Employment Law Update | **Issue 114 - June 2010**

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Head of Employment Law

Member of the Employment Lawyers Association

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

We can help employers in all aspects of employment law including :

- **Disciplinary/grievance** issues
- **Contracts of Employment**
- **Unfair dismissal/redundancy**
- **Compromise Agreements/**termination packages
- **Discrimination** claims
- **Employment Tribunal** claims including representation at the Employment Tribunal

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Welcome to the latest issue of our free employment law update. In this month's issue we look at:

HEALTH AND SAFETY AT WORK As employers, you have a general duty under the common law to look after your employees in the workplace. We provide an overview of the most important pieces of legislation that you should know about. [more...]

MAJOR OR MINOR In cases of minor misconduct, employers sometimes make use of policies aimed at negotiation and conciliation, rather than discipline. We look at a case that said that tribunals can consider whether the employer was consistent in their approach to the conduct in question. [more...]

PUBLIC OR PRIVATE To establish negligence, claimants have to show that their employer breached their duty of care to them, among other things.We look at a case in which the court said that the employer should have used their discretion to act by replacing the school's governing body with an interim executive board. [more...]

IN BRIEF We provide an overview of the main employment proposals of the new coalition 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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HEALTH AND SAFETY AT WORK

As employers, you have a general duty under the common (or judge-made) law to look after your employees in the workplace. For instance, by recruiting suitable staff and providing a safe system of work.

But you also have obligations under a range of statutes (as do your employees). The following is an outline of the main statutes, but there are many more regulations which can be found on the Health and Safety Executive website (www.hse.gov.uk).

Health and Safety At Work Act 1974

Under the 1974 Act, you have a duty "to ensure, so far as is reasonably practicable, the health, safety and welfare at work" of your employees. You therefore have to:

- employ competent staff
- provide a safe system of work as well as safe premises, plant and equipment
- provide health and safety information, instruction, training and supervision to employees
- consult safety representatives of recognised trade unions about health and safety arrangements
- ensure that your activities, premises, plant and machinery do not endanger anybody
- ensure you do not impose financial charges on employees for anything done, or for equipment provided, for health and safety purposes

The Management of Health and Safety At Work Regulations (MHSWR) 1999

These regulations require you to carry out a risk assessment of your workers and anyone else affected by what you do. The Health and Safety Executive (HSE) recommends that you:

- look for the hazards
- decide who might be harmed and how
- evaluate the risks
- record the findings
- review the assessment

If you have five or more employees, you have to record any significant findings and then monitor and review the measures you put in place.

You also have to survey your employees' health and establish procedures to follow in the event of serious or imminent danger.

You are under a special obligation to look at the risks specific to women of child-bearing age, whether pregnant or not. Once a woman has told you that she is pregnant (or given birth in the last six months or is breastfeeding), you have to then do another assessment to consider the specific risks that she might face.

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The Manual Handling Operations Regulations 1992

These regulations state that you should try to avoid situations where your employees have to undertake any manual handling operations that might put them at risk of injury. Manual handling means: any transporting or supporting of a load by hand or by bodily force, such as lifting, putting down, pushing, pulling, carrying or moving.

Where it is impossible to avoid, you have to assess the risk and then take steps to reduce the risk of injury.

Personal Protective Equipment At Work Regulations 2002

If, having done a general risk assessment under the MHSWR, you identify a hazard that you cannot eliminate, you have an absolute duty to provide suitable personal protective equipment for any employee who may be exposed to the risk. Before choosing the equipment, you have to do an assessment to make sure that it is suitable.

Provision and Use of Work Equipment Regulations 1998

These regulations state that you have to ensure that all work equipment is suitable for whatever purpose it's being used and is used safely. You have to do a risk assessment of where the work equipment is to be used and keep it in good working order.

You must make all health and safety information available to employees using the equipment and ensure they get adequate training in using it.

The definition of "work equipment" is very wide, and includes "tool box" tools such as hammers and handsaws as well as machines, lifting equipment, portable ladders etc.

Workplace (Health, Safety and Welfare) Regulations 1992

These regulations apply to factories, shops, offices, hospitals, hotels and schools as well as service roads within the confines of a factory premises, and require you to keep them in good repair. If an employee works in a location not under your control (such as a private house), then they do not apply.

Health and Safety (Display Screen Equipment) Regulations 1992

A display screen user is someone who depends on the equipment to do their job, working at the screen for more than an hour at a time on a daily basis, whether at work or at home.

Anyone satisfying the definition has to have regular breaks, preferably away from their screens. They are also entitled to eye tests at regular intervals.

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Control of Substances Hazardous to Health (COSHH) Regulations 2002

These regulations apply if you have to control exposure to hazardous substances to protect employees and anyone else who might be exposed.

You have to ensure that someone competent carries out a risk assessment before anyone uses the substances, then decide on what precautions you need to take to control exposure and ensure they're implemented. Once you've done that, you have to monitor the exposure and carry out health surveillance.

You also have to draw up plans to deal with the risk of accidents and emergencies arising from the hazard, and have regular safety drills. And you have to ensure your employees understand about the hazards and provide them with adequate training.

CORPORATE MANSLAUGHTER

Under the Corporate Manslaughter and Corporate Homicide Act 2007, companies and organisations can be charged with the offence of corporate manslaughter (England, Wales and Northern Ireland) and corporate homicide (Scotland).

The penalty can include an unlimited fine, a remedial order and a publicity order. A remedial order will require a company or organisation to take steps to remedy any management failure that led to a death. The court can also impose an order requiring the company or organisation to publicise that it has been convicted of the offence, giving the details, the amount of any fine imposed and the terms of any remedial order made.

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MAJOR OR MINOR

In cases of minor misconduct, employers sometimes make use of policies aimed at negotiation and conciliation, rather than discipline. In **Sarkar v West London Mental Health NHS Trust**, the Court of Appeal said that tribunals, when considering the "range of reasonable responses" test can take into account whether the employer had been consistent in their approach to the conduct in question.

What happened?

The Trust received a number of complaints about the behaviour of Dr Sarkar, a consultant psychiatrist, towards some of his colleagues. It agreed with Dr Sarkar that it would use a procedure called the Fair Blame Policy (FBP) to address the complaints. This procedure applied to relatively low levels of misconduct but was part of the disciplinary policy, the most severe sanction being a first written warning.

However, negotiations under the FBP broke down and D Sarkar was then suspended, partly in relation to the original complaints, and partly to new ones that had been made about his conduct. Following a disciplinary hearing, he was found guilty of gross misconduct and summarily dismissed. Dr Sarkar claimed unfair dismissal.

The tribunal agreed with him, saying that dismissal had not been within the range of reasonable responses open to the Trust. By opting to conduct the discussions within the context of the "fair blame" policy, the tribunal said that the Trust must have considered the alleged misconduct to be of a relatively minor nature. It could not then figure out how the Trust could come to the conclusion that these same offences could also constitute gross misconduct and lead to summary dismissal.

The employment appeal tribunal upheld the Trust's appeal, however, saying that the tribunal had not answered the key question - whether the decision to dismiss fell within the range of reasonable responses open to the Trust. Instead it had substituted its own view for that of the employer. It also said that just because the Trust had first tried to resolve matters through the FBP did not mean it could not then make use of the full disciplinary procedure.

The Court of Appeal has now overturned the appeal tribunal's decision. It said that the tribunal was entitled to regard the agreed use of the FBP as an indication of the Trust's view that the misconduct alleged against Dr Sarkar was relatively minor, given its readiness to deal with it under a procedure that could not result in his dismissal.

The Trust had therefore been inconsistent when it found Dr Sarkar guilty of gross misconduct on the same set of facts, resulting in his dismissal and it was a factor that the tribunal was entitled to consider when applying the range of reasonable responses test.

It also said that the tribunal had not substituted its own view for that of the Trust when considering the seriousness of the later incidents. The Trust itself had said they were relatively minor and the tribunal was entitled to accept that evidence and had not gone beyond it. [Back to contents]

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PUBLIC OR PRIVATE

To establish negligence, claimants have to show that their employer breached their duty of care to them, among other things. In **Connor v Surrey County Council**, the Court of Appeal said that the Council failed in its duty of care to the head teacher when it did not use its discretion to replace the school's governing body with an interim executive board.

What happened?

Mrs Connor became head teacher at the Monument primary school in 1998, having been deputy head since 1994. About 80 to 85 per cent of the pupils were Muslim, with 50 per cent on the special needs register. The SATS results were, on the whole, good. There were no real problems until a number of new governors - notably Paul Martin (a convert to Islam) and Mumtaz Saleem - joined the governing body in 2003.

Soon after their appointment, the new governors alleged that there was tension between the school and the local community. They subsequently made accusations of racism against two teachers and made written complaints about the head's "confrontational disposition". Two members of staff went off sick as a result.

Things then deteriorated so much that in June 2004 the head teacher - who said she was at her "wits end" - asked the local authority to intervene. It wrote a rather "anodyne" report which recommended mediation. After a petition of no-confidence in Mrs Connor which accused staff of Islamophobia started circulating in June 2005, she received counselling and in September went off sick. She was diagnosed as gravely clinically depressed. In January 2007 she made a claim of psychiatric injury against the local authority.

The High Court found in her favour. It said that the Council was on notice from June 2004 that Mrs Connor was at risk of psychiatric injury and should have replaced the governing body of the school with an interim executive board under the Schools Standards and Framework Act (SSFA). Instead, the judge said that the Council simply initiated an inquiry, followed by mediation.

The judge said the Council also gave too much weight to the complaints of the two governors and "failed to keep them in check" because of its concern that a complaint of racism would be made against it. As a result, it lost sight of the adverse effects of their behaviour on the school, the staff and Mrs Connor and failed to give the headteacher the support she asked for. The council appealed, arguing that the judge's findings of negligence related to its public law functions and could not, therefore, support a claim for damages for personal injuries.

The Court of Appeal upheld the decision of the High Court and found the Council negligent in failing to establish an interim executive board. It said that the Council should have exercised their public law duty under the SSFA in a way that fulfilled their private law duty of care to Mrs Connor, whilst making sure that it did not conflict with those duties.

It was clear that the Council had a statutory duty to deal with the serious breakdown in the management of the school affecting standards at the school under the SSFA. "The council's duty to correct that position, and their duty of care to the claimant, plainly marched together" Given the judge's findings, the Council would have been justified in starting procedures to set up an interim board by February 2005.

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IN BRIEF

The new coalition government recently published its programme for partnership government. The following are the main proposals that are likely to have an impact on employment conditions and issues in the workplace:

- Impose "sunset clauses" on regulations and regulators to ensure that the need for each regulation is regularly reviewed
- Review employment and workplace laws, for employers and employees, to ensure they maximise flexibility for both parties
- Have a full review of the terms and conditions for police officer employment
- Introduce an annual limit on the number of non-EU economic migrants admitted into the UK to live and work
- Ensure that there is no further transfer of sovereignty or powers over the course of the next Parliament and work to limit the application of the Working Time Directive
- Encourage shared parenting from the earliest stages of pregnancy – including the promotion of a system of flexible parental leave
- Promote equal pay and take a range of measures to end discrimination in the workplace.
- Extend the right to request flexible working to all employees, consulting with business on how best to do so
- Undertake a fair pay review in the public sector to implement the government's proposed "20 time" pay multiple
- Look to promote gender equality on the boards of listed companies
- Phase out the default retirement age and hold a review to set the date at which the state pension age starts to rise to 66, although it will not be sooner than 2016 for men and 2020 for women.

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