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Shaun also sat on a working
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Welcome to the latest issue of our free employment law update. In this month's issue we look at:

FORTHCOMING LEGISLATION In general, the Department for Business, Innovation and Skills introduces legislative changes twice a year ? April and October. We provide an overview of the main changes effective for the next six months from April 2010. [\[more...\]](#)

IT'S CRIMINAL We look at a case in which the Court has said that the 1997 Protection from Harassment Act can be used to tackle workplace harassment, but made clear that the conduct has to be "oppressive and unacceptable" and sustain criminal liability. [\[more...\]](#)

LET ME GO Although the law requires employers to make reasonable adjustments for disabled employees in certain circumstances, we look at a case which said that employers do not have to make them if they could not have known the disability would have a specific effect on the employee. [\[more...\]](#)

IN BRIEF Parents of children due on or after 3 April 2011 will be able to take advantage of new legislation announced recently by the Government. [\[more...\]](#)

Heptonstalls LLP's Employment Partner Shaun Pinchbeck has seen a significant increase in employers seeking advice on redundancy situations in the past 2 years:

"My aim is to explore with clients whether there is a way to avoid having to make employees redundant by considering whether there is an alternative such as reduced hours. In the event that there is no realistic alternative, my aim is then to guide clients through the process to try to minimise the consequences to the client and to minimise the risk of claims being brought. If you are in a situation where you are even contemplating the possibility of having to make redundancies, then seeking advice from the outset is something that I would urge employers to do as mistakes made at any stage of the process can prove costly".

Do not hesitate to contact Shaun if you have any queries on 01405 765661 or email shaun.pinchbeck@heptonstalls.co.uk

Heptonstalls have created a very useful summary to guide you through the key points of current employment legislation. This covers key qualifying periods and limits including a schedule of forthcoming changes.

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FORTHCOMING LEGISLATION

In general, the Department for Business, Innovation and Skills introduces legislative changes twice a year - April and October. The idea is to make it easier for employers (and employees) to keep abreast of the changes. The following are effective from April 2010.

We will publicise the changes that become effective in October 2010 in our September 2010 edition of HReSource, the most prominent being the introduction of the provisions of the current Equality Bill.

APRIL 2010

Additional paternity leave and pay

6 April 2010

Under new rights available to parents of children due (or matched for adoption) on or after 3 April 2011, mothers will be able to transfer the last six months of their maternity leave to the father if she decides to return to work before the end of her leave.

As with current paternity leave (which only lasts for two weeks), additional paternity leave extends to partners and civil partners of mothers. Some of the leave may be paid if taken during the mother's 39 week maternity pay period at the same rate as Statutory Maternity Pay (£124.88 per week as of 6 April 2010).

Right to request to train

6 April 2010

This new right gives employees working in organisations that employ 250 or more people the legal right to request time off for studying or training. This will then be extended to all organisations from 6 April 2011. It is only applicable to employees who have worked for their employer continuously for at least 26 weeks. As with a request to work flexibly, the employer must consider the request to train and can only turn it down if they have a good business reason for doing so.

Introduction of "fit notes"

6 April 2010

The Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) Amendment Regulations 2010 change the format of the medical statement so that doctors can indicate whether someone is fit (as opposed to unfit) for work. They also allow doctors to suggest arrangements that the person might take to return to work.

Increase in lower earnings limit

6 April 2010

Regulations increase the lower earnings limit for primary Class 1 national insurance contributions from £95 to £97. All other national insurance contributions rates, limits and thresholds remain unchanged.

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Data Protection - monetary penalties

6 April 2010

When serving monetary penalty notices and notices of intent on data controllers, the new law states that the Information Commissioner must consider any written representations made by a data controller in relation to a notice of intent, when deciding whether or not to serve a monetary penalty notice. It also sets out a minimum 21-day period for making written representations, and a minimum 28-day period after service of the monetary penalty notice within which the penalty must be paid. The maximum monetary penalty that can be imposed on a data controller is £500,000.

Blacklisting union membership or activities

April 2010

New regulations outlaw the sale, use, compilation, or supply of a blacklist of workers because of their union membership or activities. Anyone who thinks they have been blacklisted can complain to a tribunal and apply to the court for damages.

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IT'S CRIMINAL

Although the 1997 Protection from Harassment Act (PHA) was not drafted with the workplace in mind, the Court of Appeal has said in **Veakins v Kier Islington Ltd** that there is nothing in it to say it could not be used to tackle workplace harassment. However, the conduct has to be "oppressive and unacceptable" and sustain criminal liability.

What happened

Ms Veakins was employed by Kier Islington from September 2003 until July 2005 with no problems, but went on sick leave with depression in September and terminated her employment in June 2006 after a new supervisor - Jackie Lavy - took over. Ms Veakins claimed the supervisor had made life "hell" for her. Ms Veakins claimed that, as her employer, Kier Islington was vicariously liable for her behaviour under section 1(1) of the PHA.

Section 1(1) of the PHA states that a person must not pursue "a course of conduct which amounts to harassment" of someone else and which "he knows or ought to know amounts to harassment of the other". "Harassment" is not exhaustively defined but section 7(2) states that it includes "alarming the person or causing the person distress"

Relying on the cases of **Majrowski v Guy's and St Thomas' NHS Trust** and **Conn v Council and City of Sunderland**, the county court judge ruled against Ms Veakins on the basis "that the conduct concerned must be of an order that would sustain criminal liability". In this case, the judge said, it "plainly" was not.

The Court of Appeal, however, disagreed. It said that, since **Majrowski**, the primary focus for judges, when deciding whether the harassment satisfies the definition in the Act, is whether the conduct is "oppressive and unacceptable" and would sustain criminal liability.

In this case, it said that the substantially unchallenged account given by Ms Veakins of victimisation and demoralisation had reduced a "usually robust woman to a state of clinical depression". That, said the court was not just unreasonable or part of "the ordinary banter and badinage of life". Instead it had crossed the line into conduct which was "oppressive and unreasonable."

It noted that since the case of **Hatton v Sutherland** it was more difficult for employees to bring successful negligence claims based on stress at work, as a result of which more employees were turning to the harassment legislation for redress. Although it was unlikely that Parliament had the workplace in mind when it drafted the legislation, the Court stated there was nothing in it to say it could not be used to tackle workplace harassment. Having said that, however, it implied that in most cases, employees would have to seek redress in the employment tribunal.

It also cautioned that "it should not be thought from this unusually one-sided case that stress at work will often give rise to liability for harassment. I have found the conduct in this case to be "oppressive and unacceptable" but I have done so in circumstances where I have also described it as "extraordinary". I do not expect that many workplace cases will give rise to this liability". [[Back to contents](#)]

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LET ME GO

Under the 1995 Disability Discrimination Act (DDA), employers have to make reasonable adjustments in certain circumstances. In **Secretary of State for the Department for Work and Pensions v Alam**, the Employment Appeal Tribunal (EAT) said that employers do not have to make adjustments if they knew or ought to have known about the employee's disability, but did not know and could not be expected to know that it would have a specific effect on them.

What happened?

Mr Alam, an administrative officer for the DWP, suffered from depression. On 7 March 2008 he left work early without permission. Following a disciplinary hearing, he was given a 12-month written warning. He then argued that his employers should have made a reasonable adjustment for him as required under the DDA.

The tribunal agreed that Mr Alam was disabled and that the DWP should have known this by March 2008. It had indirectly discriminated against him by applying a provision, criterion or practice that "he should either ask for, and get permission from his line manager before leaving his workplace or receive a disciplinary sanction of a twelve month written warning."

It held that Mr Alam's disability affected his ability to regulate his feelings and he was therefore less able to control himself than a non-disabled person. As he could not control himself enough to clearly ask for permission to leave, he was much more likely than a non-disabled person to receive a formal disciplinary sanction.

But the EAT disagreed. In deciding whether the DWP was under a duty to make reasonable adjustments, it said that two questions had to be answered - firstly, whether the employer knew the employee was disabled and their disability was likely to put them at a disadvantage with people who are not disabled? If the answer is no, then the second question to ask is whether the employer ought to have known?. If the answer to that question is also no, then there is no duty to make reasonable adjustments.

In this case, the EAT said that the answer to the first question was "no" as the DWP had not known that Mr Alam was suffering from depression and did not know it was liable to have any effect on him. As for the second question, although the department ought to have known that he had a disability (i.e, depression) which meant that he sometimes had difficulty in concentrating or controlling his temper, "none of those features amount to or imply difficulty in asking for permission when it was required".

So the DWP could not reasonably be expected to have known that Mr Alam's depression would have this specific effect on him and it had no duty to make reasonable adjustments.

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IN BRIEF

Parents of children due on or after 3 April 2011 will be able to take advantage of new legislation announced recently by the Government. The rights also apply to parents of adopted children matched on or after 3 April 2011.

Under the new rights, mothers will be able to transfer the last six months of their maternity leave to the father if she decides to return to work before the end of her leave. As with current paternity leave (which only lasts for two weeks), additional paternity leave extends to partners and civil partners of mothers.

The Government says that the idea behind the new regulations is to enable parents to share a period of paid leave between them, giving families greater flexibility in how they choose to look after their children.

In essence, the regulations state that:

- Fathers who have been continuously employed for at least 26 weeks will be entitled to up to six months extra leave, which can be taken once the mother has returned to work
- Some of the leave may be paid if taken during the mother's 39 week maternity pay period at the same rate as Statutory Maternity Pay
- Parents will be required to "self certify" by providing details of their eligibility to their employer. Employers and HMRC will both be able to carry out further checks of entitlement if necessary
- The leave can start from 20 weeks after the baby's birth (or adoption) and must end 12 months after the child is born (or adopted)
- The minimum period of leave is 2 consecutive weeks and a maximum of 26 consecutive weeks
- In order to be entitled to take the leave strict notice provisions will apply

The regulations are due to come into force on 6 April 2010, but will only apply to parents of children due or matched on or after 3 April 2011.

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