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UK: EMPLOYMENT

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NOTE FROM THE EDITOR

Since 1 January 2017, French employers with 50 or more employees must negotiate with staff to agree parameters for being online outside working hours. The aim is to reduce the impact of work-related emails in the evenings, weekends and days off. The expectation is that workers are less likely to suffer from work-related stress and the changes should benefit family life. Could a similar law be passed in the UK? This is probably unlikely in the foreseeable future, as France has traditionally had a more protectionist attitude to its workforce than the UK, but overloaded individuals can still raise the matter with their employers.

The Government and ACAS have produced draft guidance on managing gender pay reporting to assist employers in complying with their reporting obligations, which are due to be brought into force on 6 April. Employers with at least 250 employees must calculate and report the difference between men's and women's average hourly pay. The guidance sets out five steps that employers should take:

- extract the “essential information”, i.e. the pay, bonuses and weekly working hours of its male and female employees;
- carry out the necessary calculations in order to assess the mean and median gender pay gap;
- confirm that the published information is accurate;
- publish the gender pay information; and

- implement plans to manage the gender pay gap, for instance, developing initiatives to encourage female mentoring and development.

The first four of these steps reflect obligations imposed by the new Regulations. The final step is not a legal requirement but ACAS and the Government consider it to be best practice.

It looks as though 2017 will be a quieter year in terms of new legislation compared to previous years, as Government lawyers have their hands full with Brexit. We are, however, awaiting some important case decisions. The ECJ judgment on the cases of *Achbita v G4S Secure Solutions NV* and *Bougnaoui v Micropole Univers* is expected during 2017. The judgment should end the confusion caused by conflicting opinions given by two Advocates General on whether a ban on women wearing headscarves at work was discriminatory. The decision is also awaited in *Chestertons Global v Nurmohamed*. The Court of Appeal will consider the decision of the EAT in the whistleblowing case that stated that it is not necessary to show that a disclosure was of interest to the public as a whole, since only a section of the public will be directly affected by any given disclosure and that a small group may be sufficient.

DISCIPLINARY WARNINGS – CAN AN EMPLOYER RELY ON AN EXPIRED WARNING?

In this and the next Insight-In depth we look at disciplinary warnings in the light of two recent decisions on different aspects of warnings. In the next Insight, we will ask whether a tribunal can look into the fairness of a warning that ultimately led to an employee's dismissal. In this edition, we consider whether an employer is ever entitled to take into account an expired warning. Most disciplinary procedures stipulate that warnings expire after a set period of time; this is usually six months for a warning and 12 months for a final written warning. What, then, is the position when an employee has been subject to a warning that has recently expired, but then carries out a similar offence? Is an employer obliged to start from scratch with the new offence or can the previous offences somehow be acknowledged? A number of cases have looked at this issue.

Diosynth Ltd v Thomson

T was employed in a factory where raw chemicals were processed by way of chemical reactions to produce chemical compounds. All employees were required to follow D's safety, health and environmental rules of procedure (SHERPS). T was issued with a written warning and suspended without pay for three days for failing to follow a SHERPS rule that had resulted in a chemical leakage. T was told that any failure to do so in the future would result in disciplinary action. The written warning was to last for 12 months.

Fifteen months later, following an explosion in which an operator died, a thorough investigation was carried out into adherence to the SHERPS rules. It was discovered that 18 operators, including T, had failed to follow the same SHERPS procedure that T had previously failed to follow. All 18 operators were disciplined. T accepted that he had failed to follow the procedure on three specific occasions and had falsified

the records to indicate that he had done so. T was summarily dismissed. D made it clear that without the previous warning, T would not have been dismissed.

The tribunal decided that D had been entitled to take the previous warning into account as part of the relevant history of events and that the dismissal was fair. However, the EAT and the Court of Session disagreed and found that D had not been entitled to use the time-expired written warning as the basis for taking more serious disciplinary action than otherwise would have been taken. The dismissal was unfair.

Airbus UK Ltd v Webb

W was dismissed for gross misconduct after he was found washing his car when he should have been working. He appealed against the decision to dismiss him and the disciplinary action was reduced to the lesser sanction of a final written warning that remained on his record for 12 months. Three weeks after the written warning expired, W and four other employees were caught watching television, outside their normal break time. All five were found guilty of gross misconduct and were therefore liable to dismissal. W was dismissed but the other four employees were given final warnings because they had no prior disciplinary record.

Taking into account the decision in *D Ltd v T*, a tribunal found that W had been unfairly dismissed. On appeal, the Court of Appeal held that *D Ltd v T* was not authority for the general proposition that misconduct for which a final warning was given that has expired can never be taken into account by an employer when deciding to dismiss an employee; all the circumstances of the decision to dismiss should be taken into account when determining whether it is fair.

The Court held that the reason for W's dismissal was that he was guilty of gross misconduct on the second occasion, not that he had received a previous warning for his conduct. The absence of previous misconduct on the part of the other four employees was a reason for imposing a lesser penalty on them.

Stratford v Auto Trail VR Ltd

S worked for ATV Ltd and had a poor disciplinary record, having been disciplined 17 times. The last two issues were a warning for failing to make contact while off sick and a warning for using company machinery and time for what the tribunal described as preparing materials for personal purposes. Both of these warnings had expired by the time of the events for which S was dismissed. S was seen with his mobile phone in his hand on the shop floor, which the employee handbook described as "strictly prohibited". S was invited to a disciplinary hearing to discuss the allegation. ATV found that S was not guilty of gross misconduct and that, ordinarily, he would have been given a final written warning. However, as S had been given every chance and would probably offend again, they decided to terminate his employment with pay in lieu of notice.

A tribunal found that his dismissal was fair and held that an employer can, in certain circumstances, take account of expired disciplinary warnings. The EAT rejected S's appeal and found that the wording of the relevant section of the Employment Rights Act 1996, was sufficiently widely worded to allow some circumstances where an expired disciplinary warning could be taken into account in deciding to dismiss an employee.

Comment

In *Stratford*, the tribunal held that S's disciplinary record and the belief that, as a consequence of that record, he would not improve, were the reasons why the employer decided to dismiss him. However, this needed to be balanced against the normal employment practice that once a warning has expired, the slate should be wiped clean. An employer may be in a stronger position in taking into account an expired disciplinary warning where that expired warning had been given in relation to a similar act of misconduct. It is also advisable to reserve the right to take expired warnings into account in appropriate circumstances in the disciplinary procedure. This would not bind a tribunal, but the employer is more likely to be held to have acted reasonably.

CASE LAW ROUND-UP

Gig economy

The gig economy continues to make headlines and to affect employment law. In *Dewhurst v CitySprint*, a bike courier for CitySprint established before a tribunal that she should be considered a worker and not self-employed. The tribunal found that D was entitled to holiday pay and the national minimum wage in consequence of the worker status. This follows on from similar decisions in cases brought by Uber drivers and plumbers providing services to Pimlico Plumbers. In the latter case, the Court of Appeal found that the plumbers were workers, despite the fact that in their contracts they were described as "self-employed operatives".

Redundancy

In *Thomas v BNP Paribas Real Estate*, T had been employed by BNP for over 40 years and was a director in the property management division. Following a strategic review, it was decided that there were too many director and senior director roles and six individuals were identified as being at risk of redundancy. T was told by letter that he was at risk of redundancy and immediately placed on garden leave. He was told not to contact clients and colleagues and was asked to attend a consultation where he was given a list of vacancies and alternative suggestions. BNP's letter to T had the wrong name on it. A final consultation meeting took place a month later, immediately after a period of annual leave taken by T, and his role was made redundant. T's dismissal letter had the wrong termination date in it.

T was unsuccessful in his appeal in which he argued that the process was a sham and predetermined. He also raised issues about his age as a number of his dismissed colleagues were also around 60.

A tribunal criticised BNP for the manner of the consultation and the "insensitive" mistakes it had made. However, it did not find that T had been unfairly dismissed. The EAT quashed the decision, remitting the claim to a different employment tribunal. The EAT criticised the decision to put T on garden leave and to prohibit contact with colleagues during the consultation period. The EAT found it troubling that the Tribunal could "call the manner of consultation perfunctory and insensitive and yet can conclude that it was a reasonable consultation". The EAT considered that if a tribunal had made a finding that the consultation was conducted in a perfunctory

and insensitive manner, then it would expect to see some reasoning as to why that consultation was ultimately reasonable.

This case is a reminder that employers must get the details right during a redundancy process, particularly where there are long-serving employees.

Disability discrimination

In *Hampshire County Council v Wyatt*, the EAT held that an employment tribunal could make a personal injury award for depression in a disability discrimination case in the absence of medical evidence. This was so even though there was a dispute as to the causation and visibility of the injury. The EAT also held that medical evidence was not a prerequisite in an unfair dismissal case when assessing future working prospects.

Although no rule of law requires medical evidence in such cases, the EAT noted it was usually advisable to have it. On the facts of this case, there was sufficient evidence from other sources to justify the personal injury award that the tribunal made.

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