

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 July 2010.

Section
1

THIS SECTION

- Terms implied into employment contracts by operation of law
 - Express terms
-

Competition – duties owed by employees to employers

Most individuals and business owners will probably be unaware of the fact that a number of terms are implied into every employment relationship (i.e. where there is no written contract of employment; *employers should of course be mindful that there are penalties for failing to adopt written contracts*).

One of the terms implied by law is the duty of “fidelity” owed by the employee to the employer. This is otherwise commonly known as the duty of loyalty/good faith.

Competing businesses

The above duty often comes into play whenever an employee seeks to set up in competition with his/her current employer and takes certain steps in readiness. Depending on the exact steps taken, this may represent a breach of the duty and give rise to a claim on the employer’s part. Every case, unfortunately, depends on its own circumstances and, frankly, it is always best for employers to spell out in their employment contracts precisely what is expected of the employee both during employment and after it ends. Either way, conflicts can often arise in these circumstances and advice from one of our specialist employment lawyers will help, either at the stage when the employment begins and assistance is required on the drafting of the contract, or alternatively after a dispute has arisen.

Please note that implied duties owed to employers by their directors are usually harsher and therefore more can properly be expected of such persons in terms of their degree of honesty and loyalty.

THIS SECTION

- ❑ Factors that may hamper constructive dismissal claims
 - ❑ Dismissals arising due to previous (mis)conduct
-

Unfair and constructive dismissals

Constructive dismissals

Many readers will already be familiar with the principle that employees can still claim that they have been unfairly dismissed even in the absence of a formal 'dismissal' (*of course, it is always imperative for employers, when dismissing an employee, to confirm the dismissal in writing and give reasons for the dismissal, even if these have already been explained verbally to the employee*). An employee who has been put in a position where they effectively have no choice but to 'resign' from their position due to some act or breach of contract/duty by the employer can in some instances claim 'constructive' unfair dismissal.

However, it is not quite that simple. Employees who wish to make such a claim must overcome a number of initial hurdles, including the need to notify the employer at the outset of their employment coming to an end that they have effectively resigned 'under protest' (we can assist in terms of advising on the necessary exact wording).

Employees also need to be careful to ensure that there are sufficient grounds for claiming that they have been (constructively) unfairly dismissed. In the recent Scottish Employment Appeal Tribunal case of *Aberdeen CC v McNeill (2009)*, the employee, a manager, was accused of bullying and harassment and subjected to an internal disciplinary procedure. He then withdrew from the disciplinary process claiming that it was harsh and oppressive, and thus breached the implied term of mutual trust and confidence (for more on implied terms, please see Section 1 of this Update). He subsequently resigned from his job, claiming constructive unfair dismissal. However, his claim was not allowed, on the basis that his own conduct (i.e. in terms of the alleged bullying) of itself breached this same implied term.

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The moral of the story for employees is to ensure that they give careful thought (and preferably seek legal advice) before choosing whether to make a claim for constructive dismissal. Snap decisions can, quite clearly, prove costly where there are insufficient grounds for proceeding with such a claim.

Unfair dismissal – previous conduct

It is a generally accepted principle that employers, when deciding whether to dismiss an employee due to misconduct, can only rely on similar acts of misconduct in certain circumstances (typically where not much time has passed between the incidents involving misconduct, and formal warnings have been given to the employee in relation to them).

There was, however, a recent case (*London Borough of Brent v Fuller (2010)*), where it was decided that the employer could base its decision to dismiss for misconduct on a similar, previous act of misconduct, in respect of which the employee did not at the time receive a formal warning.

The best advice to employers nevertheless remains to follow a proper disciplinary procedure which complies with the law and to issue formal warnings where appropriate. Our employment law team is well equipped to advise on and draft both disciplinary policies/procedures and warnings in clear and unambiguous language. Please contact us for assistance.

Section
3

THIS SECTION

- Salary sacrifice schemes
 - The importance of contract drafting
-

A general update on various other recent developments

Here are some important points to bear in mind in relation to recent developments in other employment law-related areas:

Salary sacrifice

A number of employers have in recent times turned to salary sacrifice schemes as a means of saving tax. Such schemes involve the issuing of certain benefits to employees in exchange for agreed reductions in basic pay, the latter being subject to employer's National Insurance contributions. The benefits typically take the form of vouchers, redeemable, for example, at certain retail shops or for childcare costs. Employers have in the past assumed that any VAT paid to the intermediary(ies) supplying the vouchers is recoverable without the VAT having to be accounted for to their employees.

However, in a recent European Court of Justice case it was effectively decided that VAT is accountable to employees and the implications for employers are therefore that:

- Employers cannot in all likelihood derive any future benefit in terms of VAT savings from salary sacrifice schemes; and
 - For those employers that have sought to avoid paying VAT through such schemes up until now, assessments for past unpaid VAT may well be carried out by HM Revenue & Customs.
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Now is a very good time, therefore, if you are an employer, to review your pay schemes to see whether the above news affects your business in any way, and to identify whether alternative measures can be taken to minimise the costs associated with salary payments.

Holiday entitlement

Can a worker who is sick during the course of annual leave claim additional leave at later dates? In general, yes. What about if, due to the timing of the employee's sickness, the additional leave has to be taken in a subsequent holiday year (a lot of employers do not allow this)? The answer to that question, for private sector employees at least, is currently a little uncertain. Although the Working Time Regulations 1998 do not give workers the automatic right to carry forward holiday under any circumstances (this can only be allowed if the employer chooses to), doubt has been cast on the issue by a recent Employment Tribunal case.

If any of the issues reported in this section of the Update are relevant to your personal situation or business, you should not hesitate to consult one of our employment law specialists for detailed advice, as there are likely to be a number of further developments in these areas in the near future on which you will find it important to keep informed.
