>Increase in Tribunal awards come in to effect</p> <ul style="list-style-type: none"> ▪ Maximum unfair dismissal award: £72,300 ▪ A week's pay: £430
LATE FEBRUARY/ EARLY MARCH 2012 (Originally scheduled for 25 January 2012)	<p>European Commission announces proposals to amend the current EU Data Protection Directive</p>
8 MARCH 2012	<p>Date by which Member States must, as a minimum, increase parental leave from 3 to 4 months (subject to a 12 month extension available to member states)</p>
1 APRIL 2012	<p>Increase to statutory maternity, paternity and adoption pay</p> <ul style="list-style-type: none"> ▪ From £128.73 to £135.45 per week
6 APRIL 2012	<p>Unfair dismissal qualifying period increases from one to two years</p> <p>Contracting-out of state additional pension abolished</p> <p>Deposit order increases from £500 to £1,000</p> <p>Maximum costs order increases from £10,000 to £20,000</p> <p>The default position to be that witness statements are to be taken as read at Tribunal Hearings</p> <p>Statutory sick pay increases from £81.60 to £85.85 per week</p>
OCTOBER 2012	<p>Auto-enrolment comes into force</p> <p>Employers will start to become obliged to automatically enrol into the employer's pension scheme eligible employees not already participating in a workplace pension scheme. Businesses employing 120,000 or more employees will be obligated first.</p>

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