



Employment Bulletin

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Unfair Dismissal - Private Investigations

It is sometimes difficult for employers who suspect misconduct by an employee to obtain firm evidence of wrongdoing. In a recent case an employer resorted to hiring a private investigator to film an employee's movements in order to establish that he was falsifying his timesheets in relation to call outs. The employer used the filmed evidence obtained by the investigator during a disciplinary hearing and subsequently dismissed the employee.

The employee claimed unfair dismissal and argued that his employers had

breached his right to respect for his family and private life under Article 8 of the European Convention on Human Rights. This claim was rejected. The Appeal Tribunal decided that the employer could justify any interference with the employee's private life. The surveillance went to the heart of the investigation that the employer had to carry out to protect its assets. The employer was investigating criminal activity and had considered alternative methods of evidence gathering, none of which were suitable. Accordingly, the employer's decision to dismiss was fair.

Anonymous informants

Another potential source of evidence in misconduct cases is the evidence of an anonymous informant. However, such evidence needs to be handled carefully and with due regard to fairness to the accused employee. The Appeal Tribunal has laid down guidelines relating to anonymous witnesses stating that accused employees must be given as much information as possible (including details of the time and place of any observation or incident); that accused employees should be given copies of the anonymous witness statements; and that the manager responsible for the disciplinary hearings should interview the anonymous witnesses personally.

A case decided by the Appeal Tribunal recently has decided that whilst employers should try and follow these guidelines, they are not set in stone and may be departed from in certain circumstances. The case concerned a crisp factory and the alleged theft of sealed sachets containing £5 and £20 notes, which were being inserted into one in every ten crisp packets as part of a promotion. Three employees approached

management on an anonymous basis alleging three colleagues had been stealing the sachets.

The employer decided that only the senior human resources manager should know the informants' identities and that she should be the sole contact between management and the witnesses. She was not involved in the disciplinary process other than to draft witness statements,

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which were edited to preserve anonymity. These statements were shown to the accused employees at the disciplinary hearing and questions raised by the employees were put to the informants at a later date.

The Appeal Tribunal concluded that in this case there had been real problems with identifying the witnesses, who refused to sign any statement that had not been

sufficiently edited to remove the risk of identification and refused to be questioned by those involved in the disciplinary process for the same reason. This was a close-knit community and the informants' fear of reprisals had been justified. The employer's actions had been justified in the circumstances and the unfair dismissal claims of the three accused were rejected.

Fixed-term contracts

The Government estimate that there are between 1.1 million and 1.3 million workers employed on fixed-term contracts. This is approximately seven per cent of the workforce. The rights of these workers were strengthened from 1 October 2002 by the introduction of regulations prohibiting the less favourable treatment of employees on fixed-term contracts (including provision of pay and pensions). Despite the large numbers of employees involved, cases have been slow to come through the system and it is only now that the first two cases concerning the terms and meaning of the regulations have been considered.

In the first case the Court of Appeal decided that the non-renewal of a fixed-term contract could not, of itself, constitute less favourable treatment contrary to the regulations. To hold otherwise would mean that an employee whose employment is ended by the non-renewal of a fixed-term contract would always be able to bring a claim under the regulations.

The second case concerned a contract that was stated to run until 31 July 2003. It went on to provide that either party could terminate the contract by giving one week's notice. In January 2003 the employer dismissed the employee with one week's notice. The issue for the Appeal Tribunal was whether the contract was a fixed-term contract under the regulations. The Appeal Tribunal held that the notice provision did not prevent the contract from coming within the definition contained in the regulations.

Both cases have been returned to Employment Tribunals to be re-heard and in the first case the Court of Appeal overturned the decision of the Appeal Tribunal. It seems that it will take some time before any firm views can be taken on the impact of the regulations.

Long-term liability for post-employment victimisation

Employees are protected against discrimination whilst employed, but how much protection do employees have against discrimination by ex-employers once they have left employment? In broad terms if the discrimination arises out of the employment relationship then it will be unlawful. So, for example, a discriminatory refusal to provide a reference to a new employer is unlawful even though the employer is no longer the employee's employer.

In a recent case the Appeal Tribunal considered for how long this liability continues. The case concerned a former employee who left his first employer's employment and fourteen months later began providing services to a second employer. When the second employer suddenly ended the arrangement the employee alleged that the first employer had suggested to the second employer in an unsolicited approach that they should not continue to engage the employee. The employee further alleged that this statement was made because he had brought successful claims of sex discrimination against the first employer during his employment. The employee made a tribunal claim alleging that the first employer had victimised him.

The Appeal Tribunal held that the employee's arguments were legally sound. Liability for discrimination was not limited to the first occasion on which a reference was requested. An employee has an expectation of non-discriminatory conduct on the part of an employer, whenever there may be contact or communication with a subsequent or potential employer. The Appeal Tribunal sent the case back to the original Tribunal to establish whether the employee had proved his case factually. In the meantime the message to be taken from this case is that spoiling a subsequent employment, whether on a solicited or unsolicited basis, and however long after the employee has left employment, is likely to be unlawful.

Time off for dependants - no compassionate leave for bereavement

Employees are permitted to take a reasonable amount of unpaid time off in order to deal with a number of unexpected circumstances involving a dependant. One of the circumstances in which time off may be taken is the death of a dependant. It is automatically unfair to dismiss an employee for exercising the right to take time off. The time off provisions have come under scrutiny in a case heard by the Appeal Tribunal.

The employee in question had taken five days' bereavement leave

following the death of her mother. Her doctor then signed her off work for a further 4 weeks as a result of 'bereavement reaction'. In the preceding ten months the employee had been absent for 17 days. The employer dismissed the employee, citing her poor absence record. The employee claimed that the employer had dismissed her because she had taken time off because of the death of a dependant and that her dismissal was automatically unfair.

The Appeal Tribunal decided that the

right to time off does not cover time off to deal with the emotional effects of bereavement. The Tribunal stated that the right to time off in relation to the death of a dependant covers time off to make funeral arrangements and to attend the funeral, together with matters such as registering the death and applying for probate. The right is concerned with unexpected events and does not entitle employees the right to take time off beyond the reasonable amount necessary to deal with the immediate crisis.



Parental leave provisions considered

The right for employees with more than one year's service to take up to 13 week's unpaid parental leave has been around for over five years but it is only now that the Appeal Tribunal have considered the relevant provisions.

In a judgment that should come as no surprise to those familiar with the legislation, the Tribunal decided that under the scheme of parental leave that applies where the employer and employee have not agreed any other provisions, leave can only be taken in blocks of one week and not as individual days. Accordingly, an employee who was disciplined for taking a day off work to care for his son was not subjected to a detriment for a reason related to parental leave as he did not have the right to take one day's parental leave.

Information and consultation - new requirements

Employers should note that new regulations come into force on 6 April 2005 giving employees in organisations over a certain size the right to request a consultation structure that an employer must use to consult on matters affecting their employment.

The obligation to negotiate an information and consultation scheme will come into play where ten per cent of the workforce demands it. Where there is already a valid scheme in existence, 40 per cent of the workforce must vote in favour of entering negotiations on a new scheme.

The regulations are being phased in and will apply to organisations with 150 or more employees from 6 April 2005, organisations with 100 or more employees from 6 April 2007 and organisations with 50 or more employees from 6 April 2008.

Discretionary Bonuses could give rise to a Contractual Entitlement

The recent case of *Cantor Fitzgerald International v Horkulak* has clarified the circumstances in which an employee may be able to claim payment of a bonus even if it is stated to be discretionary.

The Facts

Mr Horkulak worked for Cantor Fitzgerald, the bond and money-broking house. He received an annual salary of £250,000, he was entitled to an annual loyalty bonus of £200,000 and his contract stated that his employer "may" in its discretion pay him an annual discretionary bonus. Mr Horkulak resigned from his employment due to bullying and intolerable behaviour from the President who had threatened to "break him into two" and "rip [his] head off." The Judge accepted that Mr Horkulak had been constructively dismissed and he was awarded the discretionary bonuses he would have been paid had he not been dismissed.

The Law

In the Court of Appeal case of *Lavarack v Woods of Colchester Limited* in 1967 it was held that damages for a wrongful dismissal case should not include an award for a discretionary bonus as the bonus was not considered a contractual entitlement.

However, in 2000 the High Court case of *Clark v Nomura International Plc* decided that an employer cannot withhold a discretionary bonus capriciously or in bad faith. The Court held that the employer had acted in breach of contract when deciding not to pay the employee a bonus as it had exercised its discretion "irrationally or perversely".

In Mr Horkulak's case the Court of Appeal have now confirmed that any discretion must be exercised rationally and in good faith in accordance with the implied term of trust and confidence. They stated that Cantor Fitzgerald should have exercised its discretion by reference to his performance when deciding what, if any bonus to award. Furthermore, it was considered that the clause was intended to give rise to a contractual entitlement as it was contained in a contract in a high earning and competitive activity.

The Implications

- The alarming fact about this case is that an employee may be awarded a bonus as a contractual entitlement even if it is stated to be entirely discretionary.
- Any discretion toward a bonus based on an employee's performance must be exercised rationally and in good faith.
- This means that avoiding payment of discretionary bonuses could be more difficult in future.

Employers should consequently review bonus schemes and discretionary bonus clauses in contracts of employment.

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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