

Welcome to our summer GateWay newsletter.

1. IN THE NEWS

Politics; Regulation

Politics and regulation affecting the workplace

As employers get used to the idea of a coalition government in Westminster, a poll taken by the Federation of Small Businesses suggests that confidence in the economy is down and new jobs are unlikely. More than half (54%) surveyed said that they are not intending to take on new staff or products or services and almost half (49%) called for another election.

The lack in confidence is coupled with a recent report by the British Chambers of Commerce (BCC). It claims that the pendulum has swung too far in favour of employees, resulting in greater hardship for employers and in particular small businesses. The BCC makes a number of recommendations as to how the law can be "rebalanced" to reduce costs and bureaucracy in the UK economy, as well as increase competitiveness. The report urges the Government to commit to less regulation and reviews the burdens that current regulations impose.

Comment

The FSB and BCC reports are in line with the coalition government's stated commitment to "review workplace laws to ensure....maximum flexibility for both employers and employees". Also, in their election manifesto the Conservatives stated that they intended to "rein in" those parts of the TUPE

2006 Regulations which deal with service provision changes. Whether the coalition review of workplace laws will go as far as this remains to be seen.

The BCC report can be found at:

www.britishchambers.org.uk/zones/policy/reports

Belief; Discrimination

First of its kind settles out of Court

The Case of *Nicholson v Grainer* which was reported in previous editions of GateWay has settled out of Court. That case involved an action by Mr. Nicholson against his employer, alleging that he had been discriminated against because of his belief in climate change. In a first of its kind, the Employment Tribunal acknowledged that a belief in the environment could amount to a "philosophical belief" which had protection under the *Employment Equality (Religion and Belief) Regulations 2003*. That precedent remains.

Comment

Its unfortunate (although probably not from Mr. Nicholson or Grainer's perspectives) that this case settled. It would have been useful to have seen whether the Employment Appeal Tribunal agreed that a belief in the environment could amount to a philosophical belief. Employers are reminded that "belief" can go further than religious belief for the purposes of the Regulations.



Employment Tribunal

Tribunal Service 2010/11 Business Plan Published

The Tribunal Service has identified three main targets in its business plan for the coming year.

These are:

1. to increase the speed of its service;
2. to increase customer satisfaction; and
3. reduce operating costs.

The Service acknowledges that in order to maximize capacity it may need to introduce pilot schemes that will operate outside normal hours. For example in the employment tribunal in Glasgow parties can agree to have their case heard in the evening.

Comment

The Tribunal Service has had to come to terms with an unprecedented rise in claims as a result of the recession. In the first three quarters of the 2009/10 business year the Tribunal Service received 26% more cases than it did in 2008/09. It has therefore had to adopt a variety of case management procedures. Whilst procedures are generally common to all Tribunals, each locality can have local rules. Our own experience is that cases are generally still being heard more quickly in Scotland, with waiting times for tribunals being the longest in London.

2. CASE LAW

Redundancy; Collective Consultation

Shenahan Engineering Ltd v UNITE

The EAT confirmed in the case of Shenahan Engineering Ltd v UNITE that even when an employer can establish that it has “special circumstances” justifying why it was not reasonably practicable for it to comply with the obligation to collectively consult with employees, this will not completely absolve the employer of the obligation to consult at all, in circumstances where it was possible to do so, albeit not for the required period.

Shenahan, a construction contractor, was party to an agreement whereby the contracting firm could “instruct the Contractor to stop or start any work”. This clause was relied upon when the contracting firm instructed Shenahan to stop two construction projects within 3 days. As a consequence of this instruction, Shenahan informed its employees that they were redundant with immediate effect. Shenahan however did not consult with the employees’ union and tried to argue that practicably it was not possible for them to consult and therefore they could rely upon the “special circumstances” exception to that obligation.

The EAT was not convinced by Shenahan’s argument and held that whilst Shenahan had demonstrated that it could not reasonably practicably consult for the full 30 days as required by the collective consultation legislation, it was still under an obligation to take those steps that were reasonably practicable for it to take. That is to say, if Shenahan could have consulted for a limited period, it should have. The EAT held that the employees were therefore entitled to a protective award. The only saving grace was that the EAT also held that the award could be reduced (from what could otherwise have been up to 90 days’ pay per dismissed employee) on the basis that Shenahan could demonstrate mitigating circumstances.

Comment

Collective consultation procedures on redundancy apply when there is a proposal to dismiss 20 or more employees at one establishment within a 90 day period.

In this case, Shenahan should have consulted on a collective basis for at least 30 days before the first of the dismissals took effect.

The “special circumstances” exception to the obligation to collectively consult for at least 30 days with a recognised trade union or employee representative is limited and can only be relied upon when circumstances are indeed “special”. The burden of proving whether “special circumstances” exist is on the employer and therefore each case will be based upon its own factual circumstances.

Employers are therefore recommended to take steps to carry out some consultation, on a collective basis, however limited, to give themselves an opportunity to argue the “special circumstance” defence. After all, the wage bill for a period of collective consultation may be less costly than a protective award which can be up to 90 days’ gross salary per affected employee.

Misconduct; Unfair Dismissal

Sakar v West London Mental Health Trust

The Court of Appeal has confirmed in *Sakar v West London Mental Health Trust* that an employer’s decision to initially treat an act of misconduct as a minor indiscretion under its informal procedure, then ultimately dismiss on the grounds that the same conduct constituted gross misconduct, was unreasonable and amounted to unfair dismissal.

Initially Sakar, the employee, had been disciplined under the employer’s informal “Fair Blame Policy”, designed to deal with acts or issues that do not amount to serious or gross misconduct. However, at the end of that procedure, the medical director unexpectedly referred Sakar to the General Medical Council (GMC). The outcome was Sakar’s summary dismissal for gross misconduct.

The Court of Appeal confirmed that when an act or acts do not individually or cumulatively amount to gross misconduct, an employer can not justify dismissal. In this case, the employer’s decision to deal with the matter through an informal procedure implied that the misconduct was not sufficiently serious to amount to gross misconduct. The decision to then dismiss for behaviour of a nature that had been dealt with under that procedure was therefore

outwith the band of reasonable responses and therefore unfair.

Comment

At the start of a disciplinary process, employers need to consider the seriousness of the employee’s potential misconduct. As seen here, inconsistency in the way that an employer deals with misconduct can result in an unfair dismissal. Whilst a disciplinary policy and/or procedure may stipulate what behaviour constitutes minor misconduct, serious misconduct or gross misconduct, employers are reminded that the test which will be applied by the employment tribunal in looking at the fairness or otherwise of the dismissal will be whether the decision to dismiss fell within the band of reasonable responses open to the employer. How the employer has dealt with the particular issue of misconduct from the start of any proceedings will therefore be relevant.

Whistleblowing

BP plc v Elstone

In the case of *BP plc v Elstone*, the EAT has confirmed that a worker has protection from being subjected to any detriment by his current employer as a result of that worker having blown the whistle while employed by a former employer.

Elstone had worked for BP plc for a number of years before leaving to join Petrotechnics Limited. Petrotechnics Limited had a number of contracts with BP plc and whilst working on these, Elstone disclosed to BP plc a number of protected disclosures in respect of health and safety breaches relating to those contracts. Getting wind of this disclosure, Petrotechnics Limited dismissed Elstone for breach of confidentiality. A few days later BP plc engaged Elstone’s services as a contractor but then terminated the arrangement when it learnt of the circumstances of Elstone’s dismissal. Elstone brought a claim against BP plc alleging that he had suffered a detriment (namely his dismissal) as a result of him having blown the whistle whilst employed at Petrotechnics Limited.

Allowing Elstone to continue with his case against BP plc, the EAT confirmed that a person seeking

protection from a detriment as a result of making a protected disclosure must have, at the time of the disclosure, been employed. This is because the legislation refers to a “worker”. However, that person need not be employed by that same employer at the time that s/he is subject to a detriment. Extending this rationale beyond the facts of this case, the EAT confirmed that this would also apply if the two employments were in no way connected (in contrast to the facts here).

Comment

Interpreting the wording of the legislation widely, the EAT has aimed to extend the protective reach of the whistleblowing rules. Interestingly, it acknowledged that there could potentially be circumstances where someone is not protected because they have been refused a job on the basis of having made a protected disclosure but are not “workers” (i.e. they are not employed by any employer at the time). Although at first this looks like a scenario that would not be common in practice, the circumstances of an employee’s departure from his former employer are sometimes found out through a reference checking process, which is completed once employment with the new employer has started. In such circumstances, this extension of the whistleblowing legislation may be relevant.

3. NEW AND PROPOSED LEGISLATION

Paternity

Additional paternity leave rules in force

New paternity rules provide fathers and partners (including same sex and civil partners) with up to six months’ additional paternity leave, provided the mother has returned to work during her maternity leave. Part of the leave may be paid if the mother has not taken the whole of her paid maternity leave. The new rules apply to fathers and partners with babies due on or after 3 April 2011 and for adoptive parents who are notified of a match on or after that date. Further details will be provided closer to April of next year.

Sickness

Sick notes replaced with fit notes

As of 6 April 2010 “sick notes” have been replaced with “fit notes”. The new “fit note” allows a doctor to state whether someone is “not fit for work” or “may be fit for work” subject to recommendations which will facilitate a return. The note places an additional obligation on doctors to consider adjustments that an employer can make to facilitate the return of the employee to the workplace. An example of the new “fit note” can be found at:

www.dwp.gov.uk/docs/med3-fitnote-sample.pdf

Discrimination

New Equality Act replaces 40 years of discrimination laws

The Equality Act received Royal Assent on 8 April 2010. It aims to bring together and re-state the existing discrimination legislation concerning sex, race, disability, sexual orientation, religion or belief and age, and seeks to adopt a single approach where appropriate. However there are some changes too. The majority of the Act’s provisions should come into force in October 2010. The Act only applies to England, Wales and Scotland. It will therefore not apply to Northern Ireland. This is because Equality is a devolved matter for the Northern Ireland Administration. More information will be provided later in the year on the implications the changes in the law will bring for HR practitioners.

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