

Online Update

Essential Information for Employers



March 2010

In the News

Getting personal

What action can employers take if they are unhappy about an employee's personal life? This question has been highlighted by the recent removal of John Terry as captain of the England football team following allegations of an extra-marital affair with a former teammate's ex-girlfriend.

Employees are generally entitled to keep their personal lives private and it will usually be unfair to discipline or dismiss someone for conduct outside work, unless there is some clear impact on the workplace. This could be the case, for example, if the out-of-work conduct damages the employer's reputation, causes real dissent among colleagues or causes the employee's performance to slip. Simply disapproving of an employee's personal life would not be enough.

What about office romances, where personal and professional lives crossover? Dismissing an employee just for having a relationship at work is very likely to be unfair. There must be some other impact on the workforce that justifies taking action, such as a decline in performance, actual or perceived favouritism, conflicts of interest or confidentiality issues. Dismissal should only be used as a last resort after exploring other alternatives in consultation with employees. Concerns about favouritism or conflicts of interest can often be resolved by reallocating duties for things like appraisals, expenses and disciplinary or grievance hearings to another manager. It may also be possible to transfer one of the couple to another team either by agreement or where this is allowed under the employment contract. The employer must still act reasonably, even if the contract does allow transfer – eg by giving notice and avoiding a move that would result in loss of salary or benefits, or where the employee has not had the necessary training.

In addition, transferring or dismissing only one half of the couple could lead to a claim of sex discrimination (or age discrimination if they are the most junior employee). Employers should therefore carefully consider which employee should be transferred or dismissed and why, using objective reasons and a clear process.

A policy on workplace relationships can help establish standards of behaviour expected of staff and encourage employees to be open about their relationships. However, this will not be appropriate for all organisations and may be seen by some as heavy-handed. Ensuring the company's policies on harassment, conflicts of interest and confidential information are wide enough to cover these issues can be equally effective.

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Case Watch

Redundancy selection – a matter of opinion?

The employee was a team manager for an energy services company, which needed to make 3 of its 12 team managers redundant. Two volunteers came forward and the final place was to be determined by a selection process.

The selection criteria used were achievement of key performance indicators, sickness absence, appraisal ratings and adherence to the company's values. The score for values was combined from an assessment by the employee's line manager and a score based on a presentation by the employee. The employee's assessment from his line manager included derogatory comments that were inconsistent with his performance appraisals and, after he achieved the lowest score, he was made redundant and brought an unfair dismissal claim.

The Employment Tribunal ruled that the selection for redundancy based on values was unfair. The assessment of values by the employee's line manager was contrary to his appraisals and the manager reviewing the assessment should have queried this. There was no method of cross-checking or benchmarking different managers' assessments of values, which were necessarily subjective, and no way of ensuring consistency. In addition, the employee had received a booklet on values 2 years earlier when they were introduced but had not received any training on them.

This case highlights the importance of ensuring redundancy selection criteria are applied fairly and consistently. As well as being fair and non-discriminatory, redundancy selection criteria should be capable of objective measurement and verification, eg against performance appraisals or other records. Where potentially subjective criteria, like company values, are used, employers should ensure that more than one manager is involved in scoring and any discrepancies are challenged and explained. Records should also be kept which explain the allocation of points against the chosen criteria.

Howard v Siemens Energy Services

Equal pay and length of service

The employee was a "band 3" inspector with the Health and Safety Executive (HSE). She brought an equal pay claim, complaining that 3 male colleagues on the same band were paid more than her. The HSE's pay scale linked pay to length of service over a 10-year period and the HSE argued that the difference in pay was due to the longer service of the 3 male employees. The employee argued that this indirectly discriminated against women who tended to have shorter service than men.

The employee won her claim. The Court of Appeal ruled that, although employers will often be justified in using length of service to decide pay, where an employee raises "serious doubts" about its appropriateness, the employer will have to prove that it is justified. An employee can challenge either the decision to use length of service in the first place, or the way in which it is used. In this case, 10 years was considered too long for the HSE's pay scale, as the evidence suggested that after 5 years all inspectors would have the skills to do the job.

Equal pay aside, using length of service as a pay factor could also amount to age discrimination. Taking into account length of service of up to 5 years in pay scales will not be age discriminatory (as there is a specific exemption from age discrimination), but employers who want to rely on service beyond this would have to show that this practice meets a business need, eg rewarding experience or encouraging loyalty. This case suggests that employers will often also have to be able to justify why using length of service to decide pay is not sex-discriminatory. In view of the potential sex and age discrimination risks, employers who wish to use length of service in pay schemes should consider carefully the reasons for doing so and whether it is appropriate and justified. It is also advisable to keep a file note of the reasons.

Wilson v Health and Safety Executive

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Must employers force staff to take holiday?

The employee was a security officer and was only paid for the hours he worked. The employer's holiday year ran from 1 April to 31 March and the employee's contract stated that holiday had to be used in the current holiday year and could not be carried forward. The employee had 9 days' holiday to use before the end of the holiday year so, in early March, he asked to be paid for the 9 days. He did not request specific days off, as he was not scheduled to work again before the end of the holiday year. Nor did he use the standard form required under his employment contract. When his request was rejected he resigned and claimed constructive unfair dismissal.

The employee argued that the right to annual leave is a fundamental right and employers must, therefore, ensure that employees take their holidays each year and can not refuse holiday requests where this would result in the employee losing some of their holiday entitlement. The Employment Appeal Tribunal rejected this, confirming that so long as employees have a chance to take their holidays, employers do not have to force staff to do so. Provided employers act reasonably and comply with the relevant notice requirements, employers can also turn down requests for holiday even if this means the employee might not be able to take all of their holiday in a given leave year.

The case is a reminder that it is up to employees to manage their holiday and make sure they take it in the relevant leave year. An employer can refuse to allow a worker's request for a holiday provided the employer gives notice at least as far in advance of the proposed holiday date as the length of the proposed holiday itself (subject to any other requirements in the employment contract). However, employers must not act arbitrarily, capriciously or unreasonably in refusing requests and should give staff every opportunity to use their full holiday entitlement. Where this is not possible due to the demands of the business, it is possible to allow the employee to carry over up to 8 of the 28 days' statutory holiday (and any additional contractual entitlement). The position is more complicated where the employee is prevented from taking their holiday due to sickness, as the next case shows.

Lyons v Mitie Security Ltd

Holiday and sickness absence

The employee booked 4 weeks' holiday from mid-February to mid-March. As he worked 3-days a week, this equated to 12 days' holiday. Under his employment contract, the holiday year ran from 1 April to 31 March. Before he was due to take his holiday, the employee broke his ankle, which meant he was unable to work until mid-April, after the end of the holiday year. During his absence he received contractual sick pay (a percentage of full pay) for the time he was off, except that for the 4 weeks he had booked as holiday, he was paid at his full rate. He later asked to claim back the 4 weeks' holiday, which he could not take because of his injury, to take it at a later date. The employer refused, saying he could not carry over unused holiday to the next holiday year and that he had been paid for his holiday anyway. The employee brought a claim for the lost holiday.

The Employment Tribunal ruled that he should have been entitled to carry over his holiday to the next leave year and take it when he was well. Although statutory holiday in the UK works on the basis of the "use it or lose it" principle, where a worker has been unable to take their holiday through ill-health and there is not enough time left in the holiday year to take it when they are well, the employee should be allowed to carry it over and take it the following year.

This is the first Employment Tribunal case in the UK which suggests employees should be allowed to carry over holiday where it is not possible to take it in the current leave year due to illness.

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Where an employee has fallen ill during their holiday and wants to take extra "replacement" leave, they should normally be required to take it in the current leave year. Only if there is not enough time to do so should the employer allow them to carry over holiday to the next leave year. Employers can discourage these sorts of requests in the first place by having a policy of only paying statutory sick pay for periods of sickness absence or, if employees are entitled to enhanced contractual sick pay, requiring staff to produce medical evidence before sick pay is paid.

In terms of managing holidays for employees on long term sickness absence, there are various routes an employer can take. We considered these various options at our seminar in January 2010, "Key Cases From 2009: Are You Ready For The New Year?". To avoid holidays accruing from year to year, one option is to encourage employees on long term sick leave to take their holidays before the end of each holiday year.

Shah v First West Yorkshire Limited

New Law

Fit notes

From 6 April 2010, "fit notes" will replace existing sick notes as the form of medical evidence an employee should produce to claim statutory sick pay or incapacity benefits. The new fit notes will give doctors the option of either certifying an individual as "not fit for work" or saying they "may be fit for work", with space for additional comments. Doctors will also be able to suggest changes to the employee's workplace or job which could facilitate an earlier return to work, eg a phased return to work, altered hours, amended duties or workplace adaptations. Employers will not be obliged to implement these adjustments but should carefully consider them in consultation with the employee, as a fit note could be used as evidence in an Employment Tribunal.

Whistleblowing

From 6 April 2010, Employment Tribunals will have the power (where the employee has given their consent) to refer details of whistleblowing claims to regulators, like the Financial Services Authority, the Health and Safety Executive and HMRC. Employment Tribunal ET1 claim forms will be revised so that employees can tick a box agreeing that details of the claim can be sent to the appropriate regulator. It will then be up to the Tribunal Secretary to decide whether or not to refer the matter, and parties will be notified of any referral. Employees can currently report matters to an appropriate regulator independently of the Tribunal process, but this does not always happen in practice. Where a matter is referred, employers may need to prepare to face additional questions or investigations from the regulator.

Data protection fines

From 6 April 2010, the Information Commissioner will have new powers to issue fines of up to £500,000 to employers and other organisations that commit serious breaches of the Data Protection Act. Before a fine can be imposed, the Information Commissioner must be satisfied the breach was serious and of a kind likely to cause substantial damage or substantial distress. The breach must also either be deliberate or negligent, in that the employer knew (or ought to have known) that there was a risk of breach but failed to take reasonable steps to prevent it. At the moment, the Information Commissioner must issue an enforcement notice giving the employer a chance to comply before a fine can be issued. Under the new regime, there will be no need for an enforcement notice for serious breaches of the data protection principles, although these may be used for other breaches. If the Information Commissioner proposes to issue a fine, the employer will have a chance to make representations before it is levied or to appeal against it once issued.

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Agency workers

The Government has finalised regulations that will give agency workers the right to equal pay and conditions as compared to permanent employees. The regulations will come into force in October 2011. Key features of the regulations are that:

- after a 12-week qualifying period, temporary agency workers will be entitled to the same pay and conditions as if they were employed by the end-user
- pay will cover basic pay, overtime, shift allowances, bonuses linked to individual performance and vouchers or stamps with a monetary value (eg lunch or transport vouchers) but not other benefits like profit-sharing arrangements, bonuses based on company performance, occupational pension schemes and occupational sick pay
- the conditions covered will be those relating to working time, overtime, breaks, rest periods, night work, holidays and public holidays
- successive assignments with the same end-user will count towards the 12-week qualifying period, unless there is a break of at least 6 weeks between them or the roles are substantively different
- where repeat assignments are structured to avoid the agency worker triggering the 12-week qualifying period, an Employment Tribunal can increase any compensation awarded to the individual by up to £5,000
- end-users engaging temps will have a duty from day one of the assignment to ensure they are informed of permanent vacancies in the end-user's organisation
- agency workers will also have to be given equal access to on-site facilities (eg canteen, childcare and transport) from the start of their assignment on the same terms as employees and
- where an agency worker has not received equal pay and conditions they will be able to claim compensation in an Employment Tribunal and the minimum award will usually be 2 weeks' pay (uncapped).

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Consultation

Equality code of practice

The Government is seeking public views on a draft code of practice on equality in the field of employment to supplement the Equality Bill. When implemented, the code will be non-binding but could be used as evidence in an Employment Tribunal and employers should, therefore, take particular notice of its recommendations. The code will cover all of the grounds of discrimination, including sex, race, religion or belief, sexual orientation, disability and age. There will be separate codes on equal pay and equality in services, public functions and associations. Consultation on the draft employment code of practice will run until 2 April 2010.

Watch This Space

Gender pay reporting

The Government is encouraging employers to report voluntarily on the difference between what they pay male and female staff. If not enough progress is made by 2013, the Equality Bill could be used to force employers with 250 or more employees to publish figures on the pay gap. To support this, the Equality and Human Rights Commission is proposing that employers with 250 or more employees could choose to publish

- the single figure difference between average hourly earnings of men and women
- the difference between the average basic pay and total average earnings of men and women by grade and job type or
- the difference between men's and women's starting salaries.

Whichever method is used, the figures could be accompanied by a narrative explanation of the causes of the employer's pay gap. Employers with 250 or more employees are encouraged to report using at least one of these measures, and those with 500 or more staff are encouraged to report on 2 indicators with a narrative. As an incentive, employers who report would not receive any formal requests for information about pay from the Commission over the next 2 years. However, there would be no immunity from equal pay or sex discrimination claims that could be sparked by publishing the figures.

At the moment, employers are not required by law to conduct gender pay audits or publish statistics, but employers may wish to consider the advantages and disadvantages of doing so (see November 2009 [Online Update](#) for a discussion).

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Our Work

Since the last edition of [Online Update](#), our work has included:

- advising a French company on the dismissal of a senior executive in the UK, including providing advice on UK employment law in French
- advising in relation to a multi-site redundancy process involving collective consultation issues
- assisting an employer with the closure of its final salary pension scheme
- advising on a company's proposed restructure, including TUPE and collective consultation issues, as well as the implications of changes to terms and conditions
- advising in relation to the TUPE and general employment aspects of a second generation outsourcing to ensure appropriate indemnity protection in the documentation
- advising on collective consultation issues relating to proposals to change terms and conditions of employment across a workforce, against a background of union recognition.

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

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