LEONARD GRAY LLP

Employment Law Department

Employment Law Update
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These notes are intended to be a general overview of the law in relation to the subject detailed above.
Legal advice on the issues and the application to a particular case should still be obtained.
This constitutes our understanding of the law as at April 2010.

Section
1

Holiday entitlement – notice requirements and other related matters

THIS SECTION

- Giving notice for annual leave
- Employee rights under the Working Time Regulations 1998

Businesses managers can sometimes be forgiven for thinking that a considerable proportion of employment law is weighted heavily in favour of employees, with scant regard being paid to the interests of the employer itself. However, there are a number of areas within which it is important for *employees* to safeguard their own position and adhere to strict legal requirements, one such area being that of holiday entitlement.

Lyons v Mitie Security (2010)

The above case was recently heard on appeal before the Employment Appeal Tribunal ("EAT"). The claimant employee had given three weeks' notice of his intention to take holiday and asked for his remaining nine days' entitlement to be granted to him prior to the end of the employer's holiday year. The employee's contract of employment actually required the employee to give at least *four* weeks' notice. It also stated that he could not carry forward outstanding holiday entitlement into the employer's next holiday year.

The employee chose to resign and claim unfair dismissal, but the EAT rejected his claim, ruling that he had not complied with the terms of his contract. The employee's lawyers had attempted to argue that he was entitled to take his holiday under the Working Time Regulations 1998 ("WTR"), and that his contract could not overrule or interfere with those rights. The EAT disagreed.

Points for consideration

The main lesson to be learned from the above case is that employees must take care when signing a contract that restricts the way in which holiday/annual leave is required to be taken (almost *every* employment contract will contain such restrictions, so it is important for the employee to fully understand his obligations). Employment Tribunals, it seems, *will* uphold contracts even if they impose harsher duties on the employee (for example, in relation to the giving of notice) than those specified in the WTR.

However, employers should also be wary of the fact that there will be occasions on which contracts will *not* be upheld, depending on the circumstances surrounding the holiday request that has been made and, if in doubt, the best advice is to consult your lawyer before making a final decision and communicating it to the employee.

Section

2

A summary of recent developments in discrimination law relating to age, religion/belief and gender

THIS SECTION

- Questions to consider in relation to discrimination law generally

Many of you will have either read or seen on the news the furore surrounding the recent case of Shirley Chaplin, the Gloucestershire NHS Trust employee who lost her claim for discrimination, which arose from the Trust refusing to continue allowing her the right to wear a crucifix outside of her uniform. The case is highly controversial and has undoubtedly divided public opinion.

The case does, however, provide a useful platform for reviewing recent, wider developments in discrimination law generally. We would invite you all now to take just a few minutes to see whether you can guess the decision reached in the case studies referred to below (these are all based on *genuine* recent employment cases; turn to the final page of this Update for the correct answers):

Case A

A job for an employee with "youthful enthusiasm" is advertised. Would it be OK for the employer to concentrate on asking older rather than younger applicants about their levels of motivation, drive and energy?

Case B

A job advert is posted stating that applicants should be "in the first five years of their career". Did this amount to age discrimination?

Case C

Would it be automatically discriminatory for an employer to demand that a male employee cuts his long hair, but not necessarily make the same demand of a female employee, provided this is in line with the employer's dress code?

Case D

An airline check-in worker is prevented from wearing a cross/crucifix on her necklace, in accordance with the employer's dress code. Does this discriminate against the employee on the ground of religion or belief?

Guidance

Whilst some of the answers to the above scenarios may seem a little obvious to some, the actual outcomes are not as predictable as one might first think. It would certainly be useful for employers to pause and think carefully about whether any of the scenarios themselves are relevant to their own businesses on a day-to-day basis. If so, there is no substitute for taking expert legal advice and, at Leonard Gray LLP, we are well-positioned to give such guidance as and when you decide you need it.

Section
3

THIS SECTION

- Disciplinary proceedings involving employees on sick leave
- The importance of contract drafting

Discipline and sick pay – the difficulty of dealing with employee illnesses

Employers often complain (sometimes with merit) that, in the context of a disciplinary action against an employee, they are finding it extremely difficult to comply with their procedural obligations. Often this stems from a suspicion that the employee is, for example, 'dodging' the date of a formal disciplinary hearing by claiming sick leave and, as a result, receiving contractual sick pay.

Sick pay policy

A tight, well-worded employment contract should explicitly allow the employer some discretion as regards the length of time contractual sick pay is available. This is perfectly lawful. The importance of drafting the contract correctly, however, cannot be overstated and this work should be dealt with by a specialist employment lawyer.

Enforcement

It is critical for an employer to apply a sick pay policy consistently and fairly. Again, advice regarding this should be sought from a solicitor. It should also be noted that employers who assume the role of doctor and question the validity of an employee's illness are asking for trouble; the employment contract should entitle the employer to seek independent medical advice on this if necessary.

Answers to case studies – Section 2

Case A

If the employer questions the candidates in this way, it is likely to be treated as having discriminated against the older applicants on the ground of age.

Case B

Not surprisingly, this advert *was* adjudged to be discriminatory on the ground of age.

Case C

Not necessarily – dress codes can impose different requirements as between men and women and still be entirely lawful provided they are consistently applied.

Case D

This example is almost identical to the Shirley Chaplin case referred to above and, not surprisingly therefore, the employer was *not* deemed to have behaved in a discriminatory manner. The reason for this was that, in this particular case:

- the dress code was reasonable
- the employee's decision to wear a crucifix was a personal one and not a requirement of her faith/religion
- preventing the employee from wearing a crucifix did not interfere with the observance of her religion.