



## EMPLOYMENT LAW UPDATE

May 2011

Welcome to the May issue of the Moore Blatch Employment Law Update. This monthly bulletin will keep you updated with the latest happenings and legislative changes in the world of employment law.

### Minimum wage increase announced

The government has now announced that the adult national minimum wage will increase by .15 pence an hour to £6.08 from 1<sup>st</sup> October 2011. This is a sharp increase which employers will not be delighted about.

Other increases are as follows:

- 18 to 22 year olds: by .06 pence to £4.98 per hour;
- 16 to 17 year olds: by .04 pence to £3.68 per hour; and
- Apprentices by .10 pence to £2.60 per hour.

### Inflating the redundancy score of an employee on maternity leave was sex discrimination against her male colleague

The case of Eversheds Legal Services Limited vs De Belin has now gone before the Employment Appeal Tribunal (EAT). They have upheld the original Tribunal's decision that the law firm discriminated against a male lawyer on the grounds of his sex when they inflated the score of a female colleague who was away on maternity leave. They were scoring both against a selection criteria for the purposes of selection on grounds of redundancy. The female employee was awarded a notional maximum score in respect of one of the selection criteria. Her male colleague was given his actual score. The EAT felt that a female employee who was on maternity leave should not be treated more favourably than a male colleague unless it is reasonably necessary to remove a disadvantage that she might be put to. In this case, giving her the maximum notional score and her colleague his actual score was not considered to be a fair means of removing any disadvantage she might suffer. The EAT considered that there were other ways that the employer could have removed any disadvantage that the female employee might have suffered such as measuring both on their actual performance during the period before the female employee started her maternity leave. The employer, therefore, failed in their attempt to appeal the original decision.

This serves as a warning to employers who may bend over backwards to ensure that they don't discriminate against those who are pregnant or absent on maternity leave. It is possible to go too far and end up discriminating against their male colleagues. Care should be taken to consider how they can fairly ensure that neither are disadvantaged.

### Employer subjected employee to unfair dismissal and a detriment following a period of time off to deal with a family emergency

In the case of Clarke vs Credit Resource Solutions Limited, an Employment Tribunal was asked to consider whether an employee had been unfairly dismissed after they had taken a period of time off work to make emergency child care arrangements.

The Employment Rights Act provides employees with the right to take a reasonable amount of unpaid time off work to take what ever action is necessary to deal with certain situations that affect their dependents. This includes the unexpected disruption of childcare arrangements. The employee must tell their employer why they are absent as soon as they can and how long they expect to be away from work for. If they are refused permission to take time off, or are subjected to a detriment or dismissed for having taken it, then the employee may bring a Tribunal claim.

In the case of Mr. Clarke, he was employed by the same employer as his wife. His wife's mother normally looked after their children while they were both at work. On the day in question, Mrs. Clarke's mother was ill. Mr. Clarke, therefore, dropped his wife at work and she told his Line Manager that he would be in as soon as he found another relative that could look after their children. Mr. Clarke's shift started at 9:30 a.m. and he arrived at work at 10:00 a.m. When he arrived at work, he was asked to sign a late form which indicated that he agreed that he had been late and that an hour would be deducted from his salary at the end of the month. Mr. Clarke

refused to sign the form. He was repeatedly asked to sign it and when he became agitated, he was suspended and called to a disciplinary hearing. Following a disciplinary process, he was dismissed for gross misconduct.

Mr. Clarke then brought Tribunal proceedings arguing that he had suffered a detriment and had been unfairly dismissed because he had exercised his right to take the time off to make emergency childcare arrangements. The Tribunal upheld his claim.

This is an interesting decision that shows how careful employers have to be to consider the root cause of an issue that may have resulted in disciplinary action being taken. In this case, the employer considered that they were dismissing Mr. Clarke because he had become rude and agitated when he was repeatedly asked to sign the form. However, the Tribunal disagreed with that and found that he had been dismissed because he had taken time off to sort out childcare.

### **Use of surveillance film in disciplinary proceedings**

The Employment Tribunal was recently asked to consider whether an employee, Mr. Pacey, had been unfairly dismissed. He was absent on sick leave when his employer decided to dismiss him following a review of some surveillance film that shows him carrying out various activities whilst he was supposedly absent and unable to work. Mr. Pacey was dismissed on grounds of gross misconduct and falsely claiming sick pay. When the Tribunal considered the employer's decision to dismiss, they criticised it on the basis that the Managers alone had reviewed the film and determined themselves whether the film indicated that Mr. Pacey was able to work. The Tribunal indicated that a reasonable employer should have obtained the input of an Occupational Health doctor who was suitably qualified to assess whether Mr. Pacey had an injury that was sufficient to keep him off work. The Managers reviewing the film did not have the necessary qualifications. This case demonstrates the importance of obtaining medical advice before making any decision to dismiss an individual who is on sick leave. The Managers here clearly felt that the employee was able to work, and whilst the Tribunal acknowledged that he seemed able to do many things when they reviewed the film, they still considered that a decision should only have been made after a qualified medical expert assessed his injuries.

### **An employee was dismissed when she made inappropriate comments on Facebook**

JD Wetherspoons decided to dismiss their Pub Manager for gross misconduct after she had made, what they considered to be, inappropriate comments on Facebook about two of her customers. The customers had verbally abused and threatened her. The Manager whilst at work went on to Facebook and made postings regarding the customers. She thought that her privacy settings excluded any one other than close friends from seeing her entries. In fact, a far wider audience was able to view her Facebook page and this included relatives of the customers in question. JD Wetherspoons dismissed her for gross misconduct on the basis that she was in breach of their email and internet policy which clearly indicated that an employee was not able to use media such as Facebook while they were at work. The Employment Tribunal upheld the dismissal, finding it to be fair.

With the ever increasing use by employees of social media sites, it is advisable for employers to produce social media policies which clearly set out their rules in relation to what employees can and cannot do on social media sites and what use they can make of the internet and email facilities provided to them by the employer whilst they are at work.

#### **Contact Us**

If you require any further advice on any of the issues contained in this update, please do not hesitate to contact us.

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Regulated by the Solicitors Regulation Authority. The information contained in this update is correct as at May 2011.

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