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EMPLOYMENT AND APPEALS COMMITTEE

Friday, 31st January, 2020

The use of Welsh by participants is welcomed. If you wish to use Welsh please inform us by noon, two working days before the meeting

S U P P L E M E N T A R Y P A C K

1.	EMPLOYMENT LAW UPDATE
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To receive an employment law update.

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Employment Case Law Update January 2020

Employment and Appeals Committee

Companions - Talon Engineering Ltd v Smith

The EAT has held that an employer acted unreasonably by refusing to postpone a rescheduled disciplinary hearing by 10 days so that the employee's chosen trade union representative could attend.

This refusal to postpone for a short time rendered the subsequent dismissal procedurally unfair even though it was not in breach of the right to be accompanied provisions in s10 Employment Relations Act 1999 (which only require an employer to agree to a request to postpone a hearing if the suggested rescheduled date is within five working days of the original date).

This does not mean that an employer should always agree to a postponement in such circumstances but it is important to note that an employer's overriding obligation is to act reasonably and this may involve a degree of flexibility in the process.

Unfair Dismissal: No need for separate 'investigation' hearing

Sunshine Hotel v Goddard.

The Acas Code, at paragraph 5, states: "*It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.*"

There is no legal requirement that an employer hold an investigation meeting before holding a disciplinary meeting in order for a dismissal to be fair. Section 98(4) of the Employment Rights Act 1996 simply requires an employer to act 'reasonably'. In the modern workplace, it would be unusual - certainly for a private sector company which does not have a disciplinary policy requiring two meetings - for an employer to be acting unreasonably by only holding one meeting rather than two (provided the employee knows full details of the allegations they're facing in advance). And there is always an appeal to give the employee a second chance to explain their case.

Of course, the position is different if there is a collective agreement, or a disciplinary policy, which requires the employer to hold a separate investigatory meeting. In that situation, it is

sometimes (but not always) going to be unfair if the employer fails to comply with its own policy.

Whistleblowing- Royal Mail Group Limited v Jhuti

The Supreme Court has held that it was automatically unfair to dismiss an employee where the person who took the decision to dismiss was not aware that the employee had made protected disclosures and had been misled by the employee's line manager, who knew of the disclosure and had engineered a dismissal for poor performance.

The Supreme Court agreed with the EAT and overturned the decision of the Court of Appeal, summarising the position by stating "if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason."

New statutory rates

The government have published the proposed new rates for statutory maternity pay (SMP), adoption pay (SAP) and paternity pay (SPP) and shared parental pay (ShPP).

SMP, SAP, SPP and ShPP are all expected to increase from £148.68 to £151.20 from 5 April 2020.

The rate of statutory sick pay is also proposed to increase from £94.25 to £95.85 on 6 April 2020.

The National Living Wage for workers aged 25 and over will increase from £8.21 per hour to £8.72 per hour from 1 April 2020. The National Minimum Wage rates will also increase from 1 April 2020:

from £7.70 to £8.20 for 21 to 24 year olds

from £6.15 to £6.45 for 18 to 20 year olds

from £4.35 to £4.55 for 16 and 17 year olds

from £3.90 to £4.15 for apprentices

Casamitjana v League Against Cruel Sports

An employment tribunal has held at a preliminary hearing that ethical veganism can amount to a philosophical belief that is capable of protection under the Equality Act 2010.

The tribunal held that the beliefs were genuinely held by the Claimant in this case and met the necessary criteria:

- it related to a weighty and substantial aspect of human life and behaviour.
- it attained the required level of cogency, seriousness, cohesion and importance.
- it was worthy of respect in a democratic society, not incompatible with human dignity and it did not conflict with the fundamental rights of others.

The case will now proceed to a full hearing to decide whether the Claimant was discriminated against because of his beliefs.

Menopause in the workplace

A matter attracting increased media coverage is the menopause and how this can impact the employer/employee relationship.

An increasing number of menopausal women are now in the workforce owing to more women working generally and also later in life. The symptoms of menopause can range in severity and can include a combination of hot flushes, headaches, heavy periods, sleep disturbance, poor memory, depression and anxiety.

Acas published guidance for employers on World Menopause Day in October 2019 following the Labour Party Conference in September 2019 during which it was mentioned there were plans to require large employers to treat menopause-related absence separately from other absences.

Even without a change in the legislation, employers need to be aware of the HR and legal implications relating to the menopause and depending on the nature and extent of any symptoms, the potential for it to amount to a 'disability' under the Equality Act 2010.

Powys County Council implemented a menopause policy in 2019.

Without such policies, there is likely to be an increase in Tribunal claims in 2020 alleging disability discrimination on the basis of the menopause.

Parental bereavement leave

The Parental Bereavement (Leave and Pay) Act 2018 has received Royal Assent and will come into force on the 6th of April 2020.

The Act will give all employed parents who lose a child under the age of 18, or suffer a stillbirth from 24 weeks of pregnancy, a right to two weeks' leave and statutory parental

bereavement pay, if they meet the eligibility criteria. Details of how and when the leave may be taken will be set out in regulations in due course.

Non-smokers given four days extra holiday by Swindon employer

A Swindon based recruitment agency is rewarding workers with four days of extra holiday per annum if they don't take smoke breaks. The managing director argues that the policy aims to reward non-smokers, not penalise smokers. Accordingly, he argues that the policy does not discriminate, and is in fact balancing out the discrepancy in the longer hours worked by non-smokers who do not take frequent smoke breaks.