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Features



Taylor Wessing Employment breakfast workshop on 21 September

"A new age" - Demystifying age discrimination

21 September 2006 - 8am for 8.30am until 10.30am

Programme

This breakfast workshop will include a presentation and an interactive discussion to examine the implications of the new age discrimination legislation which comes into force on 1 October. The legislation will have potentially far reaching consequences for all employers. We will consider what this means for your employees and your organisation, including:

- Recruitment
- Discrimination during employment
- Retirement
- Dismissal

Due to time constraints, we will not cover the pension implications in any detail. If you would like advice on this, please contact Carolyn Saunders (c.saunders@taylorwessing.com), the head of our pensions team, or your usual Taylor Wessing contact.

The workshop will take place at our offices at:

Carmelite, 50 Victoria Embankment
Blackfriars, London EC4Y 0DX

If you wish to attend the workshop or have any queries, please contact Alice Liverton by email at a.liverton@taylorwessing.com

A carrot and a stick - Changing terms and conditions of employment

Changing terms and conditions of employment can present difficulties for employers. We look here at one of the ways to approach it - seeking agreement from the employee, then, if necessary, giving notice of termination and offering re-employment on the new terms. This can be a risky course for employers to navigate, but a proper procedure makes all the difference.

The Court of Appeal has recently provided a reminder to employers that this is best approached in a consultative, open and non-oppressive manner. The case concerned new restrictive covenants but the principles apply equally to all contractual changes (*Willow Oak Developments Limited v Silverwood and Others* [2006] EWCA Civ 660 - see January's Law at Work for the earlier Employment Appeal Tribunal decision).

In this case, the employer failed in its defence because it was criticised for the way in which it tried to introduce the new covenants. The employer handed out the new covenants and gave the employees only 30 minutes to decide whether to accept them. The tribunal found that the employer had not warned the employees that refusal to sign would result in dismissal, had not properly explained the effect of the new covenants, was rude to the employees who queried the covenants, and had acted irritably and abruptly. So what should employers do?

Check the contract

Firstly, check whether it is possible to fit the change within the terms of the existing contract, either within an express right to vary the required terms, or a wide interpretation of the contract might be possible, for example, in relation to

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a job description. In that case, no consent is technically required from the employee, but the change should not be implemented in such a way as to break down trust and confidence. For example, a workplace mobility clause should only be invoked after giving reasonable notice and consulting with the employee.

Benefits which are expressed to be non-contractual can be varied without consent so long as doing so does not break down trust and confidence.

Carrot and stick

If you establish that the change is a contractual variation, the first step is to seek agreement from employees. Timing and planning are often critical here, and employers should consider if there is a 'carrot' which can be offered to employees to encourage them to accept - a change is much more likely to be accepted around pay rise or bonus time. Ideally, employees will simply agree to the change. If they do agree, make sure this is in writing and signed by the employee.

At the planning stage, special consideration should be given if (i) there are 20 or more employees affected by the change because collective consultation obligations could apply, or (ii) any of the employees have ever transferred to you under the Transfer of Undertakings (Protection of Employment) Regulations because it can be harder to change their terms and conditions.

If an employee will not agree and if the change is important, it is time to start with the 'stick' and consider moving to dismissal and offering re-employment on the new terms. This type of dismissal is subject to the usual unfair dismissal rules and liabilities. Employers should therefore adopt a process which is most likely to encourage employees to agree to the change and which limits any possible unfair dismissal liability.

A process which should achieve both of these aims will involve consulting adequately about the change, which means explaining the change clearly, when it will happen and providing the reasons for the change, then listening to employees' comments. Consultation should begin well in advance of the change so that the employees get reasonable notice and have plenty of time to consider it. It is very important that the employees are told that they are at risk of dismissal if they do not accept the change but that they will be offered re-employment on the new terms.

If employees do not agree to the new terms, they are at risk of dismissal, so, at this point, the three-stage statutory dismissal procedure should be invoked as a minimum procedure before dismissal. If notice of termination is given, enclose the offer of re-employment and give a deadline for acceptance which is before the expiry of the notice period.

Unfair dismissal claims from these employees will be much easier to defend if the employer has a sound business reason for the change and if a fair procedure has been followed.

By Victoria Naughton

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Love, love me do - Love contracts in the workplace

The fall-out from Mr Prescott's recent extra-curricular activities is a timely reminder about the difficulties that workplace relationships (however brief) can cause.

Mr Prescott is unusual in that there were allegations that he may have committed a criminal offence. Criminal proceedings, at least, will not be a sanction that most philandering employees will have to face. Equally, most will not have their indiscretions recited at length in the press, nor will they have to face sniggering colleagues in the House of Commons. However, they could face disciplinary action, and worse.

Relationship difficulties

Most employers have anti-harassment and sex discrimination policies. Relationships between colleagues themselves may not actually breach such policies. However, workplace relationships (and this article covers same-sex as well as heterosexual relationships) can cause problems in a number of different ways.

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- If there is an imbalance of power between the parties (i.e. a manager having a relationship with a more junior member of staff), there is the obvious danger that either the more junior person will feel coerced into doing things he or she does not want to do (which may well breach company policies, anyway) or that other members of staff will feel that the manager's partner receives preferential treatment.
- The trouble often starts at the end of a relationship. From an employer's perspective, this could mean that signals get misinterpreted and what one day was a loving caress becomes harassment the next day. Even if that does not happen, arguments affect the morale of an office and can be difficult for other colleagues to deal with.
- Inappropriate behaviour in the office is disruptive and can also be very detrimental to the reputation of those involved - if a member of staff is caught being indiscreet in the office and this becomes public, it may be difficult for them to be taken seriously in future. An employer may also (quite justifiably) take the view that conducting sexual relationships (whether extra-marital or otherwise) in the workplace is simply not acceptable.

People get together. That is life. What can an employer do to protect itself?

Misconduct

Most employers have a list of the types of behaviour that could constitute gross misconduct and that list should be included in the employment contract and disciplinary policy. Very often, on such a list will appear the concept of bringing the company into disrepute or possibly a prohibition on indecent behaviour. If you reasonably suspect somebody of conducting a sexual relationship actually in the office, you could use this as a reason to discipline and possibly dismiss for gross misconduct. Bear in mind that, as with all conduct dismissals, you will be expected to have conducted a reasonable investigation and any dismissal must be reasonable in all the circumstances. If it is a first offence, consider whether a final written warning is more appropriate. Often the sheer embarrassment of being caught and disciplined is enough to put the employee off doing the same thing again.

It is a little difficult to know what to do if the employees concerned are not actually conducting a sexual relationship in the office but you are aware that there is a relationship. As an employer, you have a right to expect that your employees will carry out their duties properly. As with any performance or conduct issue, if you feel that they are failing to do that, you have the option of disciplining them or putting them on a performance management programme. If poor performance is down to the fact that their relationship with a colleague is disrupting their work, that does not excuse them from the requirement that they do their job properly. You may also need to consider whether you should speak to each party, or separate them if they sit near to each other and that is causing a problem. While nobody wants to treat their staff like schoolchildren, sometimes steps as basic as these can calm the situation down. (However, bear in mind the statutory disciplinary procedures which apply to "**any** action ... based wholly or mainly on the employee's conduct or capability" (emphasis added) - moving desks or reporting lines could constitute such action, triggering the need to use the formal procedures.)

Sex discrimination

An employer needs to be careful not to be discriminatory when dealing with this kind of issue. For example, if a male manager is having a relationship with a more junior female employee, they should both be treated in a similar way. To give him a verbal warning and her a written warning, without any basis for such difference, could be treated as sex discrimination. Also, while it might be tempting to move the more junior party, this could be indirect sex discrimination if there is no reason justifying such move - if you have more male than female managers, and it is always the junior person who gets moved, that is likely to particularly disadvantage women.

If an employee makes an allegation of sex discrimination against his or her former partner, the employer should be careful not to let its knowledge of the relationship colour its judgement when dealing with any such grievance - the fact that they may have once been a couple does not preclude one or other of the parties from acting unlawfully afterwards or indeed, during, the relationship.

If the relationship is not actually causing a problem and the employer has no obvious policy on the point, beyond giving the parties a timely warning that any difficulties in the workplace arising from the relationship will not be tolerated, there is often not much the employer can do beyond keep an eye on the situation.

Love-contracts

This brings us to the concept of "love-contracts" in the workplace. An employer might cringe slightly at the prospect of having to develop and roll out one of these policies. However, given the statistics about how many people actually meet their partner at work (apparently one in four of us will meet our long-term partner at work and 70% of workers will have a workplace relationship), it may be well worth having one of these because it means the employer is better able to deal with workplace relationships.

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Some employers ban workplace relationships altogether. If staff do get together, despite that, such policies often state that the employer can in theory ask one or the other to leave or possibly to relocate. Consider: if you, as an employer, found out that two of your most productive managers were having a relationship, your bluff will be called. Would you really want to dispense with their services because they were having a relationship? If exceptions are constantly being made to a policy, the strength of the policy becomes diluted.

A less extreme policy is one which requires employees to tell their employer if they form a relationship with a colleague. The policy should reserve the employer's right to ask one or both to relocate, change desks or to change reporting lines (especially if one of the couple is more junior than the other) which might mean altering one or both of their roles. This has the advantage of giving the employer a range of options while at the same time making it clear that workplace relationships can also affect the employment relationship. It also alerts employers to potential conflicts of interest, which may be relevant when deciding who should award bonuses or promotions.

If a relationship is not causing a problem and the parties are behaving sensibly, it is perfectly legitimate for the employer not to interfere unless there is a problem. The most sensible approach seems to be that of having a flexible policy in place, and assessing matters on a case by case basis.

Some regard love contracts as interference. Maybe, but provided such policies are administered fairly, they are not unlawful, at least in the private sector. The Human Rights Act 1998 (HRA) might affect the operation of such a policy in the public sector (the HRA applies only to public or quasi-public bodies) but even then, provided the policy is reasonable and not disproportionate, it is likely to survive scrutiny under the HRA.

By Naomi Branston

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Case law update

Statutory disciplinary and dismissal procedures - when do fresh allegations re-trigger the procedure?

Silman v ICTS (UK) Ltd [2006] All ER (D) 04 (Apr)

Why care?

The statutory disciplinary and dismissal procedures provide that an employer must set out in writing to an employee his alleged conduct or characteristics, or other circumstances, which lead the employer to consider dismissing or taking disciplinary action against the employee.

The Employment Appeal Tribunal (EAT) has reaffirmed the principle that an employee cannot be fairly dismissed for a reason that he or she has not been alerted to. However, where the focus of the case shifts, the employer is not necessarily obliged to recommence the statutory procedure, i.e. by setting out alternative allegations in writing.

The case

ICTS employed Mr Silman as a security officer. For a two day period, ICTS was unable to contact Mr Silman. He was suspended, and invited in writing to a disciplinary meeting to discuss "allegations of unauthorised absences and falsification of company records" in respect of a log book recording employees' times of arrival and departure.

Mr Silman claimed that on the second day he had worked from his car. A second meeting was convened to discuss what he had been doing in his car.

The employee was dismissed for misuse of company time and complained to an Employment Tribunal that his dismissal was automatically unfair because one of the reasons for dismissal had been misuse of company time, but this complaint had not been set out in the statement of conduct required under the statutory disciplinary and dismissal procedures. The Employment Tribunal held that the employee had not been unfairly dismissed and he appealed to the EAT.

The EAT held that an employer could not dismiss for a reason to which the employee had never been fairly alerted. However, shifts in the focus of the case would not lead to an obligation on the employer to write fresh statements on each occasion.

The purpose of the statutory disciplinary and dismissal procedures was to ensure that there was a fair opportunity for the parties to address the disciplinary issues which might lead to dismissal prior to the issue coming before a tribunal. Distinct new acts of misconduct require a fresh statement in writing but related matters discovered during investigations do not. In this instance there was little difference between the allegations of unauthorised absence and misuse of company time: the essence of the complaint was the same - work was not being done for the company. Therefore, the procedure did not need to be recommenced and Mr Silman had not been unfairly dismissed.

What to take away

The statutory disciplinary and dismissal procedures are not to be used to create unnecessary hurdles for either employers or employees. Fresh statements of allegations only need to be issued if distinct and new incidents of misconduct are discovered.

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Investigating alleged employee misconduct - following a fair procedure

Styles v London Borough of Southwark **UKEAT/0112/06/DA**

Why care?

In order to dismiss an employee fairly, an employer must be able to show that the dismissal was for one of five potentially fair reasons and must follow a fair procedure. In cases involving misconduct the employer must show that, at the time of dismissal, he believed the employee guilty of misconduct, had reasonable grounds for that belief and, at the time of holding the belief, had carried out reasonable investigations. Whether an investigation is considered reasonable will depend on whether the level of enquiry is such that a reasonable employer would have carried out.

The Employment Appeal Tribunal (EAT) has held that significant delays during an investigation into an employee's conduct and a failure to interview witnesses who could support the employee's case do not necessarily render the employer's behaviour unreasonable.

The case

Mr Styles (S) was employed by the London Borough of Southwark (LBS) at a local primary school. He was also a shop steward for Unison. In May 2003, the head teacher made various allegations against S who was then suspended, pending the outcome of an investigation. As part of the investigation, the head teacher and S were interviewed about the allegations, although those who S believed could support his case were not interviewed. S was shown a copy of the letter written by the head teacher in which she had made the accusations against him, although various sections were redacted on the grounds that the investigating officer considered them irrelevant.

S was invited to a disciplinary hearing in March 2004, which he attended with his representative. LBS questioned various witnesses, but S did not give evidence or call any witnesses, saying there was no case to answer. S was summarily dismissed and appealed. The appeal hearing finally took place in August 2004 after being twice adjourned. A final hearing in November 2004 upheld the initial decision to dismiss and LBS terminated S' employment in December 2004.

S complained of automatic unfair dismissal for a reason relating to his trade union activities, or alternatively that his dismissal was unfair in any event. The Employment Tribunal noted its dissatisfaction with the fact that S' witnesses had not been interviewed and the fact the letter setting out the allegations was redacted, but concluded that it was not enough to make the dismissal unfair. Further, the delay was troubling but justifiable as many allegations were recent in nature.

S appealed on the grounds that many of the alleged incidents took place over a year ago and LBS had failed to interview his witnesses, relying on *A v B* [2003] IRLR 405 (in which it was held that a dismissal was unfair because the employee's witnesses had not been interviewed).

The EAT dismissed the appeal, concluding that the Employment Tribunal was correct to hold that the delay was undesirable but did not render the process of the dismissal unfair. The complaints related to continuing misconduct as opposed to single unrelated incidents.

S had been given the opportunity to fully put his case at more than one hearing but had chosen not to do so.

What to take away

Whilst this is potentially a helpful case for employers, it should be relied upon with caution. The statutory disciplinary and dismissal procedures (SDDP) were not applicable at the time of the events concerned and it is possible that LBS would have fallen foul of the requirement under the SDDP that each step and action under the procedure must be taken without unreasonable delay.

Hot topics

Working time opt-out retained by EU ministers

Workers in the UK currently have the right to opt out of the maximum limit of 48 hours imposed on weekly working hours by the Working Time Regulations 1998. During talks on 1 and 2 June, the UK resisted pressure from other EU states to abolish the opt-out. Compromises were discussed, such as introducing a one month 'cooling off period' after commencing employment during which new employees can elect whether to opt out. However, no agreement was reached and the opt-out remains.

New age discrimination fact sheets from the Department of Trade and Industry

The Department of Trade and Industry (DTI) has published eight [fact sheets](#) which cover broad aspects of the age discrimination regulations. They address objective justification, transitional arrangements, vocational training, service related benefits, redundancy, retirement and pensions. The fact sheets include a summary of the law, issues for employers to consider and illustrative examples.

Work and Families Bill

Women becoming pregnant from July onwards will be covered by the new maternity rules if the DTI adheres to its timetable. The Work and Families Bill changes maternity, paternity and adoption rights. The government's current timetable means the new maternity and adoption rights (but not the new paternity rights) will apply to the parents of children expected to be born or placed for adoption on or after 1 April 2007. The final legislation is not yet published. The DTI has finished consulting on the maternity and adoption rights and it says it will publish the results soon. Consultation on the paternity rights closed on 31 May. Employers should begin to consider changes to their parental rights policies in time for the new legislation.

Government opens consultation on increasing statutory holiday entitlement

Workers are entitled to a minimum of 20 days' paid annual leave under the Working Time Regulations 1998. Bank holidays can currently be included in this entitlement. There are eight permanent bank holidays in Great Britain and the government proposes extending the entitlement so that all workers are entitled to 28 days' paid annual leave. It has published a [consultation document](#) and it seeks views on this proposal.

New sexual harassment guidelines from the Equal Opportunities Commission

The EOC has published detailed [guidance](#) for managers on preventing and dealing with sexual harassment in the workplace. The guidance provides practical assistance in this area, including a summary of basic responsibilities, dealing with a harassment situation, and help with formal and informal procedures.

Contacts

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Taylor Wessing employment specialists

For further details on any of the topics raised in this update please contact your usual employment contact at Taylor Wessing or one of the practice leaders below, who will be pleased to answer your queries.

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