



HR Briefing April 2009

Employment Law Update

This month we review new legislation and recent case law decisions and consider their impact on the employment relationship.

New Legislation

1. Disciplinary and Grievance Procedures

It has now been widely publicised that the statutory dismissal and grievance procedures have been repealed (with effect from 6 April 2009) and there is much uncertainty about an employer's obligations going forward. ACAS have introduced a Code of Practice which provides guidance. It is not, however, strictly binding on employers, but it will be considered by an Employment Tribunal in the event an employee brings a claim. The government has also introduced transitional provisions which are complex in nature and as a result, the old and new systems are likely to have to be run simultaneously.

We suggest that now is the time for employers to consider amending their procedures and re-training managers on how to handle disciplinary/grievance issues. To ensure compliance with the Code, employers should consider involving employees and their representatives in the development of any new rules or procedures.

2. Extension of flexible working rights

The right to request flexible working is due to be extended to employees with children under 16 from April 2006 (previously it was limited to employees with children under 6 or 18 if disabled). This will mean that even more employees will be able to apply. It will place an increasing burden on employers to ensure that each request is seriously considered and appropriate meetings are convened before a final decision is reached. An employer must ensure that they have a business case for any refusal which falls within the limited statutory grounds and that this is communicated in writing to the relevant employee. Employers will also have to ensure that they do not fall foul of discrimination legislation if they refuse a request, as a failure to do so could result in a claim of discrimination, for which compensation is unlimited. In addition, failure to deal properly with an application could result in a compensation award to a successful employee of up to 8 weeks capped pay at £350 per week (i.e. £2,800).

3. Opt-out of the 48 hour week

The European Parliament voted by majority to abolish the UK's opt-out of the 48-hour week. All workers, as of 2011/2012, will be unable to work more than 48 hours in a week, even if they want to, thus potentially reducing overall flexibility in the workplace.

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Recent Case Law Developments

4. Holiday entitlement accrues while employee is on sick leave

The European Court of Justice has ruled that workers on long-term sick leave continue to accrue holiday, which can be carried over to the next year and for which they will be entitled to be paid if employment is terminated. This decision has particularly significant cost consequences for companies with employees who are long-term sick or who are receiving permanent health insurance (PHI) benefits (under the terms of most policies, the lump sum accrued holiday will not be covered). This case highlights the importance of pro-actively managing sickness and reviewing the benefit entitlement under PHI schemes.

5. "Homophobic banter" could amount to harassment

The Court of Appeal has held that "homophobic banter" directed at an employee could be harassment under the Employment Equality (Sexual Orientation) Regulations 2003, even where the victim was not gay; his "tormentors" did not believe him to be gay; and he knew that his tormentors did not believe him to be gay. It was considered that the repeated and offensive use of the word "faggot" amounts to conduct "on grounds of sexual orientation" within the meaning of the regulations, regardless of the victim's true sexual orientation or his tormentors' perception of it. Similar definitions of harassment are contained in the race, religion or belief, and age legislation. Given this, the above decision opens the door for similar "teasing" claims to be brought in these areas. Employers are urged to ensure that their Anti Bullying and Harassment policies are updated in line with this development and that the changes are fully implemented and communicated to employees.

Key Recommendations

- Employers should ensure that they update their grievance and disciplinary procedures in line with the new ACAS Code
- Making the wrong decision in determining the correct procedure could result in a claim being made by a disgruntled employee
- Action should be taken now to review and revise flexible working request procedures in preparation for the extended flexible working rights due to be implemented from April 2006
- Employers should consider the impact on their workforce and working patterns in light of the future abolishment of the opt-out of the 48 hour week
- Pro-active absence management is of vital importance to any organisation and employers should use this opportunity to review the structure of their PHI benefit schemes
- It is suggested that Anti Bullying and Harassment policies should be reviewed and effectively implemented to curb any discriminatory "teasing" amongst the workforce.

If you have any queries on any of the above please contact **Alison Loveday** at alisonl@berg.co.uk to discuss further issues. Alternatively you contact **Alison** on **0161 833 9211**.