Employment Rights Update

August 2010

There have been quite a number of decisions made by the higher courts over recent weeks; too many to set out in this up-date given that we aim to be short and snappy. I have therefore tried to identify those decisions which are most likely to be useful and relevant.

So this month we look at cases involving:-

- Detrimental treatment due to membership of a trade union
- Consultation during TUPE transfers
- Two cases on unfair dismissal.

Gayle v Sandwell & West Birmingham Hospitals NHS Trust

An employee who was a Trade Union representative in the workplace received a final Written Warning for failing to respond to management requests to meet to discuss the arrangements for taking time off for Trade Union activities. She pursued a case arguing that she had suffered a detriment on grounds related to her Trade Union activities and alleging that her employer was attempting to prevent or deter her from taking part in those activities. She lost her case at the Employment Tribunal, and appealed to the Employment Appeal Tribunal who upheld the Tribunal's finding that she had not been subjected to detriment on the grounds of her Trade Union activities - she had been disciplined on the grounds of her failure to respond to management requests to meet. Whilst management wanted to meet with her to discuss time off for her Trade Union activities the Final Written Warning was not in itself issued because of those activities but because she was failing to respond to their requests to meet. Be careful in these cases to identify the real reason for any detriment – the Union may be merely "background" to the story, not the story itself.

Todd v Strain & Others

The employer owned a care home that was sold to Care Concern and the employees' contracts transferred under TUPE.

The employees brought claims for failure to consult and failure to organise the election of representatives.

They were successful and were awarded 13 weeks' pay (the EAT in fact reduced this to 7 weeks' pay).

On appeal the transferor argued that there were no measures to be taken and so there was no obligation to consult or inform the staff. The EAT rejected this argument. They held the duty to inform and the duty to consult were two separate obligations. The obligation to inform arose even if there were no intended measures to consult about. If there was no such duty to inform, the EAT pointed out, then employees would not even need to be told that there was to be a transfer nor the date it was to take place.

The EAT also held that if there were no employee representatives the employer should have held elections to appoint some.

It seems to me that this is a common sense interpretation of the statutory requirements.

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Salford Royal NHS Foundation Trust v Roldan

This case concerned a Filipino nurse who was accused of ill-treatment of a patient based on the evidence of another person. There was a conflict of evidence and it appears the Trust did little to seek out other witnesses or documents. Notwithstanding this the Employment Tribunal and subsequently the Employment Appeal Tribunal, found that there was still a reasonable investigation. However, the case was appealed to the Court of Appeal who stated that where there is a conflict of evidence the employer should test the evidence where it is possible to do so and where an employee faces potentially severe consequences (in this case criminal charges and possible deportation) the employer must conduct the most careful investigation. This supports the more general principle that if a dismissal could 'blight' an employee's career in a significant way the investigation may need to be wider than it would otherwise be.

McCann v Clydebank College

Mr McCann was absent from his job, as part-timer lecturer in motor engineering, due to ill-health. Whilst he was off work the College discovered (through covert surveillance) that he was working in the garage that he owned. He was dismissed for working whilst claiming sick pay. The Claimant appealed against the decision of an Employment Tribunal that he had been fairly dismissed. He argued that due to his college timetable he could not have been ordered to attend college whilst working in his garage; therefore his dismissal was unfair. He also claimed that the surveillance carried out was a breach of his privacy.

The EAT held that the default position must be that an employee cannot undertake paid work whilst off due to sickness. It was also held that the surveillance was not "disproportionate".

The case reinforces the fact that working elsewhere whilst on sick is likely to result in a fair dismissal, even if, at the time the other work is done, the worker might not have been obliged to be reporting for duty at the original workplace.

We welcome your feedback on our Employment Rights Update. Please feel free to email us with any comments or suggestions for improvement to jayne.phillips@morrishsolicitors.com

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