Employment Law Bulletin Issue 32

Guides & Advice

BLANDY & BLANDY
solicitors

Employment Law Bulletin Issue 32

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Employment Team News

Employment Law Update: The " Need to Know" developments, 18 October 2011, Davidson House, Reading

This Employment Update will involve a series of practical, interactive sessions focused on topical employment issues. Throughout the morning we will be using case studies and interactive discussion groups to enable delegates to better understand the changes and developments in employment law and how to apply the law to "real life" scenarios.

Key topics

1. A silver lining? Planning for an ageing workforce

This talk will evaluate the impact of the abolition of the default retirement age on employers. Specifically, it will focus on:

- Advice on how best to manage an ageing workforce
- Whether employers should continue to have retirement ages in contracts
- The steps employers should take to minimise the risks when retiring employees

2. Use and abuse of the internet and social networking – where to draw the line as an employer

- What are your employees doing on your time and in your name?
- Monitoring - your rights and obligations
- How does the law expect you to respond?

3. Tips for effective performance management from start to finish

- Creating the right culture and setting the required standard
- Practical steps to embrace (not fear) performance management
- Handling multiple issues – performance, sickness, disciplinary
- Keeping on track and managing diverting issues
- Damage limitation measures where all else fails

Timings
8.45am - 9.15am: Registration and light breakfast

9.15am - 12.15pm: Workshops

12.15pm: Q&A and finish

Venue
Davidson House, Forbury Square Reading RG1 5EU.

Who should attend?
The Employment Law Update is aimed at Directors, HR & Senior Managers who may, at some time, have to manage employment issues in the workforce.

Fees and Booking
Fee per delegate £55 + VAT.

Places are limited and last year's event was fully booked. To reserve your place please email full details of those who would like to attend to events@blandy.co.uk, typing 'Employment Law Update' in the subject line.

We will send out our invoice on booking. Please contact Annette Rumbold on 0118 951 6800 or email events @blandy.co.uk if you have any queries.

Recent cases

No such thing as a self dismissal

In the recent case of *Zulhayir v JJ Food Service Limited*, the Employment Appeal Tribunal (EAT) has held that Mr Zulhayir had not self-dismissed himself, as his employer, JJ Food Service Limited ("JJ") had not accepted a repudiation of his employment contract.

Mr Zulhayir had worked for JJ since 2001. However, in 2005, following an accident at work, he went on sick leave. Sick notes were provided until 25 June 2006 after which JJ wrote to him asking him to confirm whether he intended to continue working for JJ. The letter asked for confirmation by 5 July 2006, and said that if no confirmation was received by this date, his employment would be terminated "by [his] own volition". The letter was returned unopened, as, unbeknown to JJ, Mr Zulhayir had moved and not provided his new address to JJ.

JJ's letter was not received by Mr Zulhayir until his solicitors forwarded a copy of it to him at his new address 3 years later, in 2009! As a result of receipt of this letter, Mr Zulhayir started proceedings for unfair dismissal and disability discrimination, amongst other claims.

At pre-hearing review, the Employment Tribunal held that Mr Zulhayir's resignation had taken effect in 2006, and that his failure to inform JJ of his change in address as well as his failure to arrange for post to be forwarded, amounted to an implied termination by him of his employment contract. However, on appeal, the EAT held that the claims had been brought in time on the basis that Mr Zulhayir had not "self-dismissed" as JJ had not accepted his repudiation of the contract, and this could not be inferred from their letter in June 2006. The EAT has now allowed all of Mr Zulhayir's claims to proceed to full hearing.

Interestingly, the EAT discussed the doctrine of frustration, stating that had JJ raised this point initially i.e. in their ET3 and at the PHR in the Tribunal, it may have been possible to successfully argue that Mr Zulhayir's contract was frustrated due to his medical incapacity to work.

The case highlights the caution which employers need to take, especially in situations involving termination, to communicate messages effectively to employees; ensuring efforts are made to exhaust all avenues of communication before assuming a conclusion. It is important that employers do not assume situations without positive action being taken, and that they seek confirmation from the employee directly as to the status of the contract.

If you require further advice on this area please contact Shaun Hogan on 0118 951 6843 or at shaun.hogan@blandy.co.uk

Facebook comments did not justify dismissal

An Employment Tribunal has come to consider another case concerning the potential misconduct of an employee who made remarks about her job on her Facebook page and was dismissed as a result of those comments.

In *Whitham v Club 24 Ltd t/a Ventura ET/1810462/10* Ms Whitham worked as a Team Leader for Skoda, part of the Volkswagen group, which was a major client of the Respondent. After a difficult day, Ms Whitham updated her Facebook status with the statement, "I think I work in a nursery and I do not mean working with plants". She then wrote, "Don't worry, it takes a lot for the bastards to grind

me down". An ex employee of the Respondent responded with "Ya, work with a lot of planks though" to which Ms Whitham replied "2 true".

A number of Ms Whitham's friends on Facebook were also colleagues and two of them reported the exchange to a Line Manager. Following an investigation and disciplinary hearing, Ms Whitham was dismissed on the basis that her comments could have damaged the relationship between the Respondent and Volkswagen and had put the employer's reputation at risk. In making this decision, the employer relied on a policy which stated that it might be a breach of confidence for employees to "post information about their job on the internet".

The Employment Tribunal made a finding of unfair dismissal, holding that the comments made were relatively mild and therefore the dismissal fell outside the band of reasonable responses. According to the Tribunal, it would also have been relevant to consider the employee's exemplary past record and personal circumstances relating to her health. In addition, it could not be said that the comments would actually harm, or were likely to harm, the relationship between Volkswagen and the employer, as there was no evidence to suggest this.

The Tribunal went on to criticise the employer's investigation procedure and suggested that it would have been reasonable to obtain commentary from Volkswagen with regard to their view of the conduct in question. This is arguably quite a high test for an investigation, but had there been a forceful response from Volkswagen, this would have presumably afforded some more weight to the employer's decision.

There are some useful lessons to learn from this case, such as the level of detail or "particularity" that is required from employers in managing cases of misconduct and going through a disciplinary procedure. Whether the issue is related to social networking or not, it is important for employers to pinpoint the exact reason for the disciplinary meeting and any penalty associated with that. Here, the allegations against the employee were rather vague as the company sought to rely on Ms Whitham being in breach of "any company or client rules and standards" or "bringing the company into disrepute". It will always be useful to set out in writing the specific allegations against an employee, usually in the letter inviting them to the disciplinary meeting, and to ensure that those allegations are comprehensive and not ambiguous; the aim is to make the employee fully aware of the case against them.

In this case, the company mistakenly believed that they could not demote the employee, as an alternative sanction. This appeared to simply be a misreading of their own policies and procedure and as in any disciplinary situation, alternatives to dismissal should always be considered, even if they are discounted. Here, the appeal manager initially took the view that the Facebook comments were "not too horrendous" but later changed her mind to agree with the dismissal decision. This difference in opinion was apparently unsupported in evidence, which emphasises the importance of there being clear reasons for the disciplinary action in the first place.

It is worth noting that the Tribunal did make a 20% reduction in the employee's compensation due to her contributory fault. Cases involving misuse of the internet and social networking in particular are likely to become increasingly common; at this stage, it appears that the case law is drawing a distinction between comments or conduct that are fairly mild, and comments or conduct that are more serious in nature, and/or which have a potentially serious and negative impact on the employer. In practice, it will not always be easy to draw this distinction and obtaining legal advice before the disciplinary decision is made may help to avoid any unfair dismissal or, indeed, discrimination claims down the line. Some form of risk to the business' reputation will, it seems, be a necessary consideration – certainly in terms of at least assessing whether harm to the reputation is likely.

If you require further advice on this area please contact Laura Binnie on 0118 951 6855 or at laura.binnie@blandy.co.uk

Managers jointly and severally liable for religious discrimination claim and aggravated damages

A recent case has provided some rather sombre guidance regarding liability in Tribunal claims for those acting as agents of an organisation, together with an update on the types of situation where aggravated damages can be awarded in discrimination claims.

In the case of *Bungay & anr v Saini & anr UKEAT/0331/10*, the EAT dismissed an appeal
from two board members, who were – together with the employer – found liable for religious discrimination and harassment (the employees being Hindu). Mr Bungay and Mr Paul sat as members of the board for the All Saints Haque Centre which was a religious advice centre that had become a limited company.

Two employees were dismissed by Mr Bungay and Mr Paul and the Employment Tribunal found that the two board members orchestrated a discriminatory campaign against the employees which resulted in the dismissals and also then later made malicious complaints to the police which resulted in the two ex employees being arrested.

Rather unfortunately for Mr Bungay and Mr Paul, the corporate respondent went into liquidation shortly after the Tribunal case, which ordered compensation in the sum of £37,000 (including aggravated damages as well as injury to feelings). Mr Bungay and Mr Paul appealed to the EAT, arguing that they were not "agents" for the organisation, should not be jointly and severally liable for the compensation and damages and that it was not appropriate to take into account the post employment conduct (related to the police matters).

The EAT dismissed the appeal and held that the two board members were clearly acting as agents for the Centre. The key question in this regard was whether Mr Bungay and Mr Paul were exercising authority conferred by the Centre and it was held that this was the case, in light of their power to manage the business; there was no requirement to show that the Centre had actually authorised the board members to discriminate.

This meant that the principle of joint and several liability applied; i.e. where two or more respondents are liable for the same damage caused to the claimant, compensation may be recovered from any of those respondents, although those respondents can pursue each other in respect of outstanding shares of liability not paid. The EAT did not accept arguments from Mr Bungay and Mr Paul that some other managers were also to blame (apparently the only reason they were not respondents is because claims against them had been filed out of time) and were satisfied that Mr Bungay and Mr Paul were in any event the "prime movers" in the discrimination and had also been "instrumental" in causing the employees' arrests.

With regard to the aggravated damages that were awarded, the EAT were again satisfied that the Tribunal had not erred in making this award. Aggravated damages can be awarded to a claimant where the respondent has acted in a "high handed, malicious, insulting or oppressive manner" which has served to aggravate the claimant's injury. The damages are only applicable in serious cases but here, the EAT accepted that the board members' conduct of the disciplinary

hearings had been high handed and this was viewed in conjunction with the subsequent “unfounded and malicious” complaints that were made to the police. This had resulted in the ex employees having their finger prints taken, being arrested and being detained, all of which was distressing to them. This post employment conduct was therefore taken into consideration as there is not any law which prevented this and the ambit of aggravated damages was not so limited. This widens the scope of the claim quite considerably as post employment conduct will be relevant, provided it is serious and also is adequately connected to the original facts.

The case therefore clarifies the position on joint and several liability and serves as a warning bell for individual respondents to Tribunal claims. Often, when individual managers are joined as respondents to a Tribunal claim, the employer will agree to “cover” the individuals in their own defence and as such, will cover liability for any compensation awarded. However, for senior managers who are authorised to act as agents for a company, the decision will make for more grave reading as the case confirms that they can be held personally liable for the full compensation awards.

The case was decided under the Employment Equality (Religion or Belief) Regulations 2003 but the decision will apply similarly under the Equality Act 2010 (that Act also deals with the agency principle in the same way).

If you require further advice on this area please contact Aidan McGuire on 0118 951 6830 or at aidan.mcguire@blandy.co.uk

Can you dismiss on "unfair" grounds but still receive a finding of "fair" dismissal at Tribunal?

This was the question for the Employment Appeal Tribunal (EAT) last month when they ruled that an employee on sick leave was unfairly dismissed for misconduct when she carried on with a second part-time job, for which she was still medically fit, without permission from the first employer (Perry v Imperial College Healthcare NHS Trust [2011] UKEAT 0473_10_2207).

Ms Perry was a mid wife who worked part-time for two different employers, Imperial College Healthcare NHS Trust (Imperial) and Ealing Primary Care Trust (Ealing). Her job for Imperial included home visits which meant that she had to be capable of cycling to a number of different places and climbing high-rise council flats with broken lifts. Due to a chronic knee condition, she was signed off

work and received sick pay including statutory sick pay. However, she carried on with her Ealing job, which was desk-based and therefore not affected by her knee condition. This job was carried out on Monday evenings, and not during the hours she would otherwise have been working for Imperial. This carried on for around a year, while she was receiving sick pay from Imperial.

Imperial found out that Ms Perry was still working for Ealing, carried out a disciplinary procedure and dismissed her for gross misconduct. The reason given was that she had intentionally defrauded Imperial of "a large sum of money", by claiming sick pay whilst undertaking paid work. It refused to consider a letter from Ms Perry's GP confirming that, while she was unfit for her Imperial duties, she was still fit for her Ealing job which was clinic based and did not put stress on her knee.

On appeal, the Trust adopted a different argument, when it realised that, provided the contracts are not for the same employer or two associated employers, an employee can claim sick pay while medically unfit for one job, and carry on working in another job for which she is still fit. In doing so, Imperial relied instead on a clause in Ms Perry's contract of employment which prevented her from working elsewhere without prior permission. It argued that Ms Perry's failure to disclose the fact that she was working elsewhere denied Imperial the opportunity of redeploying her instead of putting her on sick leave.

An employment tribunal dismissed Ms Perry's unfair dismissal claim. Her appeal was however upheld by the EAT who substituted a finding that the dismissal was unfair, but that Ms Perry's compensation should be reduced by 30%, as a result of her failure to seek permission to carry on her Ealing job, as required by her contract. This was despite her genuine belief that the contractual obligation to seek permission for other work during sick leave did not apply to her (as the EAT held that the term in her contract had obviously applied). As a result, Imperial had good reason at the time to doubt Ms Perry's good intentions.

It was clear to the EAT that Imperial's original decision to dismiss for fraud had been legally and factually incorrect. There is nothing to stop an employee claiming sick pay while medically unfit for one job, and carrying on working for another job for which still fit. It referred to a passage from the HMRC's "Employer Help book for Statutory Sick Pay" which deals with employees who work under two separate contracts. Provided the contracts are not with the same employer

or two associated employers (which these were not), the employee can claim statutory sick pay if incapable of work under one contract, while still being capable of work under the other.

The EAT held that the requirement to obtain permission was not intended to furnish Imperial with information with a view to redeployment, but was concerned with addressing the question of whether such other employment may be inconsistent with Ms Perry being unfit for her duties with Imperial and designed to ensure that her eventual return to work was not delayed. Having considered the letter from Ms Perry's GP (above), the EAT held that there had been no reason for Imperial to be concerned about either of these issues. It was decided that Imperial was simply trying to salvage a misconceived decision to dismiss.

It was relevant that Ms Perry was not being paid twice for the same hours. Her work for Ealing was distinct from her contractual hours for Imperial, without a cross over in hours, and therefore, the sick pay she received from Imperial did not cover the hours she was working for Ealing.

In the particular circumstances, it was unreasonable for Imperial to have concluded that dismissal for gross misconduct was a suitable sanction for what was, at best, a minor deception.

Employers should be alert to the fact that if it an original decision to dismiss was based on facts which can no longer be supported, the situation cannot be "fudged" by simply maintaining the same decision with new grounds to support its conclusion. Appeal panels should concentrate on whether the facts before them justify dismissal as being a reasonable response. If not, the procedure should be started again with an open mind.

It is now apparent that an employee with two jobs for two different employers can be on sick leave (and receive statutory sick pay) from one employer, while continuing to perform their duties for the other employer. The caveat to this is if the employee is really capable of performing the first job, or is carrying on the second job during the hours she would otherwise have worked for the other employer.

Imperial argued that as Ms Perry was capable of desk-based work, she should have done more to let them know, so that they could consider redeployment options. However, the EAT took the view that the onus was on the employer to

consider this question and it would seem sensible therefore for employers to involve occupational health, if available, at an early opportunity, in order to establish exactly what duties the employee is capable and incapable of carrying out for the company.

If you require further advice on this area please contact Rebecca Hill on 0118 951 6833 or at rebecca.hill@blandy.co.uk

Employment Law News

Red Tape Challenge

The This has been launched by the Government in an effort to let the public "have their say" on how various laws can be simplified. There is currently a three week consultation period for employment legislation, divided into the following topics:

- Compliance and Enforcement;
- Letting People Go;
- Managing Staff; and,
- Taking People On

The Red Tape Challenge can be viewed here:

http://www.redtapechallenge.cabinetoffice.gov.uk/themehome/employment-related-law/

The website makes for an interesting read; the focus appears to be on the concern that the UK labour market has too many complications, legally, and comments can be given (by both employers and employees) directly via the website.

Qualifying period of service for unfair dismissal claims will rise to 2 years and Claimants will pay fees to bring a Tribunal claim

In a speech this week by Business Secretary Vince Cable, and an announcement from Chancellor George Osborne, it has been confirmed that from 6 April 2012, employees will need to have been continuously employed by their employer

for two years in order to be eligible to bring an unfair dismissal claim. This represents an increase of an extra twelve months from the current one year qualifying period and reverts back to the two year qualifying period that was in place between 1985 and 1999.

It would seem that an employee will need to ‘qualify’ by 6 April 2012 in order to bring an unfair dismissal claim following that date. Therefore, if they have not accrued two years’ service by 6 April 2012 (but may, for example, have accrued 18 months), they will effectively have their previous right “taken away” from them as they will not qualify under the new legislation by 6 April 2012. This point has however yet to be confirmed by the Government and it remains to be seen whether some transitional provisions may be put in place.

There will be ‘waiver’ measures in place for those who are unable to afford the fees but that detail has not yet been disclosed.

In addition, the Government has announced that fees will be introduced for Claimants to both lodge and continue with the Tribunal claims. This will apparently include a charge of between £150 – £250 to lodge a claim and a further £1,000 payable by the Claimant if a hearing date is issued for the claim. Higher fees will apply if the value of the claim is over £30,000. **However, these figures have not been confirmed as yet.** The fees will be refunded if the Claimant wins the case, but forfeited if the claim is unsuccessful. The new fee structure will apparently not be in force until April 2013.

The measures are designed to reduce the number of Tribunal claims and boost the economy; the Government believes that the number of unfair dismissal claims may reduce by around 2,000 a year with a saving of around £6 million per year. The rise in the qualifying period of service for unfair dismissal claims will clearly benefit businesses on the face of it, but some consider that the number of discrimination claims may rise as a result (those claims carrying no eligibility in terms of length of service). There are also arguments that a two year qualifying period is too long for an employee to “wait” before receiving protection from an unfair dismissal and it has even been suggested that the two year period may amount to sex discrimination, on the basis that more men than women may be able to meet it (there was in fact a case on this in the 1990s where the employer succeeded on the defence of objectively justifying the indirect sex discrimination claim). The Government’s announcements are to be generally welcomed by businesses and introducing fees for claims should help to filter out vexatious or spurious claims.

The full detail on the new rules has not yet been published and we will update you once such detail become available. The announcements have pre-empted the response to the Government's consultation that was launched earlier this year on "Resolving Workplace Disputes".

ACAS provides guidance on Social Networking

Last month, ACAS published a guidance document for employers concerning the use of social networking by employees. The number of tribunal cases and general issues surrounding this area are increasing all the time, with a large number of employees now using their Facebook and Twitter accounts at work, leading to many tricky questions for employers who discover that an employee may have acted inappropriately on those sites, potentially bringing the business reputation into disrepute.

The key points from the ACAS guide for employers are:

- To draw up a clear policy on social networking in order that employees are aware of what is acceptable and unacceptable behaviour 'online';
- To treat 'electronic behaviour' in the same way as 'non-electronic behaviour' ;
- To react reasonably to issues around social networking by asking 'what is the likely impact on the organisation?'

The full guidance document can be viewed here:

http://www.acas.org.uk/index.aspx?articleid=3381

Blandy & Blandy will be covering this topic in some detail in our Employment Update on 18 October 2011 which will include a "workshop" to discuss an example scenario based on an employee's "mis-use" of Facebook and the points for consideration by an employer.

Tribunal Statistics for 2010/2011

The statistics for the last year were published last month, the most notable results being:

- An 8% decrease in the number of claims received by Employment Tribunals as against 2009/2010, although this was still an increase of 44% as against 2008/2009. The number of age discrimination claims rose considerably (by 32%), as did claims under the Working Time Directive and the Part-Time Workers Regulations.
- A 9% increase in the number of claims disposed of as against 2009/2010.
- The average unfair dismissal award was £8,924, the average awards for discrimination claims were between £8,515 and £14,137 although age discrimination awards were substantially higher with an average of £30,289.
- More costs awards were made in favour of Respondents than Claimants (355 against 132).

Legislative Developments

National Minimum Wage increase from 1 October 2011

The adult national minimum wage has increased by 15p an hour, from £5.93 to £6.08, from 1 October 2011.

There are also the usual increases in non adult wages as follows:

- 18-20 year olds: from £4.92 £4.98 an hour
- 16-17 year olds: from £3.64 to £3.68 an hour
- apprentices: from £2.50 to £2.60 an hour

Reminder: Agency Regulations 2010 now in force

Further to updates in previous Bulletins, the Agency Regulations 2010 finally came into force on 1 October 2011. Keep in mind therefore that those agency workers with 12 weeks' service or more will be entitled to the same basic terms and conditions as permanent staff of the employer. For a full reminder, please visit our Guidance document here:

http://www.blandy.co.uk/news-events/news/?newsArticleID=357

As usual we hope that you find the newsletter useful and informative.

Please feel free to forward it on to colleagues and contacts or send us their details if they would like to receive a copy for themselves.

Past updates can be found on our website at www.blandy.co.uk/publications/update

Details of all our Employment law services can be found on our website at www.blandy.co.uk/business/employment

If you no longer wish to receive our monthly Employment Law Bulletin please reply to this email with 'Unsubscribe' in the subject line.

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