

# Employment Focus



## Disability discrimination What are normal day-to-day activities?

### ***Banaszczyk v Booker Limited – judgment handed down on 1 February 2016***

The EAT has held that normal day-to-day activities include manual handling of cases weighing up to 25kg.

The Claimant was employed by Booker Limited as a picker in a distribution centre. He was required to select cases and to lift and move those cases by hand for loading onto pallet trucks. The cases might have weighed up to 25kg. Booker Limited operated a “pick rate” which expected workers to pick 210 cases per hour and the minimum acceptable standard was 85% of that figure.

The Claimant was involved in a car accident in which he suffered an injury to his spine. He subsequently began to experience back pain and informed his employer that he could not pick heavy items for long periods of time. The Claimant was referred to an occupational physician who concluded that he had a long-term problem with back pain which impaired his performance and was not able to reach the target pick-rate. He was subsequently dismissed for incapability. He brought proceedings against his employer for unfair dismissal and disability discrimination.

The Employment Tribunal concluded that the requirement for manual handling of cases weighing up to 25kg was not a normal day-to-day activity. It considered the Claimant’s activities outside of work, including going shopping, unloading shopping and flying to Poland and found that he was capable of carrying out these activities. As such, it held that he was not disabled because his long-term physical impairment did not have a substantial effect on his carrying out normal day-to-day activities.

The Claimant appealed the decision.

The EAT held that, having accepted the medical evidence, the only possible outcome was that the Claimant was disabled. In holding that warehouse work and work in general is a normal day-to-day activity, the EAT expressed the view that ‘no-one with any knowledge of modern UK life could doubt that large numbers of people are employed to lift at work, including cases of up to 25kg’.

In deciding whether the Claimant’s back pain had a substantial effect on his carrying out normal day-to-day activities, the EAT noted that the time taken to perform an activity must be

considered. It concluded that the Claimant’s back pain meant that he was significantly slower than his colleagues and slower than he would have been but for his back pain, when manually lifting cases.

This wide interpretation of what is a normal day-to-day activity could clearly impact on a number of different activities, so consideration of this point will be relevant when assessing whether the definition of disability is met.

Where this point is in issue it will be necessary to ensure it has been adequately dealt with by Occupational Health.

*Ruth Everitt*

### Also in this issue

[The National Minimum/  
National Living Wage](#)

[Family Friendly Rights](#)

[Pulling a sickie – is dishonest and a  
fundamental breach of contract](#)

[Current rates and limits for unfair  
dismissal and redundancy](#)

[Employment Protection Scheme](#)

# The National Minimum/ National Living Wage

The National Living Wage, an extension of the National Minimum Wage and introduced on 1 April 2016 continues to be very much in the news. The introduction of the increased rate for over 25 year olds was preceded by much comment and debate and indeed a report by Manpower to the effect that employers would meet the challenge of the increased hourly rate by preparing to cut overtime and rates for weekend work and indeed we have seen a number of local and national companies exposed by the press in recent weeks.

We have had first hand knowledge of some of the difficulties that the increase presents as the increased hourly rate reduces the pay gap between supervisors and less senior employees. One possible scenario is

that particularly, small businesses will struggle to pay the National Living Wage which could in turn give rise to the risk of redundancies. With this risk goes a word of caution that where a selection matrix is driven by cost, for

example, eligibility for National Living Wage this could give rise to a potential claim for age discrimination. Whilst a possible defence would be that the decision can be objectively justified as a proportionate means of achieving a legitimate aim, case law serves to demonstrate that cost alone cannot amount to objective justification.

Meanwhile, the Government is committed to outing employers who fail to pay the National Minimum Wage. This includes:

- Penalties will increase from 100% of arrears to 200% of arrears (halved if paid within 14 days) and a maximum of £20,000 per worker.
- An increased budget for enforcement.
- A new HMRC team to pursue non-payers with powers to impose penalties and refer to the CPS for prosecution.
- The name and shame regime.
- A stated intention by the Department of Business Innovation and Skills (BIS) to target high risk areas such as social care, hairdressing and retail sectors.
- Power to disqualify directors for up to 15 years.

*Donna Ingleby*



## Family Friendly Rights

Recent research by the Women's Business Council and the Employer Support Firm, My Family Care supports our own experience and that of our clients which is that fathers are not taking advantage of the entitlement to Shared Parental Leave. It is no surprise that the decision is often financially driven or that concerns in relation to career progression were also a factor.

The introduction of Grandparental Leave is an extension of the Family Friendly Rights promoted by the Government

and is in recognition of the often crucial role that grandparents take in childcare. Research and our own experience suggests that many grandparents either give up work, reduce hours or take time off to help with childcare and reduce the costs of it.

Grandparental leave is currently the subject of Government consultation and is due to be introduced in 2018.

*Donna Ingleby*



# Pulling a sickie

## is dishonest and a fundamental breach of contract

Mr Ajaj was employed as a bus driver for 10 years when he was dismissed for gross misconduct having been found by his employer to have fraudulently claimed sick leave and sick pay by misrepresenting and/or exaggerating his sickness. The Claimant alleged that he had slipped and fallen at work and was accordingly unfit for work. However, surveillance evidence proved him to be exaggerating and showed him walking freely despite his alleged injury being corroborated by his physiotherapist and an occupational health adviser.

### ***Metroline West Ltd v Ajaj***

The disciplinary allegations put to the Claimant upon the surveillance evidence coming to light were that he had made a false claim for sick pay; he had misrepresented his ability to attend work; and he had made a false claim of an injury at work.

The conclusion of the disciplinary process was that the Claimant had “substantially exaggerated the degree of his incapacity” and that “it was probable that he had not suffered an accident at work and was therefore falsely claiming to be injured.” The Claimant was summarily dismissed for gross misconduct.

### **Tribunal findings**

The Tribunal accepted that the Respondent had a potentially fair reason to dismiss related to conduct and further that the Respondent genuinely believed that the Claimant had exaggerated his injury and its effects. However, it went on to assess the Respondent’s genuine belief by reference to capability (and not conduct) considerations and held that, notwithstanding evidence of exaggeration as to his ability to walk, there was no evidence that the Claimant had exaggerated his inability to perform his contractual duties.

On appeal by the employer the EAT found that the Tribunal’s consideration of capability issues was irrelevant and it was perverse for the Tribunal to hold that the dismissal was unfair and wrongful. It held that an employee who ‘pulls a sickie’ is dishonest and in fundamental breach of contract. The principal reason for dismissal of a malingering employee is conduct, not capability.

This case serves as a reminder of the need for employers to establish and document their reasons for dismissal and consider whether they have reasonable grounds to dismiss after having conducted a reasonable investigation.

*Ruth Everitt*



### **Current rates and limits for unfair dismissal and redundancy**

6 April 2016 – 5 April 2017

**Basic award/redundancy** – maximum £14,370

**Statutory cap** – maximum £78,962 or the lowest of 12 months gross salary.

**Maximum weeks’ pay** – £479

# Employment Protection Scheme

Whilst claims in the Employment Tribunal have reduced significantly since the introduction of fees in the Employment Tribunal in July 2013 – those claims that do exist and are not resolved through ACAS pre-conciliation are increasingly costly and complex.

To help employers deal with the financial risks created by Employment Tribunal claims, Rollits has relaunched their Employment Protection Scheme.

## The benefits are:

**Financial certainty** – You can set a budget from employment law costs.

**Cash flow friendly** – You can spread the cost of the insurance and employment law services (H&S by arrangement) through a monthly payment facility.

**Flexibility** – The package can be tailored to meet your exact requirements.

**Face to face** – A dedicated lawyer is just a phone call away.

**Regulated expert advice** – We are regulated by the Law Society and are required to act in your best interests.

The services will be carried out by the qualified lawyers. The service is an alternative to insurance backed products which create onerous and costly long term arrangements and which require you to access advice from impersonal telephone helplines where the advice given is often unreliable and risk averse.

Full details are available upon request but if you would like a free audit of your current policies and practices please contact Donna Ingleby, Rollits Head of Employment.

Direct Dial 01482 337314  
Email [donna.ingleby@rollits.com](mailto:donna.ingleby@rollits.com)



## Information

If you have any queries on any issues raised in this newsletter, or any employment matters in general please contact Donna Ingleby on 01482 337314.

This newsletter is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice.

We hope you have found this newsletter useful. If, however, you do not wish to receive further mailings from us, please write to Pat Coyle, Rollits, Citadel House, 58 High Street, Hull HU1 1QE.

The law is stated as at 15 April 2016.

**Hull Office**  
Citadel House, 58 High Street,  
Hull HU1 1QE  
Tel +44 (0)1482 323239

**York Office**  
Rowntree Wharf, Navigation Road,  
York YO1 9WE  
Tel +44 (0)1904 625790

### rollits.com

Authorised and Regulated by the Solicitors Regulation Authority under number 524629

Rollits is a trading name of Rollits LLP. Rollits LLP is a limited liability partnership, registered in England and Wales, registered number OC 348965, registered office Citadel House, 58 High Street, Hull HU1 1QE

A list of members' names is available for inspection at our offices. We use the term 'partner' to denote members of Rollits LLP.