

LEONARD GRAY LLP

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Employment Law Department

# Employment Law Update

## January 2010

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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 January 2010.

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THIS SECTION

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- Recent case law
  - The ACAS Code
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## Disciplinary proceedings – the case of the employee on sick leave

As explained in our April 2009 Update, the legal requirements faced by employers when dealing with disciplinary issues and dismissals in the workplace has now been overhauled. Broadly speaking, the systematic steps of holding meetings with employees, writing to them in advance forewarning of proposed disciplinary sanctions and ensuring they are given a fair and proper hearing remain important for the employer to follow. However, failing to get the procedures right are (in some cases) no longer as potentially costly, with compensation awards likely to be lower under the new regime, depending on the circumstances of the individual case.

The basic rules/guidance relating to disciplinary/dismissal procedures are now enshrined in the current Code of Practice issued by the Advisory, Conciliation and Arbitration Service (ACAS).

### ***Cook v MSHK Ltd (2009)***

Dealing with employees who are suspected of having breached their contract, but who are at the time the suspicion arises off work due to a stress-related illness, can prove enormously difficult for the employer. The employer may very well want to question the employee regarding his conduct and start internal disciplinary proceedings as soon as possible. However, taking swift action can potentially be interpreted by an Employment Tribunal as being unsympathetic and insensitive, or even discriminatory on the ground of disability.

In the above circumstances, there is a need, however, to *communicate* with the employee about any complaints against him, and not simply remain silent whilst he is off sick.

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In the recent Court of Appeal case of *Cook v MSHK Ltd (2009)*, the employer, MSHK Ltd, failed to deal with a similar situation in the right manner. It wanted to take disciplinary action against its employee Mr Cook for breach of contract, but made no mention of the matter until Mr Cook returned to work following a period of sick leave. By leaving it this late, the employer had failed to tackle its complaints properly.

**Points for bearing in mind**

As with any number of other employment-related issues, the devil is in the detail in terms of getting policies and procedures right. There are a number of steps an employer is required to take under the ACAS Code and legal advice should always be sought on following these properly. Despite the penalties having been slightly relaxed for employers who fail to comply, getting the processes wrong can still result in otherwise avoidable expenses.



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**THIS SECTION**

- Age discrimination
  - Recent case  
regarding the UK's  
default retirement  
age
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## **A short note on the UK's default retirement age/discrimination law in this area**

In a recent landmark case, the High Court held that it was lawful for the UK to maintain a default retirement age of 65 years. That means that it is perfectly legitimate for an employer to require an employee to retire from its business once he/she reaches that age.

There are competing arguments for and against a universal default retirement age and the topic continues to cause widespread public debate. On the one hand, those lobbying on behalf of individuals nearing the retirement age will say that 65 years no longer represents a point by which the individual has given 'the best of his working days' and that life expectancy levels (as well as pressure and strains on peoples' anticipated pension incomes) are now that much greater. Against this, the business community will argue that the compulsory retirement age is necessary for the purposes of affording certainty to employers and allowing for easier career progression for younger colleagues.

The issue is highly politically-charged and the controversy surrounding it shows no sign of abating anytime soon.

*Continued on the next page*

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**Some practical reminders**

Please note that the compulsory retirement age referred to above applies to *employees* only. In other words, it will not apply to consultants or non-executive directors.

This means that, for those falling in the latter categories, any business seeking to retire them at a default age (be it 65 years or at any other point) must 'objectively justify' that condition to avoid being found liable for age discrimination. We would certainly advise seeking (and can of course offer) legal advice on how to go about the process of 'objective justification', which is a complex area.

Employers and employees should also be aware that the default retirement age does *not* affect the employee's right to request to work beyond 65 years, which must be given proper consideration by the employer. Again, Leonard Gray LLP's Employment Law specialists can provide important advice to employees on the preparation of such requests, and to employers regarding the procedure they must follow when dealing with a request.

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