

February ByteSize

Employment Law

What changes will the Government's Good Work Plan bring?

The Government's Good Work Plan was described by the government as 'the biggest package of workplace reforms for over 20 years'. The most eye-catching aspects of the plan, which are currently scheduled to come into force in April 2020, are:

- A right for those on zero hours or other flexible contracts to request a more stable and predictable contract.
- Written statement of terms to be provided to all workers (currently the requirement to provide written statement only applies to employees) from day one as opposed to the current requirement to provide written statement within two months of employment starting.
- Reference period for calculating holiday pay to be set at 52 weeks.
- Abolition of the Swedish Derogation model of engaging agency workers. The Swedish Derogation currently provides an exemption from the right to equal treatment with regards to pay.

Whilst the reforms were billed as major changes, they are arguably better described as being a small number of relatively minor changes, rather than a significant overhaul of employment legislation.

When will an employer have "constructive knowledge" of an employees disability?

Employers have a duty to make reasonable adjustments for employees who are disabled within the meaning of the Equality Act 2010 (the "Act"). This duty arises where an employer has actual or constructive knowledge of an employee's disability. Constructive knowledge is where an employer could reasonably be expected to know of an employee's disability.

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In *Lamb v The Garrard Academy*, Ms Lamb was off sick from 29 February 2012 because of reactive depression and alleged bullying at work. In March 2012, she raised a grievance about two incidents at work. Ms Lamb met with the academy's Chief Executive on 18 July 2012 and told her that she was suffering from post-traumatic stress disorder (PTSD) caused by childhood experiences which could be triggered by difficult situations. Following this, Ms Lamb was assessed by occupational health. The occupational health report received by the academy dated 21 November 2012 indicated that Ms Lamb's symptoms of reactive depression probably began in September 2011 and that she had a good prognosis for a full recovery if any outstanding issues relating to a grievance she had raised were resolved. Ms Lamb's grievance was subsequently rejected in January 2013.

Ms Lamb pursued a disability discrimination claim which included a complaint that the academy had failed to make reasonable adjustments. The academy accepted that Ms Lamb was a disabled person due to PTSD triggered by alleged bullying at work and reactive depression. A key issue for the employment tribunal to determine was when did the academy know of Ms Lamb's disability?

The employment tribunal held that the academy had knowledge of the disability from the date it received the occupational health report. The Employment Appeal Tribunal (EAT) overturned this finding. The EAT held that by July 2012, at which point Ms Lamb had been off work for four months, the academy had constructive knowledge that Ms Lamb was disabled. This was on the basis that if a referral had been made to occupational health in July, it was overwhelmingly likely that the occupational health report would have concluded that Ms Lamb's impairment would be likely to last for another three months, until September 2012 (and therefore she would have met the definition of disability as the impairment was likely to be long-term).

This case highlights the importance for employers to proactively manage both employee sickness absence and grievance processes. In cases of sickness absence, seeking input from occupational health at an early stage will help an employer to establish whether an employee is disabled or not and will reduce the risk of an employee arguing that the employer had constructive knowledge of disability before expert medical advice is received. Prolonging or delaying dealing with a grievance can often prolong sickness absence and the delay itself could form part of a claim for construction unfair dismissal.

Employee called “fat ginger pikey” at work was not harassed

An employment tribunal has held that an employee referred to as a “*fat ginger pikey*” on one occasion, and who was also occasionally referred to as “*salad dodger*” and “*fat yoda*” was not subjected to harassment because of his race or disability.

The tribunal found that the office culture was one of jibing and teasing. The claimant was held to have been an active participant in inappropriate comments and behaviour in the workplace and seemingly comfortable with the office culture and environment. When reaching their decision, the tribunal took into consideration that the “*fat ginger pikey*” comment was made by a colleague who the claimant was on friendly terms with, and that the claimant had not complained about the comment at the time, which the tribunal believed he would have done had he been offended. Similarly, in relation to the “*salad dodger*” and “*fat yoda*” comments, the tribunal considered that these were also made by the claimant’s friends in the workplace and they struggled to see how the comments could have been particularly offensive.

Although the claim failed in this case, it still acts as a reminder to employers of the risks of banter in the workplace and how it can lead claims. As this claim shows, the law relating to harassment has a subjective element and although it saved the employer in this case, a milder comment than the one made in this case but, made to a more sensitive employee could lead to a finding of harassment.

Failure to comply with contractual obligation to offer trial period likely to be unfair

The Employment Appeal Tribunal has held that a redundancy dismissal is unlikely to be fair in circumstances where the employer has failed to offer the employee a trial period for an alternative role in breach of their contractual obligations.

In this case, *George v London Borough of Brent*, Ms George was not offered a trial period for a more junior, alternative role. Ms George had a contractual right to be offered the trial period as a result of a redundancy policy, which formed part of her contractual employment. The trial period related to a more junior, alternative role and Ms George had not complained at the time about the failure to offer her a trial period. Despite these factors, the EAT considered it was unlikely that a dismissal

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could be fair in circumstances where an employer has failed to follow a contractual redundancy policy and not offered a trial period for an alternative role.

This claim is a reminder to employers of the critical importance of following internal policies and procedures. Although in this case the policy formed part of the employee's contract of employment, failing to follow non-contractual policy is also likely to greatly increase the chances of an employee succeeding with an unfair dismissal claim. Care should also be taken when drafting policies to ensure that they are not overly restrictive on employers so that there is scope to act in a flexible manner when circumstances make that desirable.

Increases to rates of statutory employment payments

The annual increases for various statutory employment payments has been announced. The increases are as follows:

- From 7 April 2019, statutory maternity and paternity, adoption and shared parental pay will increase to £148.68 per week.
- As of 6 April 2019, statutory sick pay will increase to £94.25 per week.

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Our team



Nic Elliott
Director & Solicitor | Head of Employment & HR

T: 0115 9 100 253

M: 07738 764 170

E: nic.elliott@actons.co.uk



James Symons
Associate & Solicitor | Employment & HR

T: 0115 9 100 250

M: 07548 238 837

E: james.symons@actons.co.uk



Laura Robinson
Solicitor | Employment & HR

T: 0115 9 100 296

E: laura.robinson@actons.co.uk



Rachael Moxey
Paralegal | Employment & HR

T: 0115 9 100 225

E: rachael.moxey@actons.co.uk