



## Employment Law update May 2017

### ***Do you Force the Retirement Issue?***

A recent tribunal reminds us that forcing employees to retire against their will could lead to difficulties after a former company accountant won £182,000 for age discrimination. He was found to have been unfairly dismissed and discriminated against after his employer tried to force the 69-year-old to retire.

The pay-out covered loss of earnings and benefits, injury to feelings from age discrimination, and an extra payment for the employer's to follow the Acas Code of Practice.

The accountant had worked for the company for 16 years and claimed his former employer pushed him out because they wanted him to retire at 65 and had even gone as far as to recruit his replacement in anticipation of this.

After a lengthy period of sick leave for work-related stress following a particularly hostile meeting with the company's management, the tribunal was told the business then failed to follow the recommendations of two medical reports designed to help the accountant return to work.

The case demonstrates what happens when a dismissal is disguised as something else.

***Having open dialogue about retirement plans is a healthier way to deal with employees in this age demographic and agreeing medium term strategies such as part time working, reducing hours and cutting workload helps with succession planning and avoids costly litigation***



## ***Social Media and Work – Beware the Pitfalls!***

Following a recent employment tribunal in which an employee was found to have been fairly dismissed for tweeting unsavoury posts about his employer, it is worth considering a reminder of what employers should have in place in terms of social media policies.

In a recent employment tribunal, an engineer who had 30 years' service with his company, was dismissed when his employer discovered comments that he had posted on his Twitter account three years previously.

He was dismissed for gross misconduct but brought a claim for unfair dismissal, arguing that his tweets were private and posted some two or three years previously. He claimed that the employer could not discipline him for tweets that were "out of date" and private.

The employment tribunal did not agree and said that it was irrelevant whether the tweets were years old. The judge stressed that the comments were visible to anyone and in the public domain, reminding the employee that a negative comment about an employer posted some time ago can still have a negative impact on an employer's reputation. In this context, the tweets were not "private".

Considering this, what should be in place to ensure that employees understand their obligations in terms of setting out expectations for their employees?

### **For employers**

- Ensure there is a clear social media policy in place, outlining what constitutes gross misconduct. This could include such things as bringing the company's name into disrepute or bullying other employees.
- Regularly remind employees of expectations regarding social media activity, referring to the policy.
- Be clear to employees that negative social media comment will be investigated and could result in dismissal for gross misconduct.
- Ensure any decisions made are well-documented, with clear reasons.
- Ensure consistency in treatment of employees who are deemed to have breached the policy.
- Issue the "reminder for Employees" stated below:

### ***Social Media Use Reminder for Employees***

- *Before posting anything on social media consider what effect it could have.*
- *Do not think that just because privacy settings are in place this means only 'friends' or 'followers' can see comments.*
- *Just because a comment was written some time ago, does not mean it cannot be used by the employer.*
- *Remember that if a comment or photo is out there on social media, potentially anyone can see it and reuse it. Social media is just that – it's social.*

If an employee is expected to represent the business online, they must understand issues such as copyright, defamation and reputational damage. Disciplinary action will be tricky if an employee has not been adequately



trained on what the business expects in terms of representation on social media and what is not acceptable.

***Disciplinary policies should contain references to online activity and the use of social media and make provision for employees to be protected from unwanted activity relating to them personally. 121 has developed social media policies and can support clients with disciplinary matters relating to social media misuse. If you have any queries in this area, please contact us on 0800 9995 121***

## **QUESTION AND ANSWER CORNER**

***Q: We are dealing with a disciplinary case but the employee who is subject to potential disciplinary has raised a grievance. What happens now?***

A: In the course of a disciplinary process, an employee might raise a grievance that is related to the case. The statutory Advisory, Conciliation and Arbitration Service (Acas) Code of Practice on Disciplinary and Grievance Procedures recommends that if this happens, the employer should consider suspending the disciplinary procedure for a short period while the grievance is dealt with.

Depending on the nature of the grievance, you may need to consider bringing in another manager to deal with the disciplinary process. And if the employee was simply mistaken in the claim of a grievance, or over how the disciplinary procedure works, then Acas advises the employer to carry on with the disciplinary hearing.

***Q: An employee has been called up for jury service but we have a big order to get out and he is key to production. Can I avoid losing him for this period?***

A: You can ask the Courts for a delay in jury service, but only if the employee agrees, on the grounds that his absence will harm your business. You can only ask for a delay once in a 12-month period most cases is an average of 10 working days but may be longer or shorter depending on the case.

You must not dismiss or treat employees differently they serve on a jury so if the employee insists on fulfilling his civic responsibilities you have no choice but to accept this.

***Q: One of my employees has failed to return to work after annual leave. This is not the first time that this has happened. What should I do?***

A: In such circumstances the following procedure is suggested:

- attempt to contact the employee (telephone and/or recorded delivery by post) about the unauthorised absence, asking the employee to make contact and confirming that it has not



been possible to make contact directly to the employee and that the absence is being treated as unauthorised.

- when the employee returns to work, investigate the matter as a disciplinary issue and explain that unauthorised absences will be unpaid. There may be an explanation so ensure that an investigation is held to establish the reason for the absence and for the failure to make contact.
- if the employee fails to provide an adequate explanation for the absence, initiate your disciplinary procedure, which might result in dismissal — particularly if the absence has been lengthy.
- If the employee fails to make any contact, inform him or her that a disciplinary hearing will be held in his or her absence and that dismissal for gross misconduct is a likely option in the event of his failure to attend.

A dismissal for gross misconduct in these circumstances is likely to be fair if you have followed a correct procedure. Make sure that you keep records of all developments and communications.

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