RMI Employment Law Newsletter
Spring 2019

Welcome to the Spring Edition of the RMI Newsletter. In this update we aim to give you a round-up of some of the latest developments in employment law. Whilst this is not intended to provide a comprehensive summary of all the changes to the law, we hope to highlight some key areas of change for motor industry employers.

In the News

It's the start of the year, so we thought we would set out below in the "News" section some of the key dates in 2019 for upcoming changes to employment law (caveat as to whether the little-known event at the end of March will occur on time, or at all)? We also then go on to look at some future legislative changes, before considering recent interesting case law Judgments.

- **Employment law timeline 2019**
- **Good work plan update**
- **Consultation: Extending redundancy protection for women and new parents**

Case law update

- **Bias in Employment Tribunals**
- **Age discrimination and justification**

Employment Law Timeline 2019

The following are key dates for diaries for HR professionals this year:

- 21st January 2019 — Was the start of the EU settlement scheme. The Government began accepting applications from EU citizens and any family members to remain in the UK after Brexit. Note: the proposed fee of £65 has also now been scrapped.
- 29th March 2019 — The UK to leave the EU (or is it)? No immediate change in employment law as present legislation is all transferred.
- 30th March 2019 — Gender pay gap reporting for public sector employers.

- 1st April 2019 — National living wage increases for workers age 25 and over. It will increase to £8.21 per hour.

  The following new rates will apply for younger workers:

  £7.70 for 21-24 year olds
  £6.15 for 18-20 year olds
  £4.35 for 16-17 year olds
  £3.90 for apprentices

- 4th April 2019 — Gender pay gap reporting for private sector employers.

- 6th April 2019 — Employers to provide all workers with an itemised payslip and state the hours being paid on the payslip where wages vary according to time.

- 6th/7th April 2019 — Increases to SSP and SMP (plus other statutory rates of pay). SSP up to £94.25. Statutory rates up to £148.68.

- April 2019 — Changes to the Apprenticeship Levy. Employers may transfer up to 25% of their apprenticeship levy to support apprentices in their supply chain.

Looking ahead

The "Good Work Plan" In December the Government announced the Good Work Plan, which can be found at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766167/good-work-plan-command-paper.pdf . This sets out several proposed changes mostly coming into force in 2020. To implement that plan the Government has also published its first statutory instruments as follows:

The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 comes into force on 6 April 2020. It provides that the written statement of employment particulars must be given from day one of employment. It also changes the rules for calculating a week's pay for holiday pay purposes, increasing the reference period for variable pay from 12 weeks to 52 weeks.

The Agency Workers (Amendment) Regulations 2018 abolishes the "Swedish Derogation" for agency workers. It also comes into force on 6 April 2020.

The Employment Rights (Miscellaneous Amendments) Regulations 2019 extends the right to a written statement to workers (previously employees), increases penalties for aggravated breaches of employment law, and lowers the percentage required for a valid employee request for the employer to negotiate an agreement on informing and consulting its employees.

Extending redundancy protection for women and new parents

Following suggestions in the recent Taylor Review, the Government has published a consultation paper on extending redundancy protection for women and new parents.

At the moment the Maternity and Parental Leave Regulations 1999 mean that if a woman is on maternity leave is selected for redundancy, she must be given priority over other redundant employees when the employer offers suitable alternative employment.

The Government is now proposing to extend this right to women who have returned from maternity leave in the previous 6 months (not just those who are currently on maternity leave). It is also looking at extending the right to women who have just told their employer they are pregnant i.e. prior to any period of maternity leave. It is also looking at extending that protection during redundancy to others e.g. those on adoption leave, shared parental leave and longer periods of parental leave. This is a consultation paper at the moment and the consultation is due to close in April 2019.

Case Law Updates

Bias in Employment Tribunals

Did a comment by an Employment Judge to a representative that there was "*no need to lie*" suggest an appearance of bias?

No, held the EAT, in *Balakumar v Imperial College of Health Care NHS Trust*.

The Claimant brought claims of discrimination and unfair dismissal. At the hearing, the Claimant's applications for the Employment Judge to recuse herself, and for the late admission of documents (a tape and a transcript), had been refused. The Claimant was granted a short adjournment to allow her barrister to explain these to her.

When the hearing resumed, her barrister stated that she would seek a further adjournment to lodge an appeal. The Judge misheard and, believing that she had been misled as to the earlier adjournment, said words to the effect of: 'There is no need to lie'. This further application was not granted, the hearing proceeded, and the Claimant's claims were dismissed. The Claimant appealed on the basis that the remark was an unwarranted attack on her barrister and could give rise to an appearance of bias.

The EAT dismissed the appeal. It held that a fair-minded and informed observer, having considered the facts, would have concluded that there was no possibility of bias. In contrast, the case of El Faragy v El Faragy, which the Claimant relied upon, involved incidental injections of sarcasm, including the mocking and disparaging of a litigant in person. The comment was careless and tactless, but in its context (the mishearing, the swift retraction, and the various applications made on behalf of the Claimant) it was not evidence of apparent bias.

Comment

It is very difficult to argue that a Judge or a Tribunal has been guilty of "bias" and the tests are very high. That said it is sometimes an argument worth running at the Employment Appeal Tribunal and we at MILS have previously run the argument where it was clear the Judge favoured the Claimant unfairly.

Age discrimination and justification

Is the protection of older workers a legitimate aim which justifies discrimination against younger workers?

Not without real evidence, held the Court of Appeal in *The Lord Chancellor v McCloud*.

There were two sets of Claimants, one of judges and another of firefighters, who were affected by recent government pension reforms. In both cases, the government allowed those members of the old pension scheme who were closest to retirement to remain members of that scheme, while the younger members were transferred to a new, less generous, scheme.

The Court of Appeal held that a mere "visceral instinct" that "it felt right" to protect older workers was not enough to amount to a legitimate aim which could justify discrimination. In principle, discrimination against younger workers can be justified if there are financial difficulties for older workers as a result of having less time to prepare for the impact of the changes, but such a justification would have to be demonstrated by evidence. Although it is legitimate for the government to have moral and political aims in mind, it is not the case that such aims do not have to be supported by evidence.

Comment

The case really underlines the need for the employer to have good and cogent evidence if it is going to run a justification defence in any discrimination claim.

Suspending Employees

When may an employer suspend an employee without breaching the implied term of trust and confidence?

When it has reasonable and proper cause for doing so, held the Court of Appeal in *London Borough of Lambeth v Agoreyo*.

A primary school suspended a teacher after two teaching assistants accused her of using excessive force against two young pupils with special educational needs. She claimed it was a 'kneejerk' suspension and thus a breach of the implied term of trust and confidence. She resigned and brought a claim.

The County Court held that the school had reasonable and proper cause for suspending her, and dismissed her claim. On appeal, the High Court held that it had not been necessary to suspend her, and therefore the suspension was a breach of trust and confidence. She appealed to the Court of Appeal.

The Court of Appeal agreed with the County Court and held there was no breach of trust and confidence. The correct legal test was whether the Head Teacher had reasonable and proper cause to suspend, and the County Court judge was entitled to hold that it did - a decision which could not be overturned on appeal. The High Court was wrong, it said, to seemingly instead adopt a test of whether it was necessary to suspend - that was setting the bar too high.

Accordingly the teacher's claim that her suspension was a breach of contract failed.

Comment

Suspension should always be a last resort as it is not a neutral act. Where an employer is considering suspension in order to investigate a disciplinary there should be a clear consideration as to whether the suspension is reasonably required, and whether it can be justified. Where an employer does suspend an employee, there should be a clear note made of the decision, including the reasons for the suspension. Provided there are good reasons to suspend and a note is kept (and the employee is paid during any suspension) the risks of such an act can be reduced.

Should you find yourself in this situation you have access to the RMI legal helpline for telephone advice.

Case Studies

Recruitment and Discrimination

> *"We are recruiting for a new technician. I have been through the applicants and there are two strong candidates. The most qualified candidate has disclosed during the application process that they have a serious medical condition. I don't want to take the risk they prove to be unreliable, so I was going to choose the other candidate. I presume that is okay?"*

The simple answer is no. Discrimination law is very different from unfair dismissal law. The right to protection from discrimination applies to all stages of employment, including to the application process. An employer can be liable for any discrimination from the start of the process even before they have even met the candidate.

Is this a disability

The risk in the situation above is that the job applicant could prove that the medical condition is a "disability" under the Equality Act 2010. To prove this, they have to show that the condition has a substantial long-term adverse effect on day-to-day activities. The effect of any medical condition on work is not the essential ingredient in determining the issue.

It is important to note that whether or not someone is disabled for the purposes of the Equality Act is assessed as if they were not taking medication for the condition. A Tribunal does not ask whether there is a substantial adverse effect on day-to-day activities when taking any medication or treatment, but rather how they would be coping with their medical condition if they were not taking such medication? The result is that a far greater proportion of the population in the UK can argue they are technically disabled in employment law than might be expected.

If the employer rejects the candidate above then the candidate can submit a claim to an Employment Tribunal. To defend such a claim the employer essentially has to show that the decision not to offer the job was not influenced by the disability (provided always the employee can prove they are disabled within the meaning of the Act).

We would generally advise when recruiting that employers should make job offers "blind" to medical information and not seek medical information until after a job has been offered. If after the role has been offered it transpires that the prospective employee has a medical condition which is particularly serious and reasonable adjustments cannot be made to the terms of the job to accommodate that condition, then the employer can subsequently withdraw the offer and can raise a potential defence in the Tribunal.

In conclusion

The fact that someone has a disability should not unduly scare an employer. Treating all candidates fairly and openly is important, as is laying a good paper trail in recruitment to demonstrate the relative candidate's strengths and weaknesses, so that the employer can prove that the reason they didn't offer a job to someone who has a disability has nothing to do with the disability.

In the situation above, the claim will be difficult to defend if the disabled employee is the one very clear strong candidate, if reference to any condition is made during any interview or rejection or if there are not clear notes to establish the relative strengths of the candidates for the post.

Dealing With Grievances

> *"I have an employee who has come to me complaining that his manager has been bullying him and treating him unfairly. He said he wants to put in a "formal grievance". To be honest we are a fairly relaxed employer and we don't have such procedures. We usually sort out our problems informally. What do I do next?"*

All employers, no matter how large or small should have a formal grievance procedure in place to deal properly with grievances at work. A formal grievance procedure needn't be too onerous. ACAS have example policies that employers can use and ACAS publish a Code of Practice on grievances, which is referred to in Tribunals. You should certainly read the Code if ever you receive a formal grievance from an employee.

Even if you don't have a formal grievance procedure in place, the following basic steps should be always be taken:-

- Write to the employee setting up a formal meeting to discuss his/her grievance giving him/her the right to be accompanied by a trade union representative or work colleague;
- Hold that grievance meeting and listen to concerns / complaints;
- Adjourn the meeting and go away and investigate and come to a conclusion on the grievance;
- Set out the decision in writing, with a right of appeal;
- If the employee appeals, make sure that a more senior officer, who has not been involved so far, conducts the same basic procedure as above, i.e. write to him/her setting up a meeting, give him/her the same right to be accompanied, hold the meeting, investigate and confirm the appeal decision in writing.

Under the Employment Rights Act 1996, the size and administrative resources of an employer are relevant to how fairly and thoroughly an employer deals with such matters. The larger and more sophisticated the employer, the greater the onus to be procedurally perfect. The smaller the employer, the more Tribunals are supposed to give a degree of leeway given the lesser administrative resources. This should not however be an excuse for small employers, who should be following the basic steps above.

If you simply ignore a grievance and an employee has over 2 years' service, then this could form the basis of a constructive unfair dismissal claim. Likewise, depending on the contents of the grievance, you can be liable if you do not deal with matters under other parts of employment law, for example discrimination or whistle-blowing. Failure to deal with a grievance can also lead to uplifts in compensation in Tribunals of up to 25%.

Practical matters: dealing with a grievance

It is, of course, often the case that an employee will not be satisfied with the employer's decision on a grievance, especially if it is not upheld. As an employer, you have a duty to reasonably investigate and this might involve interviewing other staff, interviewing the employee in question and coming to conclusions on the balance of the evidence.

A common trap that employers sometimes fall into is to promise absolute confidentiality when dealing with grievances. That is of course not always possible, because to investigate the grievance, allegations often have to be put to other employees and statements taken. Employers can ask employees to keep discussions confidential to the meetings arranged, but cannot promise complete confidentiality of information, otherwise grievances cannot be thoroughly investigated.

Setting the law aside for a moment, for good employee relations, dealing with grievances fairly and within a reasonable time is obviously important. A fair grievance investigation and procedure can often resolve issues before they become more serious.

Previous warnings and disciplinary sanctions.

> *I am having problems with an employee and I need to undertake a disciplinary hearing. I have warned him before, can I take account of a previous, current first written warning for poor performance when determining the appropriate sanction?*

With regards to disciplinary sanctions employers are generally expected to:-

- adopt procedures that are designed primarily to help and encourage employees to improve rather than as a way of imposing a punishment
- be impartial
- impose a sanction that is reasonable and proportionate in the circumstances
- act consistently

It is also best practice to consider the ACAS Code of Practice on disciplinary procedures (www.acas.org.uk).

When it comes to imposing a sanction that is reasonable and proportionate, you should consider the following factors:-

- your disciplinary procedure and any guidelines provided in it about the relevant types of misconduct and levels of disciplinary action
- any extenuating factors that might have a bearing on events
- employee's length of service and previous disciplinary record
- any earlier examples of how similar matters of misconduct have been dealt with in the business in order to ensure consistency

Disciplinary sanctions short of dismissal which are disproportionate to the offence, or outside the range of reasonable responses, could expose you to the risk of a claim for constructive dismissal.

As to whether a previous, current warning for poor performance is relevant for the purposes of a sanction in relation to the subsequent misconduct will depend on the specific circumstances of the incident. It may be the case that the employee has been so unsatisfactory in different ways for the employer to issue one final warning across the board. Factors that will be relevant are likely to include:-

- the terms under which the previous, first written warning or improvement notice was issued and whether the circumstances giving rise to the misconduct incident fall within the scope of improvement required

- whether the previous incident was dealt with in accordance with a separate capability procedure, and the degree to which it is related to the employee's culpability

- the degree of difference between the circumstances giving rise to the first warning and those now being considered. A degree of similarity will tend to favour a more severe penalty. On the other hand, there may be some particular feature related to the conduct or the individual that may contextualise the earlier warning

Conclusion

Disciplinary sanctions can be daunting. It is always difficult to decide what action to take. As an employer, provided you have undertaken a fair and reasonable disciplinary process that complies with any contract or staff handbook, you will be entitled to put in place any sanction that would be open to a reasonable employer.

In Summary

This advice is general in nature and it will need to be tailored to any one particular situation. As an RMI member you have access to the RMI legal advice line, as well as a number of industry experts for your assistance. Should you find yourself in the situation above, contact us at any stage for advice and assistance as appropriate.

Motor Industry Legal Services

Motor Industry Legal Services (MILS Solicitors) provides fully comprehensive legal advice and representation to UK motor retailers for one annual fee. It is the only law firm in the UK which specialises in motor law and motor trade law. MILS currently advises over 1,000 individual businesses within the sector as well as the Retail Motor Industry Federation (RMI) and its members.