



Employment Bulletin

Autumn 2004

Maternity leave

Maternity leave - out of sight but not out of mind

When an employee goes on maternity leave it is all too easy for the employer to forget about her. This is a dangerous trap to fall into. In a recent case the Employment Appeal Tribunal decided that an employer had committed a fundamental breach of contract by not informing an employee on maternity leave of a job vacancy.

The employer claimed that the employee was not suitable to be shortlisted for the job in question. But the Tribunal said that this missed the point, which was that the employee believed that she was suitable for the post, and that her employer's failure to notify her of it, after 12 years' service, completely undermined her trust and confidence in the employer. The

employee's case did not depend on showing that she actually would have had a chance of obtaining the job. The employer's breach of contract entitled the employee to resign and succeed in her claim of constructive dismissal. The dismissal was automatically unfair as it was for a reason related to maternity leave.

This case has possible ramifications in other areas where employees are absent from work on a long-term basis, such as parental leave or sick leave. Effective communication of job vacancies, whether or not the employer believes the employee to be qualified or otherwise suitable, is essential to avoid potential claims.

Holiday Pay

The introduction of the right to paid holiday for workers under the Working Time Regulations 1998 has given rise to a vast amount of litigation. It is also fair to say that it has also resulted in quite a large amount of confusion. In a recent case the Employment Appeal Tribunal had to consider whether two ex-workers were entitled to bring claims for unlawful deductions from wages in respect of unpaid statutory holiday pay.

The first point to note is that the two workers in question were engaged as self-employed consultants on a commission-only basis, under contracts that did not provide for the payment of holiday pay. This, however, did not prevent them from qualifying under the wide definition of 'worker' contained in the Regulations. The Appeal Tribunal held that following termination of employment it is not necessary for the worker actually to

have taken the holiday in order to claim payment in respect of it. They went on to decide that the non-payment of holiday pay was an unlawful deduction from wages. The workers were within the time limit for claiming as they had claimed within three months of the final deduction, which was the last date on which they were paid commission.

In considering the level of unlawful deductions that had been made, the

Appeal Tribunal considered that the deductions covered the period from the date that the Regulations came into force on 1 October 1998 and the date the employment ended on 31 October 2002. The Tribunal made awards of over £30,000 to one worker and almost £20,000 to the other. These substantial amounts should convince employers to consider carefully how to limit their exposure to holiday pay claims.

IN THIS ISSUE

- 2 No general duty to take care for employee's economic well-being...
Stress and liability for psychiatric injury
- 3 Inviting employee to resign
Dispute resolution rules come into force
New tribunal claim forms
Employment Tribunals Annual Report
Requesting employee's medical records... does it breach the right to privacy?
- 4 Without Prejudice?
Retirement and sex discrimination

No general duty to take care for employee's economic well-being...

In a recent case the Court of Appeal have declined to impose 'an unfair and unreasonable burden' on employers. The burden in question was the inclusion of an implied term in every contract of employment to the effect that an employer will take reasonable care for an employee's economic well-being.

The issue arose in a case concerning a director of a company who resigned and took early retirement. In so doing he lost valuable benefits under a permanent health insurance scheme. He claimed that his employer should have warned him that resignation would prejudice his rights under the scheme. The Court of Appeal took a robust approach to this argument, holding that there is no implied contractual obligation to protect an employee's economic well-being. Such a duty could only arise in very limited circumstances.

... but take care if you set out to provide advice

By contrast to the case mentioned concerning permanent health insurance, the Court of Appeal have recently decided another case in which the Chief Constable of the Metropolitan Police Service was held liable in negligence for the economic loss suffered by an employee who lost an entitlement to a housing allowance when he transferred to another force.

The Court found that a personnel officer employed by the Met handled the arrangements for the officer's transfer. The personnel officer told the police officer that there would be no adverse effect on his housing allowance if he took some unpaid leave before joining the new force. This

proved to be wrong and the break in continuity resulted in the officer losing his monthly housing allowance.

The Court of Appeal held that the case fell within the well-established law to the effect that a person with specialist knowledge who gives advice to someone in the knowledge that it will reasonably be relied upon is under a duty of care in negligence not to give inaccurate advice. The liability arose not under a general duty but because the Met had expressly assumed responsibility for a particular matter, on which the police officer relied. Employers should be alert to their responsibilities when assuming the role of advice-giver.

Stress and liability for psychiatric injury

There have been an increasing number of cases brought by employees over the last few years claiming damages for psychiatric illness caused by pressure of work.

We reported in a previous issue of the Bulletin a decision of the Court of Appeal overturning an award of compensation in excess of £100,000 on the grounds that the employer could not have reasonably foreseen that the employee would sustain psychiatric injuries as a result of occupational stress. The employee has now successfully appealed to the House of Lords, marking a shift in emphasis in the test of reasonable foreseeability.

The House of Lords considered that on the facts of the case psychiatric injury was reasonably foreseeable.

The employee in question had already taken three weeks off work for stress and depression. Following his return to work he arranged three separate meetings with senior members of staff to inform them that he was not coping with his workload. This was enough, said the House of Lords, to trigger the duty of care. At the very least, senior management should have taken the initiative by making sympathetic enquiries when he returned to work after his sickness absence, and by making some reduction in workload. The House of Lords felt that even a small reduction in workload coupled with the support

of senior management could have made a real difference. The failure to take these steps was a breach of the duty of care, which had in turn caused the employee's nervous breakdown.

The case emphasises that where an employee has reported occupational stress the employer must be proactive. Whilst an employee cannot expect unlimited support, the onus is on the employer to make enquiries and, if necessary, to take steps to ameliorate the employee's workload.

Inviting employee to resign

From an employer's perspective, offering an employee a favourable compensation package in return for leaving employment may obviate the need to conduct lengthy and time-consuming disciplinary or capability proceedings. However, a cautionary note has been sounded by a recent decision of the Employment Tribunal.

In the case in question the employer told an employee that she could resign on 'favourable terms'. The employee refused, resigned and claimed unfair constructive dismissal. Her claim was successful. The Appeal Tribunal held that the employer's offer amounted to a vote of no confidence sufficiently serious to found a

claim of constructive dismissal. The employer had committed a fundamental breach of the implied term of mutual trust and confidence.

Whilst some of the difficulties raised by this case could be addressed by conducting any negotiations on a 'without prejudice' basis, this in itself raises a number of complexities. In particular, it is not always certain when the 'without prejudice' rules apply in the employment context and accordingly when the contents of a discussion may be admissible in later Tribunal proceedings. Employers should proceed with caution and take advice if necessary.

Dispute resolution rules come into force

The new dispute resolution procedures come into force on 1 October 2004. The rules set out minimum procedures that must be followed in cases involving discipline, dismissals or grievances. This was one of the subjects covered by our recent seminar. If you would like copies of the notes please contact Dawn Sanderson of our Marketing Department on 020 7468 2600 or by email at dsanderson@davenportlyons.com.

New tribunal claim forms

Also in force from 1 October 2004 are new rules of procedure for Employment Tribunals. The new rules have been drafted in 'plain English' to assist in the administration of justice. Among

other changes, the rules introduce new Employment Tribunal claim and response forms requiring the claimant to give more information. Use of the new forms is mandatory from 6 April 2005.

Employment Tribunals Annual Report

The recently published Employment Tribunals Annual Report for 2003/04 reports that the number of Tribunal applications increased by 17 per cent over last year to 115,042. Whilst this is the first increase for several years, it is due almost entirely to an increase in the number of cases involving more than one applicant such as failures to consult on large-scale redundancies.

Requesting employee's medical records... does it breach the right to privacy?

A recent decision by the Employment Appeal Tribunal in *Hanlon v Kirklees Council* answers the question of whether a Tribunal breaches an individual's right to privacy if it orders them to disclose their medical records.

The Access to Medical Reports Act 1988 does not permit Courts and

Tribunals to order disclosure of an individual's medical records. Nonetheless, Tribunals have ordered individuals to consent to disclosure of medical records. If this is not complied with, the Tribunal can stay or strike out a claim.

In *Hanlon v Kirklees Council*, Mr Hanlon had been ordered to disclose

his medical records but had refused to do so arguing it was a breach of his right to respect for privacy. His claim was struck out as a result. The Appeal Tribunal upheld the tribunal's decision and held that there must be a balance between the right to privacy and the right of others e.g. the right to a fair trial in litigation.

Without Prejudice?

A recent Employment Appeal Tribunal case has raised a question mark over when discussion will truly be “without prejudice” and therefore immune from being referred to a court or tribunal proceedings.

A senior executive at a bank raised a grievance and was invited to a meeting to discuss the position. At the meeting she was told that the employer needed to speak without prejudice. The employer then suggested that it would be best if the employee left the business and offered the standard redundancy package.

The Appeal Tribunal upheld the original tribunal’s finding that the fact there was a grievance did not mean that there was a dispute between the parties and that without a dispute the without prejudice rule did not apply. The employee was therefore entitled to rely on the comments made at the “without prejudice” meeting to support her claims for discrimination and victimisation. This case shows that employers must be extremely careful of their use of “without prejudice” discussions particularly where it is not clear that there is a genuine dispute between the parties.

Retirement and sex discrimination

An individual cannot normally claim unfair dismissal or a redundancy payment if he/she is over 65 years old. In a recent case, Mr Rutherford, a 67 year old sought to challenge this, claiming that it was sex discrimination and contravened EU law as it had an adverse effect on more men than women.

The case of Rutherford -v- DTI (no.2) went to the Court of Appeal and judgment was handed down on 3 September 2004. The Court of Appeal held the age limit was lawful because looking at the whole workforce there was not a sufficient adverse effect on men compared to woman.

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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