



MISCONDUCT DISMISSALS AND POLICE INVOLVEMENT

Where an employee is facing disciplinary action for misconduct and the police are also involved in investigating the same matter, should the employer wait for the police investigation to conclude before completing their own disciplinary proceedings?

This issue was looked at in the recent case of *Secretary of State for Justice v Mansfield*. The Claimant, Mr Mansfield was suspended from duty as a prison officer in May 2006 following a number of allegations of serious misconduct. Initial investigations were started by the employer but did not proceed during the police investigation and subsequent prosecution. In April 2007 the criminal matter concluded with a verdict of not guilty.

Mr Mansfield remained suspended until the disciplinary process concluded with his dismissal. He unsuccessfully appealed the dismissal and then brought a claim of unfair dismissal.

The Employment Tribunal which considered his claim concluded that he had been unfairly dismissed. Two reasons were given for this; the unacceptable delay in proceedings and the lack of a genuine belief in Mr Mansfield's guilt. This decision was appealed.

The Employment Appeal Tribunal (EAT) looked at both of these issues and concluded that while Mr Mansfield could have been given the option to continue with the disciplinary proceedings during the police investigation, the decision not to do this and to delay the process was not unreasonable. Additionally, there was no evidence to suggest that the delay had prejudiced him or affected the strength of the case against him. The EAT also upheld the second ground of appeal.

While employers will not generally want to wait until police investigations have finished before taking disciplinary action, this case shows that such a decision can be reasonable even though the ACAS Code of Practice states that action can be taken before the outcome of a prosecution if the matter 'requires prompt attention'.

Equality Act 2010 - Explanatory Notes Published

The Government has published the Explanatory Notes to accompany the Equality Act 2010 which was passed by Parliament on 7th April 2010.

The extensive notes summarise previous legislation and the Act's background, as well as providing further detail on many of the Act's provisions with helpful examples. The notes have been updated to cover provisions that were inserted during the Bill's passage through Parliament, such as the restriction on pre-employment health enquiries.

The notes which run to 215 pages can be found at :-

http://www.opsi.gov.uk/acts/acts2010/en/ukpgaen_20100015_en.pdf



CASE STUDY - West Yorkshire Police Authority V Homer

Background

The Claimant had been employed by the West Yorkshire Police Authority for 30 years as a police inspector before becoming a legal adviser for the Police National Legal Database (PNLD). When he was appointed to this new role he was required to have a law degree, an equivalent degree or exceptional experience and a lesser qualification in law. Mr Homer had the last of these. He had previously turned down the offer of assistance with pursuing a law degree as he did not want the burden of part-time study and would not have qualified until after he was 65 which was the normal retirement age for his role.

His employer then carried out a review of their pay rates and career structure, increasing pay levels and increments based on three thresholds. One of the thresholds was dependant on having a law degree. As Mr Homer did not have a law degree he was unable to benefit fully from these changes. He presented an Employment Tribunal claim alleging that the requirement to have a law degree put him and others aged between 60 and 65 at a particular disadvantage as they would be unable to complete a law degree before retirement age.

Decision

Mr Homer was successful at the Employment Tribunal which held that the criteria of holding a law degree was not a proportionate way of achieving the employer's specified aim of recruiting and retaining appropriately qualified staff.

This decision was appealed and the Employment Appeal Tribunal upheld the appeal on the basis that the disadvantage to those without a law degree was the same whatever their age and that not being able to complete the law degree before retirement was a consequence of age, not age discrimination. This decision was appealed to the Court of Appeal by both Mr Homer and PNLD.

The Court of Appeal also found that the barrier to Mr Homer meeting the criteria was not his age but his expected retirement before he could gain the required law degree. It was also noted that the purpose of the Employment Equality (Age) Regulations is 'not to legislate against the general unfairness of age, whether juvenile or geriatric' but to prohibit direct age discrimination on the grounds of age unless justified.

Comment

In this case Mr Homer had not argued that requiring a degree may be itself indirect age discrimination on the grounds that given the growth of higher education, many more younger workers would have degrees. The decision is a narrow interpretation of law on the basis of the way that the case was argued. By reaching this conclusion the decision avoids opening the floodgates to claims which a wider interpretation might have led to.

HOLIDAY PAY AND LONG-TERM SICKNESS

In *Rawlings v The Direct Garage Door Company Ltd* an Employment Tribunal allowed Mr Rawlings to claim an unlawful deduction to wages for unpaid holiday which accrued during a period of sickness absence in the last 15 months of his employment which ended in April 2006.

In the holiday year for 2004 he had asked for and been given holiday despite being away from work due to illness. In the holiday year for 2005 he had not requested and had not been given holiday while still on long term sickness absence. When he asked for his holiday pay for that year he had been told that as a result of the current legal position he was not entitled to it.

His claim had been stayed pending the outcome of the *Stringer* litigation (see Newsletter October 2009). When this case concluded he applied for and was given, leave to amend his claim to include a claim for unlawful deduction from wages for the employer's failure to pay him holiday pay which he had been unable to take due to illness.

This case is one of the first sickness/holiday pay cases to be dealt with following the *Stringer* case and as such its outcome is as expected. Workers on long-term sick leave do not need to wait until termination of their employment to seek sick pay and can notify their employers (in accordance with the Working Time Regulations) that they wish to take holiday and their employer will then be obliged to make payments of holiday pay to the employee.

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