



FIT NOTES GUIDANCE PUBLISHED

The Department for Work and Pensions has issued guidance for GPs, employers and employees on 'fit notes'. These are due to replace sick notes from the 6th April 2010.

Employees entitled to claim statutory sick pay (SSP) must provide their employers with evidence of their incapacity in order to receive the payment. For periods of 7 days or less, an employee can generally self-certify but a doctor's certificate is normally required for longer periods of sickness. The doctor's certificate will now be in the form of a fit note. The new fit note will allow doctors to declare that a patient is :-

- Not fit for work, or
- Fit for work taking account of changes that can be made to an employee's role or workplace to facilitate a return to work.

The guidance makes it clear that advice given by the doctor about possible changes to assist the employee to return to work are not binding. If the doctor declares that an employee could return to work if adjustments were made but the adjustments are not possible, the employee should be treated as not fit for work.

The fit notes aim to help employees to return to work as soon as possible. By considering issues like a phased return to work at an early stage, it is hoped that problems with return to work after long term sickness absence could be avoided. The guidance for GPs refers to the evidence that work is therapeutic and helps promote recovery and rehabilitation while unemployment is generally harmful to health. It does also recognise though that in some situations the work itself can contribute to the employee's ill health and the need to resolve workplace issues before a return to work is possible.

The guidance can be found at www.dwp.gov.uk/fitnote .

NARROWING THE GENDER DIVIDE PAY GAP

The Government's Equalities Office has just published 'Working towards equality - a frame work for action' to report on its continuing strategy to tackle the gender pay gap. Vera Baird, Solicitor General and lead Minister for the Equality Bill is quoted on the official press release which accompanied the launch of the report. She calls for flexible working to become the norm, replacing the outdated expectation of long term, full time employment.

The report details the non-statutory measures aimed at supporting businesses to offer flexible working and ensuring that being a parent or carer is not a barrier to opportunity or success. The measures that are to be introduced through the Equality Bill to 'build a labour market that is transparent and free from gender discrimination' are restated. These include; increasing transparency in pay through reporting details of the gender pay gap, strengthening enforcement and allowing positive action in recruitment and selection.



DISCRIMINATION CLAIMS AND JOB APPLICANTS

There has been considerable press coverage about 'serial litigants' who bring numerous Employment Tribunal claims against employers potentially costing employers and tax payers millions of pounds in defending or settling them.

Last year, two employment lawyers concerned about the number of claims brought by "serial litigants" set up a website to help identify them. The website searches against the name of the proposed claimant to see if they have previously won or lost Tribunal cases. This information could then be used to identify individuals who have brought numerous claims and may assist the Respondent in managing the claim.

Discrimination in the area of recruitment is set to become more topical when the Equality Act which will cover questions that can be asked about candidates health during the recruitment process, comes into force. However, the recent case of *Keane v Investigo* will give employers wishing to defend any such claims some comfort.

In this case the claimant, aged 50, applied for a number of jobs described as suitable for 'newly qualified' applicants. She then lodged 11 claims of age discrimination. Six of the claims were settled, one assumes perhaps with some benefit to the claimant. The remaining claims were dismissed by the Employment Tribunal in part because she had not suffered any loss because she had no interest in the vacancies and was applying for the roles only so that she could seek compensation.

This decision was unsuccessfully appealed by the claimant. The Employment Appeal Tribunal confirmed that an application must be genuine before an applicant can claim to have been put at a disadvantage or treated less favourably. This case will strengthen the position of any employers who are unlucky enough to be targeted by claimants who have made job applications which are not genuine with a view to pursuing discrimination claims.

CASE STUDY - BATEMAN & OTHERS -v- ASDA STORES

Employers should take care when seeking to unilaterally change terms and conditions of employment as pushing the changes through can lead to claims of breach of contract, unfair dismissal or unlawful deductions from wages.

Background

In this case, Asda sought to bring employees employed under an old pay structure in line with the new pay regime. There was extensive consultation about the proposals and many employees agreed voluntarily to the change. Some 8,700 employees were transferred involuntarily to the new regime but only 700 or so employees pursued claims as a result.

Asda sought to justify its decision to make the changes because a provision in the Staff Handbook allowed them to amend terms and conditions of employment to reflect the changing needs of the business without obtaining the employees' consent. The claimants claimed that the power to vary terms was limited to non-contractual policies and that a variation to pay would still require their consent.

Decision

The Employment Tribunal concluded that while a change to a fundamental term of a contract, such as pay, ordinarily needed the employees' consent' on the facts of the case' Asda were able to vary the terms relating to pay. The Staff Handbook specifically referred to the sections dealing with pay and variation as contractual and this gave them a contractual right to vary the pay terms.

This decision was appealed on various grounds including the duty of trust and confidence between employers and employees and the purported duty on the employer to explain to employees that the effect of the variation clause to the employees. The Employment Appeal Tribunal ('EAT') rejected this argument as the claimants had already agreed that there had been no suggestion that Asda had acted in a way that breached mutual trust and confidence. The EAT also concluded that the Employment Tribunal had been correct in finding that the wording of the handbook was clear and entitled Asda to review and change the contracts of the employees without their consent.

This judgment confirms that employers may reserve the right to alter terms and conditions unilaterally. However, such a right must be clear and exercised in a way that does not breach the duty of trust and confidence. This will mean that consultation and notice will be essential and the employer must not act unreasonably or capriciously.

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