

Online Update

Essential Information for Employers



July 2010

In the News

Managing absence – a World Cup hangover?

Employees in the UK took 180 million sick days in 2009, costing employers almost £17 billion, according to a recent survey by the Confederation of British Industry (CBI) and Pfizer UK. Around 15%, or 27 million of these were estimated to be fake. Some employers may also have seen a rise in unauthorised absence during the 2010 FIFA World Cup, raising the question of what action employers can take against unauthorised "sickies".

In principle, employers are justified in taking disciplinary action where there is evidence an employee has been dishonest about being ill, as this constitutes misconduct. In practice, however, such evidence can be difficult to find unless the employee has told one of their colleagues about it, for example, or posted photos of them appearing fit and healthy on Facebook. Without evidence, a mere suspicion is unlikely to be enough to justify disciplinary action.

Employers wishing to discourage staff from taking "sickies" should remind them that this is a disciplinary issue which could result in dismissal. In addition, a policy of holding face-to-face return to work interviews following the absence may perhaps discourage some employees from taking unauthorised leave and being dishonest about it. Employees could also be asked to provide evidence of any illness where there is some concern about its genuineness, provided this is consistent with the employer's policy, and bearing in mind that, for statutory sick pay purposes, employees are entitled to self-certify for the first seven days of absence.

Flexible working rights for all?

The coalition government has announced plans to extend the right to request flexible working to all employees, regardless of their caring responsibilities. At the moment, the right only applies to employees who request flexible working in order to care for a child under the age of 17 or a dependant adult (aged 18 or over). No timeframe has been announced for extending the right, but some commentators have suggested it could be introduced in 2012 following a consultation about the change which is expected later this year.

Many employers already consider requests for flexible working regardless of the reasons for the request and the change will not affect employers who adopt this approach. There are no current proposals to change any of the other key elements of the right to request flexible working, namely:

- the right is to request, not insist on, flexible working
- employees must have at least six months' service before they can make a request for flexible working
- employers are obliged to consider requests but can refuse them for specified business reasons, eg the burden of additional costs, the adverse impact on meeting customer demand or the inability to reorganise work among existing staff
- when considering a request, employers must follow a set statutory procedure which broadly involves meeting with the employee within 28 days of the request and then providing written reasons for any refusal within 14 days of the meeting
- the employee must also be allowed the right to appeal the decision and be given the opportunity to bring a colleague to both the original and appeal meetings.

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"The coalition government has announced plans to extend the right to request flexible working to all employees..."

Carefully considering flexible working requests from those with caring responsibilities will continue to be important, as an unjustified refusal could result in a sex discrimination claim. Employers should also be mindful of taking a consistent approach with all requests to avoid allegations of discrimination on other grounds.

Case Watch

Unfair dismissal – believe it or not?

The employee was a community and learning development worker in a school. He was caught viewing pornography during his lunch break in a shared computer area. He was suspended and, during an investigation, it was revealed he had also visited inappropriate websites earlier that morning. The employee claimed that he had no recollection of either event but, if it had occurred, it was a result of a "hypoglycaemic episode" caused by his diabetes, which meant he lost control of his actions. The employer refused to believe this explanation and dismissed him. He brought an unfair dismissal claim and won.

The Employment Appeal Tribunal ruled that the dismissal was unfair as the employer had failed to investigate the employee's explanation properly. Although the employer was entitled to be sceptical, it should have taken the claim seriously and sought medical advice. The employer's HR advisor had asked his wife, who was a pharmacist, whether the medical explanation was plausible, but it was felt this could hardly be considered a reasonable investigation. Had the employer sought proper medical advice it could well have found the employee's case plausible.

This case highlights the importance of seriously considering the employee's version of events and properly investigating all allegations during a disciplinary investigation, no matter how extraordinary they may seem. Where the employee points to a disability or illness as an explanation for misconduct, this should be thoroughly investigated and appropriate medical advice sought, as failure to do so could render the dismissal unfair or result in a disability discrimination claim. Even if the employer in this case had still chosen to dismiss after seeking medical advice, it would have been in a much stronger position to defend an unfair dismissal claim.

City of Edinburgh Council v Dickson

Age discrimination – question of degree

The employee was a legal adviser with the police. After nine years in the role, the employer decided to introduce a new pay structure to bring pay into line with market rates. As part of this, a new job profile stated that a law degree was essential for the role of legal adviser. The employee was 61 and did not want to start a law degree as he would not finish it before he retired at 65. He applied to be treated as an exception to the degree requirement based on his experience, but was denied. He brought a claim of age discrimination, arguing that the requirement to hold a degree unfairly prejudiced him, as he would not complete it before retirement meaning he would be unable to enjoy the higher pay and status that flowed from having a degree.

The Court of Appeal ruled that the requirement to hold a law degree was not discriminatory. The employee was equally able to obtain a degree at any age. Any disadvantage he would suffer as a result of not being able to enjoy higher pay and status before retirement was a result of him leaving the workforce and not age discrimination.

This case is perhaps not as helpful as it may first seem. The employee in this case did not argue that those in his age group were less likely to have a law degree or that it was in fact more difficult for someone of his age to obtain a degree. Employees or job applicants could therefore make these arguments in future and succeed with an age discrimination claim. Employers considering imposing a degree requirement for a particular job should consider carefully whether a degree is essential.

Homer v Chief Constable of West Yorkshire Police

“Where the employee points to a disability or illness as an explanation for misconduct, this should be thoroughly investigated and appropriate medical advice sought...”

Collective redundancy consultation

The employer was a contractor that supplied employees to work on the construction of two generators at a power station. Due to health and safety issues and concerns about congestion on the site, the head contractor gave notice to the employer to stop work on one of the generators and reduce the workforce immediately. About 50 individuals were made redundant without any consultation. Their trade union brought a claim for failure to comply with the duty to inform and consult trade union representatives about the redundancies. An employment tribunal ruled that there had been no consultation and awarded the maximum penalty of 90 days' pay per affected employee.

The employer appealed but the Employment Appeal Tribunal (EAT) agreed there had been a failure to consult. The EAT accepted the employer's argument that special circumstances meant it was not possible to comply with the normal 30-day collective consultation period. However, even where there are such special circumstances, the EAT ruled that the employer is still obliged to carry out some form of consultation. The employer must take all steps as are reasonably practicable to comply with the collective consultation duty. The EAT did, however, rule that the 90-day protective award was too high, as the tribunal had failed to take into account the special circumstances that existed.

Where an employer proposes to dismiss 20 or more employees as redundant at one establishment within a 90-day period, there is a legal duty to consult with trade union or elected employee representatives. The consultation must begin in good time and at least 30 days before the first dismissal takes effect (or 90 days where the employer is proposing 100 or more redundancies). An employer will only be relieved of the consultation duty where there are "special circumstances" which make it not reasonably practical to consult. Employment Tribunals have generally adopted a restrictive approach to what constitutes "special circumstances" – it generally requires some unexpected event beyond the employer's control or "bolt out of the blue". Even then, the employer must still take whatever steps it can towards consultation. In this case the Tribunal suggested that the employer could have engaged in a shorter consultation of 2 or 3 days despite the head contractor's desire for the dismissals to be effected immediately.

More generally, the case also confirms that, although consultation must begin at least 30 days (or 90 days where appropriate) before the first dismissal takes effect, there is no requirement for it to last the full 30 days. In practice, many employers will continue consultations for the full period to ensure that all genuine efforts are made to reach agreement. However, if all genuine attempts have been made and it appears that further consultation will not be fruitful, the parties can agree to end consultation early, provided that no dismissals take effect until after the 30-day (or 90-day) period.

Shanahan Engineering Ltd v Unite

New Law

UK Corporate Governance Code

A new UK Corporate Governance Code has been published by the Financial Reporting Council. The Code applies to listed companies on a "comply or explain" basis, but also establishes good corporate governance practice for all companies. The new Code replaces the existing Combined Code for financial years beginning on or after 29 June 2010. The main change in the Code is a requirement for all directors of FTSE 350 companies to stand for re-election annually. In relation to executive remuneration, the Code also recommends that:

- a significant proportion of executive directors' remuneration should be linked to corporate and individual performance, and these performance-related elements should be stretching and designed to promote the long-term success of the company

“An employer will only be relieved of the consultation duty where there are "special circumstances" which make it not reasonably practical to consult ... Even then, the employer must still take whatever steps it can towards consultation.”

- non-executive directors' remuneration should not include either share options or other performance-related elements to ensure independence
- the performance criteria for all executive incentive awards should include non-financial performance metrics where appropriate (eg appropriate risk management) and remuneration incentives should be compatible with risk policies and systems
- clawback provisions should be considered which allow the company to reclaim variable components of remuneration in exceptional circumstances of either misstated performance or misconduct.

To encourage boards to be well balanced and avoid "group think", there are new principles on the composition and selection of the board, including the need to appoint members on merit, against objective criteria, and with due regard for the benefits of diversity, including gender diversity. To promote proper debate in the boardroom, there are also new principles on the leadership of the chairman, the responsibility of the non-executive directors to provide constructive challenge, and the time commitment expected of all directors.

Watch This Space

Employment law – what's in store?

The coalition government has published its programme for government, which includes the following broad policy proposals affecting employment law:

- reform of the banking system, including the introduction of a banking levy and action to tackle "unacceptable bonuses" in the financial services sector
- introducing a "one-in, one-out" rule whereby no new regulation would be introduced without other regulation being cut by a greater amount
- reviewing employment law to ensure it maximises flexibility for employers and employees while protecting fairness and providing a competitive environment for businesses
- promoting equal pay and taking a "range of measures" to end workplace discrimination
- extending the right to request flexible working to all employees, regardless of caring responsibilities (see "In the News" above)
- promoting gender equality on the boards of listed companies
- introducing an annual limit on the number of non-EU economic migrants admitted to the UK to work (see "Consultation" below)
- gradually increasing the personal allowance for income tax to £10,000 to help lower and middle income earners – the personal allowance will increase by £1,000 to £7,475 from April 2011 while the basic rate income tax limit reduces so that higher rate taxpayers do not benefit
- phasing out the default retirement age and
- working to limit the application of the Working Time Directive in the UK (it is not clear what is intended here but commentators have suggested this would involve resisting attempts to remove or restrict the ability of employees to "opt-out" of the 48-hour maximum weekly working limit).

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Consultation

Immigration limits

The government plans to introduce an annual limit on immigration, which would apply to workers from outside Europe coming to work in the UK. The limit is intended to come into force from 1 April 2011 and a public consultation has been launched on how it will be introduced. The consultation closes on 17 September 2010. In the meantime, interim measures will take effect from 19 July 2010 including:

- an increase in the points required for highly skilled individuals under tier 1 of the points-based system
- an interim cap on tier 1 permits issued outside the UK, so that no more permits can be issued in 2010/11 than in the equivalent period in 2009/10 and
- a 5% reduction in the total number of sponsorship certificates that licensed employers can issue to skilled workers under tier 2 of the points-based system, although this will not affect transfers within a multinational company or group of companies.

“...an annual limit on immigration, which would apply to workers from outside Europe ... is intended to come into force from 1 April 2011...”

Stop Press

Agency workers

Business Secretary Vince Cable has announced a review of all new regulations applying to businesses from June 2010 onwards, with a view to decreasing administrative burdens on businesses. Among the regulations being considered are the Agency Workers Regulations 2010, which will give agency workers equal rights to pay and working conditions compared to permanent employees after 12 weeks in a given role. At this stage, the Regulations are due to come into force in October 2011. Given that the Regulations implement a European Directive on agency workers, it is unlikely the Government will be able to make significant changes or avoid them altogether. However, one area where there may be some flexibility is around the 12-week qualifying period, which is not part of the European Directive. Some commentators are urging the Government to consider increasing the qualifying period to give employers more flexibility. **Online Update** will report on any significant developments.

Our Work

Since our last edition of **Online Update**, our work has included:

- co-presenting a "webinar" on the "Equality Act: The New Law Explained" with barrister Andrew Short QC
- advising on the employment law implications of a range of "team moves" for various clients
- advising on the application of non-solicit and non-compete restrictions in the context of a high level move within the hedge fund sector
- advising on the application of TUPE, and the negotiation of appropriate indemnity protection for the transferee, in the context of a UK based outsourcing
- successfully striking out Tribunal claims of unfair dismissal and race discrimination on the basis of late submission of claims to the Tribunal.

Our News

It is with great pleasure that we announce the promotion of Ed Mills as a new partner in our Employment Department, with effect from 1 July 2010.

If you have any queries on this edition of **Online Update**, please contact any member of the Employment Department

Partners: Andrew Lilley, Siân Keall, Tim Gilbert, Ed Mills

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