

# COOLEHADDOCK

## +employment law bulletin

### Welcome

For some time employers could be forgiven for approaching employment law updates with some trepidation. The introduction of vast amounts of new legislation and the case law that inevitably goes with it has kept employers both on their toes and the back foot – an uncomfortable (if not physically impossible) position to be in.

Well, we're bucking the trend and this month's bulletin is something of a 'good news' edition. We have case law providing supportive guidance with regard to age discrimination, grievance procedures and enforced garden leave. We start with news of a useful, if controversial, service soon to be made available to employers:-

### National Staff Dismissal Register

Action Against Business Crime (the national organisation for Business Crime Reduction Partnerships) has set up a register which allows organisations that sign up to it access to details of employees who either have been dismissed for acts of dishonesty or have left employment whilst under investigation for such conduct. Some large organisations (mainly in the retail trade) have already signed up including Littlewoods, Harrods and Mothercare. On the face of it this sounds like a very useful service but employers would be wise to take some care and possibly monitor its development. Data protection and accuracy of information held could be contentious issues. It is uncertain how those who compile the register will ensure that the information contained on it will be accurate, particularly where there have been no convictions (or even a full disciplinary hearing) and where there are merely allegations at large.

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## Grievance Procedures

The statutory dismissal and grievance procedures have, since their introduction, caused considerable controversy and negative comment. So, there won't be too many tears shed when the procedures are repealed in April 2009. Employers will have to follow ACAS guidelines (and these will be fleshed out in more detail closer to next April) but it is thought that they will be less prescriptive and more flexible than the statutory procedures. In the meantime, not a month passes without several new cases being reported which further refine the law in this area. Last month was no exception and in the case of *Clyde Valley Housing v MacAulay* the Scottish Employment Appeal Tribunal seemed to move away from previous tribunal practice to accept pretty much any sort of complaint as having met the statutory requirement to raise a grievance before a claim is accepted by a tribunal. The EAT in this case supported the employers defence that a proper grievance complaint had not been lodged by the claimant before bringing her claim. Ms MacAulay resigned from her employment and her solicitors wrote to the employer setting out a number of allegations. The employer requested clarification of the allegations but these were not forthcoming so they wrote informing Ms MacAulay that they could not deal with the grievance complaint. The EAT confirmed that Ms MacAulay could not bring her claim because she did not set out her grievance and the basis for it before making an application to the employment tribunal.

## New Positive Discrimination Plans and Right to Request Training

The Equalities Minister, Harriet Harman, has announced the introduction of new legislation to make it legal for employers to discriminate in favour of job candidates who are females and/or ethnic minorities ( i.e. positive discrimination). There was a good deal of press surrounding the new Equalities Bill, but not all of it entirely accurate. Despite the reports in many newspapers, the Minister has made it absolutely clear that there will be no obligation on employers to use positive discrimination. It will be there to use if required. Apparently, the rationale behind this legislation is to close the pay gap between men and women (women earn 40% less per hour according to Government figures). The more contentious part of the Bill is likely to be the proposal to force employers to publish details of the difference in pay between their male and female employees. It is not entirely clear at this stage how much information will need to be disclosed, but the very idea runs counter to the culture in the UK of keeping salary information confidential.

Meanwhile, the snappily named Department for Innovation, Universities and Skills has launched a consultation on the proposed new right for employees to request time off for training. It is intended that employees will be given a legal right to ask to have time away from work to undertake relevant training. The only requirement would be that training should

help improve business performance and productivity. Employers will be required to take seriously any requests they receive.

It is proposed that employers will be required to deal with requests for training by following a very similar process to the current right employees have to request flexible working. The flexible working regulations were generally considered to be lacking in any bite when they were first introduced because, if the process was followed correctly, it is a fairly straight forward matter to refuse a request without penalty. However, it has become apparent that simply following the procedures does not necessarily protect employers from discrimination claims where there are refusals. It is quite possible that the right to training (if introduced) could have similar repercussions.

### Religious Discrimination

An Employment Tribunal has awarded a Muslim woman £4,000 for injury to feelings after she was turned down for a job because she wore a headscarf. The claimant had applied for a job as a stylist in a hair dressing salon. She failed in her claim for direct discrimination. The Tribunal was satisfied that the claimant was not treated less favourably than the respondent would have treated a woman who, whether Muslim or not, and for a reason other than religious belief, wears a hair covering at all times when at work. Nevertheless, she succeeded with her indirect discrimination claim.

What is interesting about this case is that it allows us some insight into how Tribunals are approaching the issue of the employers' justification defence where there is found to be indirect discrimination. The owner apparently expected her staff to reflect what was described as the "funky, urban" image of the salon. The defence that hair stylists would generally be expected to display their own hair, particularly in a salon with a trendy image, was not considered justification enough.

### Enforced Garden Leave

In the case of SG&R Valuation Services v Boudrais, the High Court has held that it may be legitimate in certain circumstances for employers to force garden leave onto senior directors, despite there being no right to do so within the contract of employment. Two directors had resigned intending to join competitors of the employer. They were placed on garden leave but claimed that as there was no right within the employment contract for the company to do so, they had a right to work. Believing that there had been a breach of contract, they left their employment immediately to go to start work with the competitor. The employer applied for an injunction restraining the employees from doing this, and was successful. The High Court held that there was strong evidence of an intention to misappropriate confidential information and that there was evidence, on the face of it, that the directors had already done so. Garden leave could, in these circumstances, be insisted upon.

## Age Related Benefits – Discrimination

An Employment Tribunal has made an important decision regarding the provision of age related benefits and how they interact with the Age Discrimination legislation. In *Swann v GHL Insurance Services UK Limited* staff had been provided with a fund with which to purchase items from a flexible benefits package. This included an option to join a private health insurance scheme, the premiums of which were calculated according to age and gender. Being more disadvantageous to older members, the scheme was, on the face of it, discriminatory. However, the Tribunal decided that the employer had satisfied the defence of 'justification' in that it had made all reasonable efforts to offer its employees a benefits package that was as advantageous as possible to all staff. The tribunal found that the benefits package would be likely to have the desired beneficial effect on recruitment and retention of staff, claimed as justification by the employer.

## And Finally

Let's finish on a positive note. This year we've seen an accountant sue Marks and Spencer claiming £300,000 after he slipped on a grape and injured himself outside one of its stores, and another claimant win a case against a

flower seller after slipping on a petal by the flower stall. So, a Dutch restaurant owner must have feared the worst following an incident outside (and ultimately inside) his premises. In what has been described as a "mooning" that went horribly wrong, three men ran down a street in Utrecht towards the restaurant with their trousers pulled down. One of the men decided, for reasons that are not immediately apparent, to push his bare behind against the window of the restaurant. The window broke and the man fell through suffering, in the words of the police report, "deep wounds to his derriere" . Surprisingly the man, who had to be rushed to hospital, took full responsibility for his actions and rather than sue the restaurant owner he agreed to pay for the broken window! In return the owner decided not to press charges. A happy ending for everyone..

## For further information please contact:

Stephen Loosemore and Malcolm Fitzgerald at

5 The Steyne, Worthing, West Sussex BN11 3DT

tel: 01903 213511 fax: 01903 237053

Nigel Desoutter at

14 Carfax, Horsham, West Sussex RH12 1DZ

tel: 01403 210200 fax: 01403 241275

**This newsletter is a guideline only to recent changes in employment law. You are advised to seek Legal Advice from our Employment Group on any specific queries you may have.**