

EMPLOYMENT LAW UPDATE



SPRING 2008

MANAGING SICKNESS ABSENCE

AGE DISCRIMINATION – CAN IT BE JUSTIFIED?

JOB APPLICANTS & DISCRIMINATION

TAKING INTO ACCOUNT EXPIRED WARNINGS

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In this issue of the Employment Law update we focus on the management of sickness absence. This is an area where employers need to tread carefully, and to balance the need to show concern with the need to avoid putting undue pressure on the employee concerned.

We also look at age discrimination, which is different from other forms of discrimination in that it can be lawful, but only if it can be objectively justified.

Employers may wish to review their procedures, in the light of our guidance on dealing with speculative job applications. In certain circumstances, applicants who apply 'on spec' may be covered by discrimination legislation.

MANAGING SICKNESS ABSENCE

With workplace sickness absence currently headline news, employers are advised to manage their employees' short- and long-term sickness absence carefully

Sickness absence includes:

- Recurrent short-term absence;
- Long-term sickness absence;
- Issue-avoidance 'illness';
- Health problems impacting on employees whilst at work.

RECURRENT SHORT-TERM ABSENCE

If absences are short-term and intermittent, employers should have an informal meeting with the employee, to draw to their attention that their attendance is cause for concern, and the reasons for that concern. If there is no improvement, then the employer should consider whether to instigate its disciplinary procedure or, if it has one, its attendance procedure.

Any warning should be issued following a fair procedure and should be accompanied by a timescale and suggestions for improvement, together with details of the action the employer will take if there is insufficient improvement within the specified timescale. Employers should remember that procedures should be used to encourage employees to improve, rather than just as a way of imposing punishment.

If the employee's attendance does improve within the specified time period, but subsequently deteriorates, the employer will not be able to move straight towards dismissal but will need to monitor attendance again and follow fair procedures in considering whether a further disciplinary warning is warranted, followed by a further period for improvement.

Also with short-term absences that are apparently unconnected, employers should investigate whether there is any underlying health problem that the employee is reluctant to address, and which is contributing to their taking time off work. A medical report may therefore be needed. Be aware, though, that the employee's absence may not even be health-related; it may relate to a problem with a colleague, manager or workload.

LONG-TERM ABSENCE

In the case of long-term absences, employers should establish the reason for absence so as to rule out or deal with any work-related cause or trigger. Employers should be alert for signs of workplace stress (see below). It will also be important to investigate whether the employee has a disability (see below).

Maintaining contact with the employee

Maintain appropriate contact with employees on sick leave. The amount of contact will depend on the employee's job and the size and nature of the employer's business. Keep a balance between showing concern and offering support, and maintaining sufficient distance so that the employee does not feel pressured to offer help or feedback on office developments.

Medical evidence

If there is an apparent underlying cause, consider a medical report. Depending on the circumstances, this may be a report by the employee's GP, an independent specialist or occupational health. The employer should act in accordance with any recommendations the report makes, unless there is clear evidence contradicting them.

“Employers should remember that procedures should be used to encourage employees to improve, rather than just as a way of imposing punishment”



Paul Seath
Solicitor

As a general rule, reports from an independent specialist or occupational health are best. Always, though, involve the employee in preparing the letter of instruction, which should set out the background, the nature of the role, and should ask specific questions about the prognosis and what the employer can do to facilitate a return to work.

It would also be sensible to meet with the employee to discuss the report prior to taking any action on the basis of its recommendations. It is good practice to write to the employee in advance, setting out the nature of the meeting so that the process can be conducted more efficiently, otherwise the employee can legitimately ask for more time to prepare. It may be necessary to hold more than one meeting.

Avoiding disability discrimination

The medical report may also reveal whether the employee is likely to be disabled for the purposes of the Disability Discrimination Act 1995 (DDA). An individual will qualify as disabled for the purposes of the DDA if they have a physical or mental impairment that has a substantial and long-term effect on their ability to carry out normal day-to-day activities.

If an employee satisfies the definition, employers must be careful not to discriminate against them either on the grounds of their disability (direct discrimination) or for a reason related to their disability (disability-related discrimination). Employers may also have a duty to make 'reasonable adjustments'.

'Reasonable adjustments' & alternative employment

In consultation with the employee, an employer should consider whether any reasonable adjustments could be made to enable the employee to return to work in some capacity.

Making appropriate adjustments would go towards discharging the employer's duty under the DDA in the case of a disabled employee, and would also be part of a reasonable capability procedure in the case of an employee on long-term sickness leave.

Possible reasonable adjustments could include: a phased return or part-time work (note any associated payment issues); providing alternative roles or duties; changing the workplace; and altering work hours.

Medical advice should also be sought if there is any doubt about the prognosis of an employee's illness; or about the scope of any adjustments that could be made and whether or not they would enable an individual to return to work at some stage.

The duty to make reasonable adjustments also applies to the procedure for managing sickness absence. For example, meetings could take place at the employee's home or another convenient venue, or the employee might require more notice of meetings than provided for in the employer's policy, or more time to read material and prepare for meetings. However, provided an employer is flexible, an employer will not be expected to hold off from taking decisions indefinitely.

ISSUE-AVOIDANCE 'ILLNESS'

Some employees 'go sick' when called to a disciplinary meeting or in other similar situations. It is important for the employer to maintain contact and retain control of the situation.

However, care should be taken, as there is a risk that an employer who tries to make too much contact could be accused of harassment. This risk may be increased if the employee is alleging that their illness is work-related, and especially if it is linked to previous workplace bullying.

If the employee is too sick to attend the meeting, it would be sensible for the employer to postpone it once and consider whether there is a real need to progress the disciplinary issue. If the employer does consider that there is a real need, then he or she should reschedule the meeting and consider the following options:

- Holding a meeting at the employee's home or at another convenient venue;
- Having a representative of the employee attend in the individual's absence; or
- Dealing with matters in writing.

If a meeting with the employee still cannot take place, the employer could consider proceeding in the employee's absence. If they do, they should state that a decision will be reached in the employee's absence and later inform them of their right of appeal.

WORK-RELATED HEALTH PROBLEMS

It may be that the employee's sickness absence is a result of work-related causes or triggers. In such a case, employers should take action to tackle them both in relation to specific employees who are (or have been) absent from work as a result, and the workforce in general, who may also be at risk.

Steps might include:

- Ensuring that up-to-date risk assessments are undertaken to identify any hazards and whether they can be eliminated or controlled;
- Recruiting additional staff, if heavy workloads have contributed to work-related stress;
- Providing additional training for existing staff;
- Providing counselling services and a confidential helpline for employees experiencing stress.

While it is reasonable to assume that an employee can withstand the normal pressures of a job, what if the employee's sickness absence has been caused by the employer?

In the recent case of *McAdie v Royal Bank of Scotland*, where an employee was dismissed after long-term absence due to stress-related illness caused by her employers, the Court of Appeal held that even where an employer is responsible for an employee's incapacity, however culpably, it would not be prevented from effecting a fair dismissal of the employee. The employer would be expected, however, to go 'the extra mile' for the employee before deciding to dismiss.

"In cases of issue-avoidance 'illness', it is important for the employer to maintain contact and retain control of the situation"

AGE DISCRIMINATION – CAN IT BE JUSTIFIED?

The age discrimination provisions are different from the other types of anti-discrimination legislation in that they permit direct age discrimination – less favourable treatment on grounds of age – where this can be justified

“The Tribunal held that, on the face of it, the arrangements were directly discriminatory and yet the discrimination was justified”

In order to justify discrimination on grounds of age, an employer must prove that the less favourable treatment is a ‘proportionate means of achieving a legitimate aim’. The test of objective justification is not an easy one. An employer must be able to provide evidence. The ACAS Guidance is summarised below:

What is a ‘legitimate aim’?

A legitimate aim might include:

- economic factors, such as business needs and efficiency;
- the health, welfare and safety of the individual (including protection of young people or older workers);
- the job’s particular training requirements.

A legitimate aim must correspond with a real need of the employer. This cannot be related to age discrimination itself – economic efficiency, for example, may be a real aim but saving money because discrimination is cheaper than non-discrimination is not legitimate.

What are ‘proportionate means’?

A Tribunal will consider:

- whether the action taken by the employer actually contributes to its legitimate aim;
- whether the discriminatory effect is significantly outweighed by the importance and benefits of the legitimate aim;
- whether the legitimate aim can be achieved by less or non-discriminatory means – if so, these must take precedence.

The justification defence

In *Bloxham v Freshfields Bruckhaus Deringer*, (October 2007), the Respondent, a law firm, made changes to its partners’ pension scheme. Mr Bloxham, a 54-year-old partner of the firm, claimed that he had been disadvantaged by transitional pension arrangements for partners over 55. The Tribunal held that, on the face of it, the arrangements were directly discriminatory and yet the discrimination was justified.

The Tribunal found that the partners’ general aim in reforming the pension scheme was to implement a more financially-sustainable scheme that was fairer to younger partners, and held that this was ‘a legitimate aim’.

In deciding whether the Respondent had used ‘proportionate means’, the Tribunal took into account:

- the changes to the scheme were aimed at reducing disadvantage to the younger partners;
- maintaining the status quo for those most closely affected is acceptable, although employers must also consider other steps;
- improving the position of the 50-54 year olds who were already protected by the transitional provisions would be seen as unfair and perverse;
- no alternative, less discriminatory way of reforming the scheme had been put forward.

The Tribunal found that the Respondent had done all that it could to minimise the impact on all age groups and concluded that it had comfortably passed the test of achieving a legitimate aim by proportionate means.

Before making changes to pension or other employment policies, employers should, therefore, evaluate the effect on all age groups. If a change occurs on a specific date that will affect employees differently because of their age, it will, almost inevitably, result in

direct discrimination, which the employer will have to justify in order to avoid a finding of unlawful discrimination.

In the recent case of *Seldon v Clarkson Wright and Jakes*, the Respondent successfully defended a claim of direct age discrimination by relying on the justification defence. The case involved the compulsory retirement of a partner at the Respondent law firm.

The Respondent put forward various potential aims in an attempt to justify its compulsory retirement age for partners, of which the Tribunal held that three were 'legitimate', including the aim of ensuring that associates/senior solicitors are given the opportunity of partnership after a reasonable period, thereby ensuring that they stay with the firm, and the aim of reducing the need to remove partners on performance grounds, thereby contributing to the firm's congenial and supportive culture.

For the purpose of determining whether the Respondent had used 'proportionate means', the Tribunal balanced the reasonable needs of the firm and the effect of the retirement policy on the Claimant.

The Tribunal concluded that compulsory retirement at 65 was proportionate and, although it amounted to direct age discrimination, it was objectively justified and, therefore, not unlawful.

However, in the case of *Hampton v Lord Chancellor & The Ministry of Justice*, a different Tribunal upheld an age discrimination claim brought by a Recorder who was compulsorily retired from his position at the age of 65. The Tribunal accepted the legitimacy of the Respondent's aim of maintaining a reasonable flow of new appointments to the office of Recorder and candidates for a post in the full-time judiciary.

The case, therefore, turned on the issue of proportionality. The Tribunal did not accept the 'new intake' argument – that the presence of Recorders between the age of 65 and 70 would prevent the recruitment of younger Recorders. Nor did it accept the 'sufficient experience' argument – that the presence of Recorders aged over 65 would mean that younger candidates may not gain sufficient experience to qualify them for consideration for judicial appointment.

The Tribunal held that the compulsory retirement age of 65 applicable to Recorders was not a proportionate means of achieving the Respondent's legitimate aim, and upheld the claim of direct age discrimination.

The default retirement age provisions are the subject of a challenge by Heydey, a membership organisation backed by Age Concern, which argues that they are contrary to the EC Equal Treatment Framework Directive. If this challenge before the European Court of Justice is successful, the provisions are likely to be removed – all retirement dismissals would then constitute unlawful direct age discrimination, unless they can be objectively justified.

Conclusion

An employer can treat an employee less favourably on grounds of age, provided that the treatment can be justified. Each case will be considered on its particular facts. Employers are strongly advised to ensure that they have real evidence to prove that they have a legitimate aim and, furthermore, that they have used proportionate means to achieve that aim.

If an employer can achieve its legitimate aim by using less or non-discriminatory means, it is unlikely to be able to justify the less favourable treatment and would not, therefore, succeed with the justification defence.

“The test of objective justification is not an easy one. An employer cannot rely on assertions alone...”



Kathryn Lloyd
Solicitor

JOB APPLICANTS & DISCRIMINATION

Employers are advised to treat speculative job applications carefully as applicants can sometimes be protected by discrimination legislation

“Anyone making a speculative application will not be protected by the discrimination legislation, unless the employer actually has employment to offer”



Louise McCartney
Solicitor

Many organisations receive speculative applications. In a recent case, the Employment Appeal Tribunal (EAT) examined how the discrimination legislation applies to such applications.

The case involved a claimant who described himself as a performance artist. He wrote to an art gallery and suggested that it might like to host a ‘performance’ around the reconstruction of a burial tomb built out of sugar cubes. The gallery politely declined.

The Claimant alleged the gallery’s refusal of his suggestion amounted to unlawful discrimination under the Employment Equality (Religion or Belief) Regulations 2003. The claim was struck out at a preliminary stage because the Tribunal decided the Claimant was not ‘within scope’ of the Regulations, on the basis that, whatever his application did amount to, it did not amount to an application for employment. The Claimant appealed unsuccessfully.

When there is no employment to offer

Although the legal arguments in the case focused on the nature of the Claimant’s application (i.e. whether it was for ‘employment’) the EAT made some interesting comments relating to speculative applications. It said:

‘There is to our mind a distinction between having employment to offer, on the one hand, and being prepared on the other hand to listen to a proposal which, if accepted, may mature into an offer of employment.

Reg. 6(1) applies where an employer has employment to offer. It does not apply merely because an employer is prepared to entertain a proposal for some new piece of work which, if he accepts the proposal, might then lead to an offer of employment.’

The EAT is effectively saying that anyone making a speculative application will not be protected by the discrimination legislation unless the employer actually has employment to offer. The EAT’s comments are not limited to just the religion regulations, and will apply to other forms of discrimination legislation too.

Good news for employers?

This is potentially very good news for employers who receive significant amounts of such applications. However, not all speculative applications will be unprotected. It is easy to distinguish, for example, the situation where a putative employer rejects speculative applications at a time when it does not have employment to offer, and the situation where, though there is no employment at the time the speculative application is received, the employer ‘saves’ the application and considers it later, when there is.

The EAT’s judgment would suggest that if a decision is made by the employer to reject the application at a time when there is no work to offer in any event, the applicant would have no right to bring discrimination claims, because the legislation would not be engaged. The situation would be very different if a decision was reserved until there was actual employment to offer.

It is also the case that discrimination legislation would only be engaged if the application made were an application for employment. The definition of ‘employment’

used in discrimination legislation is rather wider than that used for unfair dismissal purposes: it includes not only employment under a contract of service or apprenticeship, but also 'a contract personally to execute any work or labour', provided the dominant purpose of the contract was to secure the services of the particular individual.

However, if the application was for a working relationship other than employment (in the wider sense) then the discrimination legislation would not be engaged either – it exists to protect employees and applicants for employment.

Applications for voluntary posts are, therefore, also not generally within the scope of the discrimination legislation.

The EAT also clarified that a claimant did not need actually to have made an application in order to be protected as an 'applicant' under discrimination legislation. One example is where an employer makes recruitment arrangements that effectively prevent a potential applicant from applying. The EAT considered that 'it would be no answer that the person on whom they impacted had not made an application'.

Recruitment procedures

Employers should therefore think carefully about their recruitment 'arrangements' and consider whether they could potentially amount to unlawful discrimination, for example where the job advert or supporting information makes clear there is no point in certain categories of people applying.

Organisations may also wish to review how they deal with speculative applications, at least where the applications are for

employment. Weeding out obviously unsuitable applicants by dealing with their applications when they arrive, especially when the organisation has no employment to offer, may go some way to minimising the risk of claims from disgruntled applicants.

Where a large number of unsolicited applications are received, it can be tempting not to acknowledge them. Applicants for employment are not covered by the Statutory Grievance Procedure: they do not have an extended time period for bringing a claim by raising a grievance. They must bring a claim within three months of the act complained of, or satisfy a tribunal there is a 'just and equitable' reason for doing so outside this time limit.

Communicating a rejection to an applicant will fix the date of the act of alleged discrimination, meaning that time starts to run out on the Claimant's eligibility to present a claim. It also increases the likelihood that those who took the decision are still within the organisation and will have clearer memories for the purposes of giving evidence.

If claims are brought, the best defence usually lies in having clear evidence of a non-discriminatory reason for rejecting an application, particularly as the employer faces a reversed burden of proof in discrimination claims. Ideally, there would be a written record of the non-discriminatory reason for rejection.

“The definition of ‘employment’ used in discrimination legislation is wider than that used for unfair dismissal purposes”

TAKING INTO ACCOUNT EXPIRED DISCIPLINARY WARNINGS

Can an expired warning be taken into account when deciding whether to dismiss?

Contrary to earlier guidance, the Court of Appeal has recently ruled that an employer can indeed take into account expired disciplinary warnings when deciding whether to dismiss an employee.

“In *Diosynth* the [dismissal] was found to be unfair because it was clear that the employee would not have been dismissed if the expired written warning had not been taken into account”



John Curran
Solicitor

***Diosynth* case**

In Spring 2006, we reported the case of *Diosynth Limited v Thomson* [2006] IRLR 284 in which it was confirmed that an employer cannot place any reliance at all on expired warnings, even as one factor amongst many.

However, in *Diosynth* the decision to dismiss the employee was found to be unfair, specifically because it was clear that the employee would not have been dismissed if the written warning had not been taken into account.

Airbus case

The Court of Appeal in *Airbus UK Limited v Webb* [2008] EWCA Civ 49 was presented with a set of facts that, it felt, distinguished the case from *Diosynth*. It declared that *Diosynth* is not, as previously assumed by Courts, authority for the general proposition of law that misconduct, in respect of which a written warning was given, but has expired, can never be taken into account by an employer when deciding to dismiss an employee.

Mr Webb was employed as an aircraft fitter by Airbus Limited. In July 2004, he was summarily dismissed for gross misconduct, after having been accused of misusing company time and equipment by washing his car when he should have been working. Following an appeal however, a final written warning was handed down and this was expressed to remain on his personal file for 12 months, until the end of August 2005.

In September 2005, several weeks after the expiry of his final written warning, Mr Webb was caught with four other colleagues watching television during working hours. He was not at that time on his normal break and, following an interview and investigation, a disciplinary hearing was held, with all five being found guilty of gross misconduct. Mr Webb was summarily dismissed, but his four colleagues escaped dismissal because they had no prior disciplinary record and so were given final written warnings.

The dismissal letter stated that the reason for Mr Webb's dismissal was for 'being found watching television during company time whilst on nightshift'. It did not mention the expired final written warning.

Mr Webb subsequently brought a claim for unfair dismissal and the key issue was the significance of the expired final written warning in addressing the question of the apparently disparate treatment of Mr Webb and his colleagues.

Justification of dismissal

Airbus's disciplinary procedure provided that employees found guilty of gross misconduct could be dismissed, but that – as an alternative to dismissal and only in exceptional cases where mitigating circumstances make the dismissal inappropriate – such a penalty could be reduced to a final written warning. Mr Webb had benefited from this provision on the previous occasion on which he had initially been dismissed for gross misconduct. As all of his colleagues had good disciplinary records, the usual penalty of dismissal could be mitigated by substituting this lesser penalty and indeed Airbus applied this provision.

Mr Webb, however, had previously been disciplined for similar misconduct and so the mitigating factor was not present and the normal penalty of dismissal applied.

In the first instance, the Tribunal held by a majority that since the decision to dismiss was dependent upon taking account of an expired warning, *Diosynth* required that the dismissal should be treated as unfair. The Employment Appeals Tribunal subsequently upheld this decision.

Court of Appeal decision

The Court of Appeal found that the expired final written warning was not the principal reason for Mr Webb's dismissal. The warning ceased to have effect as a penalty that could be relied on itself as a conduct reason for dismissal. It did not necessarily follow that the misconduct, in respect of which the penalty

was imposed, ceased to have any relevance to the reasonableness of the employer's response to later misconduct.

Implications

In what is widely acknowledged as a common sense approach by the Court of Appeal, this decision has provided some welcome relief to employers who had been led to believe that they were obliged to ignore expired warnings for all purposes when considering which disciplinary sanction to impose on an employee.

It is important to note that an employer who relies on an expired warning as the principal reason for dismissal will still be acting unreasonably.

However, employers can now take comfort in the knowledge that they will not be obliged to ignore history and can instead take into account a previous expired warning and underlying misconduct in circumstances where these are not the principal reason for dismissal.

“This decision has provided some welcome relief to employers who had been led to believe that they were obliged to ignore expired warnings for all purposes”

RECENT NOTEWORTHY DECISIONS

MOBILITY CLAUSES

Employers must not ‘dodge’ between redundancy or mobility provisions

Home Office v Evans and Laidlaw
[2007] EWCA Civ1089

The Claimants worked as Immigration Officers, based at Waterloo International Terminal. Their contracts of employment contained mobility and transfer provisions that allowed their employer to require them to transfer anywhere in the UK or abroad.

Between March and May 2004, the Home Office decided to close the Waterloo branch and initially considered making redundancies.

In May, the Home Office announced to all staff that the Waterloo branch was closing and it would be enforcing the mobility provisions to move Waterloo employees elsewhere within the organisation. The Claimants, despite being repeatedly asked, did not meet their managers to discuss the move.

In August, the Claimants were informed they would be transferred to Heathrow. They both subsequently resigned and issued proceedings claiming constructive unfair dismissal.

Both the Employment Tribunal and the Employment Appeals Tribunal (EAT) found that the Claimants had been constructively unfairly dismissed.

They referred to previous EAT authority in *Curling v Securicor Limited* [1992] IRLR 549, which made it clear that an employer can only rely on a mobility clause if that decision is made clear to the employees in question. Employers cannot ‘dodge’ between the choice of redundancy or invoking a mobility clause.

The Court of Appeal disagreed with both the Tribunal and EAT, and overturned the decisions. There was no question of the Home Office ‘dodging’ between the redundancy or mobility provisions. The Home Office made it clear in their announcement that it was invoking the mobility provisions, which it was legally entitled to do. The Court of Appeal drew a clear distinction with *Curling*, where the employer only sought to rely on the mobility clause as a defence to a redundancy claim long after the event.

This case provides a useful examination of the circumstances in which mobility clauses may be applied to avoid redundancy procedures and dismissals. Even if redundancy is initially considered, so long as an employer is clear from the outset of discussions with staff that it seeks to rely on a mobility clause, employees should not successfully be able to accuse an employer of having ‘dodged’ between redundancy and invoking a mobility clause.

Employers wishing to rely on a mobility clause should nevertheless ensure that they do not act beyond the scope of the clause, and take care that such clauses are drafted as clearly as possible.

“This case provides a useful examination of the circumstances in which mobility clauses may be applied to avoid redundancy procedures and dismissals”

CASUAL WORKERS

Intermittent temporary worker did have employment status on each occasion

***North Wales Probation Area v Edwards*
UKEAT/0468/07**

The EAT has ruled that a casual worker who did not have to accept work when offered, and who could arrange for another casual worker to do work offered to them, was employed under a contract of employment.

Mrs Edwards was registered as a temporary worker of the probation service. Temporary workers were used to replace permanent members of staff unable to cover a shift. Although Mrs Edwards worked most of the shifts offered to her, she was under no obligation to accept a shift and she could arrange for someone else to cover. The probation service also had the right to cancel a booked shift if a permanent employee became available.

The EAT looked at the issue of employment status and followed the approach of the Court of Appeal in *Cornwall County Council v Prater* [2006] EWCA Civ 102.

The EAT held that a contract of employment was formed once Mrs Edwards came to work. From this point, the probation service had an obligation to provide work and pay for it and Mrs Edwards was personally obliged to carry out the work, under the control of the probation office. Mrs Edwards therefore worked under a succession of individual contracts of employment for each session of work.

This is the latest in a string of recent cases which show that Tribunals seem more willing to look at the nature of each individual assignment and find that casual workers are employees despite a lack of obligation between each engagement.

ILL-HEALTH RETIREMENT

Retirement on the grounds of ill health must be considered before dismissal

***First West Yorkshire Limited t/a First Leeds v Haigh* EAT/0246/07**

Mr Haigh, a bus driver, suffered a suspected stroke in June 2005, and was signed off work. His driving licence was suspended for a minimum of 12 months. As part of his employment benefits package, Mr Haigh had the option of enhanced ill-health retirement, if a medical certificate confirmed he was permanently incapable of fulfilling his role in the company.

The occupational health adviser provided a provisional view that a suspension of a minimum of 12 months was required, but wanted further advice from Mr Haigh's specialist to determine whether his condition was permanent.

Mr Haigh's manager considered that his ill health was not permanent, relying only on occupational health advice, and duly dismissed Mr Haigh.

The EAT believed that the employer conducted itself so as to avoid the cost of Mr Haigh

“Tribunals seem more willing to look at the nature of each individual assignment and find that casual workers are employees, despite a lack of obligation between each engagement”

“This case serves as a reminder for employers not to dismiss too quickly and ensure appropriate medical evidence is sought when dealing with employees on long-term sick leave”

taking ill-health retirement. It held that the employer had failed to take reasonable steps prior to dismissing Mr Haigh, and said that, in general, an employer should consult with the employee, take medical advice to determine the nature and prognosis of the illness, and consider alternative employment.

In this case, as the employer offered the valuable benefit of enhanced ill-health retirement, it was said that they should also consider whether an employee is entitled to that benefit before dismissal. Reasonable steps include seeking medical evidence on the question of entitlement.

The EAT added that it was good industrial practice to consider ill-health retirement where this forms part of an employee’s benefit package.

This case serves as a reminder for employers not to dismiss too quickly and to ensure appropriate medical evidence is sought when dealing with employees on long-term sick leave.

OTHER NEWS

EMPLOYMENT SIMPLIFICATION BILL

Now published, the Employment Bill includes the following proposals:

- Abolishing the statutory dispute-resolution procedures. The repeal of the procedures is expected in April 2009.
- The law on unfair dismissal will revert to the previous position governed by the House of Lords’ decision in *Polkey v AE Dayton Services*.

If procedural failings render the dismissal unfair, the Tribunal can reduce the award of compensation in proportion to the likelihood that, if the correct procedure had been followed, the employee would have been dismissed in any event.

- The powers of conciliation of ACAS will be extended; and the fixed conciliation periods abolished.
- ACAS will revise and strengthen their code of practice on disciplinary and grievance procedures, providing new statutory guidelines.
- Tribunals will have discretion to increase compensation up to 25% (instead of the current 50%) if an employer unreasonably fails to comply with the new code of practice.
- Changes to the methods of enforcing the national minimum wage and calculating arrears.

The main area of contention for employers from the new proposals is the sanction for a breach of the ACAS code of practice.

Similar to the current statutory dispute-resolution procedures, employers will have to ensure they follow every step of the procedure in order to avoid an increase in compensation.

INCREASE IN COMPENSATION LIMITS

From 1 February 2008, the main increases are:

- The maximum compensatory award for unfair dismissal has risen from £60,600 to £63,000.
- The maximum basic award for certain unfair dismissals (for reason of trade union membership, health and safety duties, pension scheme trustee duties, acting as employee representative) is now £4,400 – increasing from £4,200.
- The statutory cap on a week's pay for redundancy payments and unfair dismissal awards is now £330, up from £310.
- The upper limit for an additional award of two weeks' for failure to provide statement of employment particulars has increased to £660 from £620.

INFORMATION AND CONSULTATION OF EMPLOYEES REGULATIONS

From 6 April 2008, employers with at least 50 employees in the UK will fall within the scope of the above regulations. These potentially place duties on employers to establish agreements governing how they will inform and consult their employees about economic and employment-related matters.

For more information, please contact a member of the Employment team.

ILLEGAL MIGRANT WORKING

On 29 February 2008, the Home Office introduced legislations changing the law on employer sanctions, a summary of which was sent in a BWB e-flash.

We will be dealing with these in detail in our Immigration newsletter.

For more information, please contact Philip Trott at p.trott@bwbllp.com

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Comments

If you have any comments and suggestions, requests for other departmental updates, or would like to notify us of any changes to your contact details, please contact Mona Rahman at m.rahman@bwbllp.com

The information contained in this bulletin is necessarily of a general nature.

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