Employment Law update August 2018

EMPLOYER OBLIGATIONS FOLLOWING SUSPENSION?

Suspension is where an employee continues to be employed but does not have to attend work or do any work and usually occurs when:

- a serious allegation of misconduct has arisen
- there are medical grounds to suspend
- there is a workplace risk to an employee who is a new or expectant mother

Suspension should not be used as a disciplinary sanction and should not be automatic when dealing with a potential disciplinary matter as normally an employee will be able to continue doing their normal role while the matter is investigated.

Suspension should be considered if there is a serious allegation of misconduct and:

- the working relationships have severely broken down
- there is a risk that the employee might tamper with evidence, influence witnesses and/or sway the investigation into the allegation
- there is a risk to other employees, property or customers
- the employee is the subject of criminal proceedings which may affect whether they can do their job.

In certain circumstances, a health professional may recommend that an individual worker is unfit to work with a particular hazard. If the hazard cannot be immediately removed, the employer should consider:

- temporarily adjusting working conditions
- offering suitable alternative work (at the same rate of pay and on terms no less favourable than the original role).

If it is not feasible to make such adjustments, the employer may have to suspend until it is safe to return to work.

Following notification of an employee's pregnancy, the employer must undertake a risk assessment taking into account any advice the employee has received from their doctor or midwife. If the risk cannot be removed, the employer must:

- temporarily adjust working conditions and/or working hours, and if that is not possible
- offer suitable alternative work (at the same rate of pay and on terms no less favourable than the original role) and if that is not feasible
- suspend the employee from work on paid leave until their maternity leave begins or it is safe for them to return to work.
- If suspension is necessary, an employee should be provided with a suspension letter that includes:
- the reasons for the suspension and how long it is expected to last

- their rights and obligations during the suspension. For example, that they should be contactable during normal working hours
- a point of contact (such as a manager or HR) and their contact details for the employee during their suspension
- that the purpose of suspension is to investigate and is not an assumption of guilt (if applicable)

WHAT TO DO WITH OUTSTANDING HOLIDAY AT THE END OF THE HOLIDAY YEAR?

Often employers find that at the end of the holiday year, some employees have a proportion of holiday entitlement. This means there can be a rush on holiday requests at the end of the holiday year, leaving employers short of staff or unable to fulfil the request. As an alternative, can employees be paid this entitlement? Not according to the working time regulations which specifically state that an employee should not be paid in lieu of taking their minimum holiday entitlement of 5.6 weeks (28 days for an employee working 5 days per week). Holiday entitlement is there to allow for employees to take time away from work and paying in lieu defeats this object.

There is one exception and this is that accrued holiday entitlement may be paid upon on the termination of employment. Otherwise, employees must be allowed to take their full holiday entitlement during the annual leave year. This means that employers are expected to put in place mechanisms to ensure that their employees take regular holidays throughout the leave year to avoid any claim from an employee that they were prevented from taking their full holiday entitlement.

CUTTING PAY WAS CONSTRUCTIVE UNFAIR DISMISSAL

The Employment Appeal Tribunal (EAT) has considered whether an employee was constructively unfairly dismissed when his employer planned a significant cut to his pay. The employee was a showroom manager whose sales figures fell substantially over four years. His employer asked him to accept a reduction in his basic pay, from £45,000 to £25,000. He objected and the employer said it would proceed with the cut

The decision focused on the "implied term" of trust and confidence. This obliges an employer not to act in a way likely to destroy or seriously damage its relationship with the employee. If it does breach this and the employee resigns, this will be a 'constructive' unfair dismissal.

In this case, the employment tribunal found that cutting the employee's pay did not breach the duty of trust and confidence because the employer had reasonable and proper cause given his poor performance. However, the EAT held that this was the wrong approach saying that the tribunal should have considered that employers are not permitted to impose changes to key contractual terms (such as pay) without employees' consent.

Things to consider when making salary cuts:

1. If the employer has reason to question an employee's performance, follow a performance management procedure. If the employee fails to improve, they can be dismissed on capability grounds rather than trying to cut salary.
2. Consider making the post redundant in favour of offering an alternative role which has reduced responsibilities and therefore a reduced salary. For it to be a genuine redundancy and to avoid the risk of an unfair dismissal claim, employers must show that they no longer

need the existing role and the new position is different. In this case, it would involve suggesting that there was no longer the need for a manager in favour of the new role of a sales rep with fewer responsibilities.

3. If the business is in financial trouble, seek the employees' consent to pay cuts as an alternative to redundancy or the closure of the business. This must only be done following genuine and meaningful consultation.

CONSULTATION INTO CHANGES TO SHARED PARENTAL LEAVE

The Government has launched a new consultation on giving bereaved parents the right to paid time off. This is expected to pass into law but it leaves several details to be set out in regulations later.

The Government is seeking views on who should count as a bereaved 'parent' (such as other close relations or foster or adoptive parents), whether leave should be taken in one block, whether bereaved parents should give any notice before taking leave and whether they should provide evidence that they're entitled to take the leave.

8 changes to prepare for:

- Employers will have to offer all employed parents, irrespective of their length of service, the right to 2 weeks' bereavement leave if they lose a child under the age of 18, pro-rated for part time employees.
- The employee will have to take the leave within 56 days of the child's death.
- If an employee has at least 26 weeks' continuous service and their average earnings meet the lower earnings limit (currently £116 a week), employers will have to offer paid parental bereavement leave. This will be at the statutory rate, currently £145.18 a week or 90% of weekly average earnings, whichever is lower. 92% of this will be reclaimable via HMRC.
- If more than one child dies, the parent is entitled to two weeks' leave (and pay if applicable) in respect of each child.
- Employers will not be permitted to dismiss an employee or subject them to any other detrimental treatment because they took, or asked to take, parental bereavement leave.

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