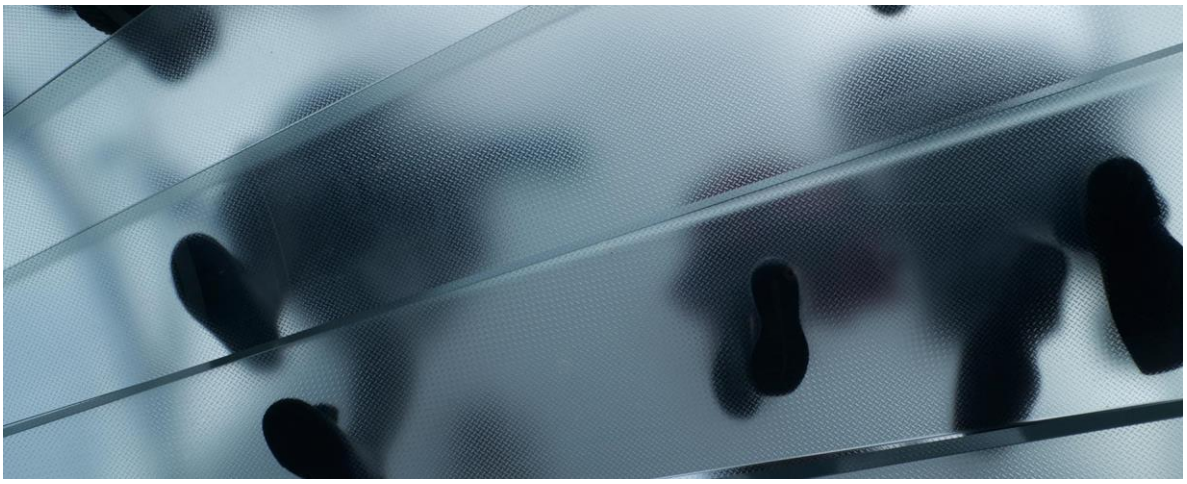

January 2016

Online Update – Essential Information for Employers

In the News

Cracking down on sickies

In December 2015, Conservative MP Lucy Allan made headlines after voicemails were leaked in which she threatened an employee on sick leave with dismissal. Ms Allan MP reportedly accused the employee of lying about being ill and told her to return to work or resign. The case raises the question of what action employers can legitimately take in these circumstances.

Taking unauthorised "sickies" or lying about sickness absence amounts to misconduct and can be treated as a disciplinary issue. However, employers must tread carefully and avoid accusations of malingering without evidence to back this up.

"...employers must tread carefully and avoid accusations of malingering without evidence..."

Before taking disciplinary action, including a warning, the employer should:

- carry out a full investigation to see what evidence there is that the employee is not sick
- seek medical advice if necessary – some evidence might appear to suggest malingering but, in fact, be consistent with genuine illness (eg light exercise during absence for work-related stress)
- notify the employee in writing of any allegations of dishonesty and invite them to a disciplinary meeting, and
- give the employee an opportunity to respond to the allegations at the meeting, ensuring they have the right to be accompanied.

A dismissal without following these steps is likely to be unfair, regardless of how damning the evidence might seem.

Even where there is no evidence of dishonesty, employers can still take action to manage unacceptable absence levels. Before doing so, the employer should:

- ensure it has a clear absence policy, specifying what level of absence is considered unacceptable and what types of action will be taken
- seek medical advice to ensure there is no underlying condition or disability linking the absence, and no adjustments that ought to be made to accommodate this, and
- warn the employee about their absence level (assuming there is no underlying condition), give them an opportunity to improve and explain that the consequences of failing to improve could include termination of employment.

Instant messenger – is it private?

The European Court of Human Rights has ruled that an employer was justified in reading a worker's personal messages on an instant messaging account.

The ruling comes after a Romanian engineer complained that his right to privacy had been breached when his employer read personal messages on a Yahoo Messenger account. However, the Court ruled that the employer's actions were justified, as the account had been set up for work purposes and company policy clearly prohibited personal use.

A similar outcome would be likely under UK law. Employers in the UK are usually justified in monitoring emails and messages on work systems where there are good reasons for doing so. The Employment Practices Code produced by the Information Commissioner provides guidance on monitoring in the workplace. It suggests that, before monitoring, employers should:

- have a clear policy that tells staff what use is allowed of company systems and explains when, how and why monitoring may take place
- consider why the particular monitoring is needed and only monitor as far as necessary (eg by not opening or reading emails which are clearly personal unless absolutely necessary), and
- consider the impact of any monitoring on the employee and whether there are any less intrusive alternatives.

"...employers should have a clear policy that tells staff what use is allowed of company systems and explains when, how and why monitoring may take place..."

Employers engaging in monitoring may wish to produce an internal file note, documenting the above considerations, in case this is later challenged.

Case Watch

Historic misconduct – can the employer still dismiss?

Case 1: The employee in this case was a manual worker for the British Waterways Board. He was required to be on standby, according to a rota, during which time he was not allowed to consume alcohol. During his employment, he raised a number of grievances about managers, including an allegation of bullying and harassment. To resolve matters, the employer arranged for mediation. To show the issues were not one-sided, one of his managers produced copies of the employee's Facebook page, where the employee had made derogatory comments about managers. This had been raised previously with HR but the HR manager had

been too busy to investigate and had not been shown screenshots. However, on this occasion, HR decided to investigate the Facebook comments and found even more derogatory comments about supervisors, as well as an entry a couple of years earlier where the employee claimed to have been drinking while on standby. Following a disciplinary hearing, the employee was dismissed for gross misconduct.

The employee brought an unfair dismissal claim. He argued that dismissal was too harsh, given the Facebook comments did not mention the employer, were very old and the employer had known about them for some time without taking any action. He claimed the employer was simply trying to avoid having to deal with his grievance. He also denied ever drinking while on standby and argued that there had never been any impact on his performance. An Employment Tribunal initially ruled the dismissal was unfair but, on appeal, the Employment Appeal Tribunal said the dismissal was fair. Although the employer had known about the derogatory comments for some time, it did not know the full extent of these. The comments about managers were highly offensive and the comment about drinking on standby had only been discovered in the subsequent investigation.

Case 2: The employee was a technical director at Leeds United Football Club. He was entitled to 12 months' notice of termination. The club decided to restructure and issued the employee with notice of redundancy. However, the club wanted to avoid paying the employee's 12 months' notice pay, so instructed a firm of forensic investigators to find evidence of misconduct on his computer. The experts discovered a pornographic email sent by the employee several years earlier to a friend at another club. Following a disciplinary hearing, the club dismissed the employee without notice for gross misconduct.

The employee brought a claim for his 12 months' notice pay and the loss of other benefits he would have received during his notice period. However, the High Court dismissed his claim. The Court ruled that the employee was guilty of gross misconduct. The email material was highly offensive and had the potential to bring the club's reputation into disrepute, as it was sent from the club's email system. Although the email was old, the club did not know about it at the time. The club was able to rely on this subsequent discovery to dismiss the employee without notice for gross misconduct, even though it had already given notice of redundancy.

The cases show that employers can, in some circumstances, dismiss for misconduct that occurred some time ago. However, employers should exercise caution here. Usually it will be unfair to take disciplinary action where the employer has known about misconduct for some time but done nothing about it. If the conduct is viewed as potentially serious, the employer should take action straight away.

"If the conduct is viewed as potentially serious, the employer should take action straight away."

In Case 1, the employer did not take action initially because it did not appreciate the full extent of the employee's misconduct. However, it did proceed to disciplinary action as soon as it discovered the full picture, including the employee's arguably more serious comments about drinking while on standby. In Case 2, the employer was only able to rely on misconduct that had occurred many years prior because it did not know about it at the time. Although the employer had been deliberately "fishing" for evidence, the misconduct it found was very serious. It is also relevant that the claim in this case was for notice pay – such a "fishing exercise" could potentially lead to a different result in an unfair dismissal claim.

BRITISH WATERWAYS BOARD T/A SCOTTISH CANALS V SMITH; WILLIAMS V LEEDS UNITED FOOTBALL CLUB

Dismissal decisions – how involved should HR be?

The employee in this case was a compliance inspector and was required to travel regularly for work. He was entitled to work-related expenses but was forbidden from using his company credit card for personal expenses. An audit of his travel expenses revealed excessive petrol consumption and personal use of a hire car, contrary to company policy. A senior manager was appointed to carry out an investigation and chair a disciplinary

hearing. Following the hearing, the manager prepared a draft report for HR, which suggested that the employee's misuse of the company credit card was not deliberate. The report recommended a final written warning. HR then made various comments on the report and a number of further drafts were prepared. After several weeks, a final report was produced which concluded the employee was guilty of dishonesty and recommended summary dismissal for gross misconduct. The employee was dismissed and brought a claim for unfair dismissal.

An Employment Tribunal initially said the dismissal was fair. However, on appeal, the Employment Appeal Tribunal ruled the case should be reconsidered. The EAT ruled that the manager's disciplinary report should have been his own product, and that if the decision to dismiss had been influenced by persons outside the process, it would be unfair. The case was sent back to another Employment Tribunal to decide whether HR had been too involved.

The case is a cautionary tale about the role of HR in disciplinary proceedings. Clearly, there are good reasons for HR being involved in any disciplinary process in practice. HR has a role in providing advice and support to the disciplinary manager, and also challenging the manager to ensure all relevant factors have been considered. HR will normally also need to explain what has happened in similar cases in the past, to ensure consistency. However, HR should be careful not to overstep the mark by influencing the ultimate decision – any advice should usually be limited to questions of law and process. The decision of the disciplinary officer must be his or her own; similarly, any investigation report should be the product of the investigating manager's own investigation.

"HR should be careful not to overstep the mark by influencing the ultimate decision..."

The case is also a reminder that draft investigation reports and disciplinary outcome letters are usually disclosable, unless they have been sent to internal or external lawyers for advice on the content. Employers should otherwise avoid creating a number of different versions that may need to be explained in any Employment Tribunal proceedings.

RAMPHAL V DEPARTMENT FOR TRANSPORT

New Law

Statutory maternity pay

The rates of statutory maternity, paternity, adoption and shared parental pay normally increase each April in line with the consumer price index. However, the Government has announced that there will be no increase in 2016 due to negative inflation. The rate of statutory maternity, paternity, adoption and shared parental pay will, therefore, remain at £139.58 per week (or 90% of the employee's average weekly earnings if lower).

Statutory sick pay

Due to negative inflation, the rate of statutory sick pay will also remain unchanged at £88.45 per week for 2016.

Zero-hours contracts

Since May 2015, "exclusivity clauses" in zero-hours contracts have been unenforceable. An exclusivity clause is any provision which seeks to prevent a zero-hours worker from working for another employer. On 11 January 2016, new regulations came into force, which support the ban on exclusivity clauses. Under the new regulations:

- any zero-hours employee who is dismissed for failing to comply with an exclusivity clause has an automatic unfair dismissal claim, regardless of their length of service, and
- any zero-hours worker who suffers a detriment for failing to comply with an exclusivity clause (eg by having pay reduced or hours withheld) can claim compensation in an Employment Tribunal.

Watch This Space

Gender pay gap reporting

As reported in the May 2015 edition of **Online Update**, the Government plans to require large employers (with at least 250 employees) to publish information about their gender pay gap. The Government ran a public consultation in 2015 seeking views on how frequently employers should be required to report and what information should be included. A response to the consultation, along with draft regulations, is expected early in 2016. While the Government has not formally published its timetable, sources have suggested that any regulations would not come into force until October 2016 and that employers would not be required to publish gender pay gap information until at least 2017 or later. Despite the delayed timetable, it still makes sense for large employers to be looking at this in advance to see what the figures look like and what can be done to address any discrepancies before the information has to be made public. **Online Update** will report developments.

"Despite the delayed timetable, it still makes sense for large employers to be looking at this in advance..."

Our Work

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

- advising a client on a complex poor performance and maternity issue
- advising a client on calculating holiday pay in the context of overtime and commission arrangements
- advising on a range of negotiated exits for senior executives
- advising on terminating the employment of a long term sick employee, including disability discrimination and PHI issues
- advising a client on changing terms and conditions for a team, including consultation around termination and re-engagement
- advising a client on the establishment of a UK operation, including around employment contracts, secondments and UK immigration and sponsorship
- advising on a collective consultation redundancy process run in tandem with a TUPE transfer consultation
- advising on the data protection issues associated with establishing a centralised HR system in the US for a global client, including preparing a data transfer agreement, and
- advising a regulated client on the employment and immigration implications of a group restructure, including the impact on its immigration sponsor licence.

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

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