



EMPLOYMENT LAW UPDATE

October 2011

Welcome to the October 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.

Security Guard on call during rest breaks . contravention of the Working Time Regulations?

Requiring a security guard to remain on call during his rest breaks does not necessarily contravene the Working Time Regulations ('Regulations'), according to the Court of Appeal in the recent case of Hughes v The Corps of Commissionaires Management Ltd.

Mr Hughes was employed as a security guard working 12-hour shifts. He had a kitchen area for use during breaks and could choose when to take breaks, although it could not be guaranteed that his break would be uninterrupted. Significantly, if a break was interrupted, he was permitted to start his break again.

Mr Hughes brought a claim against his employer, arguing that he was not receiving the rest breaks to which he was entitled under the Regulations.

The Regulations provide that a worker is entitled to an uninterrupted rest break when their daily working time is more than six hours; however, workers engaged in security and surveillance activities which require a permanent presence are excluded from this entitlement and are instead entitled, wherever possible, to take an equivalent period of compensatory rest.

The Court of Appeal held that the breaks provided to Mr Hughes were an equivalent period of compensatory rest, as they had the characteristics of rest in the sense of a break from work and, he was entitled to start his break again if he was interrupted, therefore ensuring that they lasted for at least 20 minutes.

This decision in the Court of Appeal will be reassuring to employers of security and surveillance workers. It is confirmation that, providing the employer puts in place provisions to enable workers to have 20 minutes rest when working more than six hours, the courts appear to be taking the approach that there will be no breach of the Regulations.

Unfair Dismissal - Can an employer change their mind about the reason for dismissal?

In the recent case of Perry v Imperial College Healthcare NHS Trust, the EAT decided that a dismissal was unfair where the original decision to dismiss the employee, Ms Perry, for fraud had been legally and factually incorrect.

Ms Perry worked for two different NHS Trusts, in different jobs with different hours. In the Imperial College job, she was required to travel whilst the other job was clinic based. Due to medical problems with her mobility, she was signed off sick by Imperial but continued to work for the other Trust.

Imperial discovered that Ms Perry was still working for the other Trust while signed off sick, and dismissed her for gross misconduct on the basis that she had intentionally defrauded Imperial, by claiming sick pay whilst undertaking paid work. Imperial refused to consider a letter from Ms Perry's GP confirming that, while she was unfit for her Imperial duties, she was still fit for her other job.

Ms Perry brought a claim against Imperial on the basis that the dismissal was unfair. Imperial relied on a clause in Ms Perry's contract of employment, preventing her from working elsewhere during sick leave without the permission of her manager, as a fair reason for the dismissal. Imperial stated that, had Ms Perry advised them that she was fit for desk-based work, they could have redeployed her instead of putting her on sick leave. The employment tribunal dismissed Ms Perry's unfair dismissal claim on the basis of the fair reason presented by Imperial in the tribunal. Ms Perry appealed to the EAT.

The EAT, considered whether the appeal panel, during the internal appeals process, was entitled to find other reasons for the dismissal. They decided not. The EAT found that the appeal panel did not address the fundamental test 'whether the decision to dismiss was within the range of reasonable responses available to the employer acting reasonably'. Since, on the facts, the decision was not within the range of reasonable responses the dismissal was held to be unfair.

Although this case does not lay down any new principles, it emphasises that appeal panels and tribunals must concentrate on whether the facts justify dismissal as being a reasonable response. Where the original decision to dismiss was based on facts which cannot be supported at appeal or tribunal level it is likely that the decision to dismiss will be unreasonable. It was not open to the employer to rely on a different reason for dismissal at Tribunal i.e. the clause in Ms Perry's contract, when this was not relied on at the time she was dismissed.

Disability Discrimination . What are Reasonable Adjustments?

Does there need to be a good or real prospect of an adjustment alleviating the disadvantage suffered by a disabled employee for that adjustment to be a reasonable one? The EAT has considered this question in the case summarised below.

In the recent case of Leeds Teaching Hospital NHS Trust v Foster, Mr Foster had been employed by the Trust for many years in various capacities, ending up as a senior security inspector in the Trust's Security Department. When Mr Foster's relationship with his line manager broke down, he was unable to work as a result of stress. Mr Foster was dismissed on the grounds that it could not be predicted whether his "situation" was likely to alter within the foreseeable future. Mr Foster successfully claimed in the employment tribunal and EAT that he had been subject to disability discrimination and unfair dismissal.

The EAT stated that Mr Foster had been placed at a substantial disadvantage by his employer when they required him to return to work within the security department, knowing that his disability - stress - was caused by that department. The EAT held that it would have been a reasonable adjustment to put Mr Foster on the redeployment register. They said that it was not necessary for them to find that there would have been a good prospect of a redeployment opportunity becoming available or that Mr Foster was likely to be well enough to work. All that was needed was that this would have been a prospect.

This case highlights that there does not necessarily need to be a **good or real prospect** of an adjustment alleviating a disadvantage suffered by a disabled employee. There only needs to be a reasonable prospect. Employers must make sure that they consider all adjustments in these cases and assess the prospect of them assisting the employees return to work.

Providing a reference and ensuring that it is true, accurate and fair

Generally there is no legal obligation on an employer to provide a reference for an employee or ex-employee. However, if you do decide to provide a reference, then you have duties towards both the employee or ex-employee and the recipient to take reasonable care to ensure the information contained in it is true, accurate and fair.

As there is an obligation on the employer to ensure that a reference is true, fair and accurate, employers often question what they can and cannot include in a reference.

In the recent case of Jackson v Liverpool City Council (2011), the Court of Appeal decided that a reference will be both true and accurate if it refers to allegations against the former employee but makes it clear that the allegations have not been investigated.

In Jackson v Liverpool City Council, Mr Jackson was employed by the Council as a social worker. After he left, concerns were raised about his work. However, the Council decided that the allegations could not be investigated because he was no longer an employee. A year later, Mr Jackson required a reference from the Council and the Council were asked a number of specific questions. The Council did not answer two of the questions: would the Council re-employ Mr Jackson and was there any reason why the recipient of the reference should not employ him.

The Council stated that there were some issues identified in respect of recording and record keeping. They explained that the issues had not been investigated, but went on to say that had the allegations been upheld it would have resulted in a performance improvement plan rather than formal disciplinary action. The Council made it clear that they were not able therefore to answer the questions in either a positive or negative manner.

The Court of Appeal decided that the reference was both true and accurate and could not see how the Council could have honestly answered the questions in the reference without referring to the allegations, giving particular weight to the fact that the Council had stated that it could not answer the questions in either a positive or negative way.

It should be noted therefore that when providing a reference it is important to ensure that it is not misleading overall.

Negative comments about work by an employee on a social media site did not instantly justify a dismissal.

There have been a number of recent cases concerning employees and their use of social media sites to moan about work.

In the case of Witham v Club 24 Ltd, Mrs Witham was employed by Club 24 (Company) as a Team Leader of Skoda, part of the Volkswagen group and a Client of her employer.

Mrs Witham posted some comments on Facebook stating that she felt like she worked in a nursery - no individuals were identified. A number of other comments were posted in response by colleagues. Mrs Witham's privacy settings meant that only her friends on Facebook (not members of the public) could see her messages.

The matter was brought to the attention of her employer. The Company believed that the comments could have a detrimental effect on the relationship between the Company and Volkswagen and had put the Company's reputation at risk. She was therefore suspended. Following disciplinary proceedings, Mrs Witham was dismissed for breaching the Company policy which placed an obligation of confidentiality on employees which extended outside of the workplace and that included posting information on social media sites.

Mrs Witham brought a case for unfair dismissal. The Tribunal found that Mrs Witham's comments were relatively mild and that the company's

decision to dismiss her was outside the band of reasonable responses open to a reasonable employer. A number of mitigating circumstances were considered by the tribunal:

- she had an exemplary record;
- she had personal problems relating to her son's death and her husband's fidelity;
- her comments did not specifically refer to Volkswagen;
- there was no evidence of any embarrassment on the part of Volkswagen or likelihood of actual harm to its relationship with the company; and
- she had immediately apologised.

The decision in this case clearly shows that negative comments about work, by an employee, do not instantly justify a dismissal and that, in determining the action to be taken, the employer should consider all of the surrounding circumstances.

Varying Employment Terms and Conditions

Occasionally employers may wish or need to make changes to an employees' contract of employment. Such changes can be made for many reasons, but in order to make these changes an employer has three principle options:

- To seek agreement to the changes, and dismiss those who refuse to agree (point to note: those dismissed may have claims for unfair dismissal and (if the employer does not serve notice) breach of contract).
- To terminate the existing contracts of employment and offer re-engagement on the new terms (point to note: employees may have claims for unfair dismissal and (if the employer does not serve notice) breach of contract, but the mere offer of re-engagement may mitigate their loss).
- To impose the changes, and leave it to the employees to decide how to respond (point to note: this may result in claim of constructive dismissal).

In a recent case, *Slade v TNT (UK)*, the EAT provided authority for the proposition that an employer does not necessarily act unfairly when, after failed negotiations to change terms of employment, which include an offer to 'buy out' certain existing terms, the employer terminates existing contracts with an offer of re-employment on the new terms which do not include the buy-out payment.

In this case, for legitimate reasons, TNT sought to remove an 'end of sort' bonus for loading bay operatives. Negotiations included an offer of a buy out payment and a warning that if the deal was declined, existing contracts would be terminated and an offer of re-employment would be made.

The employment tribunal decided that there was 'some other substantial reason' for the dismissal and that the employer had acted fairly.

The EAT decided that it was not right to say that the only reasonable response for the employer would be to offer re-engagement on terms which included the buy-out sum. On applying the band of reasonable responses test, it was open to a reasonable employer to conclude that they should not offer a lump sum on re-engagement when they were not going to achieve any of the benefit of the agreement for which the lump sum had been offered.

This authority shows that, if negotiations to change the terms of employment fail, when offering re-engagement the employer will not be unreasonable by not offering an incentive that had originally been on offer for employees to enter into a new contract.

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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