

Disciplinary investigations – what is reasonable?



Can an investigation make a dismissal unfair if its breadth is too wide? In a recent case, an employee argued that a reference to two previous incidents of misconduct that had not led to a disciplinary meant this was an unfair investigation.

The EAT accepted that although this argument might succeed in an overzealous inquiry, on the facts it was merited given its relevance to a third subsequent misconduct issue. The EAT emphasised that there simply has to be sufficient investigation of the facts. It is for the dismissing officer to decide how to treat that background information and to decide whether it would be fair to rely on it, to any extent, in deciding whether to dismiss the claimant.

Data Protection

The Data Protection Bill is currently going through Parliament. This legislation will replace the Data Protection Act 1998 and implement the provisions of the GDPR.

A recent European Court of Human Rights decision emphasises that where an employer monitors employee's emails and has not communicated to its employees that it is doing this, then it will be a breach of Article 8 (right to privacy) of the Human Rights Act. Public sector organisations must have clearly defined policies setting out in what circumstances it will monitor employee communications.

A recent ICO decision has resulted in Nottinghamshire County Council receiving a £70,000 fine for failing to keep personal data safe. The ICO felt that one of its online portals was not secure enough, lacked authentication processes and that data would be accessible to anyone using a search engine.

Suspensions

Another case has emphasised the need to take great care before suspending an employee. A teacher was suspended due to concerns about using force in a classroom. The High Court held that this was unfair on the facts because (i) it was not convinced that it was reasonable and necessary, (ii) there hadn't been sufficient investigation before suspending the employee, (iii) the employee had not been given a chance to respond to the allegations, (iv) no consideration to alternatives to suspension had been looked at, (v) the judge also observed that the suspension letter stated that "*the purpose of the suspension is to allow the investigation to be conducted fairly*", casting doubt on any assertion that suspension had been implemented because it was necessary to protect the children.

HR professionals are reminded that suspensions are not a neutral act and that they must think very carefully about the timing and reasons for them.

Strikes - voting papers

The High Court has recently ruled on whether it is a requirement to give an exact date for industrial action when unions ballot their members.

The voting paper in this case stated: "*it is proposed to take discontinuous industrial action in the form of strike action on dates to be announced over the period from 8 September 2017 to 18 February 2018*".

The High Court did not accept that the Trade Union Act 2016 required specific dates to be on the voting paper and accepted that it is not practical for a trade union to specify a strike date on the voting paper due to the dynamic nature of industrial dispute negotiations. The window of time during which the strikes may take place is all that is has to be specified.



Disability discrimination

A recent tribunal case has flagged up the issue of disability discrimination when an employer insists on tests to ensure that its staff are competent. The Employee suffered from dyslexia, dyspraxia, dyscalculia and dysgraphia. He was going to work at an airport as a security officer but needed to pass a 15 day induction course. One written exam was a mixture of multiple choice and short answers. The employer provided him with reading material and also arranged for one of its staff to verbally explain any technical terms, gave the individual



more time and an additional reset exam on the same day after he had failed. When the employee failed again, he was dismissed. The tribunal

held that on this set of facts it was legitimate for the employer to impose a test given the importance to the public of security and that the employer had made reasonable adjustments. Of interest, is the observation that if the employee had made an additional claim based on the employer's perception of dyspraxia, he would have succeeded as there was evidence to show that the perception influenced part of the test relating to body searches.

Termination payments reform

The new Finance Bill has indicated that any payment in lieu of notice will always be taxable – it had been thought that where no PILON clause existed in an employee's contract this would allow a tax free PILON payment to be made.

Additionally, any termination payment over £30,000 will now attract employer's national insurance contributions.

Mental Health / Flexible working

ACAS has published a new guide on Mental Health - www.acas.org.uk

It has also published a report on flexible working for parents returning to work that may be of interest.

TUPE – Employee Liability Information

A recent case has discussed the meaning of what employee liability information has to be provided. The EAT has ruled that it is not limited to pure contractual entitlements but also includes non-contractual elements as well. It pointed out that some entitlements of remuneration would be contractual but others may not be (e.g. One-off non-contractual bonuses). Consequently, our advice is that it is not enough to simply provide contractual documents – further information and due diligence will have to be done.

Holiday Pay- voluntary overtime

The EAT has ruled that where individuals perform regular voluntary overtime then the calculation of their holiday pay must include this. In other words, if we are in a situation where voluntary overtime occurs sufficiently regularly, it



won't be correct to pay an employee's contractual rate of pay - it needs to be increased to factor in the extra remuneration earned through regular overtime. The difficulty with the decision is the frequency of overtime was left as an assessment of fact for a tribunal to determine. HR should check this out as a priority .

Contact details

If you have any queries relating to this newsletter or wish to seek employment law advice or discuss training needs, please contact: andrew.brett@norfolk.gov.uk, 01603 223101



Please follow us on Twitter: @NplawNorfolk

nplaw is LEXCEL accredited and authorised and regulated by the Solicitors Regulation Authority with registration number 65083.