

EMPLOYMENT UPDATE

November 2009



Welcome to the fourth edition of CFR's Employment Update highlighting some recent interesting legal developments for employers.

In this issue, we examine recent changes to the definition of a week's pay for redundancy and unfair dismissal purposes, a procedural mistake by a firm that ignored its consultation obligations and the Independent Safeguarding Authority. We hope you find this useful and would invite you to send this email bulletin to friends and colleagues.

Michael Black, Employment Partner

SAFEGUARDING VULNERABLE GROUPS

New legislation requiring employers to ensure they employ only properly vetted staff who will be working with children and vulnerable adults is now in force. The new Independent Safeguarding Authority (ISA) was operational on 12 October 2009. Employees and volunteers will need to apply to register with the ISA and will be assessed using data gathered by Access NI. Only ISA registered individuals can undertake regulated activity which involves treatment or intensive contact with children or vulnerable adults. Employers who employ an unregistered person can face imprisonment or a fine up to £5,000. Registration and checking is mandatory from November 2010. It is essential that employers review their recruitment procedures to ensure that the necessary checks are in place and are carried out for existing and future staff. Employers also need to put into place policies governing the information which will be provided to the ISA. Although the government has factored in a need to phase in the legislation it is highly likely that the current backlog within the Access NI system will be exacerbated quite considerably.

FAILURE TO CONSULT COSTS EMPLOYER £366,773

Shanahan Engineering Limited has been ordered to pay the maximum award of 90 days' pay totalling £366,773 after workers were made redundant by the firm with no prior consultation in May 2008.

The employees were helping to build the Power Station for Alston Power in Plymouth. However, following an agreement between Shanahan and Alston, there was a change in the working schedule which resulted in 46 people being made redundant on 1 May 2008. Where more than 20 employees are being made redundant, they must be consulted at least 30 days in advance. Shanahan argued that the change in the working schedule happened so suddenly that they had to make the employees redundant immediately.

Please note: The content of this newsletter is for information purposes only. Further advice should be sought from a professional advisor before any action is taken.

The Tribunal found however that despite the short notice, Shanahan should still have consulted with its employees and found that the failure to do so completely was unacceptable.

In imposing the maximum award of 90 days' pay (pay being actual pay and not a statutory week's pay) the Tribunal was sending a very clear message to the employer that the failure to consult was unacceptable and shows just how costly such a failure can be for an employer.

RE-HIRING FORMER EMPLOYEES – BEWARE OF THE PITFALLS

There is growing evidence that companies are already re-hiring employees who were previously made redundant. Re-hiring ex-staff has its advantages. The staff know the business, have the right skills and savings can be made on recruitment. However, if an employee can prove continuity of employment exists then an employer could be exposed to a number of Tribunal claims. There must be a break of at least one week between the previous period of employment ending and the new one beginning. However, there are exceptions to this situation. Breaks between periods of employment can be described as a temporary cessation especially where a similar pattern has occurred in the past (e.g. seasonal hotel staff). Where an ex-employee is re-engaged and is obliged to repay their redundancy payment then this will preserve continuity of employment. Some employers make provisions in their contracts of employment to claw back any redundancy payment as such payments are not repayable automatically on re-employment. However, this will preserve continuity of employment if their claw back is subsequently made. Any employee who received a tax-free enhanced redundancy payment but who is re-hired could fall foul of HM Revenue and Customs which may consider the payment as a sham. It will therefore be important for employers to demonstrate that it was originally a genuine redundancy situation by keeping proper records of the redundancy process.

NATIONAL MINIMUM WAGE RATES INCREASED

From 1 October 2009 the National Minimum Wage ("NMW") adult worker rate increased to £5.80 an hour while the rate for 18-21 year olds is now £4.83 an hour. Tips can no longer be used to top up wages to meet the NMW.

REDUNDANCY PAY

Also from 1 October the maximum amount of a week's pay increased to £380 from £350. The weekly maximum is used to calculate statutory redundancy payments and basic awards for unfair dismissal claims.

INFORMATION COMMISSIONER FEE INCREASE

From 1 October 2009 a new notification fee of £500 will apply when registering as a data controller for private sector organisations with a turnover of £25.9m and 250 or more staff. The new £500 rate also applies to all public bodies with 250 or more staff. Everyone else will continue to pay the current rate of £35 per annum, unless exempt from the requirement to notify altogether.

HEALTH AND SAFETY EXECUTIVE

The Health and Safety Executive has reported that the costs of sickness absence in the UK is over £12 bn. With employees taking around 8 days sickness absence each year on average it is important for employers to know how to effectively manage and minimise absence levels. The impact on the organisation, including the adverse impact on revenue and management time as well as the negative effect on staff morale of those left to pick up the pieces often make this a critical issue.

In cases of frequent short term absence the following steps are vital:-

- Ensure the employee understands the level of attendance expected and the improvement required within a specific timeframe.
- Obtain appropriate medical advice to establish the likelihood of a return to work within a reasonable period of time.
- Issue verbal warnings in respect of the unacceptable level of attendance, point out the impact on both colleagues and the organisation overall.
- While giving the individual an opportunity to explain the reasons for the high level of absence ensure they are fully aware of the consequences of failing to make immediate improvements.
- Warn the employee when the level of attendance makes it impossible for the employment relationship to continue.
- Follow the disciplinary procedure throughout the process and, where appropriate, take legal advice prior to any decision to dismiss.

One of the most common problems for an employer is to determine how long the situation continues before a dismissal is considered unfair. This depends on the facts of the case and the employer should consider whether any decision to dismiss is reasonable in the circumstances. Aside from assessing the attendance record on a continual basis an employer should also have regard to its resources and business needs. Accordingly, it would be easier for a small employer to dismiss within a shorter timeframe than a larger employer.

Before dismissal can occur it is important for the employer to consider the nature of the illness, the likely length of continuing absence and the necessity for the work the employee was engaged to do to be carried out. There may be issues of disability in which case the employer may be expected to make adjustments to consider alternative roles for the employee. If the employee benefits from permanent health insurance then any decision to dismiss will be unfair if the employee is deprived of the financial support provided by the insurance.

Unfortunately, it is often the case "out of sight out of mind" and many employees forget about those on long term sick leave. However, in light of the recent case of *HMRC v Stringer* it is possible for an employee on long term sick to continue to accrue statutory annual and claim back untaken leave for previous years if they have not received paid holidays. A full-time employee is currently entitled to 28 days paid annual leave. This makes it all the more important for employers to address the issue of long term sickness absence as a priority.

The Employment Team

Please do not hesitate to contact any member of our Employment Team to discuss the Employment Update or any other employment law/HR matter.



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Michael has a wealth of expertise regarding employment and discrimination law, working with both the private and public sectors. The advice he provides ranges from all aspects of discrimination law, equal pay, breach of contract, restraint of trade and employee relations through to unfair dismissal, disciplinary issues, redundancy, executive severance packages, health and safety, TUPE, data protection and employment aspects of commercial transactions.



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Aisling joined our Employment Unit in 2001 and now handles wide-ranging employment and discrimination cases. Her approach has achieved successful conclusions and fulsome praise from clients representing both the public and private sector. Phrases like 'professional support and guidance', 'good piece of work which clarified our thinking', 'quick turnaround time' show that Aisling's style gets results.



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Claire advises clients on a variety of Employment and Equality issues, both contentious and non contentious, including employment contracts and policies, dismissals and redundancies, unlawful discrimination and the Working Time Regulations. Claire also liaises with the Corporate department to assist with employment related matters in the acquisition and disposal of companies.

For further details on our Employment practice please see our website www.cfrlaw.co.uk