



## Employment Law Newsletter - April 2019

### In this issue ...

**Lorraine Kelly is not employed by ITV**

**Is providing a car parking space a reasonable adjustment?**

**Can diversity training cause discrimination rather than prevent it?**

**The Government plans to stop the misuse of NDAs**

**Dismissing a mentally ill employee for failing to attend meetings constituted discrimination**

**Employment Law Update 2019**

### Lorraine Kelly is not employed by ITV

Your initial responses may be 'Yes she is' and 'So what?' Well, last month Ms Kelly defeated HMRC at an IR35 tax tribunal after successfully appealing a tax bill of £1.2 million. Yes, we raised an eyebrow too. HMRC claimed that despite ITV engaging with Albatel Ltd, a limited company owned by Ms Kelly and her husband, she was really an employee, who owed £900,000 income tax and £300,000 in National Insurance contributions.

#### There are two Lorraines

The court found that ITV did not engage Lorraine Kelly herself but Lorraine Kelly, the brand, with her 'act' being to 'perform the role of a friendly, chatty and fun personality'. Ms Kelly could work for others and didn't benefit from holiday or sick pay. It was a contract for services not a contract of service.

#### Greater scrutiny

In 2016/17, HMRC collected £819 million in additional taxes following payroll investigations. From April 2020, the rules for engaging individuals through personal service companies are changing. It will be your responsibility to determine whether the off-payroll working rules apply because your engagement is really one of employer and employee. In addition to shortfalls in tax and NI, if you are found to have incorrectly engaged someone on a self-employed basis, you may be liable to backdated pay for holiday, maternity, redundancy, sickness and pension. So, what should you do?

#### Time for a review

**Look** at your current workforce including those engaged through agencies and other intermediaries to identify those people who are supplying their services through Personal Service Companies.

**Determine** whether the off-payroll rules apply to any arrangements that will extend beyond April 2020.

**Talk** to your contractors about whether the off-payroll rules apply to their role.

**Draft** a clear contract of engagement that mirrors your practice and minimises the risk of future liabilities.

**Ensure** that you put a process in place to determine the status of current and future engagements.

## Is providing a car parking space a reasonable adjustment?

Yes in the case of [Linsley v Commissioners for HM Revenue and Customs](#). In another defeat for HMRC, the EAT considered Mrs Linsley who joined the organisation in 2001. She had a disability, ulcerative colitis, which can manifest itself in an 'unpredictable, sudden and urgent need for a bowel movement'. Following medical advice, HMRC provided her with a dedicated car parking space but failed to do the same when Ms Linsley changed jobs and moved sites. A non-contractual policy gave priority to employees who required a parking space as a reasonable adjustment, but her new managers were unaware of it.

Despite reducing Mrs Linsley's hours, moving her workstation close to the toilets, allowing her to use any space or lay-by and discounting disability-related sickness, the EAT said providing a dedicated space would have removed the stress caused by uncertainty and alleviated the disadvantage. HMRC's policy, while non-contractual, provided a starting point for making an adjustment. Cases on making reasonable adjustments for disabled people always depend on their own facts, but what lessons can we learn?

### Non-contractual policy

Even if you have a policy that is non-contractual, a tribunal will consider it as a relevant factor if an employee argues that an adjustment was reasonable, and your policy addresses that particular adjustment.

### Other adjustments

The fact that you have made several other adjustments may not save you. The focus will be on the employee's particular disadvantage and whether your adjustments alleviated it.

### Stress

Remember that any stress induced by your refusal to make a particular adjustment may be a second disadvantage that your disabled employee suffers.

## Can diversity training cause discrimination rather than prevent it?

Yes, if not handled with care. As an employer you will generally be liable in law for any discriminatory actions perpetrated by your staff in the course of their employment. So, if a manager discriminates against one of their team, you may be left to foot the bill. You can minimise the risk of it happening and strengthen your defence against claims by implementing training on equality and diversity.

In [Georges v Pobl Group Limited](#), Ms Georges was the only black person out of a group of 16 employees who attended equality and diversity training. During an exercise about using

discriminatory words, the trainer asked each attendee to shout out the most derogatory and offensive words that they could think of. The trainer wrote two racially offensive words on the board including the N word. Ms Georges who was going through induction, was shocked. She left, was signed off sick and didn't return after her grievance was dismissed.

A tribunal upheld her claim of racial harassment because encouraging the use of discriminatory words was 'crude and unnecessary'. In addition, the word that offended Ms Georges is, by its very nature, a 'deeply loaded and offensive word with distressing racial connotations'. How can you avoid the same mistake?

### Plan carefully

Interactive exercises are a good way to encourage your staff to consider the impact that offensive words can have on others. However, you must think carefully about the format. Actively encouraging staff to use offensive words in a group setting would run counter to your message that those words should not be used. Be sensitive to the manner in which the message is delivered.

## The Government plans to stop the misuse of NDAs

Well-publicised cases involving non-disclosure agreements (NDAs) being allegedly used to prevent employees speaking out about harassment and discrimination have provoked action from ministers. The Department for Business, Energy and Industrial Strategy has been consulting about how to achieve a better understanding of confidentiality clauses. The Government intends:

- to clarify that confidentiality clauses cannot prevent people from reporting a crime
- to require a clear, written description of rights before employment contracts or settlement agreements containing confidentiality clauses are signed
- to extend the law so that advice to a worker covers the limits of any confidentiality clauses in a settlement agreement.

## Dismissing a mentally ill employee for failing to attend meetings constituted discrimination

An NHS trust was found to have discriminated against, and unfairly dismissed, a mentally ill employee when it sacked him for failing to attend a sickness absence meeting and occupational health appointments. It was also criticised for its 'appalling response' to its employee's e-mail revealing that he was contemplating suicide. [Flemming v East of England Ambulance Services NHS Trust](#).

When employees refuse to cooperate with your sickness absence reporting process, their colleagues and managers can become frustrated and impatient causing you to act hastily. How should you approach it?

### Use your policies for guidance not instruction

Don't be fettered by your own internal policies. Consider going beyond what is required by them, for example by arranging for external mediation or by assisting the employee with an application for ill-health retirement.

### Be sensitive

When dealing with an employee experiencing mental health problems, especially someone who indicates suicidal tendencies, it is vital that members of staff communicate with them in an appropriate and sensitive manner at all times.

### Training

Ensure that all line managers and those members of staff who sit on disciplinary or grievance panels undergo training on how to approach mental impairment disabilities.

## Employment Law Update 2019

This is your early invitation to Watershed's free annual update on employment law for 2019. As usual we will be in Manchester and London in June. I do hope you will be able to join us.

We are going to steer clear of Brexit this year. Now, as we send these invitations and plan our seminar there is still much uncertainty; but undoubtedly it will get a mention.

HR's role is ever-changing and none more so than as we move towards the end of the decade. HMRC has been auditing compliance with the national minimum wage and employers are being caught out in ways that they did not expect. So, we will discuss this. Employers are increasingly finding themselves in situations where they have lost all trust in an employee who has not committed any obvious act of misconduct. So, we will look at what an SOSR dismissal is and when it can apply. Despite the uncertainty of Brexit, businesses are growing by acquisition and have been battling with various terms and conditions of service. Navigating the risks of changing terms and conditions is a useful topic to refresh. We are frequently asked for ways to ensure that discretionary bonuses do not need to be paid, so it seems appropriate to discuss the impact of implied terms and the exercise of discretion. We will also cover managing transgender, bigender, trigender, pangender and other forms of gender identity in the workplace, and part time working and how to avoid unlawful treatment. And of course, our annual update would not be complete without our look at recent case law and legislative changes that you need to know about. We will guide you through what's happening in Employment law and suggest how you could deal with the challenges it poses.

There is no charge to attend. Each day starts at 9.15am and finishes at around 3.45pm. Refreshments will be provided at registration (8.45am), at morning and afternoon breaks and in the form of a buffet at lunch.

And there will be an opportunity to learn about our wider work on HR matters

All delegates will receive the new edition of our handbook Employment law for line managers. We hope you will be able to join us.

To register, click [here](#) and fill in the registration form. We shall acknowledge your booking promptly and will send you more details on the event. If you have any questions, please contact us on:

+44 161 703 5611

This event is always oversubscribed, so act early to reserve your place.

If you would like to discuss these or any other issues facing your organisation please speak to your usual contact at Watershed or Keith Morgan on +44 161 703 5611

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