Employment Law dispatches

Willans LLP | solicitors

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Welcome

Welcome to the second edition of our electronic newsletter charting the world of employment law. In this edition we continue our review of the current employment law changes and report on:

- tribunal decisions on gross misconduct dismissals
- rights to be accompanied at disciplinary hearings, and
- sickness absence for disabled employees.

Your feedback will help us to shape future editions, so please do get in touch with us to let us know what you like and what you don't like – we are keen to listen!

Email your feedback to: **matthew.clayton@willans.co.uk**

Matthew Clayton
HR and employment partner – *Chambers UK* rated: *"is deemed a solid and respected practitioner noted for his technical abilities."*

Legislation review

With Matthew Clayton

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Changes to the TUPE Regulations

The government has now responded to the consultation feedback on the proposed changes to the TUPE Regulations. It has decided not to remove outsourcing, insourcing or retendering (known collectively as 'service provision changes') from the ambit of TUPE. However the proposal is to amend TUPE to bring it in line with recently decided case law in this respect – namely that service provision changes will only be caught by TUPE if the activities carried on after the alleged transfer are 'fundamentally or essentially the same' as those carried on before it. The greater the difference, the less likely it will be that the change is caught by TUPE.

Of course, the legal argument will then simply focus on how closely or broadly you define the 'activities'. For instance, are freight services for a particular product by road 'fundamentally or essentially the same' as freight services by train? If you define the activities simply as 'freight services' for that particular product, then the answer is probably 'yes' – but if you introduce the method of transport into the definition, then the answer may be 'no'. So, still plenty of scope for litigation!

More helpfully, the government proposes to extend the deadline (from the current 14 days to 28 days) for the old employer to provide information about the transferring employees prior to the transfer – a kind of statutory due diligence obligation introduced in 2006. It also proposes to introduce some technical changes making it easier to relocate a business upon acquisition, without incurring TUPE liabilities.

Lastly, small employers will be exempted from the obligation to elect employee representatives for the purpose of TUPE consultation, so they can simply consult directly with the employees – this simply legalises something which tends to happen in practice anyway.

The changes are likely to be introduced gradually during 2014 – we will keep you posted.

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Legislation review

Financial penalties for employment law breaches

"…the employer can be ordered to pay a penalty to the government…"

As from 25th October this year, employment tribunals are gaining the power to issue employers with financial penalties for breaches of employment law. If the tribunal considers that any worker's rights (nb – 'worker', not 'employee') have been breached, and if the breach has an 'aggravating factor', the employer can be ordered to pay a penalty to the government of between £100 and £5,000. As with a parking fine, the penalty is halved if paid within 21 days. Complicated rules come into play if more than one claim is involved, and there is plenty of debate over what amounts to an 'aggravating factor'.

Employee shareholders

The new concept of 'employee shareholder' was introduced into law on 1 September this year. These are employees who forgo some of their employment rights, such as unfair dismissal protection and redundancy payments, in exchange for free shares in their employing company. The employees receive CGT breaks on those shares.

The House of Lords insisted on certain protections for the employees concerned but there are no minimum requirements on the voting or dividend rights attached to those shares and the employees may have to forfeit them on exit.

These arrangements might be attractive to start-up companies and highly-mobile employees. However, our prediction is that there will not be widespread use of this new employee status, save as a tax-avoidance measure.

For further details see our article on the news section of our website. Click here to view

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Case law watch

With Laura Davis
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Proportion of time spent on account not conclusive for purposes of TUPE

The TUPE Regulations will apply to a change in service provider if there is "organised grouping of employees…which has as its principal purpose the carrying out of the activities concerned." The meaning of this phrase was considered in the case of *Ceva Freight (UK) Ltd v Seawell Ltd*.

Although the regulations make it clear that a 'grouping' can include a single employee, the court held that there must be an element of deliberate organisation on the part of the employer. In this case, although the employee had spent 100% of his time on the account that was transferring, the workforce was organised by reference to the type of service they provided, not by the identity of the client they worked for. For that reason, the proportion of time spent on the transferring account was irrelevant and the employee did not transfer.

What should I do?

If you are an incoming contractor being asked to inherit staff, ask for documentary evidence that there has been a deliberate organisation of the employees working on the account, and check that this aligns with the nature of the account transferring.

Case law watch

Employees beware - Big Brother could be watching

"Perhaps surprisingly, the tribunal upheld his claim, but the Employment Appeal Tribunal (EAT) has since overturned this decision…"

In *City and County of Swansea v Gayle*, the council hired a private investigator to covertly film its employee Mr Gayle playing hooky (or in this case, squash) on five separate occasions when he should have been at work, and he was promptly dismissed. Mr Gayle claimed unfair dismissal on the basis that his right to privacy under the European Convention on Human Rights had been breached, and therefore the dismissal process was unfair.

Perhaps surprisingly, the tribunal upheld his claim, but the Employment Appeal Tribunal (EAT) has since overturned this decision, stating that the tribunal's dislike of the covert surveillance was irrelevant to the question of fairness. There had been no breach of the right to privacy since the filming had taken place in a public setting, and employers are entitled to know where their staff are during working hours. In any event, Mr Gayle was effectively defrauding the council, and therefore could have no legitimate expectation of privacy.

What should I do?

Covert surveillance as part of a disciplinary investigation will not always be reasonable so take care to ensure that such steps are proportionate in the circumstances and seek legal advice if in doubt.

Serial complainant was victimised

Mr Woodhouse had previously brought nine grievances and ten tribunal claims against his employer, complaining of acts of alleged race discrimination, the way in which previous complaints were dealt with, and the manner in which his return to work following sick leave was handled. All were rejected following investigation, and he was subsequently dismissed on the basis of his "incurable disaffection" with his employer. The company considered that its working relationship with Mr Woodhouse had "irretrievably" broken down by reason of his incessant complaints. Mr Woodhouse filed a further claim for victimisation (*Woodhouse v West North West Homes (Leeds) Limited*).

Under the Equality Act 2010, an employee is deemed to have been victimised if he is dismissed, or subjected to a detriment, because he alleges unlawful discrimination.

The EAT concluded that the reasons for Mr Woodhouse's dismissal were inherently linked to the fact that he had brought so many grievances complaining of race discrimination and was likely to continue to do so in the future. It did not matter that there was no basis for most of his complaints, and the EAT upheld his claim of victimisation.

What should I do?

Dismissing an employee because you are at the "end of your tether" with their complaints is dangerous. Make sure you have a reason for dismissal that is genuinely separable from the complaints, particularly if they relate to discrimination.

Gross misconduct should not automatically lead to dismissal

"…a disciplinary sanction must always fall within the range of reasonable responses in all of the circumstances."

The EAT has provided a useful reminder in the case of *Brito-Babapulle v Ealing Hospital NHS Trust* that a disciplinary sanction must always fall within the range of reasonable responses in all of the circumstances. A finding that the employee has committed gross misconduct offers no exception.

In assessing the fairness of a dismissal, a tribunal will of course take into account the seriousness of the misconduct, and a finding of gross misconduct will almost always justify summary dismissal. However, the tribunal will also consider whether there are any mitigating factors that might take a dismissal outside of the band of reasonable responses. Such factors will include the employee's length of service, their disciplinary record and the consequences of their dismissal.

What should I do?

When dismissing for gross misconduct, show you have considered all of the circumstances in reaching that decision. E.g. state in the dismissal letter that you have taken into account relevant mitigating factors (listing them in the letter), but that they are not considered sufficient in the circumstances to avoid summary dismissal.

Case law watch

Choice of companion does not have to be reasonable

"We find the EAT's decision in this case surprising, given that the identity of the companion must be a factor in whether the request itself is reasonable."

Employees have a statutory right to be accompanied at a grievance or disciplinary hearing by a companion of their choice who is either a trade union official or a colleague. This right is triggered when the employee makes a "reasonable request" to be accompanied.

The ACAS Code of Practice on Disciplinary and Grievance Procedures states that "it would not normally be reasonable for workers to insist on being accompanied by a companion whose presence would prejudice the hearing nor…a companion from a remote geographical location if someone suitable and willing was available on site".

In the case of *Toal v GB Oils Limited*, the claimants were denied their first choice companion who was a trade union representative. The EAT said that the word "reasonable" in the legislation applies only to the request to be accompanied, and not to the choice of companion. For that reason, it upheld the employees' claims that the employer had breached its statutory obligations, and said that the ACAS Code had no bearing since the legislation was clear.

We find the EAT's decision in this case surprising, given that the identity of the companion must be a factor in whether the request itself is reasonable. However, unless and until it is superseded by another EAT or higher authority judgment, this decision remains legally binding.

What should I do?

Although the financial implications of refusing an employee their choice of companion should not be significant - only nominal compensation of £2 was ordered in this case – think carefully before refusing an employee's chosen companion, since it could render the dismissal unfair.

Reasonable adjustments when applying sickness absence management policy

The EAT has issued helpful guidance to employers on the approach they should take when assessing the level of a disabled employee's absences for the purposes of a sickness absence management policy.

In the recent case of *HMRC Commissioners v Whiteley*, the EAT suggested that an employer can take one of two approaches in these situations. First, they could try to work out precisely the level of absence that was attributable to the disability during the relevant period and only take into account the remaining absence for the purposes of management intervention. Alternatively, the employer could check, by reference to medical information, the sort of periods of absence someone suffering from that disability would reasonably be expected to have over the relevant period due to their disability, and use that figure to make an adjustment to the trigger points. The EAT said that it thought the second approach would be more attractive to employers.

What should I do?

Decide, and record in your equal opportunities policy, how you will make reasonable adjustments for disabled employees in relation to sick leave, and obtain expert medical advice in each specific case.

Holiday pay

"This case illustrates the importance of complying with the Working Time Regulations 1998…"

It has been widely reported that John Lewis will be paying a whopping £40 million to its employees as a result of miscalculating their entitlement to holiday pay over the last 7 years. They based their calculations on the employees' contracted weekly hours and standard hourly rates and did not take into account the higher rates payable for work carried out on Sundays and bank holidays.

This ties in with the case of *Neal v Freightliner* reported in September's issue of Dispatches, which held that overtime, even where it is done voluntarily, should be taken into account when calculating holiday pay. Click here to view.

What should I do?

Ensure that you comply with the Working Time Regulations 1998, which state that holiday pay, whether paid at the time the employee takes their holiday or in lieu on termination, should be based on the average hours and pay actually collected by employees over the previous 12 weeks.

Seminar programme

Employment law 'to go' seminar dates announced

Dates & topics

Tues 12 November 2013

What employers need to know about tribunal claims

Thurs 23 January 2014

Strategies for creating a lean workforce

Tues 18 March 2014

Top 5 employment law issues for non-profit organisations

Thurs 15 May 2014

Top 5 employment law issues for professional practices

For more information or to book visit **our website www.willans.co.uk/events**.

The employment law landscape is endlessly evolving and it can be a task in itself for employers to keep on top of the law.

We are running a series of breakfast briefings aimed at providing you with the top-line facts; a quick and digestible overview of changes. Take away some top tips from our breakfast seminar series.

Who should attend?

- Directors (CEO, MD, FD) and senior executives with responsibility for HR and risk management issues
- Human Resources managers and advisors
- In-house legal advisors

Why attend?

- Refresh your knowledge or ensure you are up-to-speed with employment law requirements in your organisation
- Make sure you are not falling foul of the law or exposing the organisation to unnecessary risks
- Networking opportunity to share ideas and experiences with other professionals

Contact

For advice on any of the issues covered in this bulletin or any other area of law, please contact these people in the first instance.

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