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Employment Law Bulletin

Welcome

The role of Human Resources in disciplinary proceedings continues to be a hot topic. Managers conducting a disciplinary investigation or hearing may need advice from HR. However, HR should confine their advice to technical matters such as the law and procedure. If HR try and influence the decision-maker or persuade the manager to dismiss, then this may make the dismissal unfair.

This is illustrated in the case of Mr Ramphal who was unfairly dismissed from the Department for Transport, when an HR officer persuaded the dismissing manager to change his view of the sanction from a final written warning to dismissal.

This does not mean that HR can never be the decision-makers in a case. Some smaller businesses rely on HR professionals to conduct investigations and even disciplinary hearings and appeals. The trick is to make sure that the role of HR is clearly defined. If an HR professional conducts the investigation for example, then they should not advise the manager on the disciplinary hearing or appeal. The procedure should be fair and transparent. The employee must be given the opportunity to put his case to the true decision-maker.

In a case involving Arnold Clark, different members of HR were the decision-makers at the investigation, dismissal and appeal stages. This was acceptable. However, the dismissal of Mr Spoor was still unfair, as the HR professional who conducted the disciplinary hearing did not take account of Mr Spoor's long service (42 years) and exemplary record when dismissing him for physical violence.

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Dismissal of pregnant employee

Do you have to reconsider a decision to dismiss an employee if you later find out she is pregnant? Ms Thompson was employed by Really Easy Car Credit, to do online telesales. She had worked there for a short time before discovering she was pregnant. During that time her performance was described as "average at best" and her employer raised various conduct issues with her. Ms Thompson took a day off sick. Unknown to her employer she went to hospital for a scan to find out whether she had miscarried.

About Us

Beers LLP has a national reputation and is recognised and named in the Chambers and Partners and Legal 500 directories for expertise in employment law. From our offices in the South West of England our specialist solicitors provide advice, representation and training on all aspects of employment law.

We advise strategically and tactically on how to resolve problems and disputes arising from HR issues. We look to you for your intended outcome, agree a way forward and implement it. We work with you to solve problems in a constructive and cost effective manner.

We are experienced at dealing with unfair dismissal, capability, misconduct, discrimination, union related issues, redundancy exercises and ex-employee problems.

We will represent you cost effectively in the Employment tribunals and the County Court.

We will provide you with up to date employment contracts for your staff; update your policies and procedures handbook and provide training for your managers to help you maintain best practice throughout your organisation.

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On Ms Thompson's return to work an incident occurred between her and a customer which led to her being spoken to by her manager. She became very upset during this meeting. Her employer decided to dismiss her on 3 August 2016 as they were tired of her "emotional volatility" and thought that her conduct and performance were not good enough. A letter was drafted that day, but it was not posted out as they decided to invite her in for a meeting. Ms Thompson was still within her probationary period.

Meanwhile Ms Thompson spoke to her manager on 4 August and told him that she was pregnant. On 5 August Ms Thompson returned to work. She was handed the prepared dismissal letter and explained the reasons for her dismissal, emphasising that it was nothing to do with her pregnancy.

Ms Thompson brought claims for unfair dismissal and pregnancy discrimination. She argued that the reason given for her dismissal was false. She said that the real reason was that she was pregnant, which her employer had found out the day before she was dismissed. The Tribunal found that the decision to dismiss was made before her employer knew of her pregnancy. The Employment Appeal Tribunal decided that there was no obligation on her employer to reverse the decision to dismiss once it discovered her pregnancy.

Ignorance of employment rights

A woman who was paid 33 pence per hour as a domestic worker and was unaware of her right to the national minimum wage has been successful in her claim for constructive unfair dismissal under the Employment Rights Act 1996. Ms Mruke was uneducated and illiterate. She was from Tanzania and spoke no English. Ms Mruke argued that her employer Ms Khan had breached her contract of employment by failing to pay her the national minimum wage.

Ms Mruke was unsuccessful at the first two stages of her claim. The employment tribunal agreed that failure to pay the national minimum wage could amount to a breach of contract by Ms Khan which would have entitled Ms Mruke to resign and claim constructive dismissal. However, the tribunal decided against her because she had been unaware of her right to be paid the national minimum wage and couldn't show that she had resigned as a response. Ms Mruke didn't give any reasons at all for her resignation. She did however, say that she had stayed working there for 4 years because she had no money and nowhere else to go. However, the judge thought that this was different from saying she had resigned because she was underpaid.

Sensibly the Court of Appeal disagreed and ruled that Ms Mruke had been constructively dismissed. The Court said that Ms Mruke did not have to show that she knew of her right to the minimum wage. It was important that social legislation such as the National Minimum Wage Act 1998 should be interpreted in such a way as to protect workers. Some employees could be exploited exactly because they were illiterate or uneducated. The Court ruled that there had been an egregious breach of Ms Mruke's contract of employment given the extremely low pay. Given the circumstances it was obvious that she had resigned in response to it.

Disability discrimination – definition of cancer

Cancer is listed as a disability under the Equality Act 2010, providing sufferers protection from discrimination. Employers must also make reasonable adjustments to a cancer sufferer's job to remove any disadvantage they suffer as a result of their cancer. The Employment Appeal Tribunal has now held that pre-cancerous lesions will also amount to a disability.

Ms Lofty suffered from a pre-cancerous lesion on her cheek which could result in a malignant melanoma. Cancerous cells had been found in the top layer of Ms Lofty's skin and the lesion was a type of the earliest stage of skin cancer. She was absent from work for surgery and related health issues. Her employer Mr Hamis eventually dismissed her. Ms Lofty raised an employment tribunal claim for unfair dismissal and disability discrimination. However, the employment tribunal

ruled that as the diagnosis was 'pre-cancerous' she did not suffer from cancer and was therefore not disabled under the legislation.

Ms Lofty's appeal was successful. The Equality Act only requires an employee to show they have cancer for the legal protections to apply. The medical evidence showed that there were cancerous cells in the top layer of skin and this was enough for her to be considered disabled under the law.

Redundancy bumping

A redundancy arises when there is a reduction in the employer's requirements for employees to carry out work of a particular kind. Sometimes an employee whose role is redundant can be redeployed into another role in the organisation. The occupier of that second role can be fairly dismissed instead – even though their role is not redundant. This process is known as 'bumping'.

Bumping was discussed in a recent case involving Mr Mirab who was the sales director for Mentor Graphics (UK) Ltd. The employer no longer had a requirement for the role of sales director and made Mr Mirab redundant.

The tribunal found that the dismissal was a fair redundancy dismissal. The company had looked for alternatives to dismissal and was not required to consider bumping another employee from the more junior role of account manager because Mr Mirab had not raised this as a possibility.

However, the Employment Appeal Tribunal decided that the employee does not need to specifically raise the possibility of bumping for an employer to consider it. Conversely, an employer does not always have to consider bumping for the dismissal to be fair. Fairness will always depend on the facts of the case and whether the employer fell within the range of reasonable responses open to the employer in the circumstances.

Duty to disclose relationships

The Supreme Court has decided that a head teacher, Ms Reilly was fairly dismissed for gross misconduct, for failing to disclose to her school's governing authority the fact that she had a close relationship with a sex offender. The teacher argued that she was under no duty to disclose the relationship. There was no clear clause in her contract requiring her to report such a relationship. She did not live with the offender, although they owned a house together as an investment. They went on holiday together. She was a named driver on his car insurance. They were not partners, but their relationship was thought to be more than a financial one.

The Supreme Court (and every tribunal and court before that) disagreed with Ms Reilly. It ruled that she was in breach of her contract by failing to report the relationship. As a head teacher with safeguarding responsibilities, she should have realised that her association with this man, posed a risk to the children in her care. She had a duty to inform the school, so that protective steps could be taken. It was not for the teacher to decide whether her relationship gave rise to a risk of harm. There were many ways in which the offender could have used his friendship with Ms Reilly to gain access to the school's pupils.

Sandwell Metropolitan District Council and the school in question had fairly dismissed Ms Reilly. Her refusal to accept that she had been in breach of her duty suggested a continuing lack of insight making it inappropriate for her to continue to run the school.

And Finally...

Scotland Yard reportedly spent more than £5,000 on disciplinary procedures after a policeman was accused of stealing a tin of biscuits. PC Hooper was accused of taking biscuits from a tin which belonged to his colleague. The policeman said that he had intended to share them and offered to replace the tin. After a three-day disciplinary hearing and 7 months on restricted duties, the panel found the officer had no case to answer.

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