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CHILTERN HR NEWSLETTER FEBRUARY 2017

Six Nations Rugby

The Six Nations is back! The fortunes of the teams are bound to be a popular topic of conversation in many offices. Fortunately, this is one sporting event that is largely confined to weekends, so most employees won't face distraction during working hours. Some businesses however do employ weekend staff.

If you are one of them you may want to plan ahead and think about shift patterns, or set out rules of how people can or can't follow the games whilst on duty.

While they can cause productivity issues, popular sporting events can be a great way to bring teams together, too. Staff may get together informally to watch a game at the pub. Or you could set up a sweepstake to inject a bit of topical fun into your workplace– make sure it's lawful though.

Guidance On When Work Stress May Be A Disability

The Employment Appeal Tribunal has confirmed that there is a distinction, where an employee suffers from stress, between a mental impairment (which could be a disability), and a reaction to life events (which could not). In giving judgment the Employment Appeal Tribunal gave the following guidance in relation to cases where an employee's work situation is the cause of their stress:

- There is a type of case where an individual will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities.
- A doctor may be more likely to refer to the presentation of such an entrenched position as 'stress' than as anxiety or depression.
- A tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to raise grievances, or a refusal to

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compromise, are not of themselves mental impairments as they may simply reflect a person's character or personality.

- Any medical evidence put before a tribunal that supports a diagnosis of a mental impairment must be considered with great care, as must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction. However, in the end the question whether there is a mental impairment is one for the tribunal to assess.

When obtaining medical reports employers should ensure that they ask the right questions to establish the cause of the condition.

Type 2 Diabetes May Amount To A Disability

The Employment Appeal Tribunal has ruled that when considering whether someone is disabled it is necessary to consider the likely effect of the condition in the future, rather than during the period under consideration in the discrimination claim.

When determining whether a condition, such as type 2 diabetes, could be regarded as a progressive condition it is necessary to ask the question whether the condition is likely to result in a substantial adverse effect on normal day-to-day activities.

Paragraph 8 of the Equality Act 2010 Guidance exists to ensure that an employee whose condition is progressive and who in the future may end up with a substantial adverse effect, as a result of the deterioration of their condition, is to be deemed as suffering from a disability before they have got to that stage. It is therefore important to consider the likely effect of the condition in the future, rather than during the period under consideration in the discrimination claim.

The Employment Appeal Tribunal also said that it is not apparent that one should take into account the employee's reasonable conduct when dealing with progressive conditions. When obtaining medical reports, employers should ask the right questions to that they understand whether the

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condition is likely to have a substantial adverse effect on the employee's normal day-to-day activities not only at the present time but in the future too.

Reasonable Adjustments Had Not Been Made

The Supreme Court has ruled that a service provider failed to make reasonable adjustments to avoid disadvantaging passengers who are wheelchair users.

The case arose from the refusal of a bus passenger with a pushchair to give up a wheelchair space in favour of the wheelchair user when asked by the bus driver to move. The bus operator's policy was that other customers would be asked to move from the wheelchair space to accommodate a wheelchair user, but that if they refused the wheelchair user would not be permitted to board.

The Supreme Court said that the operating company should do more than simply request non-wheelchair users to give up a space for wheelchair users. It said that operators should instruct their drivers to consider taking further steps where a non-wheelchair user refused to vacate the space. This, it said, could include, if necessary, stopping the bus to speak to the non-wheelchair user.

Transport and service providers should review their policies to consider whether they are taking sufficient steps to require non-wheelchair users to cede designated wheelchair spaces to wheelchair users. They should also train relevant staff on how to enforce their policy.

Expired Warning Taken Into Account Did Not Mean Dismissal Was Unfair

The Employment Appeal Tribunal has held that an employee was fairly dismissed despite the fact that expired warnings were taken into account when deciding to dismiss the employee.

On the facts of this particular case, where the employee had received 17 warnings in the past, it was fair to dismiss him for conduct consisting of his disciplinary history and by reason of the employer seeing no reason to believe that this would change. Whilst expired warnings should

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normally not be taken into account, the employer had been entitled to have regard to the employee's disciplinary record and his attitude to discipline in general and had been entitled to decide that enough was enough.

Expired warnings should not normally be taken into account and specific legal advice should be obtained before making a dismissal.

Unfair Dismissal Where Employer Failed To Take All The Circumstances Into Account

The Employment Appeal Tribunal has held that an employee was unfairly dismissed as his employer had failed to have had regard to all of the circumstances, including the employee's exemplary record over his 42 years' continuous service.

The dismissal was unfair as the investigation undertaken by the employer was not one that could be said to be within the range of reasonable responses open to a reasonable employer in all the circumstances. The investigation had not looked at the seriousness of the incident itself and no reasonable employer would have dismissed the employee having proper regard to all of the circumstances including his previous record. Before dismissing an employee, employers should carry out a full investigation and take specific legal advice.

Mobility Clause Was Unenforceable

The Employment Appeal Tribunal held that the dismissal of two employees following reliance on a mobility clause in a redundancy situation were unfair.

The dismissal of the employees for refusing to relocate was not reasonable in the circumstances of this case and the employees had reasonable grounds to refuse. Their dismissals were, therefore, unfair. Using a mobility clause may enable an employer to avoid dismissing employees for redundancy. However, the terms of the mobility clause and the manner in which the employer operates the clause may themselves be subject to scrutiny. For this reason employers should always take specific legal advice in such instances.

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Citysprint Courier Was A 'Worker'

An employment tribunal has ruled that a cycle courier for Citysprint was a worker, rather than a self-employed contractor as the terms of the documentation did not reflect the true relationship between the parties. When deciding what the employment status is of an individual tribunals will look at the reality of the situation rather than what the contractual documentation says. Employers should take specific legal advice in they are unsure of the employment status of an individual.

Rest Breaks

You may have heard about the Employment Appeal Tribunal (EAT) decision which dealt with a worker's entitlement to 20 minutes' rest after six hours' work. The outcome, in a nutshell, is that employers will no longer be able to defend an alleged failure to allow rest breaks by claiming that the worker had not asked for them.

it is important for an employer to actively ensure that workers can take their breaks. This means that employers need to ensure work schedules are arranged appropriately. Equally, employers must ensure that they cultivate a culture where breaks are encouraged so that it becomes "the norm" for them to do so.

Of course, workers cannot be forced to take their breaks, but employers could fall foul of the law if they haven't actively put in place working arrangements that enable them to take those breaks if they choose to do so.

Formal breaks are more commonplace in some industries and sectors than others. However, following the recent EAT decision; the former defence of "they never asked for it" will no longer cut the mustard!!

Lone Working

It is sometimes unavoidable that certain employees need to spend all or at least part of their working time, alone without any direct supervision. In the event of an emergency, the mere fact

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that they are a lone worker puts them at a greater risk of harm. What do you as an employer need to do to protect them?

The Health and Safety Executive (HSE) define lone workers as “those who work by themselves without close or direct supervision”. Always carry out a risk assessment on an individual basis for any lone workers in your business and where deemed necessary, put in place appropriate safety measures.

Lone working is covered by the general provisions of the Health and Safety at Work Act, 1974 which requires all employers to ensure as far as reasonably practicable the health, safety and welfare of their employees and any other persons who may be affected by their business activities. It doesn’t matter whether working alone is a regular occurrence or just happens from time to time, it will still be necessary to carry out a risk assessment and put plans in place where necessary.

You could start by identifying all roles within your business that spend part of their working time alone. What activities are they carrying out whilst working alone? For example, are they required to climb ladders, to be in a building alone, or use dangerous machinery?

Consider all the individual facts including an employee’s personal health which could make working alone more dangerous. If the risk assessment concludes that the level of risk is simply too high, then action will need to be taken.

Time Keeping

Poor timekeeping on a regular basis is unacceptable, damaging to productivity and unfair on other staff. Ignoring this issue can lead to further problems throughout the workforce particularly when other staff consider that the odd one or two are being allowed to get away with it so why shouldn’t they?

We recommend regular routine monitoring of timekeeping and to challenge employees where necessary regarding their reasons for being late. it is possible to dismiss as a result of no improvement provided you go about it in the right way.

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Driving Bans

Driving bans are imposed for many reasons but the main reasons are driving under the influence of alcohol, dangerous driving, speeding and disqualification under the totting up rules when an individual receives twelve or more penalty points on their driving licence within a three-year period. Bans are usually imposed based on the seriousness of the offence and can range from anything from as little as seven days to several years.

So if one of your employees is banned from driving, are you able to automatically dismiss them? A statutory ban is a potentially fair reason for dismissal if an employee is unable to continue working in their current role as a result of their ban. For example a lorry driver would be unable to continue in this role if he received a licence ban. However, an employer does not have an automatic right to dismiss.

It all boils down to what is reasonable. A tribunal would consider the duration of the ban, how it affects the individual's work, whether or not the employee could be redeployed elsewhere in the business to alternative non-driving duties, the employee's length of service and the procedure followed in reaching a decision to dismiss.

An employer would need to look at the individual circumstances in detail. How long is the ban, is driving essential for the role carried out, could the employee continue in the role using public transport or could the driving duties be carried out by another employee? If the ban is short, could the employee take annual holiday or unpaid leave?

If the ban is lengthy and the driving part of the role cannot be given to anyone else, could the employee be given a temporary non-driving role? Employers are not required to "invent" a role but should consider the employee for any vacancies that may exist at the time even if some training might be required. Dismissal should only be a very last resort following full investigation and discussion with the employee regarding alternative options.

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Chiltern HR will keep you legally compliant without the need to recruit your own specialist employee.

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