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Employment Law Update | 112 - April 2010

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Member of the Employment Lawyers Association

Shaun also sat on a working party advising the Government on law relating to "working status"

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- **Unfair dismissal/redundancy**
- **Compromise Agreements/**termination packages
- **Discrimination** claims
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Welcome to the latest issue of our free employment law update. In this month's issue we look at:

DISCIPLINARIES AND GRIEVANCES A year on from the introduction of new dispute regulation rules, it is a good time to ask if the new system has made any difference and to look at the approach that employers should now be taking. [more...]

HOLIDAY NOTICE We look at a case in which the court said that, although workers are entitled to four weeks' paid holiday, they can lose holiday not taken by the end of the leave year as long as the employer had not imposed the notice provisions in an unreasonable or arbitrary way. [more...]

TRYING TO BE FAIR Although everyone has the right to a fair trial, we look at a case in which the court said that it is not a 'trump card' but one of a number of factors that tribunals have to weigh up when considering all relevant factors. [more...]

IN BRIEF We provide an overview of the 'fit' notes that replaced the old sick notes on 6 April. [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.**To obtain your own FREE copy e-mail Sarah.Leddy@Heptonstalls.co.uk putting "FREE Summary" in the subject box.**

DISCIPLINARIES AND GRIEVANCES

Following a thorough review of the statutory dispute resolution regulations that came into force on 1 October 2004, the government introduced a new set of rules on 6 April 2009.

A year on, it seems timely to ask if the new system has made any difference to the number of cases being brought to tribunal and to summarise the approach that employers should now be following.

Do the Acas figures show a difference?

According to figures released recently by Acas (the conciliation service), the answer is undoubtedly yes.

It estimates that over 5,000 tribunal claims have been avoided already as a result of the launch of its pre-claim conciliation (PCC) service in April last year to coincide with the new rules, along with the introduction of a new Code of Practice on Disciplinary and Grievance Procedures.

At the moment around 300 referrals are being received every week on average, and Acas expects this number to rise to about 400 during 2010.

What does the Acas code of practice state?

With regard to disciplinaries, the code states that:

- Employers should carry out any necessary investigations without delay to establish the facts of a potential disciplinary issue. Ideally different people should carry out the investigation and disciplinary hearings
- Employers should inform employees in writing of the basis of any alleged misconduct, giving them enough information to allow them to answer the case at a disciplinary hearing
- Employers should give employees the chance to put their side of the story before making any decisions. When giving written notification of the time and venue of the hearing, employers should include copies of any written evidence and inform the employee of their right to be accompanied at the hearing
- At the meeting the employer should explain the complaint and go through the evidence. The employee should be allowed to set out their case, answer any allegations that have been made and have a reasonable opportunity to ask questions, present evidence and call relevant witnesses, having given advance notice that they intend to do this
- After the meeting the employer must decide whether or not to take disciplinary action and inform the employee accordingly in writing. They should then allow employees to appeal any decision to formally discipline them
- If an employee is persistently unable or unwilling to attend a disciplinary meeting without good cause the employer can make a decision in their absence, on the evidence available to them

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With regard to grievances, the code states that:

- Employees should set out a potential grievance in writing, having tried to resolve it informally first of all
- Employers should then arrange for a formal meeting to be held without unreasonable delay and then decide what action to take
- They should set out their decision, in writing, and, where appropriate, make clear what action they intend to take to resolve the grievance
- The employee should be told that they can appeal if they are not happy with the employer's decision
- The appeal should be heard without unreasonable delay and at a time and place which has been notified to the employee in advance. It should be dealt with impartially and wherever possible by a manager not previously involved in the case.

The code recommends in general that:

- Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.
- Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.

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HOLIDAY NOTICE

The 1998 Working Time Regulations (WTR) state that workers must abide by certain notice provisions when asking to take their statutory holiday entitlement. In **Lyons v Mitie Security Ltd** the Employment Appeal Tribunal (EAT) said that workers can lose any holiday that they had not taken by the end of a leave year as long as the employer had not imposed the notice provisions in an unreasonable or arbitrary way.

What happened?

Mr Lyons worked as a security guard for Mitie but was only paid for the hours he worked, which were not guaranteed. Clause 5 of his contract stated that he was entitled to four weeks' paid holiday but that he had to give four weeks' advance notice of any holiday requests on a standard company form. The holiday year ended on 31 March every year.

At the beginning of March 2008, Mr Lyons had nine days' leave still due to him. Mitie failed to provide him with any shifts and it looked increasingly as if he would not receive any further work for that month. On 6 March Mr Lyons sent a fax asking to be paid for the nine days leave still due to him. He then lodged a grievance when he did not receive the payment. The company replied that as he had not given four weeks notice of the request and as it could not be carried over, he had to forfeit it.

Mr Lyons resigned and made a number of claims, including one for breach of contract for unpaid holiday leave. The tribunal rejected Mr Lyons' claim, saying it was not a breach of contract for Mitie to refuse to grant him the leave, and therefore to pay him holiday pay.

The EAT said that the question was whether the notice requirements in regulation 15 of the WTR (that employees must give statutory notice of any request subject to contractual variation) were superseded by an employee's "inalienable right" to take four weeks paid leave within the leave year as stated in regulation 13.

It concluded that this was not an easy question to answer, but "the absence of case law would suggest that employees have not been denied their reasonable requests for holiday entitlement, even towards the end of a leave year".

It decided that the right was not, however, inalienable (in other words, it was not absolute) because it was "subject to the notice provisions ... set out in Regulation 15 subject to any contractual variation. Clearly that mechanism must operate during the whole of the leave year and the mechanism must not be operated by an employer in an unreasonable, arbitrary or capricious way so as to deny any entitlement lawfully requested. But it does seem to us that the mechanism, if operated correctly by both employee and employer, could result ... in the loss of the right at the end of the leave year in respect of leave not taken".

As the tribunal had not properly dealt with whether there had been a breach of the contractual provisions in relation to holiday entitlement, it would remit the case back to a different tribunal for a re-hearing.

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TRYING TO BE FAIR

The European Convention on Human Rights states, among other things, that everyone has the right to a fair trial. The Employment Appeal Tribunal (EAT) has said, however, in Khan v Vignette Europe Ltd that the right to a fair hearing is not a "trump card" but one of a number of factors that tribunals have to weigh up when considering all relevant factors.

What happened?

After his dismissal for accessing pornographic and other inappropriate internet sites during work hours in June 2007, Mr Khan lodged a number of tribunal claims. The case was due to be heard on 14 April 2008 but had to be postponed because Mr Khan was unwell.

The tribunal then wrote to both sides in May giving a fixed listing of 1 to 5 September. Mr Khan's new solicitors asked for an adjournment on 26 August but this was refused. All the parties turned up for the hearing on 1 September at which Mr Khan asked for another adjournment, but this was again refused.

Then on 3 September Mr Khan made another application for an adjournment because, he said, the hearing dates clashed with Ramadan. The tribunal also rejected this on the ground that Mr Khan had known the dates for the hearing since May and been aware for the best part of a year when Ramadan would fall in 2008.

It also rejected his argument that it would be distressing for him during a "period of mental and spiritual purity" to be caught up in the anger or upset of litigation and a case in which he would have to consider sexually explicit images. The tribunal said that it would direct the contents and style of cross-examination and that the evidence of the sexual material (which he himself had watched at length) would not be dealt with in a way that was "disproportionate or prurient".

It also rejected his argument that not granting him an adjournment was a breach of article 6 (right to a fair trial) and article 14 (right of non discrimination) of the European Convention on Human Rights. Instead, it said these rights had to be balanced against the company's right to a trial within a reasonable time and the public interest in bringing litigation to a close. The rest of the hearing - which dismissed his claims - was conducted in his absence. Mr Khan appealed on the basis that the failure to adjourn meant he had been denied a fair trial under article 6.

The EAT, however, disagreed. It said that it could not find any "error in the Tribunal's approach or reasoning which would permit us to interfere with what was plainly a discretionary decision, arrived at after carefully balancing all the relevant factors, and which cannot, even arguably, be said to be perverse".

The tribunal was entitled to have regard to the point in time when Mr Khan first raised the issue of his beliefs and to conclude that he had not taken even the most basic steps to avoid a hearing that clashed with Ramadan. The tribunal had also been correct when it concluded that Mr Khan's religious views and his right to a fair hearing were not a "trump card" but an important factor to be weighed in the balance.

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IN BRIEF

It costs a lot of money when employees go off sick, so the Government agreed last year that the sick note (which it felt encouraged employees to stay off work) should be scrapped.

So on 6 April, the current sick note was replaced by a "statment of fitness for work" or "fit" note which is applicable to all employees in England, Scotland, Wales and Northern Ireland.

Under the old system, doctors issued a sick note to an employee when they were ill or injured which employers used as evidence for sick pay purposes. In the old sick notes, doctors simply described the individual's condition and indicated whether or not they were fit to work.

With the introduction of the new fit note, doctors can advise employees on how they may be able to return to work. The purpose of the note as evidence for claiming sick pay has not changed.

The new form requires the GP to advise the employee either that they are "not fit for work" or "may be fit for work". This means that the doctor believes the employee may be able to return to work with some help from their employer. It then allows the GP to suggest four types of alterations, as follows:

- A phased return to work
- Altered hours
- Amended duties
- Adaptions to the workplace

Under this new system, GPs can no longer declare someone to be "fit for work". If they think that the person is fit, they just do not issue a new medical certificate.

There is also space on the form for the doctor to provide more information on the condition and how it may affect what the patient does.

There is, however, some concern about how the fit note will work in practice, in particular the amount of detail that GPs will have to provide and that they may make recommendations that are either not practical or are too expensive. Although not legally binding on employers, some experts are concerned that the fit notes may also lead to more grievances.

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