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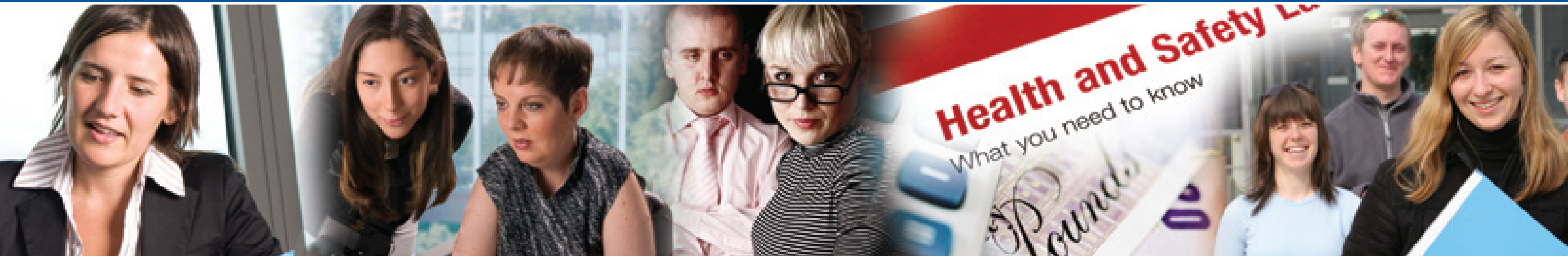
Health & Safety : Human Resources : Training : Risk Management



FAILURE TO FOLLOW CORRECT DISCIPLINARY PROCEDURE CAN RESULT IN A BREACH OF CONTRACT

In the case of Edwards v Chesterfield Royal Hospital the appeal outcome indicates that an employee could sue an employer for breach of contract and future losses, if the employer has caused an unfair dismissal by failing to follow a contractual procedure.

The appellant was a consultant surgeon who was dismissed following findings of gross professional and personal misconduct following a disciplinary hearing. Mr Edwards claimed that the way in which the Trust had conducted the disciplinary hearing was in serious breach of its contractual procedures and it was this which caused him to be dismissed and consequently prevented him from finding future permanent NHS employment. The amount of £4 million was claimed for long term career loss.

The Court of appeal was asked to decide on the initial issue of whether Mr Edwards was entitled to claim for all losses, or only for the 3 months' notice period breach of contract claim. The Court determined that Mr Edwards was entitled to claim damages for breach of contract without limitations.

It is important to note from this decision that where an employer causes unfair dismissal by failing to follow a contractual procedure, the employee could claim for damages for future losses due to that breach of contract.

This type of claim would not be capped and it would enable an employee to potentially avoid making a claim which would be limited to the statutory unfair dismissal cap of £65,300.

HUMAN RESOURCES - SUPPORTING YOUR BUSINESS

Failure to Follow Correct Disciplinary Procedure can result in a breach of contract

Providing a disabled employee the option to swap jobs with another employee can be considered a reasonable adjustment

National Minimum Wage to increase

Single Equality Act introduced

Bribery Act 2010

Whistleblowing

Handling Employee references safely

Employer's vicarious liability for frolicking at work

Conducting Health and Safety risk assessments to avoid fines

Employee's right to request time off to train

Employers are warned of fake sick notes being sold for £9.99 online

Employer's inflated redundancy scoring for a female on maternity leave found to be discriminating to her male colleague

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PROVIDING A DISABLED EMPLOYEE WITH THE OPTION TO SWAP JOBS WITH ANOTHER EMPLOYEE CAN BE CONSIDERED A REASONABLE ADJUSTMENT

The Disability Discrimination Act 1995 provides a list of possible reasonable adjustments and in the case of South Yorkshire Police Chief Constable v Jelic 2010, the EAT confirmed this list is not exhaustive.

The claimant Mr Jelic was diagnosed as suffering from a chronic anxiety syndrome. Mr Jelic was a police constable and it was decided he should medically retire on the grounds of ill health. Mr Jelic claimed disability discrimination on the grounds that his employer should have considered redeploying him to a role that was a 'non-client facing officer role'.

It was held by the ET that this could have been achieved by enabling him to swap his job with that of another officer who carried out a National Crime Recording Standards role, or else through medically retiring him and re-engaging him in a new role.

The Chief Constable appealed to the EAT on the grounds that as a matter of law, it was not open to the tribunal to find that it would have been a reasonable adjustment to swap the claimant's job with that of another employee. It was contended that such a measure fell well outside the list of potentially reasonable adjustments which might be expected of an employer as set out by s.18B of the Disability Discrimination Act 1995.

The EAT stated that it was well established that the test of reasonableness is an objective one and stated what was reasonable would always be dependent on the particular circumstances in each individual case. The EAT upheld the ET decision.

The outcome of this case implies that in certain circumstances it may be a reasonable adjustment to move a disabled employee to a job that is not vacant. The tribunal was clearly influenced by the nature of the employment and not every employer would be in a position to require another employee to move jobs to accommodate a disabled colleague.

The case does confirm, however, that if a suitable role can be identified, the employer should at the very least be exploring options for redeployment and consulting with the employees concerned where the alternative is dismissal.

NATIONAL MINIMUM WAGE TO INCREASE

From 1st October 2010 the National Minimum Wage limit will increase from £5.80 per hour to £5.93 per hour for low paid workers aged 21 years and over.

Until October 2010 the adult rate applies from a worker's 22nd birthday and after October 2010 the adult rate will apply from a worker's 21st birthday.

The rate for 18 – 20 year olds will increase from £4.83 per hour to £4.92 per hour.

The rate for workers aged 16 to 17 years will increase from £3.57 to £3.64 per hour.

An apprentice rate of £2.50 per hour will apply to apprentices who are under 19 years of age, or those who are aged 19 years and over, but in the first year of their apprenticeship.

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SINGLE EQUALITY ACT INTRODUCED

It is anticipated that as of 1st October 2010 the Equality Act 2010 will consolidate the existing equality laws into a single piece of legislation and introduces a number of reforms. It will define direct discrimination as 'less favourable treatment because of a protected characteristic'. This widens the scope for associative discrimination. In certain cases, the Act will allow claimants to bring a claim for discrimination based on a combination of two protected characteristics.

The Act will also;

- Prohibit employers from asking questions about health before offering a candidate a post.
- Include a provision to make regulations requiring employers with at least 250 employees to publish information relating to the differences in pay between men and women.
- Abolish the list of areas upon which a disability must impact; mobility, manual dexterity, memory, etc.
- Ban secrecy clauses which prevent employees from discussing their wages.
- Makes it legal for employers to positively discriminate in favour of a person from an underrepresented group where candidates are equal. This will be optional and not an obligation.

Further details of The Equality Act 2010 can be viewed on the OPSI website.

BRIBERY ACT 2010

The updated legislation under the Bribery Act 2010, due to come into force in April 2011, will require employers to have procedures in place to avoid liability.

The Act contains a defence under Section 7(2) whereby employers can escape liability if they can demonstrate they had 'adequate procedures' in place to prevent those persons performing services on its behalf from committing bribery.

Consultation on the content of the guidance for the 'adequate procedures' is anticipated to commence in September 2010 and once confirmed employers should have procedures which are compliant with the guidance.

WHISTLEBLOWING

In the case of Goode v Marks and Spencer plc a customer relations manager protested to his manager that the Marks and Spencer proposed changes to his redundancy scheme 'were disgusting'.

He claimed that this was a 'qualifying disclosure' under the Public Interest Disclosure Act and that he was being victimised as a result of having made his disclosure.

The Public Interest Disclosure Act governs what is known as 'whistleblowing' by employees. The first requirement for a qualifying or valid disclosure relates to the content of the information disclosed. In this particular case the information disclosed should have shown that the organisation was likely to fail to comply with a legal obligation.

In this case the EAT confirmed that facts, not opinions, are required for a worker to be protected from victimisation under whistleblowing legislation. It held that even if there was evidence that the company was planning to terminate Goode's employment contract, at the time the disclosure was made, the statement he made to the employer conveyed no information, just opinion, and therefore it did not amount to a 'qualifying disclosure'.

When an employee releases information to the press there are stringent requirements and based on the above, the information released to the press by Goode could not amount to a 'qualifying disclosure' and his dismissal for doing so was not automatically unfair.

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HANDLING EMPLOYEE REFERENCES SAFELY

Unless required by the contract of employment or for a specific business sector (childcare or finance), there is no general obligation to provide references for current or former employees.

Whatever decision you take, whether to provide references or not to, you must then be consistent. A confidential phone call is just as relevant and can be just as damning to the employee as a written reference. Comments such as, "the less said about that employee the better", would be considered as an adverse reference.

If you currently provide or decide to provide references in the future, then great care must also be taken with the preparation and representation of the reference. For example if you provide a glowing reference for an employee as a method of getting rid of them, if the new employer experiences the same issues you had and dismisses the employee, the new employer could sue you for the cost of obtaining a replacement; advertising, recruitment agency fee etc.

Similarly if you state adverse comments about an employee that cannot be substantiated, and this results in the employee not being able to secure future employment, the employee could sue you for compensation.

How to provide a safe reference

Be honest and do not mislead the recipient with what you do or do not include. A good reference is a truthful reference.

You should initially have a clear understanding of who within your company is authorised to provide references and ensure that references which are sent are delivered to the correct authorised person as well. Ideally there should only be one person in your organisation who compiles references and issues them. This will help with accountability and consistency.

If you receive a reference request via email or phone call, contact the organisation directly to confirm the person who has contacted you is the legitimate authorised person for you to issue a reference to.

When compiling the reference provide facts and avoid stating opinions which could be considered malicious or humorous.

Mark the letter as 'Private and Confidential', to reiterate that the information you have provided is to be treated with discretion. Keep in mind that the employee may gain access to the reference provided and ensure the information you have provided is that which you would be prepared to substantiate in a court of law if required.

Obtaining references for potential employees

When seeking a reference describe the role and the nature of work the employee would be undertaking, clearly state their specific responsibilities. You may wish to ask relevant questions such as; 'how has the employee performed under pressure', 'his/her relationships with other people', 'how well he/she can handle money or sensitive information', etc. If you receive an unclear response to such questions, you can contact the reference provider directly and ask further questions to seek clarification or hold a further interview with the employee and explore the issues further with them.

If you require the reference to support your recruitment process, always check with the potential employee if they are happy for you to contact their current employer, unless you have made a clear job offer to them.

Many times references are sought once the employee has started working for the organisation, therefore it is imperative to give notification in writing to the employee that the job offer provided is subject to the receipt of adequate references. It is also imperative that references are requested consistently for all employees.

If you receive a concerning reference or one which contradicts information provided to you from the employee, then further investigation would be required. Ultimately if the reference is inadequate and the investigation has not resolved this, then the employee would be invited to a meeting and potentially dismissed as their offer of employment would have been conditional upon receipt of an adequate reference.

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CONDUCTING HEALTH AND SAFETY RISK ASSESSMENTS TO AVOID FINES

The charity Mental Health Matters was fined £30,000.00 and required to pay an award of £20,000.00 for failing to protect the health and safety of an employee.

The employee, a care worker, was stabbed to death by a paranoid schizophrenic whom she was visiting at the home.

The court was told that although there was no guarantee the employee would not have been killed in the incident, the likelihood would have been reduced if risk assessments had been carried out.

Employers should regularly review their procedures and ensure that risk assessments are carried out regularly, especially where employees could come into contact with violent individuals.

EMPLOYER'S VICARIOUS LIABILITY FOR FROLICKING AT WORK

At Excel frozen food depot in Motherwell a colleague crept up to a clerk, Miss Wilson, and pulled her head right back by grabbing her hair, whilst making a 'rabid' remark.

Miss Wilson was injured and claimed damages from the employer alleging the company was vicariously liable for the actions of its employee. The claim was initially dismissed and Miss Wilson appealed.

The appeal court said that the question was whether the employee's actions were so closely connected with the employment that they can be said to be within the scope of employment, and that it would accordingly be 'fair and just' to find the employer liable.

It was found that the offending employee was not doing something connected to his duties, but was engaged in a frolic of his own. He was engaging in an 'unrelated and independent venture of his own, a personal matter rather than a matter related to his authorised duties'.

Excel was not vicariously liable simply because it had happened at work during working hours. This is an interesting different approach to previous case law where there generally only needed to be a slight degree of connection to the employment for the employer to be vicariously liable.

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EMPLOYEE'S RIGHT TO REQUEST TIME OFF TO TRAIN

At present the statutory right to request time off to train applies to employers with over 250 employees and from April 6th 2011 it will apply to all employers. The legal right to request time off applies to employees who have more than 26 weeks continued service. This right does not apply to employees who are aged 16 or 17 years who are not in full time secondary or further education.

These provisions give employees the right to request time off to undertake any training they believe will improve their effectiveness in your business and improve the performance of your business.

This is a right to request training, but not the right to be granted it and although employers are expected to consider the request by following a set procedure, requests can be denied by giving a good business reason.

In brief all requests should be made in writing to the employer, if necessary a meeting will then be held to discuss the request and the employee will then be informed of the employer's decision and given the right to appeal the decision.

This procedure is very similar to the current Flexible Working procedure.

To make a valid request the employee must state;

- Their request in writing and date it.
- That it is a request being made under Section 63D of the Employee Rights Act 1996.
- Details of the study or training.
- Where and when the study will take place.
- Who will supervise the study or training (for example, a training supervisor, or someone at work supervising on-the-job training).
- The name of the qualification the training will lead to, if any.
- An explanation of how the employee sees this study or training making them more effective at work and improving the performance of their employer's business.
- Whether the employee has made a previous request and the date of that request, and whether it was e-mailed or posted to the employer.

If the request is invalid because the employee has not provided all of the above, the employer should notify the employee of this within 28 days of receiving the request. The amended request would then be re-submitted.

Once a valid request has been received the employer can either;

1: Accept the request based on the information in the written request and inform the employee in writing of this

OR

2: Meet with the employee to discuss their request in detail and send the employee the outcome of that meeting within 14 days of that meeting. At this meeting the employee has the statutory right to be accompanied with another work colleague.

If time off is agreed there is no obligation for the employer to pay for any training or to pay the employee for any time they take off for the training.

Refusing a Request

The employer can reject a request on one or more of the following grounds:

- the training would not improve the employee's effectiveness in their business
- the training would not improve the performance of their business
- the additional costs
- it would cause a detrimental (negative) effect on their ability to meet customer demand
- they cannot reorganise the employee's work among existing staff
- they cannot recruit additional staff
- it would cause a detrimental impact on quality
- it would cause a detrimental impact on business performance
- there is insufficient work during the periods the employee proposes to work
- it conflicts with planned structural changes.

When considering the request, the employer should make sure that they do not discriminate against the employee. If the employer rejects the employee's request, they must write to them stating which of the above reasons apply and why. They should explain accurately and relevantly the key facts about why this reason applies in this particular employee's case.

The right of appeal

The employee can appeal against the employer's decision and they must put their appeal in writing stating their grounds of appeal within 14 days of receiving the employer's decision of refusal.

An appeal meeting must then be arranged and the employee has the right to be accompanied by a work colleague of their choice. This meeting would be held by a manager not previously involved in the process for objectivity.

The employee must be sent the appeal outcome in writing within 14 days of the appeal meeting.

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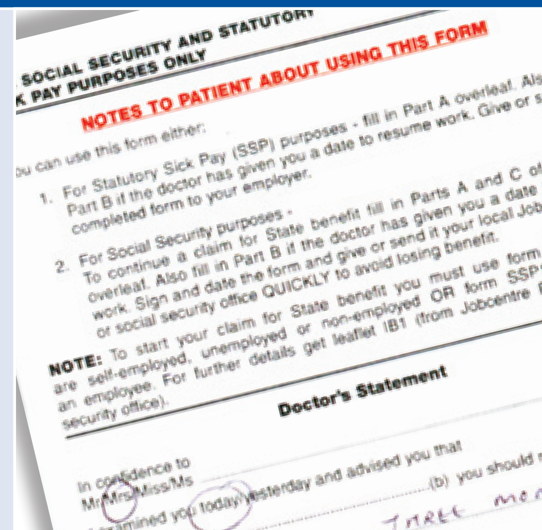
EMPLOYERS ARE WARNED OF FAKE SICK NOTES BEING SOLD FOR £9.99 ONLINE


SOCIAL SECURITY AND STATUTORY
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NOTES TO PATIENT ABOUT USING THIS FORM
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1. For Statutory Sick Pay (SSP) purposes - fill in Part A overleaf. Als
Part B if the doctor has given you a date to resume work. Give or s
completed form to your employer.
2. For Social Security purposes -
To continue a claim for State benefit fill in Parts A and C of
overleaf. Also fill in Part B if the doctor has given you a date
work. Sign and date the form and give or send it your local Job
or social security office QUICKLY to avoid losing benefit.
NOTE: To start your claim for State benefit you must use form
are self-employed, unemployed or non-employed OR form SSP
an employee. For further details get leaflet IB1 (from Jobcentre
security office).
Doctor's Statement
In confidence to
Mr/Mrs/Miss/Ms
examined you today/yesterday and advised you that
(b) you should

Employers are being warned of a website; www.doctorsnotestore.com that is producing and selling fake sick notes for 'novelty purposes'. The website offers stamped sick notes by 'a Doctor in any particular city faculty; London, Manchester, Birmingham or any other area'.

The NHS fraud squad has advised that selling sick notes is not illegal, a person can type one up and sell it without being prosecuted and it only becomes illegal once used by an employee.

Employers are being advised to ensure sick notes being received are genuine. This can be done by comparing sick notes to those previously received from the same employee and their GP or alternatively advising employees that spot checks will be done on sick notes provided and the employer can then contact the GP surgeries to confirm authenticity.

EMPLOYER'S INFLATED REDUNDANCY SCORING FOR A FEMALE ON MATERNITY LEAVE WAS FOUND TO BE DISCRIMINATING TO HER MALE COLLEAGUE

In the case of De Belin v Eversheds Legal Services Ltd an employment tribunal held that the employer had discriminated on the grounds of sex against a male employee in their redundancy scoring process.

Scoring was done for the criteria of 'lock-up', the time taken between carrying out a piece of work and receiving fees for it. The employer had chosen a period of time from the previous year to measure this criteria and scored the male colleague 0.5, whilst allocating a notional scoring of 2 to his female colleague who was on maternity leave for some of that period and where there were no accurate records available for her. Overall the claimant scored 27 whilst his female colleague scored 27.5.

The tribunal found that inflating the female colleague's score amounted to less favourable treatment on the grounds of sex, and due to this discrimination the claimant had been unfairly dismissed.

The employer could have scored this criteria from a period of time where there were accurate records for both colleagues.

Employers are advised to always ensure redundancy scoring is based on objective, quantifiable and accurate records.

Over the last couple of years the number of cases reaching Tribunal has hugely increased, it is thought to be by more than 50%. Many of you may have experienced this for yourselves, the increases being driven by disputes about equal pay, unfair dismissal, age, sex, race and disability discrimination.

With this being high on the agenda, we are able to offer our clients with not only hands on consultancy but also, an insured/legal expenses cover of up to £75,000 per claim.

For further information please contact Michelle Brinklow at BBi Alternative Solutions:

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