TRAVERS SMITH

Online Update

Essential Information for Employers

November 2013

In the News

Dealing with sickies

According to the CIPD's annual Absence Management survey, more than a quarter of workers admit they are 'rarely ill' when calling in sick. The survey also revealed that the average number of sick days has risen back up to 7.6 per employee in 2013 after a dip in 2012. As the winter "sickie season" approaches, how far can employers go to manage this type of absence?

"... more than a quarter of workers admit they are 'rarely ill' when calling in sick."

Taking "sickies" or lying about the reasons for absence amounts to misconduct and should therefore be dealt with as a disciplinary matter. However, it can be very difficult to obtain evidence to support a disciplinary hearing. Before taking any disciplinary action for misconduct, the employer should:

- ask the employee to provide an explanation for the absence at a return to work interview
- carry out a full investigation into the reasons for the absence
- if there is evidence of dishonesty (eg the employee confessed to a colleague or posted photos on Facebook which are inconsistent with being ill), convene a disciplinary hearing
- notify the employee in advance of the hearing of the allegations against them (in writing) and offer the employee the opportunity to be accompanied
- give the employee an opportunity to respond to the allegations at the disciplinary hearing –there may be an innocent explanation even if the evidence looks damning.

Where there is no evidence of dishonesty, employers can still take action to manage unacceptable absence levels. The employee should be asked to see a doctor first to establish whether there is an underlying medical condition and employers should consider specifying in contracts or sickness procedures that medical reports will be obtained in these circumstances. Particular consideration should always be given to whether there is any underlying condition that amounts to a disability and whether any reasonable adjustments can be made to accommodate this.

Where there is no underlying condition – the employee simply catches a lot of bugs or curls up under the duvet at the first sign of a sniffle – this is a capability issue. The employee should be warned about their level of absence and given an opportunity to improve. Absence policies should ideally specify what level of absence is considered unacceptable and when action will be taken, to ensure a consistent approach across the organisation. Where there has been no improvement, the employer can move to consider dismissal on capability grounds, provided the employee has been warned about their absence, given the opportunity to improve and told that a failure to improve could lead to the termination of their employment. The employee's length of service, previous record and any other mitigating factors should also be taken into account, as well as the impact of the absence on the business.

Case Watch

Handling grievances – how important is process?

The employee drove large goods vehicles. He raised a grievance about health and safety issues, a lack of training and his treatment by the deputy transport manager, who he claimed abused him and swore at him on two occasions. The grievance was heard by the regional managing director, who upheld some aspects of it but rejected the allegations of abuse by the deputy transport manager. The employee appealed. The appeal was dealt with by the same regional managing director, who dismissed it in a meeting lasting only 20 minutes. The employee resigned and claimed unfair constructive dismissal. He argued that having the same person hear the appeal was a breach of the implied duty of trust and confidence.

The Employment Tribunal at first instance said that there was no breach of trust and confidence – reasonable consideration had been given to the grievance at the original hearing, even if the appeal may have been inadequate. On appeal, the Employment Appeal Tribunal took a different view. The EAT said that having the same manager hear the original grievance and the appeal was contrary to both the Acas Code of Practice on Disciplinary and Grievance Procedures and the employer's own grievance policy. It ruled that this could amount to a breach of the implied duty of trust and confidence, which could allow the employee to claim constructive dismissal. Whether it amounted to such a breach in any case would depend on all the facts, including what was said at the appeal hearing. The EAT ordered the case to be sent back to the Employment Tribunal to be considered again.

The case is a reminder that employers should always follow their own disciplinary and grievance procedures, wherever possible, as well as the Acas Code of Practice on Disciplinary and Grievance Procedures. Failure to do so could amount to a breach of the implied duty of trust and confidence and will also be unhelpful in defending any unfair dismissal or discrimination claim. Minor procedural breaches – such as not complying with strict timeframes – are unlikely to amount to a breach of trust and confidence, but a failure to give genuine and thorough consideration to a grievance or appeal could. To minimise the risks, any disciplinary or grievance appeal should be heard impartially, by a manager who has not previously been involved in the case. That person should ideally be a more senior manager or at least someone who is able to exercise independent judgment and does not feel obliged to uphold the original decision. This may mean bringing in a manager from another department or site, or even someone from outside the business.

Blackburn v Aldi Stores Ltd

"... employers should always follow their own disciplinary and grievance procedures, wherever possible ..."

Right to be accompanied

Two employees raised grievances with their employer and were invited to grievance hearings. They asked to be accompanied by a particular union official but the employer refused each of their requests. They were accompanied instead by a fellow worker at the grievance meetings and then by a different union official at the appeal hearings. The employees claimed that, by refusing their original choice of companion, the employer had breached their right to be accompanied.

The Employment Appeal Tribunal ruled that the employer had breached the right to be accompanied. The EAT said that, although the request to be accompanied has to be reasonable, there is no requirement that the employee's choice of companion has to be reasonable. The employee has the right to be accompanied by whomever they choose, provided the companion is a trade union official or a fellow worker. The employer's refusal of the original choice of companion was, therefore, a breach of the right to be accompanied. However, since the employees were allowed another companion, their loss was minimal and the EAT suggested any compensation should, therefore, be nominal, in the order of £2.

Employees have a right to be accompanied to a disciplinary or grievance hearing by a work colleague or a trade union official (whether or not the employer recognises the trade union). Prior to this ruling, it was thought that an employer could refuse a request if the employee's chosen companion was not reasonable, eg because they had been involved in the case or they were from a remote work location and someone else was available on site. This was supported by the Acas Code of Practice on Disciplinary and Grievance Procedures. However, this case suggests that employers must always agree to the employee's chosen companion so long as the companion is a trade union official or fellow worker.

Acas has announced that it will be amending its Code of Practice in the light of the ruling. Despite this, there will still be situations where employers will be justified in declining a request to be accompanied by someone whose presence would prejudice the hearing, eg because they have previously been involved in the case either as a witness or a co-accused. It is unlikely that refusing a request to be accompanied in these circumstances would render any subsequent dismissal unfair. However, if the employer objects to the employee's chosen companion, it should always give the employee a chance to choose someone else so that, even if there is a technical breach of the right to be accompanied, any loss is nominal.

Toal and another v GB Oils Ltd

"... this case suggests that employers must always agree to the employee's chosen companion so long as the companion is a trade union official or fellow worker."

Settlement offers – when are they binding?

The employee brought a claim against his former employer for unpaid commission. Shortly before the hearing, the employer's solicitors wrote to the employee offering to settle the case. The letter stated an amount which represented the employer's "final position", that the sum would be in "full and final" settlement of all claims, and that the settlement was to be "recorded in a suitably worded agreement". The employee's solicitors accepted the offer and said that a draft agreement would be forwarded for approval. However, discussions about the form of the settlement broke down and the employee sought a declaration that a binding settlement agreement had been reached. The employer argued that no settlement had been reached as it had not yet been recorded in an agreed settlement agreement.

The High Court ruled that a binding settlement had been reached. The offer letter and subsequent acceptance were enough to create a binding agreement, even though the wording of the agreement still had to be sorted out. Since the offer was not expressed to be "subject to contract" it was not dependent on the specific terms of the contract being agreed.

Employers will usually prefer for any settlement offer not to become binding until the parties have agreed the terms of the settlement agreement. This is so the employer can make sure the agreement covers off all the necessary claims and includes obligations on the employee such as keeping the settlement confidential and not making any disparaging comments about the employer. To achieve this, the settlement offer must be conditional on the parties entering an appropriately-worded settlement agreement and must, therefore, be expressed as "subject to contract". Without this wording, the offer can become binding as soon as it is accepted, even if the parties do not later agree on the terms of the settlement agreement.

Newbury v Sun Microsystems

"... the settlement offer must be ... expressed as "subject to contract"."

Holiday pay and overtime

The employee worked for a rail freight and logistics company. His employment contract provided for a 35-hour week made up of five, seven-hour shifts. However, in practice, he never worked seven-hour shifts. His shifts were usually eight-and-a-half or nine-hours, and occasionally twelve-hours long. He was paid an overtime premium for hours over and above his contractual hours. The overtime was voluntary, in that he could in theory refuse to work it, although he never did. The employee's holiday pay was calculated by reference to his 35-hour basic salary, with no account for overtime. He brought a claim arguing that he was being underpaid, as his holiday pay should have included overtime.

The Employment Tribunal ruled that overtime should have been included in the holiday pay. Under European law, workers are entitled to be paid for holiday at the rate they would have been paid had they been working. This means that overtime has to be included, even if it is voluntary, as do any other payments intrinsically linked to the employee's work. The Tribunal ruled that the employee was entitled to back pay for his underpaid holiday, going back to the start of his employment in 2007.

This ruling suggests a change in the way holiday pay is to be calculated. The UK rules on holiday pay have, until now, said that voluntary overtime should not be taken into account for workers with "normal working hours" (ie workers whose contracts specify their normal hours or who work regular hours week to week). Overtime has traditionally only be included for such workers where it is obligatory, in the sense that the employer is obliged to provide it and the employee is obliged to work it. In contrast, overtime is taken into account for workers with no normal working hours, as holiday pay is calculated by reference to the average of all remuneration over the previous 12 weeks. However, this case suggests that overtime payments should be included in the calculation of holiday pay for all workers, regardless of their normal working hours. The case also suggests, based on European law, that other payments which are intrinsically linked to the employee's work should also be taken into account (eg shift premiums, unsocial hours allowances, call-out payments and commission payments). This is only an Employment Tribunal ruling, so it is not binding, and it is being appealed. Employers who offer overtime, therefore, have to decide whether to hold off changing the way they calculate holiday pay until the position is clarified or include overtime in holiday pay calculations to avoid claims for back-pay. **Online Update** ***will report developments.***

Neal v Freightliner Ltd

"... this case suggests that overtime payments should be included in the calculation of holiday pay for all workers ..."

New Law

Changes to TUPE

The Government has published its response to a public consultation on TUPE, which sets out its plans to make some changes to TUPE. The response confirms that:

- the "service provision change" regime, which applies to outsourcing, will be retained so that there continues to be a degree of certainty about when TUPE applies to outsourcing arrangements
- incoming employers on a TUPE transfer will have to be provided with information from the outgoing employer about employment liabilities for transferring employees earlier – 28 days before the transfer instead of the current 14 days
- the rules around changes to workplace location following a TUPE transfer will be relaxed and
- the incoming employer will be allowed (but not obliged) to begin consultation with transferring employees before the transfer about future redundancies, but only where the outgoing employer agrees to this.

"... the "service provision change" regime, which applies to outsourcing, will be retained ..."

The Government will also seek to remove any 'gold plating' of the rules which prevent changes to employment contracts following a TUPE transfer but it is not clear whether this will have any real practical effect, as similar restrictions apply under European law. The Government will, however, produce improved guidance on this area and on TUPE generally. Draft new regulations are expected to be published in December 2013, with the changes coming into force in January 2014.

Watch This Space

Zero hours contracts

As reported in the September 2013 edition of **Online Update**, the Government is reviewing what can be done to prevent the exploitation of workers under zero-hours contracts. Business Secretary Vince Cable has said the Government would consider some or all of the following measures if it felt they were necessary to prevent abuse of workers' rights:

introducing a code of conduct on zero-hours contracts, which would require employers to provide better information to workers about their rights

banning exclusivity clauses in zero-hours contracts which prevent workers from working for anyone else and

introducing measures to force employers to switch workers to permanent contracts after a certain time.

"... the Government is reviewing what can be done to prevent the exploitation of workers under zero-hours contracts."

Collective redundancy consultation

Collective redundancy consultation obligations now apply much more widely than before, following the *Woolworths* ruling earlier this year (see July 2013 **Online Update** for details). Prior to the ruling, the collective consultation duty was only triggered under UK law where an employer was proposing to make 20 or more redundancies (or changes to terms and conditions for 20 or more staff) "at one establishment" within a 90-day period. However, in the *Woolworths* case, the Employment Appeal Tribunal ruled that the reference to "at one establishment" was incompatible with European law and should be ignored. The impact of the ruling is that any employer proposing to make 20 or more redundancies (or changes to terms and conditions) anywhere in its business, even if they are spread across several sites, will have to consult collectively about the proposals. The Secretary of State for Business, Innovation and Skills has now been given permission to appeal the *Woolworths* decision, so the position could change. Until then, employers should continue to ensure that numbers of employees affected by any proposed redundancies (or changes in terms) at any location in the UK are aggregated when deciding whether the collective consultation duty is triggered. The appeal will be heard in the first quarter of 2014 and **Online Update** will report developments.

Our Work

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

- advising on the enforceability of restrictive covenants in a senior executive contract and the strategy around ensuring compliance with those
- drafting and negotiating a set of TUPE indemnities applicable to an outsourcing client taking services out of one of its own clients on a pan-Europe basis
- advising a client on handling issues of repeated sickness absence of an employee where there was a theoretical underlying disability
- advising a financial services client on a pan-EMEA redundancy exercise
- defending on behalf of a client against claims of whistleblowing and discrimination in the Employment Tribunal
- negotiating a settlement agreement with a long term sick employee on PHI whose role has become redundant
- reviewing recent changes to the UKBA immigration guidance.

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

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