



Employment Bulletin

June 2006

Warning over warnings

The nature and terms of warnings given to an employee as part of a disciplinary process are often crucial to the outcome of an unfair dismissal case. This is because such warnings are relevant to the reasonableness of the employer's behaviour and thus to the fairness of the dismissal.

The nature of an employee's misconduct will determine whether it leads to a written or oral warning. Any written warning should set out the nature of the misconduct and the change in behaviour required. The warning should state the consequences of a failure to improve, such as the issuing of a final written warning, and also inform the employee of his or her right of appeal.

The importance of employers getting it right when it comes to warnings was illustrated in a recent case. In that case an employer issued a written warning to an employee who had failed to carry out an important step in the manufacturing process. The employer stated that the written warning would stay on the employee's record for 12 months.

Four months after the warning expired, the employee admitted further failures to

carry out the correct procedures. Following disciplinary proceedings the employer dismissed the employee. The Court of Session upheld the employee's claim of unfair dismissal.

The Court noted that the ACAS Code of Practice on Disciplinary and Grievance Procedures states that a written warning should normally be disregarded for disciplinary purposes after a specified period. The employer in this case had acted as if the warning was still current and remained in force after the 12-month period. The employer had acted unreasonably and had unfairly dismissed the employee.

The clear message from this case is to abide by the 'shelf life' of any warnings issued. Employers should also note that warnings should give an indication of the consequences of a failure to improve. In this case the serious nature of the misconduct in question may arguably have justified the employer issuing a final written warning. Final written warnings should state that recurrence of the misconduct in question will lead to the employee's dismissal.

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References - the truth, the whole truth and nothing but the truth

Another area that can cause anxiety for employers is the giving of references. There is no general legal duty on an employer to provide a reference for a past employee. But if a reference is provided then the employer is under a duty

to exercise reasonable care and skill to ensure the accuracy of any facts which are included in the reference or are used as the basis for drawing an adverse opinion about the employee. If an employer fails to exercise

reasonable care and skill then the employee can claim that the employer has been negligent and seek damages for the loss of a chance of employment.

The High Court has recently considered a case in which a financial adviser claimed breach of the duty of care in the provision of a reference leading to the loss of a job offer and, in the longer term, loss of employability in the arena of investment advice.

The defendant company in question had answered a questionnaire sent by the prospective employer. In the questionnaire the company stated that it had received complaints by clients against the financial adviser. It went on to state that the adviser was a difficult person to work

with and that the company had received two complaints of sexual harassment from other members of staff.

The High Court concluded that the answers given to the specific questions were true. On the evidence before the Court, the company had also been justified in stating that the adviser was difficult to work with. As regards the allegations of sexual harassment, the Court held that it was irrelevant that these incidents did not meet the legal definition of harassment. The company was trying to get across in plain English that complaints of a sexual nature had been made against the adviser. The company had not acted negligently and the Court dismissed the adviser's claim.

Roll up for more on holiday pay

The European Working Time Directive introduced the right for workers to receive four weeks' paid annual leave. This right was transposed into UK law in October 1998 and has led to much litigation and resulting confusion. In previous issues of the Bulletin we have examined the legality of the practice of 'rolling up' holiday pay. This practice is common in industries where there are a lot of temporary workers and involves paying an hourly rate that expressly includes an element of holiday pay. When workers actually take holiday they receive no pay.

The issue of rolled up holiday pay has now been considered by the European Court. It has ruled that there are no circumstances in which it is lawful to pay rolled up holiday pay. This practice must therefore stop. It went on to conclude that genuine holiday payments, made previously, in a comprehensible and transparent way, could be set off against a worker's entitlement to holiday pay when he or she takes leave. This avoids the possibility of an employer who has genuinely uplifted the hourly rate to take into account holiday pay being forced to pay additional holiday pay.

In response to this decision the Department of Trade and Industry has amended its guidance on the working time legislation advising employers to renegotiate contracts involving rolled up holiday pay as soon as they can. This will mean that holiday pay should be paid at the time that holiday is taken - see www.dti.gov.uk/employment.

Vicarious liability - neither a borrower nor a lender be?

Liability of an employer for the wrongful acts of its employees is termed 'vicarious liability'. Generally an employer is only liable for acts committed by those actually employed by it. In limited circumstances the employer will be deemed to be the *temporary* employer of an employee where the deemed employer has the necessary level of control over the employee. Where two employers hold an equal amount of control over the employee, a court can find both employers liable.

In a recent case the Court of Appeal had to decide who was responsible for the actions of a door supervisor at a nightclub who became involved in a fight and caused extensive injuries to a customer. The door supervisor was employed by a company supplying staff to the nightclub owner.

The Court decided that control over the door supervisor's actions had transferred to the nightclub owner. The nightclub owner told the door supervisors what to do and how to do it. In addition, all door supervisors reported to an employee of the nightclub who was in charge of security. This was not a case where a finding of dual vicarious liability could be made as the supplying company had no effective control over the employee's actions.

Employers who may find themselves in the position of borrowing or lending employees should ensure that their contractual arrangements address the issue of liability for negligent acts of employees. They should also ensure that appropriate insurance cover is maintained.

The cost of failure

The new disciplinary, grievance and dismissal procedures which came into force in October 2004 are starting to impact on tribunal cases. In summary the standard disciplinary procedure involves three steps:

1. Writing to the employee detailing the allegations against them and inviting them to a meeting with the employer
2. Holding a meeting and informing the employee of the employer's decision
3. Allowing an appeal meeting and informing the employee of the employer's final decision.

There are two important consequences of a failure to follow a standard disciplinary procedure. First, any subsequent dismissal will be automatically unfair. Secondly, a tribunal may increase the amount of compensation awarded to the dismissed employee. An example of this uplifting of compensation was given by a recent decision of the Employment Tribunal.

The case concerned a gay employee who the tribunal found had been dismissed by reason of discrimination on the grounds of sexual orientation. As the employer had totally failed to follow the standard disciplinary procedure outlined above, the tribunal increased the employee's compensation by 50 per cent. In addition to uplifted compensation for unfair dismissal, this meant that the award of £8,000 for injury to feelings was also increased by 50 per cent to £12,000. This case illustrates the dangers of ignoring the statutory disciplinary procedures and reminds employers to apply them where required.

Age discrimination

European States have until 2 December 2006 to implement legislation outlawing age discrimination. However, in the interim the European court has held that a German law passed in 2003 that gave workers aged over 52 less rights than younger workers was unlawfully discriminatory on the grounds of age. The Court said that inconsistent domestic legislation introduced after the European law was published (in this case the equality law was published on 2nd December 2000) had to be set aside, even though the period for implementation of the age legislation had not expired.

The consequences of this judgment in the UK remain to be seen. For example, if employees can identify discriminatory laws introduced in the UK after 2nd December 2000, then it seems there may be a potential claim.

However, these possibilities may never see the light of day. In the meantime there are plenty of issues to be considered by employers as the time for implementation of the age discrimination legislation - 1st October 2006 - fast approaches. One useful recent publication on the subject has been the ACAS 'Guidance on Age and the Workplace' which can be downloaded free of charge from www.acas.gov.uk.

Action points for employers highlighted by the Guidance include:

- Update equality policy to include discrimination on the grounds of age
- Consider amendments to redundancy policy - last

in first out is likely to be considered discriminatory

- Review drafting of recruitment advertisements and application forms
- Consider whether selection procedures are applied in a way that stereotypes workers
- Ensure training is available to all regardless of age
- Review performance appraisal to ensure the same standards are applied regardless of age

A recent survey commissioned by the Department of Work and Pensions found that age played a direct role in many employment policies and practices. For example, 49 per cent of the employers surveyed had a maximum recruitment age. There will be many challenges ahead for employers seeking to combat ageism in the workplace - see www.dwp.gov.uk.



Age limits and unfair dismissal

An exceptionally long-running case finally drew to a close recently following a seven-year battle by employees to show that the age limit for claiming unfair dismissal of 65 (or normal retiring age for the job in question) indirectly discriminated against men. The employees were ultimately unsuccessful but as a result of the age discrimination legislation discussed overleaf, the age limit on claiming unfair dismissal and redundancy payments will be removed from 1 October 2006 anyway.

Stress and working time

In the last Bulletin we reported on a successful claim by an employee for damages for psychiatric injury caused by stress at work. The employee had surmounted the legal hurdle of showing that it had been 'reasonably foreseeable' that he would suffer psychiatric injury. One of the significant factors in the case was that the worker had refused to sign an opt out from the 48-hour working week but his employer had continued to ask him to work around 90 hours per week.

The working time legislation has again been raised by an employee in a claim for damages for psychiatric injury in a case heard by the Court of Appeal recently. In this case the employee worked 52.5 hours per week over a period of five months. However, whilst the court found that the employer was in breach of the Working Time Regulations this, in itself, was not sufficient to justify a finding of reasonable foreseeability. The employee in this case had agreed to work the additional hours and had not complained about her workload. She had not been absent from work and had no history of illness due to stress. Her claim was dismissed.

This case illustrates that long hours in themselves are not determinative of foreseeable psychiatric injury. However, the failure to adhere to the working time legislation sets what the Court in the above case termed a 'favourable background' to a claim.

New increases to minimum wage

The Government have announced increases to the minimum wage with effect from October 2006. The rate for adult workers will rise from £5.05 to £5.35 and the rate for workers aged 18-21 will increase from £4.25 to £4.45.

Contacts

This Bulletin is designed to provide a summary of the subject matter. It does not purport to be comprehensive or a substitute for specialist legal advice in individual circumstances.

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