
Employment Write News

A commercial law firm in the North West with lawyers specialising in all employment law matters.



Employment Law Update

With all the talk about the credit crunch and the economy, it is an uncertain time for both employers and employees at present.

However, changes in the employment law field continue unabated, with new developments being announced almost on a daily basis. Further, the potential for disputes and litigation only ever increases in a period of economic downturn. It is therefore more important than ever for employers to keep on top of their obligations towards their employees.

We have summarised the key recent developments that employers need to be aware of below.

Can employers rely on expired disciplinary warnings?

You would think that the answer to this question is a resounding "No". However, surprisingly, the courts have recently taken a different view.

The ACAS Code of Practice on Disciplinary and Grievance Procedures provides that a record of a disciplinary warning against an employee should be kept on file, but should be disregarded for disciplinary purposes after a specified period of time (for example, after 6 months for a written warning and after 12 months for a final written warning). Therefore, it is generally accepted that an expired warning cannot be relied upon if further disciplinary action needs to be considered.

In the case of *Airbus v Webb*, Mr Webb was given a final written warning lasting 12 months for misusing his employer's time. A month after the warning had expired, he and some of his colleagues were caught watching TV when they were supposed to be working. Mr Webb was dismissed, but his colleagues, who did not have previous final warnings, were not.

The Employment Tribunal and the Employment Appeal Tribunal felt that Mr Webb's dismissal could not be justified because of the employer's reliance on the expired warning. However, the Court of Appeal has now overturned the earlier decisions and stated that, if an employer has taken an expired warning into account when dismissing an employee, this fact will not necessarily make the dismissal unfair. Instead, an expired warning is a relevant factor when deciding whether the employer has acted reasonably or not in dismissing the employee. This is because an employer can legitimately take the expired warning into account when considering whether there are any mitigating factors affecting a potential decision to dismiss.

So, where does this leave employers?

Despite the decision in *Airbus v Webb*, employers still need to be very careful when considering expired warnings and should not rely on them as the principal reason or deciding factor to conclude that an employee's conduct amounts to gross misconduct. However, in situations where the employee's conduct on its own is enough to justify summary dismissal, an employer can take into account previous similar misconduct when considering what disciplinary sanction to impose.

Prison sentences and fines for employing illegal workers – important new rules

With effect from 28 February 2008, new civil and criminal offences have been introduced to deal with illegal working under the Immigration, Asylum and Nationality Act 2006. Illegal workers are those:

- who have not been granted leave to enter or remain in the UK;
- whose leave is invalid; or
- who have been prevented from undertaking employment in the UK.

If an employee is not entitled to work in the UK, the employer may be liable for a fine of up to £10,000 for each offence. An employer may also be liable to criminal charges if it knowingly

employs a person who is not eligible to work in the UK. If found guilty, directors may be liable to a custodial sentence of up to a maximum of 2 years and/or an unlimited fine. It is therefore important that employers have procedures in place to check that employees have the right to work in the UK prior to commencement of employment.

In order to avoid liability, employers should ensure that they see certain documents prior to commencement of employment, and that reasonable steps are taken to ensure that these documents are verified, copied and retained.

Depending on the type of information provided, different levels of protection will be available for employees.

Provided the employer has followed these steps, and the employer was not aware that the person in question was not permitted to work in the UK, the employer will have a defence. However, this defence will not apply if the employer knew during the period of employment that the employee was not entitled to work in the UK.

If potential employees are European Union (EU) or European Economic Area (EEA) nationals then they are generally free to take employment in the UK (subject to some exceptions).

However, it is important that an employer ensures that the appropriate information is requested from all employees, regardless of apparent nationality, in order to ensure that no potential race discrimination claims are brought against the employer.

An employer should also ensure that all persons involved in the recruitment process are aware of the obligations under this legislation, in order to ensure that the employer is not held liable for any failures to comply with these requirements.

ICE Regulations – Are you speaking to your employees?

From 6 April 2008, businesses which have at least 50 employees in the UK, will be required to comply with the Information and Consultation of Employees Regulations 2004 ("ICE"). Companies, partnerships and co-operatives, whether or not operating for profit, must comply with ICE which requires employers to keep employees:

- informed about the business' economic situation;
- informed and consulted about employment prospects; and
- informed and consulted about decisions likely to lead to substantial changes in work organisation or contractual relations, including redundancies and transfers.

These obligations are wide ranging. Employers within the scope of ICE are obliged to provide this information and consult with employee representatives or directly with employees.

ICE permits employers to use pre-existing workforce agreements in order to inform and consult with employees. However, if no agreements are in place then an employer may have to put new arrangements in place if a formal request is made by employees. Employees can trigger negotiations to put suitable arrangements in place provided the request is made by 10% of employees (subject to a minimum of 15 employees). Alternatively, an employer can decide to put arrangements in place itself.

A failure to put appropriate arrangements in place could result in a fine of up to £75,000.

Until recently, ICE covered all employers with at least 100 employees and it is estimated that a further 19,000 (approx) employers will now be covered by this legislation.

If ICE is new to you as an employer, then it is recommended that you review your existing information and consultation arrangements, whether they are with trade union representatives, employee representatives or individual employees, to ascertain whether they comply with ICE. As a general rule, there should be one representative for every 50 employees.

ICE does give employers the flexibility to set up information and consultation arrangements to suit their different businesses. For example, arrangements could be in the form of employee forums or team briefings. However, employers have a better chance of achieving practical information and consultation structures that work for them if they deal with this issue on a proactive basis, rather than wait for employees to seize the initiative.



Entitlement to holiday during sick leave – the saga continues

For several years now, the legal position has been unclear as regards an employee's right to receive paid holiday during long term sickness absence which is otherwise unpaid.

In 2005, the Court of Appeal held in *Ainsworth v HMRC* (now known as *Stringer v HMRC*) that the right to paid holiday under the Working Time Regulations 1998 does not continue to accrue whilst an employee is absent on long-term sick leave. The Court also held that a worker who is dismissed whilst on sick leave, and who has been on sick leave since the start of the leave year, is not entitled to payment in lieu of their untaken holiday. The case was appealed to the House of Lords who decided to refer two questions to the European Court of Justice (ECJ), namely:

1. Does entitlement to paid statutory holiday accrue during sick leave?
2. Is an employee entitled to be paid for accrued but untaken holiday if their employment is terminated?

The Advocate-General (whose opinion is usually followed by the ECJ) has now given his initial opinion on these questions.

On the first question, the Advocate-General's opinion is that entitlement to paid statutory holiday does accrue whilst a worker is absent on indefinite sick leave. However, a worker may not take their holiday whilst they are on sick leave. The rationale for this is that a worker has to be at work in order to take holiday from that work.

This decision could potentially result in health and safety concerns where a worker decides to return to work early in order to take the benefit of paid annual leave, where their entitlement to receive

sick pay has reduced or ended. This can be dealt with by including a provision in employees' contracts of employment that requires them to provide a doctor's note stating that they are fit to return to work, or by requiring them to undergo a medical assessment to ensure fitness for work.

On the second question, the Advocate-General's view is that, after termination of employment, workers are entitled to a compensatory payment to reflect accrued but untaken holiday leave, even where the worker has been on sick leave for the full holiday year. On a practical note, if the Advocate-General's opinion is followed by the ECJ, an employer could decide to terminate the contract of a worker who is on indefinite sick leave at the start of the employer's leave year so that accrual of holiday entitlement would be limited.

Fast-track system for simple monetary claims

The Government has announced a proposal to develop a fast-track system to enable Employment Tribunals to deal with simple monetary claims. The fast-track system would deal with five types of monetary claims: unlawful deductions from wages, breach of contract, redundancy pay, holiday pay and the national minimum wage where the issues are straightforward. This should lead to quicker and cheaper determination of cases. However, as is often the case, if these claims are combined with others outside the list then they would not be eligible for a fast-track determination and will be dealt with under the normal procedures.

Annual increase to national minimum wage

From 1 October 2008, the adult national minimum wage rate will rise from £5.52 to £5.73 per hour. The rate for 18-21 year olds will increase from £4.60 to £4.77 and the rate for 16-17 year olds will increase from £3.40 to £3.53 per hour.

Annual increase to tribunal compensation limits

From 1 February 2008, the limit on a week's pay increased from £310 to £330. This figure is used to calculate statutory redundancy payments and unfair dismissal basic awards. The maximum compensatory award for unfair dismissal also rose from £60,600 to £63,000. These increases apply in relation to employees who are dismissed on or after 1 February 2008.

Employment Bill

The Employment Bill was introduced in the House of Lords towards the end of 2007 and is likely to take effect in 2009. The Bill includes provisions to:

- abolish the statutory dismissal, disciplinary and grievance procedures and related provisions about procedural unfairness in unfair dismissal cases;
- give tribunals a discretion to increase awards by up to 25% if an employer unreasonably fails to comply with a Code of Practice;
- remove the fixed periods of conciliation which ACAS are currently obliged to follow and extend ACAS's powers of conciliation;
- clarify and strengthen enforcement powers for compliance with national minimum wage legislation and employment agency standards.

As you are no doubt aware, there are currently procedures in place that have to be followed before disciplining or dismissing an employee. The procedures are complex and many employers are finding themselves inadvertently in breach. The changes in the Employment Bill should, hopefully, go some way towards simplifying the procedures. However, we obviously have some time to wait for the changes to be introduced. We will keep you informed as the details relating to these changes are published.

The Employment Department – Key Contacts



Joanne Evans
Partner and Head of
Department

Jo is a nationally recognised employment law specialist. She was a partner at one of the country's leading law firms before joining Neil Myerson last year to head up the firm's team of employment specialists.



Melloney Anderson
Solicitor

Melloney is a solicitor in the employment department. After working in business for a number of years, Melloney read law at the University of Sheffield. She then trained and qualified at DLA Piper UK LLP and joined Neil Myerson in 2007 at 3 years qualified.

Our Employment Department provides clear and straightforward advice on all aspects of the employment relationship. We are pragmatic and commercial, and always look for solutions that work for you and your business. A policy of recruiting only the best lawyers from the leading firms means that our clients enjoy the benefit of city centre standard of advice and service levels, in the relaxed environment of our Altrincham offices.

For assistance with any employment matters, please call 0161 941 4000 or email Jo on joanneE@neil-myerson.co.uk or Melloney on melloneyA@neil-myerson.co.uk.

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