Employment Law update April 2017

State Pension Age Changes!

The state pension age is likely to rise to 68 years of age by 2037 as early indications from a Government report show that the long-term affordability of the state-funded pension will be put under increasing pressure due to greater life expectancy.

The review, headed by John Cridland, the state pension age independent reviewer, considered different options for what retirement might look like beyond 2028, taking into account changes in life expectancy and wider changes in society. The main finding is that the state pension age will have to increase again within 20 years.

Cridland's recommendations include:

- state pension age should rise to 68 between 2037 and 2039;
- state pension age should not increase more than one year in any 10-year period
- all employers should have elder care policies in place which set out a basic care offer; and
- that people should be able to access a mid-life career MOT and review which should be facilitated by employers and by the government.

When Previous Warnings Count….

An expired warning can be taken into account as part of the overall circumstances considering a dismissal. The previous misconduct and the fact that a warning was given can be relevant when considering the outcome of a disciplinary. This was the finding in a recent Employment Tribunal.

The claimant had a poor disciplinary record and there was a list of 17 previous disciplinary issues on record, with the last two items being a nine-month disciplinary warning for failing to make contact while off sick and a three-month warning for using company machinery and time for preparing materials for personal purposes. Both of those warnings had expired by the time of the events that led to the dismissal.

The subject of the disciplinary was that the claimant was seen with his mobile phone in his hand on the shop floor. This was something that the employee handbook described as "*strictly prohibited*". A disciplinary hearing was held and a final written warning was issued. However, the letter then continued to dismiss the claimant giving the reasoning set out below:

"I have had to consider whether you can learn from this process or whether we will be discussing yet another matter within a few months. This is the eighteenth time we have had to discuss your

actions, for different reasons, on a formal basis. This is in addition to the informal conversations we have had and on many occasions, you have confirmed that this is the last time. In your defence you asked that you be given one more chance, that you love your job, you are highly skilled and pass on your skills to new employees...

I genuinely believe that you have been given every chance... You have given me no reason to believe that we will not be having a similar conversation in the near future. While your actions may not always be intentional, you do not understand the consequences of your actions and I do not believe this will change...

I can therefore confirm that my decision now is to terminate your employment."

The employment tribunal found that the reason for the dismissal was because of the claimant's disciplinary history and that the decision fell within the band of reasonable responses given the claimant's disciplinary history, so that the claim for unfair dismissal failed.

The claimant argued that this decision was legally flawed. The grounds of his appeal were that where an employee is guilty of misconduct which is not regarded as gross misconduct, it is not reasonable for the employer to rely upon earlier misconduct as the principal reason for dismissal – particularly where warnings have expired.

This was rejected by the Employment Appeal Tribunal (EAT). The question to be determined was whether the employer acted reasonably or unreasonably in the circumstances. The EAT considered the background and the employer's approach and dismissed the appeal, finding that the original dismissal decision was fair.

Whilst this decision may seem like a breath of fresh air to employers, we always recommend taking advice before coming to a disciplinary conclusion. It is not automatic that "spent" disciplinary warnings can be taken into account and this case demonstrates an extreme case where the employee had received 17 warnings over his career!

QUESTION AND ANSWER CORNER

Q: ***We have an employee who has raised a grievance in the middle of us conducting a disciplinary process. What should we do?***

A: In the course of a disciplinary process, an employee is entitled to raise a grievance related to the disciplinary case. When this occurs, you need to suspend the disciplinary procedure for a short period while the grievance is investigated and managed.

Depending on the nature of the grievance, you may need to consider bringing in another manager to deal with the disciplinary process – particularly if the grievance focuses on something relating to the way in which the disciplinary was conducted. Then, once the grievance is upheld and resolved, or not found, then you will be in a position to re-commence the disciplinary procedure to its conclusion.

Q: ***We have an employee who is a delivery driver. He has advised us that he is losing his sight due to a medical condition. The business needs to consider the impact of this on his ability to drive. What do we need to be aware of?***

A: Safe driving requires effective and reliable control of the vehicle and the capacity to respond to the road, traffic and other external conditions.

His failing eyesight does not necessarily mean he has to stop driving immediately and so you are entitled to ask him for consent to seek a medical report to enable you to understand the implications of his condition on his on-going short and long term ability to drive for work. Once you are in a position to understand the effect and timescales of his condition you will be able to judge how to respond to the employee.

Under UK legislation, the holder of a driving licence has a legal obligation to inform the Driving and Vehicle Licensing Agency (DVLA) of certain medical conditions. Failure to inform the DVLA can result in a fine of £1000 so it would be sensible to confirm with the driver that he has informed the DVLA of this condition, if required to do so.

If, ultimately, this employee cannot drive for work and you have no alternative role for him then you would be entitled to consider dismissal on the basis of capability.
However this could not occur until you have fully investigated the effect of his medical condition and any possible alternative roles that he may be able to fulfil.

If you have a particular question that you would like answered email training@scottishwholesale.co.uk or call 0800 9995 121 and we will publish next month – all names will be removed to ensure confidentiality.