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## October 2018 Update

Welcome to this month's update - where we discuss the latest legislation and guidance.

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In this month's edition, we report on:

- An update on Providing References
- Dealing with High Sickness Absence
- Constructive Unfair Dismissal

### An Update on Providing References

We often get asked about what should be included in references. In particular, what happens if the ex-employer receives a form with many questions on it about a job applicant?

Often these forms include questions like:

- \* the applicant's absence levels;
- \* confirming the reason for leaving;
- \* information about the job applicant's skills and abilities
- \* details about the applicant's character, strengths and weaknesses;
- \* questions relating to the suitability for the role they have applied for

Previous employers are able to answer the basic facts about the applicant but then find it very difficult to answer additional questions that may be asked, particularly if there has been performance, disciplinary or attitude issues which have not been resolved. In addition, previous managers and colleagues might also be asked to provide character details.

A reference must be a true, accurate and fair reflection of the job applicant. Try and stick to the basic facts of the dates the employee was employed, job roles and responsibilities and avoid giving opinions and character references. If you do feel the need to reply to a question on the suitability of a job applied, then make sure your answers are based on fact.

Often managers within a business give more detailed references, unknown to the senior managers or directors. You need to be clear with all managers in the business, on the style and format for references.

Resolving problems with references. If a job applicant is unhappy with a reference provided about them they can request, usually in writing, a copy of any reference sent to a new employer. Under the General Data Protection Regulations, they may make a subject access request to see a copy of the reference provided.

If an external job applicant believes a reference provided for them was inappropriate they may be able to claim damages in court. However, the job applicant must be able to show that the information was misleading or inaccurate and that they have suffered a loss, for example the withdrawal of a job offer.

**Employers:** Many employers are adopting a policy of standard factual references only. If you do this, ensure you are making this clear to your managers.

**Contact us:** We can advise on giving references and reference requests.

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## Dealing with High Sickness Absence

High sickness absence places huge pressure on businesses. Taking disciplinary action is easier if an employee has short-term frequent spells of sickness for a variety of reasons. However, how easy is it to take disciplinary action against a disabled employee for high sickness absence? The Employment Appeal Tribunal (EAT) looked at this issue recently in a case where the employee was absent for 60 days in a 12-month period.

Mrs O'Connor had a disability and very high sickness absence over many years. Her employer had made reasonable adjustments and dealt with the absence sensitively. They had allowed her to have significantly more absence than their policy usually allowed. By 2016, they decided to issue Mrs O'Connor with a written warning and stopped her company sick pay.

She brought a claim for disability discrimination. To defend such a claim an employer would need to show that the less favourable treatment could be objectively justified by showing that what the company did was a proportionate way of achieving a legitimate aim. Mrs O'Connor won her discrimination case at tribunal. The company appealed but the EAT agreed with the tribunal.

It was accepted that the company had the legitimate aims of assuring adequate attendance levels across the workforce and in trying to improve Mrs O'Connor's attendance. However, the written warning was not found to be a reasonable course of action.

The company had not followed its own policy of referring an employee to occupational health before taking disciplinary action. Therefore, the warning was not a proportionate way to achieve any of the employer's legitimate aims.

**Employers:** This is a reminder of the difficulties in dealing with disability related absence. Make sure you can justify how the warning helps achieve your stated aim.

**Contact us:** We can advise you through sickness absence procedures to assist with justification arguments for actions taken.

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## Constructive Unfair Dismissal

The law on constructive dismissal has been looked at by the courts recently. Sometimes, employees claim constructive dismissal, which means they resign saying usually something amounting to a 'last straw' pushed them to leave. The courts have recently considered whether a fair disciplinary process – no matter what the outcome – can ever be considered that 'last straw'.

Ms Kaur was a nurse with Leeds Teaching Hospitals. She received a final written warning for inappropriate behaviour, which included an altercation with another member of staff. She appealed against this sanction. When her appeal failed, she resigned claiming constructive dismissal.

Her claim was based on what happened in the altercation and the disciplinary proceedings. She claimed the 'last straw' was her appeal being rejected.

The Court of Appeal gave some useful guidance on 'last straw' constructive dismissal cases. Where there is a course of conduct which creates a serious breach of contract, the most recent act can revive earlier affirmed breaches. What this means is that if Mrs Kaur had accepted earlier breaches by not resigning at that point, then a new breach of contract could revive them. So, she could bring her constructive dismissal claim.

This case overrules the recent *MacKenzie v Pets at Home* case. However, it will be comforting for employers to know that Mrs Kaur's case was struck out for having no reasonable prospects of success.

**Employers:** The Court of Appeal confirmed a fair disciplinary process can never form part of a serious breach of contract, so the appeal decision could not be a 'last straw'.

**Contact us:** We can help with disciplinary and grievance procedures.

**For more information or assistance Email:** [enquiries@employmentlawsupport.co.uk](mailto:enquiries@employmentlawsupport.co.uk)





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