Employment Law update October 2017

Think Carefully Before Suspending!

A recent case shows that immediately suspending an employee accused of serious misconduct can cause difficulties for the employer, if unjustified

A teacher was accused of using unreasonable force towards two children in her class, who were known to exhibit challenging behaviour. The head teacher investigated and concluded that the teacher had used no more than reasonable force. However, the teacher was suspended by the executive head. A letter was sent to the employer, stating that the suspension was a 'neutral act' and not a disciplinary sanction. It also indicated that the purpose of the suspension was to allow an investigation to be conducted fairly.

The teacher raised a claim for breach of contract, arguing that, in suspending her, the council had breached the implied term of mutual trust and confidence. She won her case on appeal. The High Court made several criticisms of the council's handling of the case, including:

- The teacher was not asked for her version of events before being suspended;
- the head teacher's initial investigation concluding that the previous allegations were unfounded was overlooked;
- no alternatives to suspension were considered; and
- no explanation was given as to why an investigation could not be carried out fairly without the suspension

This decision is a reminder that employers must give careful thought to a decision to suspend. Failure to do so might lead to a claim of constructive dismissal.

Employers can mitigate this risk by ensuring the following points are considered in deciding whether or not suspension is necessary:

- Would the employee's presence impede an investigation?
- Is there a risk of the employee interfering with witnesses or evidence?
- Is there a risk to the safety of other staff, customers or service users?
- Are there suitable alternatives?
- Is suspension reasonable in the circumstances?

That is not to say that suspension should be avoided at all costs. It is important not to lose sight of the nature of the allegations against the employee – there will be cases where suspension is

necessary. However, caution must be exercised to ensure that it is not the default position, even in cases involving potential gross misconduct, and all circumstances should be taken into account.

When is a Contractual Change Constructive Dismissal?

Constructive dismissal is where an employee resigns and shows they were forced to do so by the conduct of their employer. An employee may only bring a claim for constructive dismissal if they have a qualifying period of service of two years' continuous employment. The steps leading to a constructive dismissal claim are:

1. The employer commits a 'repudiatory breach' of the contract of employment (ie the employee feels that they have no choice but to leave)
2. The employee resigns in response to this breach. The resignation may be with or without notice.
3. The employee does not delay in resigning.

With constructive dismissal the employee resigns in response to the alleged breach which must be so serious that it justifies the employee resigning. Examples include:

- Unilateral changes to the employee's contract; for example, pay cut or demotion.
- Changes to the employee's working hours.
- Change of the employee's working location.
- Changes to the employee's duties: many constructive dismissal cases are brought on the basis that the employer made unreasonable demands of the employee.
- Subjecting the employee to unlawful discrimination to the extent that the employee-employer relationship breaks down.

To be effective for constructive dismissal claims, the employee's resignation letter should unequivocally set out the reasons for their resignation. If it doesn't, the employee will find it difficult to prove later that it was solely down to the repudiatory breach. Constructive dismissal claims are technically difficult to win, but employers should take them seriously.

Don't be caught out by the National Minimum Wage rules

Last month, more than 200 employers found themselves on a published list of those who had failed to pay their employees either the national minimum wage (NMW) or the national living wage (NLW).

However some of those employers felt aggrieved because the failure to pay was not deliberate, but because they said they had been caught out by some of the more complex HMRC rules relating to failing to account for overtime, not paying apprentices correctly and making deductions for uniform costs from pay.

It is vital for companies to maintain accurate records and understand what amounts to working time for NMW purposes. For example, when employers ask workers to attend additional training throughout the employment, this time is classed as working time for which they should be paid at least the NMW. The impact of this decision could be costly. Unpaid monthly training may soon add up to a significant underpayment of the NMW.

Many employers have also been caught out for making deductions for uniform costs. Under NMW rules, requiring employees to follow a dress code without any additional pay to cover the cost of the dress code is considered a deduction from NMW. The NMW guidance gives the example of a hairdressing salon requiring its employees to wear white t-shirts and black jeans. If the salon does not pay the employee a clothing allowance and is paying the NMW, then HMRC will consider that the employer has failed to pay the employee the appropriate wage.

It is also important for employers to keep track of birthdays, especially if salary levels are set in accordance with, or near to, the NMW or NLW. The NMW increases when individuals reach 18, 21 and 25 years old. Recognising annual rate changes effective from 1 April each year should also be part of an employer's salary planning.

Questions & Answer Section

Q. **Can I *recover training costs from an employee if they leave the business shortly after their training is completed?***

A. The most suitable solution is to implement a training agreement with an employee. Normally under such agreements, an employer agrees to pay training fees and course fees for the employee. In return, the employee agrees to remain in employment following the training period for a certain amount of time. The agreement typically includes a clause that states if the employee leaves following the training, the fees will be recouped on a sliding scale basis, e.g. if he or she leaves immediately following the end of the training, they must repay the full amount or if they leave after six months, they repay 75% and so on.

The only restriction in respect of such agreements is that the repayment conditions must be clear from the outset, and both parties have signed their agreement prior to the training commencing. The repayment clause itself must also be reasonable.

Q. ***Today we have suspended an employee pending investigations into an act of gross misconduct. They had pre-booked holiday in a week's time and I don't think we will be able to complete the investigations by then. Do they remain on suspension during her holiday?***

A. It is possible to lift an employee's suspension in situations such as this, which would allow the employee's holiday entitlement to be used up this would ensure that you are limiting your liability to pay accrued holiday should your investigations result in a disciplinary hearing and subsequent dismissal. You should write to confirm the period that the suspension is lifted. You should be cautious and aware that, over this period of annual leave, the restrictions that apply during suspension (i.e. that the employee cannot contact colleagues or come into the office) cannot be applied. However, you should remind the employee that the investigations will continue regardless of the holiday, and if they do anything in that time that could be considered as evidence (such as intimidating a witness or attempting to destroy data), it can still be considered for the purposes of the disciplinary.

Q. ***An employee has been called up for jury service. Can I avoid losing him for this period?***

A. You must allow the employee time off for this jury service, which is a public duty. Anyone on the electoral register aged 18–70 may be selected to serve on a jury. You can ask, however, for a delay because it will harm your business but you can only ask for a delay once in a 12-month period.

It is estimated that jury service in most cases is an average of 10 working days but may be longer or shorter depending on the case.

are under no legal obligation to pay an employee while on jury service as the court will pay certain costs for example, loss of earnings, travel costs and a subsistence rate during jury service.

You must not dismiss or treat detrimentally employees because they serve on a jury. They also have the right not to be selected for redundancy, where the reason is connected to their jury service.

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.