Employment Law Newsletter – October 2018

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This week, many of you will be 'enjoying' half-term, entertaining your children or just benefiting from the temporarily speedy daily commute. What about those who haven't booked holiday but need someone to look after their children. Is it your problem?

Dependants' leave during school holidays

Childcare arrangements. All employees, regardless of their length of service, have a statutory right to take unpaid dependants' leave but childcare problems alone are not enough to allow them to exercise the right. It's only available where pre-existing arrangements have broken down unexpectedly.

When can you say no? Employees cannot take dependants' leave to deal with problems that are not emergencies such as:

- the usual childminder leaving for a planned holiday
- forgetting to arrange childcare in time
- the employee changing their plans, which leaves them without childcare.

Set out the rules. Many employees have misconceptions about their right to take time off so you should clarify the position with a policy. That will also ensure that your rules are applied consistently throughout your business. Define who is a dependant, what you view as an emergency and how employees should obtain permission to take time off.

Points to remember:

Your employees have no statutory right to be paid during dependant leave. Make any payment discretionary.

There is no limit to the number of days that employees can take. Leave should be enough to cope with the emergency and make alternative arrangements.

There is no limit to the number of times employees can exercise the right. Judge each occasion on its merits.

Christmas is coming. Can you insist that people work overtime?

It depends on your contract and how you enforce it. In Edwards v Bramble Foods Ltd a tribunal found that Bramble Foods was entitled to dismiss Mrs Edwards for refusing to work overtime because her contract of employment required her to work such hours as may be necessary to fulfil her duties or the needs of the business. 74 of 75 employees had agreed to work four out of eight Saturdays in the busy run up to Christmas. Only Mrs Edwards refused because she spent Saturday mornings with her husband.

In the absence of a legitimate reason for refusing to work overtime, she was breaching her contract. It was reasonable to dismiss her for refusing to comply with the terms of her employment and refusing a reasonable management instruction. Her boast to her colleagues that she would be having a lie-in while they worked may not have helped her case.

So, what should you do?

Include an appropriate clause. Without a contractual right, your hands may be tied when you ask a reluctant employee to work extra hours. But what should it say?

Why? Explain that the requirement to work additional hours is because, at times, their job will require it, as will the business

What? Define what hours are considered overtime and when they might be asked to work. For example, weekends, bank holidays or after 5pm.

How? Describe how overtime will be authorised and by whom.

How much? There's no such thing as a free lunch so tell employees the rate of pay for working overtime.

Points to remember:

Be reasonable. Don't spring the overtime requirement on an employee at short notice if it is avoidable.

If an employee has difficulty working overtime on a particular occasion, discuss it with them and be flexible.

Reserve the right to vary overtime rates at your absolute discretion.

If you cannot rely on a clause in the contract, then working overtime will be a matter of agreement and an employee will be entitled to say no without giving a reason.

Is a contract of employment binding if it is signed electronically?

Your Head of IT wants to drag you into the 21st century by having your employees sign their contracts of employment electronically. You have kicked them and screamed at them because it makes you nervous. So where do you stand?

Signing electronically can vary between employees applying a unique digital code to a document as a form of personal identification, to typing their full name into a document or simply ticking a box.

English and Welsh law says that, provided an employee can read their employment contract on screen, it is considered to be in writing. It doesn't need to be printed out and it is perfect acceptable for an employee to sign it electronically. It will be just as binding as an ink-based contract.

What are the benefits?

You don't have to print a hard copy.

Your employee can sign the document remotely.

Your employee is more likely to sign it quickly.

You'll know instantly when it's been signed.

Points to remember:

Be wary of just using a tick box because an employee may say that they did it by accident. Other methods require more effort from the signer, so they should reduce the likelihood of a dispute.

Make sure you and the employee have a permanent record of the signed document.

Don't use this in Scotland because its rules on validly executing a contract are different and don't lend themselves to this method of signing.

Many commercial providers such as Adobe Sign and DocuSign offer e-signing platforms that you can use.

Can you refuse to postpone a disciplinary hearing when an employee's chosen companion is unavailable?

The Employment Relations Act 1999, section 10, provides that where a worker's chosen companion is unavailable for a scheduled disciplinary hearing, the worker can propose an alternative time that is both reasonable and within five working days of the original date.

In Talon Engineering Ltd v Smith Mrs Smith, who had over 20 years' service, was accused of making inappropriate comments about colleagues in e-mails to another company. Her disciplinary hearing was postponed because she was ill. When she asked to postpone the rescheduled hearing for two weeks because her trade union official was unavailable, her employer refused because, among other reasons, Mrs Smith had not proposed a date that was within five days. It dismissed her in her absence.

A tribunal found that the employer's refusal made the dismissal unfair.

Where did they go wrong?

The employer forgot that tribunals assess whether a dismissal is unfair by considering whether it has acted reasonably in choosing to dismiss. The right to be accompanied is a separate right governed by separate legislation. Assessing reasonableness, in this context, involves several factors. As in this case, tribunals will consider:

- the employee's length of service
- the length of the delay
- whether the reason for delay is the unavailability of a companion.

What should you do?

Hold a disciplinary hearing in an employee's absence only as a last resort.

Weigh your reasons for wanting to conclude the matter against the reasons that your employee has asked for a postponement.

Don't allow frustration to cloud your judgment.

You dismiss someone with notice. They go off sick. Do you have to pay full pay?

Let's consider an employee with 20 years' service who has no contractual right to full pay when they are off sick, but only to statutory sick pay (SSP). Is the situation different during notice?

Yes. The Employment Rights Act 1996 (ERA 1996) provides that you must pay full pay during the statutory notice period where an employee is 'incapable of work because of sickness or injury'. It also provides that, unless dismissing for gross misconduct, you must give one week's notice for each complete year of service up to a maximum of 12 weeks. So, in this case you would need to pay 12 weeks at full pay. You would pay the remainder of the four months' notice at the SSP rate.

A strange provision at section 87 (4) of the ERA 1996 says that the employee's rights to statutory notice don't apply if the notice under their contract is 'at least one week more than statutory notice.'

So, in Scotts Company (UK) Ltd v Budd [2003] IRLR 145 EAT Budd was dismissed on three months' contractual notice after two years' sickness absence but wasn't paid any notice pay as he had exhausted all his sick pay entitlement. He was entitled to twelve weeks' statutory notice because of his long service. He brought a claim for statutory notice, but the Employment Appeal Tribunal held that his employer wasn't liable for it because his contract of employment provided for at least one week more than statutory notice.

Had his contract provided for 12 weeks' notice, the same as statutory, then the employer would have had to pay 12 weeks' full pay.

If you would like to discuss these or any other issues facing your organisation please speak to your usual contact at Watershed or Keith Morgan on +44 161 703 5611

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