



## Our monthly review of key cases and new law affecting employers

### “Loose” causal connection to establish discrimination arising from disability

**Facts** The Claimant was a paraplegic and classed as disabled under the Equality Act. His employer organised a workshop which did not have wheelchair access. The day after discovering this, the Claimant was extremely rude and made racially offensive comments to the PA of the manager who had organised the venue. The employer subsequently dismissed him for gross misconduct given the comments to the PA.

The Claimant brought a claim for unfair dismissal and for breach of s15 of the Equality Act. The legislation provides that “a person, (A), discriminates against a disabled person, (B), (i) if A treats B unfavourably because of something arising in consequence of B’s disability, and (ii) A cannot show that the treatment is a proportionate means of achieving a legitimate aim”.

The Tribunal dismissed the claim for disability discrimination. It considered that the loss of temper on this occasion was not something arising out of the Claimant’s disability. Where for example, an individual loses his temper because of the pain he is caused by his disability, and this is out of character, this illustrates a linkage between the individual’s loss of temper and the disability. In this case, the Tribunal said that there was insufficient linkage, as the loss of temper was not related to the disability itself and that there was no link to the alleged unfavourable treatment. As a result, the disability discrimination claim had to fail.

On appeal, the EAT referred back to several recent cases which established that there does not need to be a direct link between an individual’s disability and the adverse behaviour by the individual. The EAT said that the Claimant’s anger which led him to make the offensive comments was sufficiently linked to his disability as had he not been disabled, he would have been able to go to the workshop and would never have been angry. The EAT allowed the appeal and the matter was remitted to the Employment Tribunal to decide whether the decision to dismiss him was a proportionate one.

**Impact** This case shows that it is relatively easy for an employer to get caught out. Here, the employer did not think that there was any link between the individual’s disability and the conduct which gave rise to disciplinary action, which they were taking due to his offensive behaviour. However, the outcome of the case means that employers are going to have to take a wider view of

#### The View From Mayer Brown



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#### Episode 96

Enforcement of restrictive covenants; whether a working practice which had never have been explicitly imposed could be a “provision, criterion or practice” for an indirect discrimination claim; whether courts can award damages for pain and suffering for breach of the Working Time Regulations..

#### Episode 95

Head of Mayer Brown’s Global Mobility and Migration practice, Elizabeth Stern, talks about trends in the mobility market for international employers and key steps employers need to take to manage the risks proactively and efficiently.

#### UK Employment Law: for HR and in-house lawyers



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matters and see if they are likely to be held to a higher standard if the Tribunal or the claimant is able to identify some linkage between the disability and the behaviour in question. In some cases, the employer may not know the individual is disabled, and could not reasonably be expected to know. But where the employer knows the individual is disabled, the employer will have to consider whether there is any linkage to disability (however tenuous it might appear), to know ahead of time if the employer will have to justify the decision to dismiss. Bear in mind that a claimant will not necessarily succeed in a claim if an employer can justify its actions.

*Mr T Risby v The London Borough of Waltham Forest*

*Khanty-Mansiysk Recoveries Ltd v Forsters LLP [2016] EWHC 522 (Comm)*

## Employer warning for dismissals of employees following actions of their spouses or family members

**Facts** The Claimant was a school teacher and also a practicing Anglican Christian. She was married to another teacher who worked at a nearby school, with which her school had some contact. Her husband was arrested and convicted for downloading indecent images of children and voyeurism. There was never any suggestion that his wife had been aware of his activities before he was arrested. The Claimant's employer made numerous comments about the dangers for the wife if she chose not to leave her husband. Eventually a disciplinary investigation was set up and she was charged with gross misconduct, namely, erosion in her ability to carry out her safeguarding responsibilities as a teacher because she had failed to leave her husband. She was suspended following the investigation and she was dismissed one month after her husband was convicted.

The Claimant brought a claim for unfair dismissal, arguing she should not have to choose between her marriage vows and her career. She also brought a claim for indirect religious discrimination under Sections 10 and 19 of the Equality Act. Indirect religious discrimination occurs if A applies to B a provision, criterion or practice which puts, or would put, people of B's religion or belief at a particular disadvantage compared to people who do not have that particular belief. B (in this case, the Claimant herself) must suffer that disadvantage. At the Tribunal, the Claimant won her claim for unfair dismissal but lost her claim for indirect religious discrimination. The Tribunal agreed that the Claimant had a religious belief, namely that her marriage vows were sacrosanct. It also accepted that there had been a provision, criterion or practice applied to the Claimant, which was a policy of dismissing those who chose not to end a relationship with a person convicted of making indecent images of children and voyeurism, however, there was no disproportionate disadvantage or group disadvantage to those holding the Claimant's religious belief when compared with those who did not hold that religious belief. The Tribunal said that anyone who elected to stand by their partner in the same circumstances would have been dismissed and, therefore, those who shared the Claimant's religious conviction were at no greater or lesser risk of being dismissed. The Claimant appealed.

### 30 seconds with...



#### **Ann Robson**

Senior Associate

E: arobson@mayerbrown.com

T: +44 20 3130 3345

#### *What is the best thing about your job?*

It's a great area of law – often entertaining as employees can do very unusual things and the employment team at Mayer Brown are great.

#### *What three things would you take to a desert island?*

My husband Steve, music and gin & tonic. Would like to take the kids but it might get crowded!

#### *What is your favourite book?*

The Goldfinch by Donna Tartt – it has brilliant characters and is a wonderful tale.

#### *What super-power would you like to have and why?*

Time travel. I waste lots of very valuable time travelling to visit people I love – I would prefer to maximise the time with them.

#### *Where are you next going on holiday?*

Ile de ré - solace, great food and gentle times.

#### *What talent/skill do you have that not many people know about?*

Campanologist – don't use it that often!

On appeal, the EAT pointed out that the Tribunal had referred to something as a “policy” when in fact the statutory wording refers to “provision, criterion or practice”. In the case, the EAT found that since the employer’s position was that it would have dismissed others in the same situation then it was applying a practice, not a policy. The EAT determined that there was evidently indirect discrimination on the facts of this case. Anyone in a long-term relationship forced to choose between his or her partner whether married or not would be placed in a terrible dilemma. However, those with the Claimant’s religious views would have an additional crisis of conscience to deal with. Since the employer had not produced any evidence to show the dismissal was justified, the EAT found that the Claimant was indirectly discriminated against on the grounds of her religion.

**Impact** This case is fact-specific. However, it is a reminder for employers to proceed with caution in cases relating to actions of employee’s spouses or family members. Alternatives to dismissal should be considered and, when dealing with indirect discrimination, an employer will need to show that any treatment was a proportionate means of achieving a legitimate aim in order for it to be justified, so it is not deemed unlawful.

*Pendleton v Derbyshire County Council & Others*

## What employers need to know about the Immigration Act

On 12 July 2016, the Immigration Act 2016 (the “Act”) will introduce changes to rules on employing illegal migrants.

Currently, an employer should know that an employee has not been granted leave to work, to be guilty of the offence of employing an illegal migrant. This position changes under the Act, which states that the employer must either know or have reasonable cause to believe that the employee is working illegally. The test for culpability has therefore been lowered from actual knowledge to reasonable cause. Employers found guilty of the offence currently face a prison sentence of two years but under the Act this will increase to five years. The maximum fine for employers for this offence will continue to be £20,000 per worker. Government authorities will also have the power to close premises for up to 48 hours where a business employs illegal migrants. Inspections will take place during this time to determine whether employers have carried out right to work checks and only upon satisfaction of this fact will the closure be lifted. Authorities will also be able to arrest without warrant if they suspect an offence has been committed or there has been an attempt to do so.

As part of the Government’s tougher position on these offences, action will also be taken against workers who take up positions when they do not have the relevant immigration permissions to work. Workers convicted of illegal working will face a sentence of up to 6 months and/or a fine and can also have their earnings seized.

### Events



Our current upcoming events are below, all to be held at our offices. Invites are usually sent out one to two months in advance.

**28 September 2016**

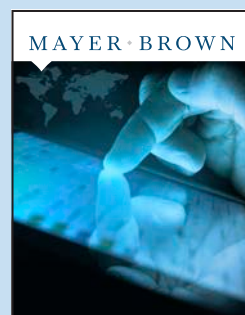
**Breakfast Briefing: Team Moves**

Team moves and restrictive covenants, including the use of forensic searches.

**30 November 2016**

**Seminar: Sickness and Disability**

### Global Tools & Resources



[Click here](#) to view our range of global tools and resources which highlight topical workplace issues across multiple jurisdictions, including our global guides, traffic lights and app.

Other provisions of the Act include an immigration skills charge for employers who continue to use foreign labour, expected to come into force in April 2017. The proposed “skills levy” for companies who sponsor workers from outside the EEA will be £1,000 per worker per year. Employers who sponsor workers on Tier 2 visas should be budgeting for the increased costs of employing these workers. There will be a lower charge for small and charitable sponsors and exemptions applied for those on certain student visas or with equivalent status.

Changes are due to come into force on 12 July 2016. In preparation for the changes, employers should continue to carry out right to work checks on all job applicants and new employees. There should be effective record-keeping systems in place, which should be reviewed regularly, and training should be provided to HR and compliance departments to ensure relevant personnel are aware of the legal obligations with which the company should be complying. If you employ migrant workers, then recruitment and HR teams should be aware of the immigration requirements and the status of each applicant or employee, e.g. when visas are due to expire. In addition, if acquiring a business after 12 July 2016, the buyer will need to carry out careful due diligence on right-to-work documentation and seek appropriate warranties/indemnities in the purchase documentation in order to protect itself from losses arising from prior breaches of the Act.

## Employment Legislation Timetable 2016 And Future Developments

<b>12 February 2016</b>	<b>Gender pay gap reporting:</b> Draft regulations published on 12 February 2016. Reporting to include bonuses and extended to cover public sector employers. Employers with 250 or more ‘relevant employees’ in an individual entity should report on the ‘relevant date’, which is 30 April in each year. ‘Relevant employees’ will have a wide definition to include LLP members and individuals ordinarily working in the UK under a contract governed by UK legislation.
<b>15 February 2016</b>	<b>Recruitment agencies:</b> Consultation response published on regulation of recruitment agencies and further restrictions on overseas recruitment.
<b>7 March 2016</b>	<b>Regulatory framework for individuals in financial services:</b> The new senior managers and certification regime was implemented, which regulates individuals working in banks, building societies and some investment firms, and is intended to align risk and reward and strengthen individual accountability in the financial services sector.
<b>16 March 2016</b>	<b>Budget 2016:</b> Taxation on termination payments: From 2018, termination payments subject to income tax on amounts in excess of £30,000 will be subject to employer national insurance contributions. The £30,000 exemption will remain.
<b>31 March 2016</b>	<b>Modern Slavery Act:</b> Organisations operating in the UK with a turnover of £36m or more, with a financial year ending on or after 31 March 2016, are to complete a transparency statement in respect of that financial year.
<b>1 April 2016</b>	<b>Introduction of the National Living wage:</b> £7.20 per hour for all working people aged 25 and over. Other National Minimum Wage rates to increase on 1 October 2016.

Please speak to your usual contact in the Employment Group if you have any questions on any of the issues in this update, or contact either of the authors below.

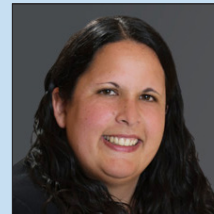


**Nick Robertson**

Partner, London

E: [nrobertson@mayerbrown.com](mailto:nrobertson@mayerbrown.com)

T: +44 20 3130 3919



**Miriam Bruce**

Senior Associate, London

E: [mbruce@mayerbrown.com](mailto:mbruce@mayerbrown.com)

T: +44 20 3130 3695

<b>6 April 2016</b>	<b>Introduction of the new flat-rate State Pension:</b> £155.65 a week.
<b>6 April 2016</b>	<b>Maximum compensatory award for unfair dismissal:</b> raised from £78,335 to £78,962. The maximum amount of a week's pay was also raised to £479.
<b>6 April 2016</b>	<b>Financial penalties for employers:</b> may now be imposed on those who do not pay employment tribunal awards or sums due under a COT3.
<b>12 July 2016</b>	<b>Immigration Act 2016:</b> comes into force which introduces changes to the rules on employing illegal migrants.
<b>7 September 2016</b>	<b>Whistleblowing in financial institutions:</b> FCA rules to come into force.
<b>October 2016</b>	<b>Gender pay gap reporting:</b> regulations to come into force. First reports to be published by 30 April 2018.
<b>April 2017</b>	<b>Immigration Act:</b> employers will lose National Insurance employment allowance for a period of one year if they are subject to a civil penalty for employing illegal workers. Potential skills charge to be brought in for employers hiring migrant workers in a bid to reduce employers' reliance on imported workers.
<b>April 2017</b>	<b>Apprenticeship levy:</b> due to be implemented. Levy will be on large employers to help fund 3 million new apprenticeships during the current Parliament.
<b>September 2017</b>	<b>Tax-free childcare scheme:</b> A new scheme will allow working parents, where each earns less than £150,000 a year, to receive 20% of their yearly childcare costs of up to £2,000 for each child under the age of 12.
<b>April 2018</b>	<b>(Budget 2016 changes) Termination payments:</b> subject to income tax on amounts in excess of £30,000 will also be subject to employer NICs. Termination payments below £30,000 will remain exempt.
<b>October 2018</b>	<b>Brexit:</b> if the Article 50 notice is served in October 2016, by this stage, the post-Brexit landscape will be clearer.
<b>November 2018</b>	<b>Equalisation of state pension age:</b> to age 65 for both sexes by 2018. The age will increase to age 66 by September 2020.
<b>2018</b>	<b>Grandparental leave:</b> legislation to be introduced by 2018.

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