

COOLEHADDOCK

+employment law bulletin

Welcome

In recent weeks there have been sit-ins by workers in the UK and in France, in at least two separate instances, bosses have been barricaded in and held hostage. Events in Arkansas, USA, may cause managers (particularly stressed ones) even more concern. An employee stands accused of slipping some tranquilizers into her boss's morning coffee. The manager thought he was having a heart attack, an ambulance was called and he was rushed to hospital. The employee told police that she did it because "he needed to chill out". She is set to appear in Court this month and is currently languishing in jail.

But there is some good news out there for employers. On 6th April the much loathed statutory disciplinary and grievance procedures (AKA 'the DDPs') were finally abolished. Mr Justice Elias, the former President of the Employment Appeal Tribunal, last year described the DDPs as "so remote from reality that they would surprise even the most desiccated Chancery lawyer conjured up by the imagination of Charles Dickens". Change has finally arrived and so it is to the DDPs replacement to which we turn our main attention in this issue:-

ACAS Code of Practice – Disciplinary/Grievance

As of 6th April, the 3 stage disciplinary and grievance procedure is abolished. Employment tribunals will now take the new ACAS Code of practice into account when considering claims. Where an employment tribunal finds that an employer or employee unreasonably failed to comply with the Code, an uplift or reduction of up to 25% of any award can be imposed. Tribunals have no power to increase/reduce an award if it was reasonable for the employer or employee not to comply with the Code.

The Code requires that disciplinary/ grievance rules and procedures should be set down in writing and that examples should be given of acts the employer regards as gross misconduct (usually theft, fraud, violence, gross negligence/insubordination etc.). In short, the recommended procedures are as follows:-

Discipline

- Establish the facts of the case by way of investigation, without unreasonable delay;
- If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing together with the evidence to be relied on;
- Hold a meeting with the employee to discuss the problem;
- Allow the employee to be accompanied at the meeting by a colleague or trade union representative;
- After the meeting, decide whether or not disciplinary or any other action is justified and inform the employee accordingly in writing;
- Provide employees with an opportunity to appeal.

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Although most of this is not controversial there are aspects of the Code which are unclear and new. For example, the Code specifically says that employees should be given a “reasonable opportunity to call relevant witnesses”. This among other issues may cause difficulties and existing disciplinary procedures should be reviewed.

Grievances

- The employee must let the employer know the nature of the grievance (in writing) without unreasonable delay;
- A meeting should be held with the employee to discuss the grievance;
- The employee may be accompanied at the meeting by a colleague or trade union representative;
- The employer should decide on appropriate action and inform the employee in writing;
- The employee should be informed of the right of appeal.

Where an employee raises a grievance during a disciplinary process, the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related, it may be appropriate to deal with both issues concurrently.

Retirement at 65

As you probably read in the press, the European Court of Justice has recently rejected Heyday’s (a political branch of Age Concern) attempt to declare the UK retirement age of 65 illegal.

UK law allows employers to retire employees once they reach 65 – provide a specific ‘retirement procedure’ is followed. Heyday argued that the UK government, by allowing employers to retire employees at 65, was in breach of the European-wide prohibition on age discrimination (which does not contain a specific exemption for retirement). The European Court said it was up to each country to decide whether a retirement age was justified, and sent the case back to the English High Court to decide. Watch this space – but we predict it very unlikely the High Court will rule the UK retirement age illegal. In any event, the government has promised to review – with a view to raising or possibly even abolishing – retirement ages in a few years time.

Long Term Sick – Holiday Pay

In 2005, the Court of Appeal decided that the right to paid holiday leave did not accrue during period of sickness absence, under the Working Time Regulations. The decision was appealed to the House of Lords, which

in turn asked the European Court of Justice (ECJ) to clarify the law. The ECJ has now provided its opinion, which contradicts the Court of Appeal ruling (which will therefore be overturned when the House of Lords gives its final judgment).

In essence, the right to paid annual leave is not extinguished at the end of a leave year, even if the worker was on sick leave for the whole of that year (or for part of the year and was still on sick leave when the employment terminates). A full-time worker who is on sick leave for the whole of a leave year is entitled to 24 days paid annual leave (28 days from April 2009), despite the fact they are not actually at work. The UK courts will have to decide whether the paid leave can be taken during that year, or whether it should be carried over to another year. Either way the employee is entitled to paid leave.

The case will now return to the House of Lords for it to give a final judgment on the matter (expected later this year). One crucial issue to be decided is whether employees will be able to claim for back-payments, which could potentially be for up to 10 years, when the Working Time Regulations were first introduced.

Maternity Leave

There has been a delay in plans to extend statutory maternity pay to 52 weeks (to cover the whole period of both ordinary and additional maternity leave) and to introduce an entitlement to up to 26 weeks’ paternity leave (at least part of which would be paid), which would have the effect of allowing both parents to share the ordinary maternity leave period. The Government has previously said that has a “a goal” of extending both the statutory maternity pay period and the paternity leave period by 2010, but there are now suspicions that the change could be delayed indefinitely.

Heat of the moment resignations

What do you do if an angry employee resigns in the heat of the moment? Simply accept it? The case of Ali v Birmingham City Council is instructive. Mr Ali was employed by Birmingham City Council until 25 April 2007, when he handed in a letter of resignation due to “personal circumstances”. He claimed in the Employment Tribunal that he was under pressure, stressed out and couldn’t think straight and was not fully aware of what he was doing at the time.

Ali’s manager offered him a cooling-off period and even left him for 30 minutes to reconsider. Ali confirmed his decision to resign with immediate effect, which his manager accepted. Four days later, Ali emailed his manager asking to return. He was told that a decision

had been made not to reinstate him and his resignation therefore stood.

The general rule is that an employer is entitled to treat unambiguous words of resignation as being effective, but the Court of Appeal has identified three 'special circumstances' in which an otherwise clear and unambiguous resignation should not be relied upon:- (i) an immature employee; (ii) an employee being jostled into a decision by the employer; and (iii) a decision taken in the heat of the moment. Where these special circumstances exist, a reasonable period of time should be allowed to lapse (it has been held that this should be a day or two) and further enquiry to see whether the resignation was really intended, if circumstances arise during that period which put the employer on notice that it's desirable.

In this case, the Employment Tribunal held that Ali had confirmed his wish to resign after 30 minutes' reflection and so did not resign in the heat of the moment. Even if special circumstances had applied, the four day delay before notifying the council that he had changed his mind would have been too long.

Paid Holiday

As of 6th April, the minimum paid holiday entitlement (under the Working Time Regulations) increased to 5.6 weeks per year. This includes public holidays. This means that an employee who works 5 days per week is entitled to 28 days holiday. If the employee receives four weeks holiday plus the usual 8 public holidays, the new entitlement will be met. Care should be taken to ensure that part time workers receive the statutory minimum, because there can be confusion as to whether they are entitled to holiday if they do not work on days that fall on a public holiday. Now it is a straight forward calculation. For example, if an employee works 3 days per week, they are entitled to 17 days paid holiday per year, whether made up by way of annual leave or public holidays.

Flexible Working

Also, new from 6 April, the rules regarding employee requests for flexible working have changed. Employees who have children 16 and under can now request flexible working. Previously the upper age limit was 5. The rules remain unchanged for employees with disabled children – requests can be made if those children are under the age of 18. Employers can still refuse requests for flexible working on a number of specified grounds provided that the statutory procedure is followed. That said, care must be taken to ensure a refusal does not amount to indirect sex discrimination.

Employee or self-employed?

In the case of *Littlewood v HMRC*, the owners of a window firm argued that individuals who worked for them were independent contractors – i.e. self-employed. HM Revenue and Customs argued that the individuals were employees and that PAYE and NIC were therefore payable.

Both sides accepted that the need for mutual obligation was an essential pre-requisite for there to be an employer/employee relationship. The Special Commissioner (hearing the case) found that "mutuality of obligation" can be in relation to an individual contract and that there need not be long-term continuity. In this case, there was mutuality of obligation in the separate individual contracts. However, the Special Commissioner decided that the window firm did not exercise a sufficient degree of control over the workers to make it an employer. The workers acted independently of the firm and agreed matters within their teams, membership of which was not chosen by the firm. Team members had to follow the instructions of the persons running the site: the firm's site visits were simply to check the progress of a job, to ensure that the contract was being fulfilled, and to take account of any changes needed to the pricing because of extra work.

HMRC were therefore unsuccessful in this instance.

Retirement age

Around 6 months ago we predicted that the 'Heyday Appeal' was on its last legs. The European Court of Justice (ECJ) has found in favour of the UK in deciding that it is legal for UK employers to insist that employees retire at the age of 65. However, it would clearly be too simple for that to be an end to the matter. Whilst stating that a mandatory retirement age of 65 is capable of being objectively justified, it has referred the matter back to the High Court in the UK to consider whether it is actually justified. The ECJ said that the compulsory retirement age could remain if it had a "legitimate aim" linked to social or employment policy.

As the law stands, a British employer can dismiss employees, by reason of retirement, on their 65th birthday without redundancy or other termination payments. The employment equality regulations do give employees the right to be given at least 6 months' notice of this, and to formally make request to carry on working beyond 65. The Government has said that the existing law will be re-examined, and could be relaxed, in 2011.

TUPE – Post transfer obligations

An important decision regarding the Transfer of Undertakings legislation (TUPE) may have significant implications for transferees (e.g. a purchaser of a business). In the case of *Alemo-Herron v Parkwood Leisure*, the Employment Appeal Tribunal has held that a transferee is bound by pay increases negotiated by the transferor (e.g. the seller) with a union under a collective agreement, even where the negotiations take place after the TUPE transfer has taken place. An appeal against this decision has been lodged.

And Finally

.... has a solicitor ever caused you to feel a bit sleepy? Or, alternatively, just to have tired eyes? – it seems there's a subtle difference. A Lancaster magistrate is being investigated, after it was alleged that he fell asleep during a trial. He was sitting with two colleagues at Lancaster Magistrates Court when the defendant's solicitor made an official representation to the court that he had fallen asleep. The magistrate denied he was asleep and set the scene for a local newspaper; "the court was warm – the heating was on and the sun was pouring in through the window". He says he was still listening to the defence solicitor speaking and "I was not asleep, but I rested my eyes for five minutes or so" ...

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.