CHILTERN HR OCTOBER 2014 NEWSLETTER

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1. Shared parental leave

On 5 April 2015 new rules come into force which will allow couples whose babies are due from 5 April or who are adopting a child from that date, to choose to share maternity or adoption leave.

Employers can expect to start to receive notices of eligibility and the intention to take shared parental leave from qualifying employees from January. To help employers understand how the new changes will affect them Acas has published a guide on shared parental leave which can be found here http://www.acas.org.uk/index.aspx?articleid=4911 . Acas has also indicted that it is working on detailed guidance to help employees and employers manage shared parental leave requests fairly.

Separately BIS has published its own guide for employers on shared parental leave and pay

2. Guidance on accompanying a pregnant woman to antenatal appointments

BIS has published guidance for employers on the right to time off to accompany a pregnant woman to antenatal appointments which was introduced on 1 October.

The guidance explains who is entitled to time off, how much time can be taken off and what evidence an employer is entitled to ask for. It also explains the entitlement of a man who is an expectant father with more than one woman and the entitlement of a husband whose wife is pregnant by another man.

3. Employee was not unfairly dismissed for taking dependant leave

The Employment Appeal Tribunal has held that an employee was not automatically unfairly dismissed for taking time off to take his heavily pregnant partner to hospital because he had not told his employer the reason for his absence as soon as reasonably practicable.

What does this mean?

Employees have the right to take a reasonable amount of unpaid time off work to take necessary action to deal with particular situations affecting their dependants. However, the right to time off only applies if the employee tells their employer the reason for their absence, as soon as it is reasonably practicable to do so and how long they expect to be away from work (unless it is not reasonably practicable for the employee to tell the employer of the reason for their absence until they return to work).

In this case the employee was off work for a week. He failed to contact his employer on the first morning of his absence to explain the situation but arranged for his father to telephone the employer in the afternoon. It was not until the third day of absence that he contacted his employer himself and that was in response to a request that he contact the office urgently. He then failed to turn up for work or contact his employer on the fourth and fifth days of absence.

The tribunal said that even if his phone battery had run out of power he could have recharged it, borrowed a phone or used the hospital's payphone and called his employer to let them know what was going on.

What should employers do?

Employers should exercise caution in such circumstances because where the reason, or principal reason, for an employee's dismissal is that they took or sought to take time off for dependant leave, the employee will be regarded as having been automatically unfairly dismissed. In this case the reason for the dismissal was not that the employee had taken the time off but because he had failed to take reasonably practicable steps to keep his employer informed. As to what is reasonably practicable will depend on the facts of a particular case and there is very little case law on this point.

4. Managing bereavement in the workplace

Acas has published a good practice guide on managing bereavement in the workplace.

The guidance is intended to help employers manage employees who have suffered a bereavement through appropriate and sensitive discussions with their employee, both in the immediate aftermath of bereavement and in the longer term.

The guide explains the legal position relating to time off to cope with bereavement and the data protection issues which surround making announcements to other members of staff. It provides practical advice for employers, illustrated by examples, as to what they should do when one of their staff suffers a bereavement or discovers that a loved one is terminally ill and advice on how to manage the death of a team member. It also highlights the possible discrimination issues which may arise and contains guidance on how to deal with bullying.

5. Should employers permit E-cigarettes in the workplace?

E-cigarettes, that are battery operated devices that mimic tobacco smoking, fall outside of the scope of smoke free legislation. That being the case the use of E-cigarettes in the workplace is not illegal. However, that does not mean that employers should necessarily allow their use in the workplace.

The long term health effects of E-cigarettes are not known. Potentially they could provide a health risk for other members of staff much in the same way as passive smoking and this presents a strong argument against their use at work. Other arguments in favour of a ban include the possibility that other staff may find the vapour that E-cigarettes emit annoying and a concern that they normalise what looks like smoking.

On the other hand E-cigarettes are advertised as aids to stop smoking and employers may want to support their use by staff who are trying to quit smoking.

What should employers do?

Ultimately it is for an employer to decide whether to allow staff to use E-cigarettes, and similar products, in the workplace or ban them as they would ordinary cigarettes. Whatever they decide employers should ensure that their policy on the use of E-cigarettes is clearly communicated to their staff either as a free standing rule or as part of their no-smoking policy.

6. Acas guidance on dress codes

Acas has published new guidance for employers on dress codes. The guidance contains key points an employer should bear in mind when setting a dress code including the need to avoid unlawful discrimination and health and safety considerations. It also contains sections on tattoos and body piercings and on religious dress.

7. Deduction from wages for failure to return company property was unlawful

The Employment Appeal Tribunal has held that an employer was not entitled to withhold wages due to an employee's failure to return company property as there was no evidence that the employee had authorised or given her prior written consent to the deduction.

What does this mean?

It is unlawful for an employer to make a deduction from a worker's wages unless the deduction is required or authorised by statute or a provision in the worker's contract or the worker has given their prior written consent to the deduction. In this case the employee had not authorised or given her prior written consent and, therefore, the deduction was unlawful.

What should employers do?

Employers who are unsure whether they are entitled to make a deduction should obtain specific legal advice.

8. Qualifying period for unfair dismissal is removed for reservists

On 1 October the qualifying period for unfair dismissal where the dismissal is connected with an employee's membership of the Reserve Forces was removed. This change applies to reservists (members of the Territorial Army, Royal Naval Reserve, Royal Marines Reserve or Royal Auxiliary Air Force) whose employment terminates after 1 October.

Dismissal connected with an employee's membership of the Reserve Forces won't be treated as automatically unfair – the change simply removes the need to have two years' qualifying service which places reservists at a disadvantage as periods of call up are not usually counted for continuity of employment purposes.

It's worth noting that it is, in any event, a criminal offence for an employer to dismiss a reservist because they are called out or likely to be called out. Also a former employer is obliged to re-employ any reservist who was employed by it in the four week period before mobilisation. The employee must be allowed to return to the same job within six months after the end of their military service, and on terms and conditions no less favourable than those which would have applied if there had been no call-up, although if this is not reasonable and practicable, the employee must be offered the most favourable terms and conditions that are reasonable and practicable in the circumstances.

Also from 1 October small and medium sized employers of reservists who are called out for service will be entitled to a monthly payment of £500 for each full month that a mobilised reservist, who is employed on a full time contract, is absent from work. A pro rata amount will apply to periods of less than a month and where the reservist is contracted to work less than 35 hours a week. This will be in addition to the awards currently available to cover the pay of a replacement for the reservist or overtime payments to, or salary increases for, existing employees who cover the reservist's normal work in their absence.

9. Employer did not have to await outcome of criminal proceedings before making dismissal

The Employment Appeal Tribunal has upheld a tribunal's ruling that an employer was not required to await the outcome of criminal proceedings before embarking on disciplinary proceedings.

What does this mean?

A careful investigation is required where there are serious allegations of criminal misbehaviour but that does not mean that an employer has to await the outcome of criminal proceedings. In this case the tribunal concluded that there had been a reasonable and adequate investigation by the employer and the decision to dismiss the employee fell within the range of reasonable responses. It did not matter that the manager who conducted the disciplinary hearing did not have a taped interview of the employee's questioning by the police or a full transcript of that interview. He had seen a summary of that interview and had been taken through that summary by the investigators and had sufficient detail to reasonably assure himself of the position.

It also did not matter that documents relating to an internal appeal upon which the employee was invited to comment were mistakenly sent to the wrong address. This was because it was not unusual for employees not to reply to such letters and the sender, therefore, had no reason to believe that there had been a mistake. Also, had the employee raised this after he received a subsequent appeal report which referred to that correspondence and the fact that he had not replied to it the employer would have provided him with an opportunity to respond as they had done so with other employees in the past who had, for example, been on holiday.

What should employers do?

Employers should avoid making knee jerk decisions if they learn that a member of staff is being investigated by the police even if it is for a serious offence. They should instead carry out a thorough investigation themselves before making a dismissal and should always take specific legal advice.

10. US employee could not claim unfair dismissal or discrimination

The Employment Appeal Tribunal has held that a US employee who worked 49% of his time in the UK could not bring unfair dismissal or discrimination claims in an employment tribunal.

What does this mean?

In order to bring an unfair dismissal claim where an employee's place of work is not Great Britain, it will be necessary for them to show that the connection with Great Britain is sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for a tribunal to deal with the claim.

In this case it was held that the tribunal did not have jurisdiction to hear the employee's unfair dismissal claim because, despite carrying out work in the UK, he had not given up his base in the US, his contract had an 'overwhelmingly close connection' with the US, the dismissal had been

carried out in the US, and his assignment to the UK had finished before his employment was eventually terminated.

The Employment Appeal Tribunal also said that the territorial scope test should not be less stringent for whistleblowing automatically unfair dismissal claims or discrimination claims as Parliament could have provided that aspects of British employment law should protect any individual who worked partly in Great Britain but it had not done so.

What should employers do?

Despite this ruling it would be good practice for employers to apply their policies and procedures on discrimination and whistleblowing to all employees.