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Specialist Workplace and Health & Safety Lawyers

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Against the backdrop of the rather dreary 'Summer' and the 'Credit Crunch' we have tried to keep our latest newsletter relatively upbeat and hope you find it an inspiring and interesting read. In addition to sections on the latest legal developments, both in legislation and case law, and practical advice on managing absence, we bring you news about the government's current consultation process relating to flexible working and a hard-hitting article on the controversial National Staff Dismissal Register. Our guest writer this month is Phil Osborne, our HR Practitioner, who provides practical advice for managers.

We have asked you to contact us if you would like to be involved in the consultation and to be sent more details. This applies to all the issues covered, and, of course, if you have any advice or training needs, please let us know.

Mike Rogers & Sarah Pugh

Managing the Cost of Absence

Absence costs money

Last year it was reported* that the average direct cost of absence per employee was £659 a year (this is about 3.7% of the average pay of employees). This is the equivalent to each employee being absent for an average of 8.4 days in every year. On 8.4 days a year, product or service is not delivered unless other employees cover or temporary employees are hired. The £659 each year does not cover those costs.

Further information from these surveys indicate that:

- manual workers lose more time than non-manual workers;
- younger people have more frequent and shorter absences than older people whose absence pattern is less frequent, but for longer periods;
- 60% of absence is reported as periods of less than a week;
- For manual workers the biggest cause of longer absence is back-pain whereas for non-manual workers it is stress.

Rewards for managing absence well

Sound management of absence will reap benefits for businesses: it will lead to a reduction in sick pay and in the direct costs of covering absence. Alongside this is the benefit of uninterrupted provision of product and/or services.

Sound management will also reduce the risk of being exposed to liability arising out of the poor handling of absence, which can result in a breach of employment law or a personal injury claim.



Techniques for Managing Absence

In the first instance, you need to know what your absence levels are and how they can be usefully analysed to provide a framework for improving absence levels.

Secondly, you need to have effective 'return to work interviews' that provide the necessary information to help both the employee and the company. You need more than tick-box 'return to work interviews', they are a waste of everybody's time.

The techniques for dealing with short-term absence are likely to be different from dealing with long-term absence.

From the analysis of absence, an overall strategy, including a well formulated absence policy, for the company can be agreed. From 'return to work interviews', an appropriate way of dealing with an individual employee can be determined.

How We Can Help

- If you do not know what your absence levels are, and do not have the time to do it, we can do that analysis for you.
- We will soon be offering a presentation that gives an overview of the management strategies that you can use.
- We can prepare an absence policy which will reflect your priorities and will make a real difference to the costs of absence.

We offer training for the line managers, who are dealing with sickness and absence issues every day and who carry out return to work interviews, to ensure that they handle these issues properly and can get the best out of the interview.

Phil Osborne
HR Practitioner

*Sources:

- *Analysis of Sickness Absence in the Civil service RED Scientific Lt on behalf of the Cabinet Office (2007)*
- *CIPD National Survey of Absence (2007)*

Changes To Sex Discrimination Law

Time for Policy Review and Training..

There have been a number of changes to the law relating to sex discrimination, specifically pregnancy and maternity-related discrimination. These have come about as a result of the Equal Opportunities Commission's (EOC) application for judicial review of the relevant legislation which, the EOC contended, did not adequately implement the European legislation. The main purpose behind these changes is to provide more protection for female employees, especially those who are pregnant or on maternity leave. We take a brief look at one of these changes and recommend a timely review of policies and training for managers and employees, in the light of the implications.

Harmonisation of Leave Periods

Up until now, there has been a distinction between 'ordinary maternity/adoption leave' (OML/OAL), i.e. the first 26 weeks of leave, and 'additional maternity/adoption leave' (AML/AAL), a further 26 weeks. Under the current legislation, employees on OML/OAL have the right during the leave period to continue to benefit from all the terms and conditions of their employment contract, other than those relating to remuneration. From 5 October 2008, this protection will be extended to include employees on AML/AAL.

For employees who are due to give birth or adopt on or after 5 October, this will all change and the rights and obligations of these employees

during the additional period of leave will be brought in line with those on the ordinary period of leave.

The new regulations also provide that the seniority, pension and similar rights and benefits of an employee returning from AML will be the same as those returning from OML. The right of an employee on OML not to be subjected to any detriment or dismissal for a reason related to pregnancy, childbirth or maternity will be extended to those on AML.

In conjunction with the amendments to the Sex Discrimination Act referred to below, this means that employers will have to ensure that employees who choose to take up AML or AAL are treated in the same way as they currently treat employees on OML and OAL. In particular, employers will need to make sure that employees on AML/AAL continue to accrue their full holiday entitlement during the longer period of leave, and not just the statutory minimum. A failure to do so may give rise to a claim of unlawful discrimination.

No need to show less favourable treatment

It is no longer necessary for a pregnant employee or one on maternity leave to show that she has been treated less favourably than a non-pregnant female employee. As a result, if a pregnant employee can show that there is a causal link between her pregnancy or the fact she is on maternity leave and the way she is treated, the employee may have a claim of discrimination without the need to refer to someone who is not pregnant or on maternity leave who has been treated more favourably.

Example: a pregnant employee who is required as part of her job to carry heavy loads may have a claim of sex discrimination.

Advice: Carry out risk assessments for all employees, whatever their job, but in particular for women of child-bearing age, so that any necessary changes to duties can be made, to avoid a claim of sex discrimination.

Harassment: 'unwanted conduct' does not need to be directed at the complainant...

..it will now be enough for a woman to complain about general sexist comments, which are not directed at her, but which have the effect of 'violating her dignity or creating an intimidating atmosphere at work'. Unwanted harassment can therefore now be related to the sex of another person and a witness of harassment can bring a claim under the Sex Discrimination Act 1975.

....and employers will be liable for failure to protect employees from third party harassment.

Prior to this amendment, the position in relation to third party harassment (e.g. harassment by a customer or supplier) was that an employer could only be liable where the failure itself amounted to discrimination. Liability will now accrue where an employer has failed to take reasonably practicable steps to protect a woman who is acting in the course of her employment from third party harassment and when such harassment is known to have occurred on at least two occasions. It is also important to note that the harasser does not have to be the same person each time.

Advice:

- Review and update maternity and equal opportunities/harassment policies
- Provide annual training to managers and employees on diversity issues
- Introduce a zero tolerance approach to sexual harassment and circulate this internally and to connected third parties

Stop Press!

Advice following some recent cases...

Offering a new role in a redundancy situation

In *Commission For Healthcare Audit v Ward*, the Employment Appeal Tribunal (EAT) upheld the Employment Tribunal's decision that although a proposed new role offered to an employee within a redundancy process was suitable "on balance" for the employee, she had not acted unreasonably in her refusal of the offer, taking into account her feelings of disillusionment and alienation and based on her perceptions at the time.



The Tribunal decided that it was entitled to consider the degree of suitability of the alternative role when deciding whether the employee's refusal was reasonable. The Tribunal could take into account that the new role was only "marginally", as opposed to "plainly", suitable for the employee.

The EAT upheld the principle that it is possible for an employee to reasonably refuse an objectively suitable offer on the ground of their personal perception of the role offered: the question of the reasonableness is a matter of fact and it is for the employer to establish that the employee's refusal is unreasonable.

ADVICE: When considering alternative roles for employees whose jobs are at risk of redundancy, the employee's own view of whether an alternative role is suitable has to be taken into account and each individual case must be considered in the light of its particular circumstances. Employers should remember that an employee's perception of a role may be reasonably affected by the manner in which the employer conducts the redundancy process and deals with and communicates with the employee.

How to deal with protracted grievance/disciplinary procedures

There has been an interesting and useful case which provides helpful guidance for employers when dealing with dismissals. In *Selvarajan v Wilmot* it was decided that, if the statutory dismissal procedure has been completed, then a failure to comply with a requirement of the procedure will not make the dismissal automatically unfair, which would be the finding if the procedure had not been completed and the employer was to blame for this.

In this case, the employers had delayed steps of the procedure and had therefore failed to carry out the procedure in a reasonable time. The Court of Appeal decided that, as the employers had continued to participate in the procedure, and the procedure had in fact been completed, there was no automatically unfair dismissal.

However, it was noted that, if the employees had decided they could not continue to participate in the procedure due to the unreasonable delay, the procedure would then not have been completed and the Tribunal would have had to decide whether the delay had in fact been unreasonable and, if it had, who had been responsible for the delay. If it was the employer, then the dismissal may be automatically unfair and there would be an uplift in the compensation payable to the employee of up to 50%.

ADVICE: it is important to deal with disciplinary, dismissal and grievance procedures within a reasonable period of time. If, due to the need to carry out a detailed and lengthy investigation, or the availability of the people involved, the time scale for the procedures is likely to become protracted, it is advisable to seek the express agreement of the employees concerned to the delay and, at the very least, write to the employees concerned, explaining why there is a delay. This will be important evidence supporting an argument that a delay is reasonable and the employee was kept informed and, if relevant, consented to the delay.

Various parts of the Employment Act 2008 come into force

From April 2009, the government will repeal the statutory disciplinary, dismissal, and grievance procedures, under the new Employment Act 2008.

The Employment Act 2008 (Commencement No.1 and Transitional and Savings Provisions) Order 2008 brings into force the new Employment Act 2008 ('the Act'), Sections 1 to 7 and Schedule 1, Part 1. These Parts will repeal the statutory dispute resolution procedures set out in the Employment Act 2002, Sections 29 to 33 and Schedules 2 to 4.

At the same time, a new statutory ACAS Code of Practice on discipline and grievance procedures will come into force. The Code is being substantially revised and will be re-issued when the

Act comes into force. Although the Code is not legally binding, unlike the statutory procedures, it can still be taken into account by Employment Tribunals when considering if a fair procedure was followed by an employer in cases of dismissal. Tribunals will have new powers to amend and adjust awards where parties have unreasonably failed to comply with Code's recommendations.

The draft Order can be viewed at: www.berr.gov.uk/files/file46775.pdf

Contact us for advice on the new provisions governing the handling of disciplinary action, dismissals and grievances.

The Act also proposes to make a number of other changes relating to strengthening the national minimum wage enforcement framework and the employment agency standards regime, and changes to trade union membership law.

Flexible Working Regulations

On 26 August 2008 the Government launched a consultation to extend the right to request flexible working. Currently those with parental responsibility for children under six (or 18, if disabled) have a right to request flexible working. From 6 April 2007 this right was extended to include carers of adults.



On 6 November 2007, the Prime Minister announced that the Government has decided to extend the right to request flexible working to parents of older children. This was followed by an independent review being conducted by Ms Imelda

Walsh, HR Director of J Sainsbury plc, which considered the issue of the age to which the right should apply and whether this change should be implemented.

The consultation considers methods of raising awareness of the right to request flexible working amongst the workforce and methods of making it easier for employers to deal with requests. The consultation is looking at the merits of the current obligation for the employer to inform staff formally, in writing whenever they approve an employee's request to change their working pattern and they propose replacing this obligation with a right to receive written confirmation only if the employee specifically requests it. This would therefore reduce the paperwork involved in processing flexible working requests.

The consultation contains estimates of the number of parents likely to use the extended right and the costs to businesses as a result of the proposals. It also confirms that the increase in the age cut-off will be introduced in one step in April 2009.

If you are interested in viewing and commenting on the consultation document it can be found at <http://www.berr.gov.uk/files/file47434.pdf> or contact us with your views. All responses to this consultation should be submitted by **18 November 2008**.

Guilty until proven innocent?

Action Against Business Crime (AABC) is a partnership between the British Retail Consortium and The Home Office established to help businesses protect themselves against crime.

It intends to establish a National Staff Dismissal Register where retailers can record details of staff dismissed or who have left the company whilst under suspicion of dishonesty. It will include cases of theft or suspected theft, suspected fraudulent action, falsification of documents and causing criminal damage to company property or where the company or a third party has suffered a loss.

Being convicted of such a crime is irrelevant, the accusation will be enough. There is a risk that businesses could abuse the system to blacklist an ex employee and that an individual's work opportunities could be seriously damaged or destroyed.

Companies expose themselves to a risk of action for defamation if they cannot subsequently prove the accusations and an individual claims their reputation has been damaged. Whilst there is the right to challenge an entry, it takes time and by the time it is removed the damage will have been done. An employer must inform an individual that they are being added to the Register and they will have the right to appeal to an independent

person but it will be their word against the business and what will stop the employer adding the record regardless?

The Code of Practice, which members of the AABC adhere to, states that an employer should not use the fact of an entry as the sole reason for refusing employment but in reality what is the purpose of the Register if it is not to be relied upon? Will an employer who refuses to employ an individual who is recorded on the Register leave themselves open to action?



In an age where references are becoming increasingly uninformative it may seem a good idea but we must be careful to ensure the facts are correct and that they have been fully investigated. What would stop a business from falsely recording details against an employee looking to join a competitor? In the criminal courts guilt must be established beyond reasonable doubt. Not here. It will be enough simply to make the claim. Giving a false reference leaves a business open to a claim and an accusation of this type must increase the probability of a claim being made.

All businesses need to be protected against dishonesty but the cornerstone of our judicial system has and must remain: that we are "innocent until proven guilty."

SERVICES

WH Law LLP have specialists able to assist and advise both employers and employees in all aspects of Employment Law.

We take a client focused approach to advice and consider the practical as well as the legal implications of decisions made within your business.

We provide a holistic service to businesses, focusing primarily on the assessment and management of the risks involved in employing people within a business, with particular focus on diversity issues and post-termination issues such as employee competition and breach of fiduciary duties.. We prepare and review documents (contracts, policies and procedures) and conduct litigation on your behalf.

Our services include bespoke training for managers and personnel officers and running seminars..

We can offer these services through a programme tailored to your needs with a monthly retainer, negotiated with you, or on an ad hoc basis according to your needs.

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