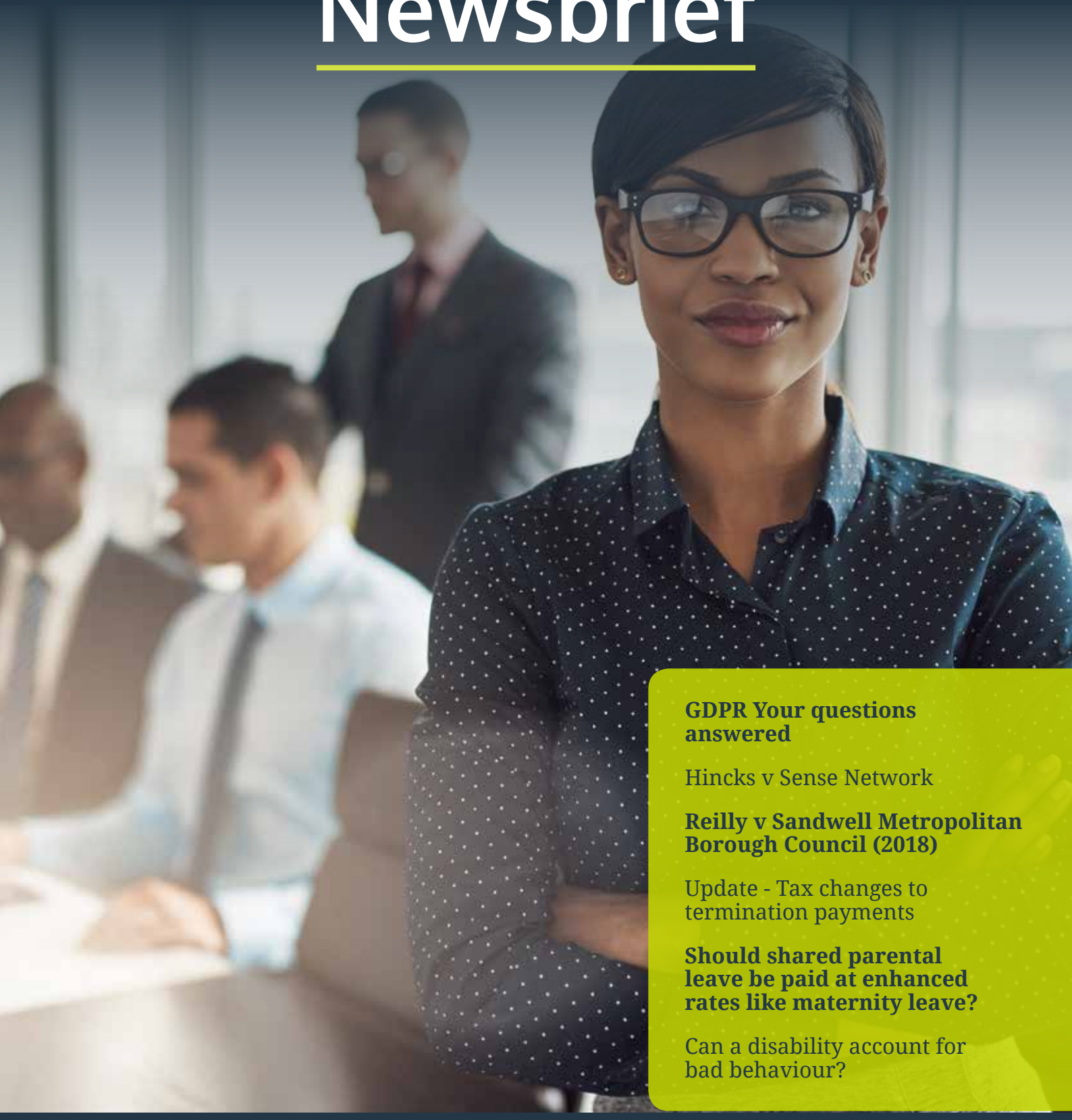
HEMPSONS

Employment Newsbrief



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25 May 2018 marked the introduction of the new General Data Protection Regulation in the UK in the form of the Data Protection Act 2018 and we have been answering many clients' HR-related questions on the new legislation. In this article we have collated some frequently-asked questions to help you prepare and deal with some key challenges the GDPR presents.

Can we just rely on employee consent to process their data for employment/payroll purposes as we did under the old Data Protection Act (DPA 1998)?

As an employer you are required to inform your staff of the legal basis under which you will process their data. Relying solely on consent is not advisable under the GDPR because of, amongst other things, of the imbalance of power between an employer and employee – the consent is unlikely to be deemed to be "freely given".

Rather than consent, the most likely grounds on which you will be able to rely under the GDPR are where processing data is:

- necessary for the performance of a contract to which the data subject is party; or
- necessary for compliance with a legal obligation; or
- necessary for the legitimate interests pursued by the data controller or a third party.

Some activities may have more than one purpose, in which case more than one lawful processing condition may apply. For example, processing data about an employee's statutory holiday entitlement would be necessary under their employment contract and necessary to comply with a legal obligation to pay statutory holiday.

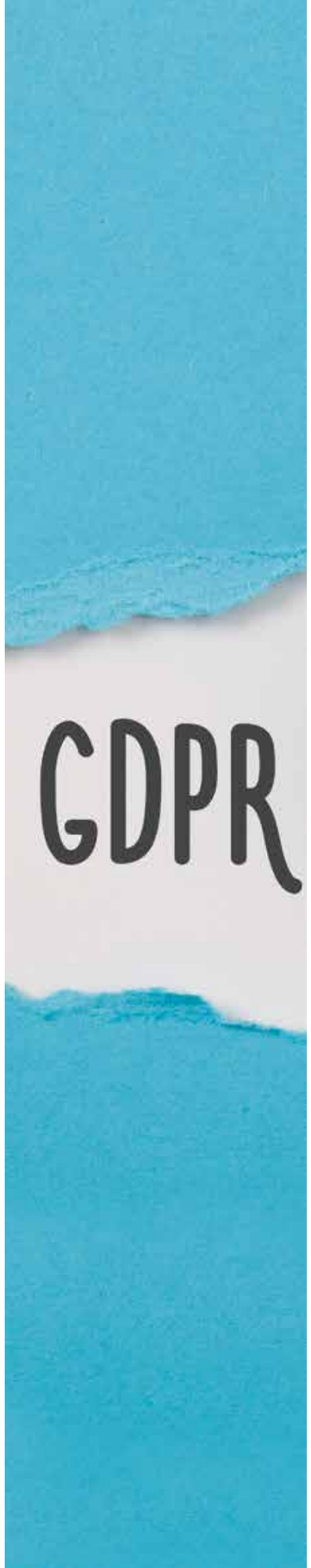
Employers relying on the "legitimate interests" ground must (as was the case under the DPA 1998) balance their legitimate interests against the interests of the employee and consider whether they are overridden. The "legitimate interests" condition is unlikely to apply if the employee would not expect the processing to take place, or if it would result in unjustified harm.

In some circumstances it will still be appropriate to rely on consent in the HR context – for example where an unsuccessful job applicant consents to you retaining their details in case another job opportunity arises. In that kind of situation the applicant would be viewed as having a genuine choice in the matter and unlikely to suffer negative consequences if they refuse.

Official guidance on the GDPR indicates that it is not going to be acceptable for employers who request consent for data processing to use one of the other lawful bases as a "back-up" if consent is withheld or withdrawn. That means it is vital to identify the correct legal basis for processing the data from the outset.

Do we need to treat occupational health reports and criminal records checks differently in future?

Health-related information comes under the GDPR definition of "special category data" rather than "sensitive personal data" as it was known under the DPA 1998. To process special categories of data lawfully, additional conditions will need to be satisfied. These are set out in the Data Protection Act 2018 and include that the processing is necessary for the performance of employment law rights or obligations. The explicit consent of the employee will also be required, as it is now, for the release of a medical or OH report to the employer.



Data relating to criminal convictions has been carved out for special treatment (it's no longer going to be considered together with "special categories of data") but is expected to require the same additional conditions to be met as mentioned above.

How have the rules about subject access requests changed?

The GDPR is intended to provide data subjects with greater control over how their data is processed. The new legislation has removed the ability of data controllers to charge a fee for subject access requests (unless the request is "manifestly unfounded or excessive") and has shortened the timeframe within which they must be responded to from 40 days under the DPA 1998 to one month. In cases where requests are particularly complex, the deadline can be extended by up to two months.

Under the GDPR, if an individual makes the request electronically, for example via email, you must provide your response in electronic form too (unless otherwise requested by the individual). In practice this might mean providing pdf copies of the documents or providing access to the documents via a secure online file storage system.

Finally, the new rules require you to provide more extensive information as part of your response to a subject access request. This supplementary information should already be in your employee privacy notice and includes what information is held about the applicant, what processing is being carried out, what the relevant data retention period is, and confirmation of their rights to have inaccurate data corrected and to make a complaint to the Information Commissioner.

Does the GDPR change how long we can keep employee records?

No. It was already a requirement under the DPA 1998 to keep personal data "no longer than is necessary for the purposes for which the personal data are processed". However, the significant financial penalties introduced under the GDPR (see below) might provide an incentive to reconsider the processes you have in place to destroy personal data when it is no longer needed.

We didn't have the resources to be ready for 25th May – how worried should we be?

Now that the GDPR is in force, you need, at least, to have identified what needs to be done and have put into action a plan to achieve it. For many organisations this will be a work in progress. Although the new rules are enforceable from 25th May, any breach will be considered in the context of arrangements you have in place to make yourselves compliant, including evidence that you have correctly prioritised outstanding tasks.

The ICO has the power to impose fines of up to €20m or 4% of annual turnover (whichever is greater) on employers who do not process employee data lawfully and fairly, or who do not provide employees with the required information. However, fines will be proportionate to the breach and the harm caused. The ICO have said that it will reserve its powers for those organisations who "choose not to cooperate, or show deliberate disregard for the law".

Can Hempsons give me a suite of documents and forms to fill in to make us GDPR compliant?

We can help you to draft compliant documents but GDPR compliance is unique to every organisation and involves cultural changes that will continue long after it comes into force. Even privacy notices need to be tailored to take account of the specific information employers hold and how they handle it.

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Julia is an employment law specialist, working in the health sector as well as for charities and other third sector clients. She advises on contentious and non-contentious aspects of employment law, and has a special interest in discrimination.

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Hincks
v Sense Network

When does an unfavourable reference amount to negligent misstatement?
It is commonly accepted that when a person applies for a job, they will usually be asked to provide a reference from their previous employer. By the same token, employers are usually willing to provide a reference for an employee leaving their employment and doing so is standard practice.

How much detail should the employer include in a reference? Following an upward trend of claims being brought by new employers in respect of misleading positive references given by ex-employers, it has become standard practice for ex-employers to offer purely factual references to avoid such litigation.

The recent case of Hincks v Sense Network Ltd, heard by Mrs Justice Lambert in the High Court, involved a claim for negligent misstatement brought by Mr Hincks after more than just a factual reference was given about him which rendered him unable to find future employment. This case serves as a warning to employers when including negative opinions in a reference.

The facts
Mr Hincks was a financial advisor who worked for CIFS as an Independent Financial Advisor (IFA). CIFS was a small company not authorised to conduct activities authorised by the Financial Conduct Authority (FCA). As such, CIFS acted as one of the Appointed Representatives of Sense Network Ltd, which was authorised by the FCA.

Various concerns were raised about Mr Hincks' work which resulted in Mr Hincks being required to obtain pre-approval from Sense Network before giving certain advice, re-registering clients or completing transactions. Mr Hincks failed to comply with those pre-approval rules. As a result, he was suspended from giving financial advice, undertaking transactions or seeing clients (i.e. IFA duties) in December 2013 whilst an investigation into his files took place and the necessary remediation was implemented.

Mr Hincks was allowed to recommence undertaking certain IFA duties in the autumn of 2014, but he remained subject to the pre-approval process formerly in place. Once more, it was alleged that Mr Hincks failed to comply with the pre-approval rules. Sense Network investigated his failures and Mr Hincks was orally summoned to a meeting, although it was accepted by both parties that Mr Hincks was not aware in advance what the meeting would be about.

Following the meeting, Sense Network terminated Mr Hincks' authorisation to act as an IFA and his engagement with CIFS ended as a result. Mr Hincks appealed against this decision, but his appeal was rejected on paper, without any further meeting.

Mr Hincks applied for various positions as an IFA with other firms and two requested a written reference from Sense Network.

The reference was prepared by the person who had conducted the investigation meeting and decided to terminate Mr Hincks' authorisation. It contained various negative statements and opinions, it referred to his suspension and that the "investigation concluded that, in spite of the explanations offered by Mr Hincks, it was reasonable to conclude that he had knowingly and deliberately circumvented the agreed process."

Mr Hincks brought a claim against Sense Network for negligent misstatement on the basis that the opinion stated in the reference was wrong and was based on the internal investigation which was a "sham and prejudged investigation", which had been conducted in bad faith. Mr Hincks contended that where a negative opinion is expressed on the conclusion of an investigation, the reference writer has an obligation to be satisfied that the investigation was reasonably conducted and procedurally fair.

High Court ruling
The Court ruled in favour of Sense Network and held that there are "formidable difficulties" associated with requiring a reference writer to inquire into the procedural fairness of earlier investigations. When an investigation was undertaken months or years before a reference is requested, the reference writer may have very limited, if any, access to the relevant information and as such, this would place considerable burden on the reference writer.

The Court gave some guidance in respect of the standard of care required by a reference writer, (recognising that the nature of the level of care would be dictated by the specific facts of each case), specifically:

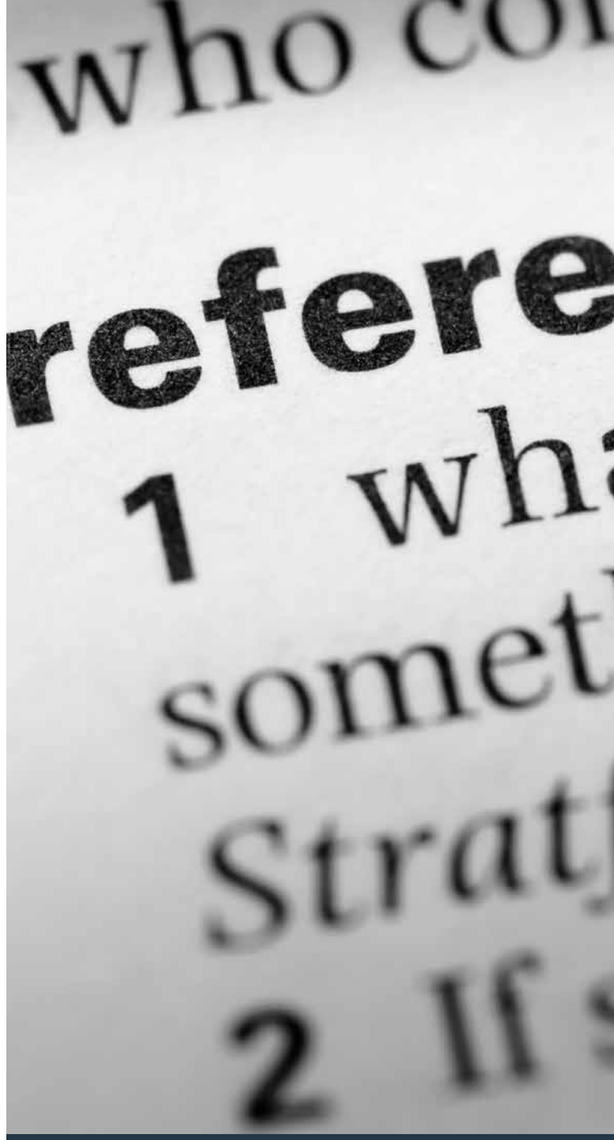
- conduct an objective and rigorous appraisal of facts and opinion, particularly negative opinion, whether those facts and opinions emerge from earlier investigations or otherwise;
- take reasonable care to be satisfied that the facts set out in the reference are accurate and true and that, where an opinion is expressed, there is a proper and legitimate basis for it;
- when an opinion is derived from an earlier investigation, take reasonable care in considering and reviewing the underlying material so that the reference writer is able to understand the basis for the opinion and be satisfied that there is a proper and legitimate basis for the opinion; and
- take reasonable care to ensure that the reference is fair and not misleading, either by reason of what is not included or by implication, nuance or innuendo.

Furthermore, the Court confirmed that there is no duty on the reference writer to examine the procedural fairness of the underlying investigation, save for where there are "red flags", which prompt further enquiry.

Analysis
In light of the findings in this case, reference writers should be aware of the potential implications if they prepare a reference advancing a negative opinion and the standard of care they should take when doing so. They should satisfy themselves that the facts in a reference are accurate, that opinions derived from an investigation are legitimate and ensure that the reference is fair and not misleading.

It would be advisable to say that reference writers should satisfy themselves that anything put in a reference can be supported by evidence and that there is a sound, legitimate basis for including such information.

Hempsons' Employment Team can assist with compiling, reviewing and advising on references, whether given or received, and any potential legal implications that may arise as a result.



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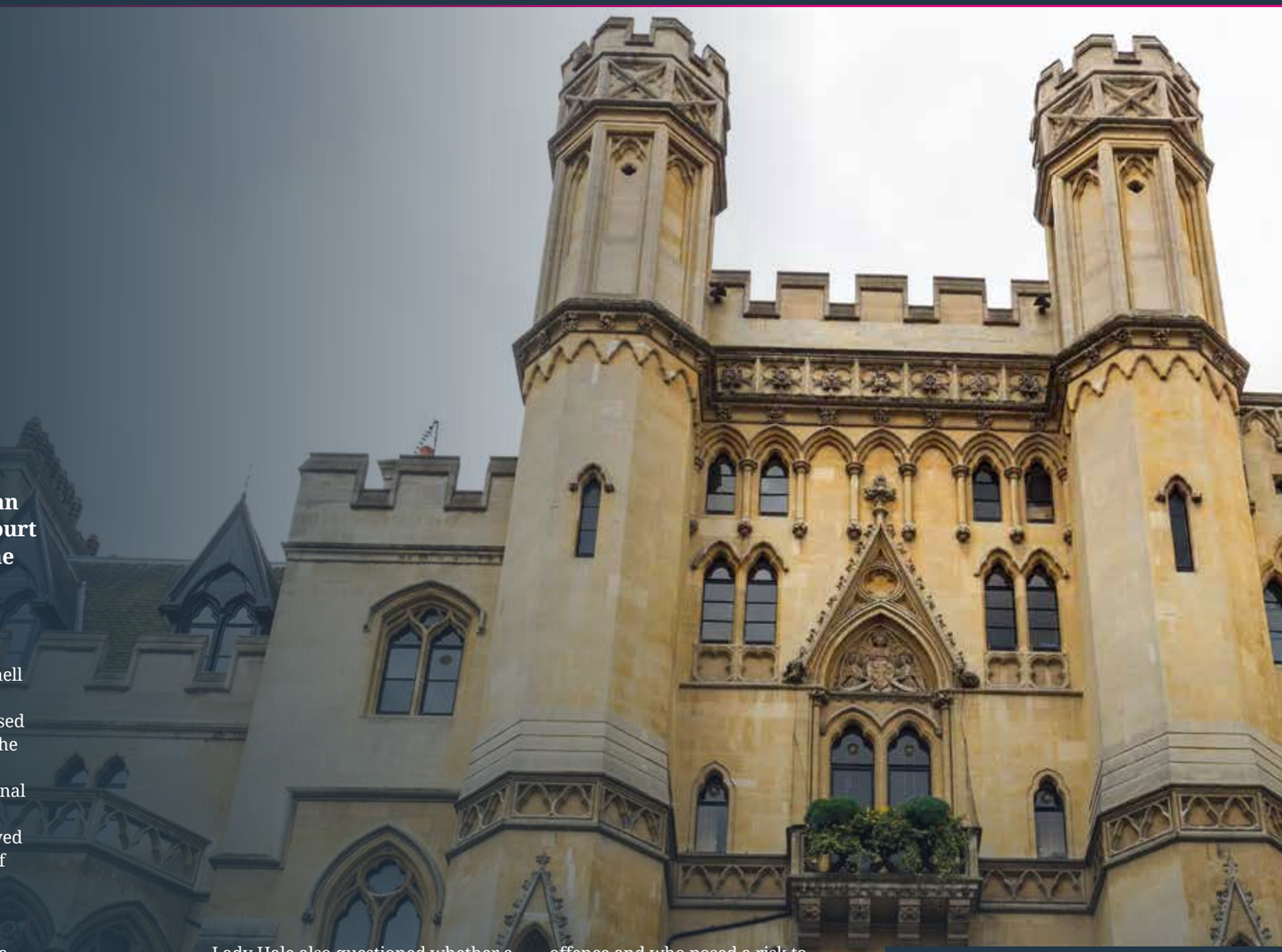
Reilly v Sandwell Metropolitan Borough Council (2018)



Would it be fair to dismiss an employee if they had failed to disclose a relationship with a person convicted of serious criminal offence (even if this was not necessarily a breach of an express term of the employee's contract)? This question was addressed by the Supreme Court in the case of Reilly v Sandwell Metropolitan Borough Council (2018) UKSC 16. The Supreme Court also considered the standard approach to the reasonableness of a dismissal, the Burchell test.

Facts

The Claimant was employed as the head teacher of a primary school. She had a personal relationship with a man who was convicted of making indecent images of children. Their relationship was not sexual and they did not live together, although they had jointly bought a house and the Claimant stayed there with him occasionally. The Claimant knew of his arrest and subsequent conviction. However, she did not inform her employer, which at that time was the local authority.

The school became aware of her friend's conviction and, knowing of her relationship to him, she was suspended pending a disciplinary investigation. The panel held that she had been under an obligation to inform the school of the situation, and by failing to do so, was guilty of gross misconduct. She was dismissed as a consequence. One factor that stood against her was her refusal to accept that she should have disclosed the relationship and her friend's conviction.

The Employment Tribunal proceedings

The Claimant brought a claim of unfair dismissal. She argued that she was under no duty to disclose the relationship, and there was no term of her contract of employment which required her to do so. The council argued that although there was no express term covering this situation, she was under a duty to disclose. The Employment Tribunal accepted this. Whilst the Tribunal held that her dismissal was unfair on separate procedural grounds due to problems with the appeal process, she was not entitled to any compensation on the basis that she had contributed to her dismissal through her own actions.

The Claimant appealed to the Employment Appeal Tribunal and subsequently to the Court of Appeal, but both appeals were rejected. The Claimant appealed to the Supreme Court.

The Supreme Court's decision

The Supreme Court endorsed the Tribunal's view that the Claimant's failure to disclose her relationship and her friend's conviction, and her ongoing refusal to accept that she had been wrong, merited dismissal.

Lord Wilson used the case as an opportunity to consider the Burchell test (British Home Stores Ltd v Burchell (1978) ICR 303). This is used where the employer asserts that the fair reason for dismissal was the employee's misconduct. The tribunal must be satisfied that:

- The employer genuinely believed that the employee was guilty of the misconduct.
- The employer had reasonable grounds for this belief.
- The employer had carried out a reasonable investigation.

The tribunal would then consider whether the employer had acted reasonably or unreasonably in treating the misconduct as sufficient reason to dismiss. As Lord Wilson noted, the Burchell test was not directed at this issue of reasonableness, but the test is often applied as if it did. However, no harm was done by this approach. Lord Wilson concluded that a dismissal can be fair even if the alleged misconduct is not in breach of contract. In this case the Claimant was under a duty to disclose the relationship, and it was for the school governors to assess the risks. This was compounded by her continuing lack of insight.

Lady Hale also questioned whether a dismissal could be fair if the alleged misconduct was not a breach of contract but, as she agreed that the Claimant was under a duty to disclose the relationship, that was not an issue in this case. She also questioned whether the Burchell test was appropriate to the test of reasonableness, for the same reasons as Lord Wilson, but since the Court had not heard argument on these points she expressed no view.

Conclusion

Primarily, this case reinforces the breadth of the duties owed by an employee to an employer. The tribunal upheld the employer's decision that the employee was under a duty to disclose her relationship with a person convicted of a serious offence and who posed a risk to children. Her failure to recognise that she was at fault exacerbated this.

However, the Supreme Court also emphasised that an employee can be fairly dismissed for conduct that does not necessarily amount to a breach of contract. The tribunal had applied the correct test by holding that her employer genuinely believed that the non-disclosure amounted to misconduct, there were reasonable grounds for that, and dismissal was in the range of reasonable responses. Whilst there may be risk in approaching the Burchell test too rigidly, and the hints dropped by the Supreme Court may lead to change in the future, for now employers should still know what they must do in order to arrive at a fair dismissal.

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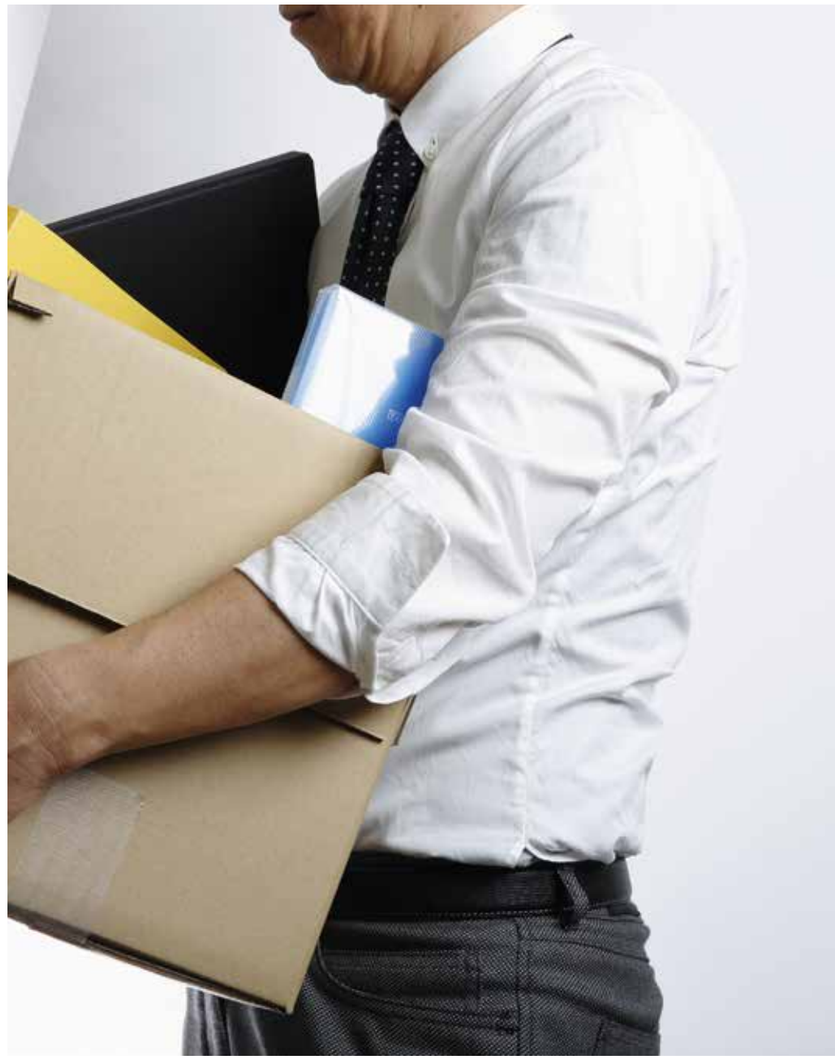
James acts for employer clients on a wide range of Employment Tribunal claims including unfair dismissal, discrimination and whistleblowing. As a solicitor advocate, James has represented clients on a number of substantial, complex and lengthy hearings at tribunals throughout the country.

Update - **Tax changes to termination payments**



Background

Back in the 2016 Budget, the government announced that from April 2018, it would "reform and simplify" the taxation of termination payments. Following a technical consultation, the reforms expanded and now aim to "clarify and tighten" (i.e. increase) the taxation of such payments.

The tax changes came into effect on 6 April 2018 with important implications for employers when negotiating exit payments with employees. The most important changes relate to payments in lieu of notice (PILON) and 'injury to feelings' payments.

The old tax regime

Prior to 6 April 2018, the tax treatment of a PILON depended on the contract of employment.

If the contract contained a clause providing the employer with a contractual right to make a PILON, then any PILON made was treated by HMRC as being fully taxable. Therefore, any contractual PILON payment had to be subject to deductions for income tax and national insurance contributions (NICs).

If, however, there was no PILON clause in the contract and the employer had no contractual right to pay an employee in lieu of notice, doing so was generally regarded as a breach of contract. As such, a PILON payment effectively constituted a payment of damages for breach of contract and could therefore be paid tax-free up to £30,000. Any amounts in excess of this threshold were subject to tax. There was therefore a tax benefit in making a PILON payment where there was no right to do so in the employee's contract of employment under the old tax regime.

Key changes under the new regime

From 6 April 2018 onwards, all PILONS are now subject to tax regardless of whether or not there is a PILON clause in the contract of employment. For tax purposes, termination payments are now split into two elements: (1) Post-Employment Notice Pay (PENP), and (2) the remaining balance.

PENP represents the amount of basic pay the employee would have received had their employment been terminated with full and proper notice being served. This element is now subject to income tax and NIC deductions. The legislation sets out a statutory formula to calculate the PENP. Helpfully, detailed guidance and examples have recently been published in HMRC's Employment Income Manual (https://www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim12800).

Statutory redundancy payments and elements of a termination payment which do not constitute PENP (or any other contractual entitlement) may still be payable tax-free up to £30,000.

Future changes

Currently termination payments above the £30,000 threshold are subject to deductions for income tax but not NICs. However, from 6 April 2019, all termination payments above £30,000 will also become subject to employers' NICs. Employees' NICs will, as is currently the case, not be deducted.

Payments for 'injury to feelings'

Another important change to the tax treatment of termination payments relates to 'injury to feelings' payments made in settlement of claims.

The definition of what constitutes an 'injury' changed on 6 April 2018, so that now a psychiatric injury (or other recognised medical condition) is included, and may therefore be compensated tax free, but injury to feelings are expressly excluded. As such, these payments must now be subject to tax. This is in contrast to the previous regime, and in many cases involving discrimination, will substantially increase the taxation on a termination payment.

What does this mean for employers?

Employers currently negotiating termination agreements need to be aware of the changes as they could potentially increase their costs/impact negatively on settlement negotiations. This is because the value of the overall termination package to the employee will likely be reduced as a result of the changes, and therefore there may be a request to 'gross up' the package to account for this.

In cases which are not straightforward, it would be prudent to take legal advice on the implications of the tax changes and the best strategy for managing the situation.

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Should shared parental leave **be paid at enhanced rates like maternity leave?**

Not according to the Employment Appeal Tribunal (EAT). The EAT held in Capita Customer Management Ltd v Ali that maternity leave was not the same as shared parental leave, and to have pay differentials between the two was not discriminatory.

The facts

Mr Ali's wife was diagnosed with postnatal depression following the birth of their child, and was advised to return to work. Mr Ali, who was employed by Capita, had taken two weeks' paid leave immediately upon the birth of his child, and due to his wife's circumstances he wished to take further leave to look after his child. Capita informed Mr Ali that he was eligible to take Shared Parental leave (SPL), which would be paid in accordance with the statutory pay requirements. (currently paid at the rate of £145.18 a week or 90% of your average weekly earnings, whichever is lower).

However Mr Ali raised a grievance claiming that he should receive enhanced SPL as his female colleagues were entitled to enhanced maternity leave. The grievance was not upheld by Capita and Mr Ali issued proceedings at the Employment Tribunal on the grounds of direct and indirect sex discrimination.

Employment Tribunal (ET)

The ET held that Mr Ali had been directly discriminated against on the ground of his sex, but dismissed his indirect discrimination claim.

This is because the ET considered it immaterial that Mr Ali had not given birth, since he was comparing himself with a woman taking leave to care for a child after the end of compulsory maternity leave. Mr Ali was not comparing himself with a woman who had given birth.

The ET decided that, on the facts of the case, the caring role that Mr Ali wanted to perform was not a role exclusive to the mother, as men are being encouraged to take a greater role in caring for their child.

EAT

Capita appealed the ET's decision and the EAT found that the ET's conclusion was based on incorrect facts. This was because;

For maternity leave:

The Pregnant Workers Directive requires member states to provide a minimum of 14 weeks' maternity leave paid at least at the same level as statutory sick pay; and

For Shared Parental leave:

The Parental Leave Directive focuses on the care of the child and makes no provision for pay.

Thereby, the ET's finding that the purpose of the statutory maternity leave and pay given to a woman after the compulsory first two weeks is for the care of the child did not accord with the purpose of the Pregnant Workers Directive. As maternity leave and pay is for the health and wellbeing of the mother. The purpose or reason for SPL is for the care of the beneficiaries' child.

Therefore the correct comparator could not be a woman on maternity leave, it would be a woman on SPL who was given SPL on the same terms/rate as Mr Ali.

Comments

The case confirms that employers can continue to provide female employees enhanced maternity pay, as the reason for compulsory maternity leave is for the woman to recover from child birth, and it will be difficult for a male employee to compare himself to a woman in these circumstances. However, employers should take care when dealing with requests for SPL as the case of Ali suggests that a male employee can compare himself to a female employee who may be receive enhanced SPL as the purpose of SPL is for the care of the child.

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Prior to joining Hempsons, Zubeda worked at DWF specialising in both contentious and non-contentious employment issues. She has experience of conducting her own caseload and advising clients on various areas of employment law.

Can a disability account for bad behaviour?

The recent Employment Tribunal decision of Wheeley v University Hospitals Birmingham NHS Foundation Trust serves as a timely reminder that where conduct issues are said to arise from an underlying mental health condition employers should be cautious of departing from medical opinion.

Facts

Ms Wheeley was a long-standing employee of the Trust and held a senior management role. She had suffered from recurring periods of depression since she was a teenager. This had been managed by medication and she had had no absences from work due to her depression. In fact, the Trust was unaware of any mental health concerns until the disciplinary process at the heart of this case was underway.

Ms Wheeley had a clean disciplinary record but she had been a challenging employee. Her behaviour was difficult and inappropriate at times, such as banging her fists on the table or walking out of meetings. However, this behaviour was not formally addressed by the Trust and there was no suggestion that it was related to her health.

In May 2015 Ms Wheeley learned that her department was to be restructured and she made clear her hopes for a promotion. Following the restructure, she was unhappy about a number of matters, including that she was not promoted, and she sent an email to the Medical Director in which she refused to report to a new line manager. She also threatened to write to her team "informing them that the announced change would not be happening and why". She was given an express management instruction not to do so.

Despite this instruction, Ms Wheeley later responded to a group email which included members of her team and the Trust's executive directors stating that she had not been aware that communication about the restructure would be sent and that she was "considering her position".

Ms Wheeley was suspended for responding angrily, failing to follow a management instruction and communicating and acting inappropriately. An investigation commenced, following which an additional allegation was added because Ms Wheeley went to the Medical Director's house outside working hours in an to attempt to discuss the issues. Ms Wheeley accepted she should not have done so and apologised, but largely sought to justify her other actions throughout the course of the investigation. She also reported symptoms of stress and depression and the disciplinary hearing was postponed because she was deemed unfit to attend.

Ms Wheeley remained unrepentant and issued a lengthy grievance. She also changed her trade union representative, at which point concerns about her mental health were raised. Ms Wheeley was referred to Occupational Health, who subsequently referred her to a psychiatrist. The psychiatrist was unable to reach a definitive conclusion about whether or not Ms Wheeley had bipolar disorder but he felt it was "certainly possible".

Shortly after the grievance was heard (her complaints were rejected), Ms Wheeley made a private appointment with another consultant psychiatrist, who felt that a bipolar diagnosis was not supported. Occupational Health later arranged a referral to an independent psychiatrist, Professor Oyebode.

Professor Oyebode reported that Ms Wheeley presented with the cardinal features of bipolar disorder and took the view that there was clear evidence of periods of depression and mania. He reported that it is well recognised, in manic phases, that people can exhibit behaviours that are out of character and which demonstrate irritability, hostility, recklessness and poor judgement. He referenced Ms Wheeley's threatening and insubordinate emails and said she regretted these behaviours and considered them to be out of character. Professor Oyebode's opinion was that Ms Wheeley was in a manic phase during the period in question and that her behaviour, which formed the basis of the disciplinary allegations against her, was compromised by severe mental illness.

The Trust's disciplinary panel considered this opinion in the context of mitigation, however, it was not convinced that Ms Wheeley's behaviour had been out of character (due to the history of her challenging behaviour). The allegations were therefore upheld and Ms Wheeley was dismissed for gross misconduct.

Employment Tribunal

She brought a claim for unfair dismissal and discrimination arising from disability in the Employment Tribunal. The ET found that absent any mitigation, Ms Wheeley's behaviours amounted to "gross insubordination on a grand scale". It also found that notwithstanding her long service and clean disciplinary record, dismissal would ordinarily have been well within the band of reasonable responses.

However, the ET went on to find that the disciplinary panel had departed from the medical opinion of Professor Oyebode by essentially finding that Ms Wheeley's mental health did not substantially cause or exacerbate her misconduct, since the behaviours were not seen to be out of character. The Trust had reached this conclusion without raising further questions with Professor Oyebode and it could not produce cogent evidence before the ET that Ms Wheeley's mental health had played no more than a trivial part in the events under consideration. The ET therefore determined that her condition did in fact have a significant impact on her actions, which arose in consequence of her disability.

The ET went on to consider the Trust's justification for its actions and agreed that its aims had been legitimate. However, it found that summary dismissal had not been a proportionate response in circumstances where the Trust had simply rejected a key medical finding that Ms Wheeley's actions were compromised by severe mental illness. This had been unreasonable and the ET concluded that no reasonable employer would have done so.

Ms Wheeley therefore succeeded in her claim, but her compensation was reduced by 25% to reflect her contributory conduct.

Conclusion

This case serves as an important reminder for employers that in order for a dismissal to be fair, the relevant evidence must be gathered, tested and given proper weight. The Trust had legitimate concerns about the conclusions reached by Professor Oyebode, but rather than revert to him to raise these concerns or ask further questions, it rejected his conclusions. Ultimately this was fatal to the Trust in being able to defend the unfair dismissal claim and also the disability discrimination claim, as it was unable to show that the dismissal had been a proportionate means of achieving a legitimate aim.

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Hempsons is a leading national law firm specialising in health and social care, practitioners, real estate, charities and social enterprise sectors across the UK. Our highly experienced lawyers provide a number of cost-effective solutions for a range of Private and Public healthcare organisations, from employment law through to clinical negligence.

We aim to achieve our clients' objectives and provide support down to the last detail whether the issue is big or small, challenging or simple. We work with over 200 NHS organisations including NHS trusts, foundation trusts and commissioning bodies, with services delivered by a team of over 130 specialist healthcare lawyers. A significant number of our employees hold dual qualifications, combining medical, dental or nursing qualifications with their legal credentials.

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