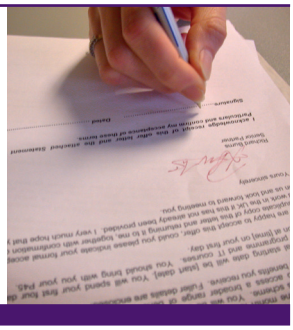
August 2010

Review

Employment



Sometimes it seems that lawyers only ever write about cases that impose new burdens or obligations on employers. This month we highlight a number of "employer-friendly" cases that have caught our eye, perhaps because of their rarity.

No need to conclude grievance procedure before dismissal

What should you do when an employee raises a grievance at the same time as dismissal or disciplinary action is proposed? Deal with the grievance first or press on with the dismissal or disciplinary proceedings regardless? According to the EAT, there is nothing that says employers must necessarily complete all or any of the grievance procedure (including any appeal) before the dismissal or disciplinary hearing can take place.

"Employers should adopt a pragmatic approach"

In *Samuel Smith Old Brewery v Marshall* Mr and Mrs Marshall were managers of one of the Brewery's pubs. In accordance with the terms of their Management Agreement with the Brewery they were instructed to reduce their staff's working hours in response to difficult trading conditions. They refused to do so, partly on the basis this would increase their own working hours, and raised a grievance about the instruction. This was rejected and they lodged an appeal. Before the appeal was heard they were invited to attend a disciplinary hearing on the basis that their refusal to implement the change in hours as instructed constituted gross misconduct. The Marshalls refused to attend the disciplinary hearing on the grounds that their grievance appeal was still outstanding and that they had been advised that the Brewery "could not do that to them" in those circumstances. The Brewery rose to the challenge, the hearing went ahead in their absence and they were both dismissed for gross misconduct. Their grievance appeal was also subsequently rejected. They brought claims for unfair dismissal, arguing primarily that the Brewery should not have gone ahead with the disciplinary hearing until the appeal procedure had been concluded.

The Tribunal upheld their claim but its decision was overturned by the EAT. It said that: "it is only in the rarest of cases that it would be outside the range of reasonable responses for an employer to proceed with a disciplinary process before hearing a grievance appeal, at least in the absence of some clear evidence of unfairness or uncompensatable prejudice". Though this relates on its face to disciplinary proceedings, there is no reason why the same should not be true for a dismissal proposed on any other grounds also, or for action proposed short of dismissal.

Employers should adopt a pragmatic approach, especially when dealing with overlapping disciplinary and grievance issues. No two cases will be identical but it is possible to split these circumstances into three main categories: (i) If a grievance is totally unrelated to the disciplinary allegations it would normally be safe to progress with the disciplinary matter and deal with the grievance at a later stage if it still then had any meaning; (ii) If the grievance essentially constitutes the defence to the proposed disciplinary charges or dismissal it is possible to deal with the two things at the same time; (iii) If, however, the grievance seeks to impugn the integrity of the individual making the disciplinary or dismissal decision then the safest course of action will continue to be to adjourn the disciplinary hearing until the grievance has been resolved – and this will probably mean concluding the appeal too. Otherwise it will in effect be the person accused who has to rule on a grievance against himself.

"Without prejudice" rule remains intact

The "without prejudice" rule provides that written or oral communications which are made for the purpose of a genuine attempt to compromise a dispute between parties may generally not be admitted in evidence. There are a limited number of situations in which the rule can be set aside, including where the rule would operate as a cloak for perjury, blackmail or other "unambiguous impropriety". In other words the rule cannot be used to cover up what would otherwise be unlawful acts.

In *Woodward v Santander UK Plc* Mrs Woodward brought a victimisation complaint under the Sex Discrimination Act 1975, claiming that as a result of an earlier similar complaint Santander was refusing to provide a reference and generally making adverse comments about her. She sought to refer to the discussions between the parties leading up to the settlement of her earlier claim, in which Santander had also flatly refused to provide a reference for her. Mrs Woodward accepted that these had been "without prejudice" but argued that her employer's conduct fell within the "unambiguous impropriety" exception. She claimed that they were evidence that Santander had "reprisal in mind" from the time of those negotiations and invited the Tribunal to view her current victimisation claim through the lens of that past refusal.

The EAT (upholding the Tribunal's decision) said that Mrs Woodward could not refer to the "without prejudice" discussions. The fact that Santander had refused to provide a reference as part of an earlier settlement could not in itself constitute impropriety. The impropriety must be unambiguous to trigger the exception to the rule, and that was not the case here.

Employers should not be discouraged from seeking to settle disputes with staff by a fear that something said in the course of negotiations may be used against them in subsequent litigation. This does not of course mean that employers can say anything at all and still "get away with it" – any discriminatory actions or comments in the course of the discussions would fall within the exception to the rule. Furthermore, it is important to remember that just because a conversation/document is stated to be "without prejudice" does not mean that it is a genuine "without prejudice" communication. In order for the rule to apply in the first place there must be a dispute extant between the parties and the communication must relate to a genuine attempt to compromise it.

Employer defeats claim for holiday pay

It is so far only a Tribunal decision but *Khan v Martin McColl* suggests that employers may be able to defeat claims for holiday pay stretching back over a number of years simply by paying for the most recent holiday year.

Mr Khan went off sick on 26 May 2008 and remained off work until his employment terminated on 14 August 2009. On termination his employer paid him for the holiday he had accrued during 2009, but Mr Khan brought an unlawful deductions claim, arguing that in light of the House of Lords' decision in *Stringer* he was also entitled to be paid for 2008.

The Tribunal said that in making a payment for 2009 the employer had effectively "broken" the series of alleged unlawful deductions, making Mr Khan's claim for 2008 out of time. In other words the last unlawful deduction took place at the end of 2008 (being the end of the 2008 holiday year) and Mr Khan should therefore have brought his claim on or before 31 March 2009, being three months from the last in the series of deductions. Though the point was not dealt with expressly it seems very likely that this would only work if the final year's holiday pay was paid before the start of proceedings – otherwise the withholding of 2009's holiday pay would bring 2008's within time as part of a series, and the later payment of 2009's holiday would merely amount to part-settlement, leaving the claim in respect of 2008 alive and kicking.

Whilst another Tribunal might adopt a different approach employers should therefore ensure that any termination payments made to employees who have been on long-term sick include a sum in respect of holiday accrued during the final year of employment, thus giving them the scope to run this argument at a later date.

> " The impropriety must be unambiguous to trigger the exception to the rule"

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