

## Workplace Law

Make sure you read this edition so you know about the increase in maximum weekly pay and compensation on unfair dismissal claims. We also consider whether you can dismiss an employee for “pulling a sickie” and whether childcare vouchers = remuneration.

### A week’s pay and cap for unfair dismissal claims increase

From 6 April 2016:

- the statutory maximum weekly pay will increase to **£479** (up from £475); and
- cap for compensatory awards for unfair dismissal will increase to **£78,962** (up from £78,355)

Please also note that the Government has announced that the National Minimum Wage for those aged between 21 and 24 will increase from £6.70 to £6.95 in October 2016.

### Can you dismiss an employee for “pulling a sickie”?

The Employment Appeals Tribunal (**EAT**) has held that ‘pulling a sickie’ can amount to serious misconduct, giving grounds for dismissal.

In *Ajaj v Metroline West Ltd (Unfair Dismissal) [2015] UKEAT* a bus driver went on sick leave after claiming he had slipped on the floor of a workplace toilet. He was absent from work for a number of months, claiming his injuries prevented him from working. His employer suspected that this was not the case and placed him under covert surveillance. The surveillance appeared to show that he was able to walk much more than the 4-5 minutes he claimed he was able. Metroline considered such conduct to be dishonest and dismissed him after an internal disciplinary hearing.

The bus driver took Metroline to an Employment Tribunal (**ET**) which upheld his claim for unfair and wrongful dismissal on the grounds that it had not based the dismissal on the ability of the bus driver to sit for long periods of time. The ET did accept however that the bus driver had deliberately exaggerated his injuries and his compensation award was reduced by 35% to account for his contributory fault towards his dismissal.

Metroline appealed to the EAT and was successful on the grounds that the ET had based its decision on the capability of the bus driver to work, rather than on the employer’s conduct in dismissing him. The real question which had to be asked was whether the employer was reasonable in concluding, after a reasonable investigation, that the employee had acted dishonestly.

As the employer had a genuine and reasonable belief, based on a reasonable investigation, that the bus driver had either misrepresented or exaggerated his injuries in order to qualify for sick

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leave, it was entitled to dismiss him on the grounds of misconduct (even if the bus driver was not, in fact, capable of driving).

Interestingly, if the employer had dismissed the bus driver because he was incapable of working, the case might have been decided in the bus driver's favour. This is because the employer had taken into account the bus driver's ability to walk, not to sit, which the ET had indicated was an irrelevant factor.

This is a helpful case for employers who suspect that employees are being dishonest about the nature of their illnesses. A word of caution however, an assumption or a feeling that the employee is "pulling a sickie" will not be enough. Employers will need to have evidence to demonstrate that the employee has in fact misrepresented or lied about being sick.

## Can child care voucher schemes be discontinued during maternity leave?

In the recent case of *Peninsula Business Services v Donaldson*, the EAT has ruled that employees on maternity leave were not entitled to continue receiving childcare vouchers provided to them under a salary sacrifice scheme but its decision is a tentative one!

As you will know, a salary sacrifice scheme permits an employee to agree to forgo part of their salary in order to receive an equivalent benefit. These schemes have tax and National Insurance Contribution benefits for both employers and employees.

Peninsula offered membership of a childcare voucher scheme to their employees, which contained a condition allowing it to suspend membership during certain types of leave, including maternity. The Claimant attempted to join the scheme, however was refused membership as a result of her refusal to accept the maternity condition. The Claimant argued that the scheme was discriminatory and initially succeeded with her claim in the employment tribunal.

On appeal, the EAT considered whether childcare vouchers provided under a salary sacrifice scheme were part of an employee's 'remuneration' (wages or salary). The *Employment Rights Act 1996* provides that whilst the terms and conditions of an employment contract remain in force during an employee's maternity period, terms and conditions relating to remuneration do not apply. As a result, whilst an employer must continue to provide employee's on maternity leave with non-cash benefits, they do not have to pay the employee remuneration throughout the maternity period.

The EAT held that the payment of childcare vouchers did fall within the definition of 'remuneration' as a result of which Peninsula was entitled to suspend membership to the scheme during the employee's maternity leave.

The EAT's judgement has helped to shed some clarity on an issue which has been treated with considerable uncertainty. HMRC guidance had previously stated that childcare vouchers were not remuneration even if provided by way of salary sacrifice scheme. The EAT itself gave its

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decision 'somewhat tentatively', indicating that the judgement was by no means straightforward. The EAT stated that whilst childcare vouchers provided by way of a salary sacrifice scheme are a 'diverted salary' and therefore fall under the definition of remuneration, childcare vouchers provided in addition to a regular salary are 'non-cash benefits' and must still be paid.

The hesitant nature of the judgement suggests that there is the possibility of further appeal; therefore it may be sensible for employers to wait for any further developments to occur before amending salary sacrifice policies. This is particularly due to the likely closure of salary sacrifice schemes from 2018.

## Time to take note of work related stress, anxiety and depression

The plight of junior doctors seeking better pay and working conditions has attracted lots of media attention this year so far. In September 2015 The Guardian reported that the NHS faced the prospect of losing more than 80% of its senior hospital doctors who were considering early retirement due to work-related stress. Such stress was cited as causing sleepless nights, marital break-ups and further, significant ill-health.

The Health and Safety Executive (HSE) defines work-related stress, depression or anxiety as 'a harmful reaction people have to undue pressures and demands placed on them at work'.

Of course, stress is not limited to those working in medicine; it is an issue affecting many industry sectors. The HSE estimates that every year around 2.2 million people experience a health problem which they believe to have been caused by pressures in their working environment, with stress the most common cause of work-related illness.

The Labour Force Survey (LFS) estimates that between 2014 and 2015 there were about 440,000 cases of work-related stress, depression or anxiety and, of those, 234,000 were new cases. During that period, a total of about 9.9 million working days were lost due to mental health related absences. The LFS's findings suggest that stress is most prevalent in public service industries such as education, health social care, public administration and defence.

The main factors cited as causing work-related stress, depression or anxiety were:

- workload pressures
- tight deadlines
- too much responsibility
- a lack of managerial support.

If you have attended any of our employment updates and brainstorming sessions you will be aware that we have flagged mental health as a major factor we believe employers should have on their HR Agenda.

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Mishandling a mental health problem can amount to a breach of the implied term of trust and confidence, as well as the contractual duty of care to maintain the health and safety of employees. Either could trigger constructive dismissal claims, or worse claims from whistleblowers who report such health and safety breaches, and lose their jobs as a result. Personal injury claims based on negligence and/or breach of the employer's duty to provide a safe workplace and system of work can also be brought.

The law around ill health and in particular anxiety, stress and depression is complicated but the starting point for employers should be to approach any issues with sensitivity and to seek professional guidance.

Whilst stress itself is not a medical condition, anxiety, depression and any related conditions if they have a substantial and long-term adverse effect on an employee's day to day activities may amount to a disability giving an employee protection under the Equality Act 2010.

If you would like to discuss how to tackle work related stress issues in the workplace please contact a member of the team – full contact details below.

## Focus on...

We welcome to the team two new Trainee Solicitors, George Liley and Naadim-Khan Shamji.

Naadim joins us from the Private Client department and will be based in our Tunbridge Wells office. George joins us from the Commercial Property department and will be based in our Thames Gateway office.

We would like to take the time to wish them both the best of luck during their employment and hope they enjoy it.



### Naadim-Khan Shamji – Trainee Solicitor in the Employment Team

#### What was your first job?

My first job was as a Visitor Assistant for the Summer Opening of Parliament in 2008.

#### What was your worst experience as a pupil?

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School seems like a long time ago! I had a fairly decent time at school, but my worst experience as a pupil was probably receiving a C in PE for my GCSEs. I worked so hard for it!

### **What's your favourite film?**

I'm not sure I have a definitive favourite, but Shutter Island and Rocky are up there. The Lord of the Rings and the original Star Wars trilogies are also among my favourites.

### **If you hadn't decided to be a lawyer, what would you have been?**

I seriously entertained the idea of becoming an architect or a geneticist.

### **What was the first record you ever bought?**

I'm too young to have had a record! But the first CD I bought was probably of Handel's Water Music suite, belying my early interest in classical music.

### **What's your favourite children's book?**

The Tiger Who Came to Tea.

### **Who do you most admire and why?**

I most admire those with imagination, those who stand up against established ways of thinking and those who act upon it. Gandhi and J.S. Mill would not be bad exemplars.

### **Tell us two truths and one lie**

1. I was the runner up in a composing competition for the Bournemouth Symphony Orchestra.
2. My dad's cousin once owned Wembley Stadium.
3. I was a choral scholar at King's College, Cambridge.

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### Meet the team

For more information on anything mentioned in this newsletter please contact a member of the employment team.



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**Although this newsletter highlights some key issues relating to employment law, it should not be considered comprehensive and is not a substitute for seeking professional advice on a specific issue.**