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solicitors



EMPLOYMENT REVIEW

Your quarterly legal bulletin on Employment Law news from Allan Janes Solicitors

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Disability discrimination – reasonable adjustments



placed a disabled worker at a substantial disadvantage compared with persons without a disability. Under Section 20 of the Equality Act 2010, which has now replaced the DDA, this duty remains largely the same.

The recent case of *Roberts v North West Ambulance Service* concerned a PCP that had a substantial effect on a disabled person, even though it did not apply to him directly.

Nathan Roberts was employed by North West Ambulance Service NHS Trust as an emergency medical dispatcher between January 2008 and January 2010, when he resigned. He suffered from a social anxiety disorder, which meant that he was a disabled person for the purposes of the DDA. He worked in a control room containing 24 work stations.

Under Section 4A of the Disability Discrimination Act 1995 (DDA), employers had a duty to make reasonable adjustments if a provision, criterion or practice (PCP)

with anxiety, however, he thought this location might be the cause and asked to sit in a less prominent position at the back of the room. His employer wrote to managers asking them to ensure that Mr Roberts could sit in this position when on duty and to reserve it for him if necessary. This did not always happen, however, so an agreement was reached that a 'reserved' sign should be put on the desk prior to Mr Roberts' shift. This proved difficult in practice as at busy times there was a need to use every single work station in the control room. On three occasions, Mr Roberts' preferred seat was not available and either he or the supervisor had to ask the occupant to move. After the last of these occasions, Mr Roberts resigned and brought a claim for disability discrimination on the ground that the requirement to 'hot-desk' was a PCP that placed him at a substantial disadvantage in comparison with non-disabled people and that North West Ambulance Service had failed to make reasonable adjustments.

The Employment Tribunal (ET) dismissed Mr Roberts' claim on the ground that he was not required to sit at any desk other than the one he preferred. As the PCP had not been applied to him, the duty to make reasonable adjustments did not arise.

The Employment Appeal Tribunal disagreed. In its view, the ET had erred in law in its application of Section 4A of the DDA. The ET should have followed the statutory wording and asked whether the PCP applied by North West Ambulance Service placed Mr Roberts at a substantial disadvantage in comparison with workers who were not disabled. If so, had his employer taken reasonable steps to prevent this? A PCP may affect a disabled person even if it is not applied to them directly. The case was remitted to the same ET to reconsider the claim.

We can help you ensure your workplace policies and contractual arrangements minimise the risk of a claim of discrimination arising.

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The dispatchers worked on a complicated shift system, with various changeover times and overlapping shifts, so they 'hot-desked' – took any available work station – rather than having allocated desks. At first, Mr Roberts chose to sit in the middle row in the control room. After periods off work

The national minimum wage exemption for domestic workers



Although most workers of school-leaving age or older are entitled to be paid the National Minimum Wage (NMW), there is an exception (under Regulation 2(2) of the NMW Regulations 1999) where a domestic worker is being treated as a member of their employer's family. For the exemption to apply, the worker must reside in the family home and be treated as a family member, in

particular with regard to the provision of accommodation and meals (without any liability to pay) and the sharing of tasks and leisure activities.

In *Jose and others v Julio and others*, the Employment Appeal Tribunal (EAT) found that the exemption did apply to three foreign domestic workers employed by families, so they were not entitled to be paid the NMW.

In reaching its decision, the EAT held that when deciding whether or not the exemption applies, the worker's position in the family must be considered holistically. Regulation 2(2) should be interpreted narrowly, with particular regard given to the provision of accommodation and meals and the sharing of tasks and leisure activities, but this does not exclude having regard to other material matters, such as the general dignity afforded to the worker, the degree of privacy they are given and the extent to which, if at all, they are exploited. As regards the meaning of the words 'the sharing of tasks', this does not

include work that the worker was employed to do but refers to those tasks performed by the family as a unit. For the exemption to apply, it is not necessary for the worker to share all meals, tasks and leisure activities with the family but that they are treated as a member of the family in those particular respects. Each family is different and the habits of the individual family have to be examined when determining whether or not the condition is satisfied in each particular case.

Although exploitation or mistreatment of the worker was not a feature of this case, the EAT indicated that where an employer exploits a worker's position as a migrant worker – for example by paying them less than the agreed amount over a substantial period – this would run counter to treating them as a member of the family and the exemption would not therefore apply.

Contact us for advice on any employment law matter.

Employment status – Weight Watchers UK lose the battle

The recent case of *Weight Watchers UK Ltd. (WW) v HM Revenue and Customs (HMRC)* serves as a reminder to employers of the dangers of having contractual arrangements in place that do not match the reality of the employment arrangements of those engaged to carry out work for your organisation.

WW operated on the basis that its 'Leaders' – former members engaged to arrange and conduct meetings for others wishing to lose weight by following the WW Programme – were self-employed, not employees of the company. They were required to pay their own Income Tax (IT) and National Insurance Contributions (NICs). However, in 2007, HMRC ruled that the Leaders were employees of WW for the purposes of IT and NICs. WW appealed against the decision.

The First-Tier Tribunal found that, on balance, the terms and conditions of the contractual relationship between WW and its Leaders were characteristic of contracts of service as opposed to contracts for services, meaning that the Leaders were employees of WW.

The Upper Tribunal agreed and dismissed a further appeal. In doing so, it took a purposive approach to the issue, paying due regard to the practical realities of the relationship in



question, as is called for by the decision of the Supreme Court in *Autoclenz v Belcher*. The Tribunal found nothing in the arguments put forward by WW that was sufficient to disturb the 'on balance' conclusion that, taken as a whole, the Leaders were employees of WW rather than independent contractors.

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