CHILTERN HR

SEPTEMBER 2013 NEWSLETTER

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1. Reasonable adjustments where a disability interacts with other ailments

The Employment Appeal Tribunal has suggested two approaches an employer can take where an employee's disability interacts with other ordinary ailments in relation to sick absence.

What should employers do?

One option is for them to look in detail and with care and, if necessary, with expert evidence at the periods of absence and attempt to analyse with precision what was attributable to the employee's disability and what was not. Alternatively, they could ask and answer with proper information the question: 'What sort of periods of absence would someone suffering from the disability reasonably be expected to have over the course of an average year due to the disability?'

Case reference: The Commissioners for HMRC v Whiteley

2. Gross misconduct does not necessarily justify dismissal

The Employment Appeal Tribunal has held that mitigating circumstances should be considered in cases involving gross misconduct before deciding whether a decision to dismiss is fair.

What does this mean?

The Employment Appeal Tribunal accepted that dismissal is almost inevitable in cases involving gross misconduct, but said that the tribunal should have considered the mitigating circumstances of the employee's case because mitigating factors could make a decision to dismiss unreasonable. Mitigating circumstances, it said, might include long service, the consequences of dismissal for the employee and having a previously unblemished record.

What should employers do?

Employers should always be prepared to consider if there are any mitigating circumstances and take specific legal advice before dismissing an employee or taking disciplinary action short of dismissal.

Case reference: Brito-Babapulle v Ealing Hospital NHS Trust

3. New employer liable for misuse of confidential information

The Patents County Court has held that an ex-employee and his new employer company were liable for misuse of confidential information belonging to the former employer.

What does this mean?

The employee was held liable for misuse of confidential information on the basis that the information he had taken was actually used.

The new employer was also held liable for the breaches, including those before it became the employer. This was because the employee was acting to further his new employer's interests as their agent and because his knowledge could be attributed to the company which was his new employer. In that way, the company could be held jointly liable.

The new employer's director could also have been held to be jointly liable for the breaches had he had a 'common design' to commit them, or had he 'dishonestly' ignored what was going on. However, the evidence did not show that he knew what was going on so he was not held to be jointly liable.

What should employers do?

Employers should recognise the considerable risk of allowing employees who used to work for a competitor to use confidential information from their old employment. They should make it clear to prospective employees that any such information should not be used by them before or after they start.

Case reference: Pintorex Limited v Keyvanfar and others

4. Death in service benefits can be recovered by the estate of a deceased former employee

The Court of Appeal has held that the estate of an employee who died shortly after being dismissed could include in its claim for unfair dismissal or discrimination the loss of the death in service benefit which would have been provided had he still been employed when he died.

What does this mean?

Normally the loss recoverable in such instances would be the amount of securing replacement insurance. However, since the employee in this case had died just less than a month after dismissal, he was unable to obtain alternative life insurance cover and his estate was entitled to the equivalent to the full sum payable on death.

What should employers do?

Employers faced with claims of this kind should take specific legal advice.

Case reference: Fox v British Airways PLC

5. Valuation of shares awarded to employee shareholders

HMRC has revised its Shares and Assets Valuation Manual to take into account the introduction of employee shareholder employment status on 1 September 2013. This new employment status will apply where an employee receives fully paid up shares in the employer company or in its parent undertaking, with a value of at least £2,000 and certain other conditions are met.

If the shares are worth less than £50,000 at the time they are awarded, they will be exempt from Capital Gains Tax if they are subsequently disposed of. If the shares are worth more than £50,000, the new employment status will still apply, although the exemption from Capital Gains Tax will only apply to the first £50,000 of shares.

For valuation purposes when determining whether the shares are worth at least £2,000 the value will be the actual market value of the shares, taking into account any restrictions. However, the value of the shares for the purposes of the £50,000 upper limit will be the unrestricted market value, without taking into account restrictions.

Applicants will be able to apply to HMRC for a valuation check, using form VAL 232, before shares are awarded.

Further details can be found on HMRC's website
http://www.hmrc.gov.uk/manuals/svmanualnew/SVM109090.htm

6. Employers who fail to pay the National Minimum Wage will be publicly named

The Government has announced that it will be introducing a new NMW naming scheme in October making it easier for employers who are in breach of NMW legislation to be named.

Under the revised scheme any employer who has been issued with a Notice of Underpayment by HMRC can potentially be named.

Employers have 28 days to appeal against a Notice of Underpayment. If the employer does not appeal or unsuccessfully appeals, BIS will consider them for naming. The employer will then have 14 days to make representations to BIS outlining whether they meet any of the following criteria:

- naming the employer carries a risk of personal harm to an individual or their family;
- there are national security risks associated with naming the employer; or
- there are other factors which suggest that it will not be in the public interest to name the employer.

BIS will then, normally within 14 days, inform the employer of any representations. If BIS does not receive any representations or the representations received are unsuccessful, the employer will be named by BIS in a press release.

Full details can be found here:
https://www.gov.uk/government/news/national-minimum-wage-rogues-to-be-publicly-named-and-shamed-under-new-plans

7. Report recommends changes to the way employee benefits and expenses are reported and taxed

The Office of Tax Simplification (OTS) has published an interim report in which it recommends that the complex system for reporting and taxing employee benefits and expenses be overhauled.

The OTS intends to make its final recommendations ahead of the 2014 budget and in the meantime is welcoming comments, ideally by mid September.

Details of the proposals and a link to the interim report are here:

https://www.gov.uk/government/news/tax-rules-for-employee-benefits-and-expenses-under-review