

Long term ill health Dismissals/Disability Dismissals

The Court of Appeal has given some recent guidance on long term absence which all HR practitioners need to factor into their practice. Firstly, if a dismissed employee presents new evidence relating to their health at an appeal this must be considered thoroughly but did note that there was a significant difference between a situation where an employee states that they are well and one where the employer is being asked to wait a little longer. It is crucial to look at the effect of new treatment and it will be advisable to write directly (with the employee's consent) to an employee's medical professional to ascertain the true position.

Secondly, it is crucial that employers provide detailed evidence on the impact of the absence at the workplace- general comments or assumptions are not enough.

Thirdly, the Court stated that there wasn't a big difference between the 'reasonableness' dismissal test for unfair dismissals and the 'proportionality' test for disability dismissals under the Equality Act and that the outcomes of both types of cases should normally be the same.

Redundancy – Indirect sex discrimination

A recent case has highlighted that employers need to take care to avoid indirect discrimination. On the facts a team of three was going to be reduced into a team of 2. The impact of this meant that the employee would have to work longer after 5pm and that this would have to be done at the office and that the Claimant didn't even apply for the role. The Employment Appeal tribunal ruled that this was indirect discrimination because it impacted more on women than men because of their childcare responsibilities. The Employer had not engaged with the employee about flexible working. This suggests that if a restructure is planned, it is essential to look at whether the impact would mean working longer office hours and also that a discussion about flexible working is carried out.



Religious discrimination –dress codes warning

The European Court has ruled that imposing a dress code whose aim is to promote neutrality to an employer's customer base by banning any religious dress or political signs does not amount to direct religious discrimination. This story attracted a lot of media attention with stories such as 'it's ok to ban the hijab' appearing. However, what HR professionals need to bear in mind is that when imposing a dress code could be indirectly discriminatory and although it might have a legitimate aim it must still be implemented proportionately.



TUPE service provision change

When assessing the issue of whether there has been a service provision change and in particular, the principle purpose of an organised grouping of employees, an employment tribunal is entitled to look at what the employees were actually doing just before the transfer as well as what happened when employees were initially grouped together. This is important because to transfer over it is necessary for staff to be primarily employed on the work that transfers. This means that in a recent case there was no service provision change because most staff no longer worked for a particular service user and had been allocated to other service users.

Holiday Pay

The British Gas v Lock case which relates to the need to incorporate commission payments in the calculation of holiday pay seems to have reached a conclusion as permission has not been granted to allow a final appeal to the Supreme Court. Consequently, if any of your staff get commissions or performance bonuses, this needs to be addressed if you haven't done so already.



Unfair Dismissal Trade Union activities

It is automatically unfair to dismiss employee who engage in trade union activity. However a recent case has highlighted that there are

limits to what the law will protect. A trade union official obtained from an employee the private notes of a manager relating to a restructure. The official subsequently used this in assisting an employee with a grievance even though he knew that the employer had not given its consent to the release of the information. The official was dismissed for gross misconduct because he had stored and shared this information. The employment Tribunal ruled that because the official's actions related to his trade union activities that the dismissal was automatically unfair. The Employment Appeal Tribunal overturned this decision because on the facts the actions of the official were wholly unreasonable because the information was private and had been illegally obtained.

Unfair dismissal- interesting case on warnings

The issue of whether an Employer can take into account expired warnings has proved problematical. A recent case heard that an employee had over the years had 17 disciplinary offences over a 13 year period. The Employee was then caught using a mobile phone at work which was a breach of the disciplinary code. The Employee was dismissed with notice notwithstanding that this latest offence was one where it had confirmed that it was only worthy of a final warning. In the dismissal letter the Employer stated that as this was the 18th occasion it did not believe that the individual was capable of changing their behaviour. The Employment Appeal tribunal, upholding the Employment Tribunal's decision, confirmed that this was a fair dismissal. On using expired warnings, it referred to Court of Appeal decision in *Airbus v Web* which states that using expired warnings may be relevant in relation deciding whether or not to dismiss and that simply because a warning has expired does not mean that it is irrelevant. That said, it is not entirely clear where the boundary lies on this issue because on this set of facts there were many offences that were of a similar



nature, but there is a risk of a finding of unfairness. In other cases if the offences did not relate to matters that for which an employee had been warned, or there were less previous incidents or there was a greater time period between the offences. The advice that for HR is to tread carefully on this issue and it may be safer to follow the advice given in *Airbus* to adapt disciplinary policies to allow for this approach in **exceptional circumstances**.

Redundancy mobility clauses

A recent case has highlighted the need for an employer to be realistic when it comes to mobility clauses. Two employees had mobility clauses which meant that they could be required to work anywhere in the UK. One employee had 25 years of service and appeared to have only ever worked at one site and his daily commute was going to be 47 miles each way as opposed to his current 18 miles and he was easing down to retirement. The other employee had been asked to work elsewhere but had never had to do it and objected to the fact that he would have to drive instead of walking or getting the tube. The Employer (Kellogg) dismissed both employees when they refused to change location as a result of restructuring. The Employment Appeal Tribunal confirmed that their dismissals were unfair and noted that the mobility clause was very widely drafted, that the steps to assist these Employees that Kellogg had taken would not assist these employees, that the extra length of journey was a reasonable basis for refusal for the one who was doing significant extra mileage. The learning points from this case are that for those not performing national roles, mobility clauses need to be more limited, question whether the clause is going to be enforceable if it's never previously been used, greater steps need to be taken to assist with any move and a sensible view on whether it is simpler to just to pay the redundancy.

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