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Newsletter February 2012

UK: Employment Update

Welcome to the February edition of the UK Employment Update which provides a round-up of recent employment law developments.

This Update reviews the increase in the qualifying period of employment required to claim unfair dismissal, what test an Employment Tribunal will apply when considering whether a redundant employee has unreasonably refused alternative employment and when an employer will be vicariously liable for violent employees. In addition we consider a few practical employment issues that the Olympics may throw up.

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Unfair dismissal: who is eligible to claim

Last year the Government announced that it was going to increase the qualifying period of service from one to two years before an employee could claim unfair dismissal. The Government has now clarified that only employees who commence employment on or after 6 April 2012 will be required to accumulate two years' service before being able to claim unfair dismissal. If an employee started employment prior to 6 April 2012 he or she will only need to accumulate one year's continuous employment before being able to claim unfair dismissal. An employee who has between one and two years' service on the 6 April 2012 will retain their right to claim unfair dismissal. An employee who has not yet accumulated one year's service at 6 April will acquire the right to claim unfair dismissal once they hit the one year threshold.

Violent employees: when is an employer liable?

In most workplaces violence will not be a common occurrence in day-to-day life, however, if an employee is injured by a fellow employee when will the employer be liable?

Case law has established that an employer can be liable in relation to violence towards a third party committed by the employer's employee where there is a sufficient connection between what the employee is required to do in the performance of their job and the violence in question.

The Court of Appeal recently considered when an employer will be liable for injuries sustained by an employee at the hands of a fellow employee. Two cases were considered. In the first case, A was a manager of a care home and B a health assistant in that home. One evening A was on duty when an employee called in sick. In accordance with normal practice A rang around the employees to see who would volunteer to take on an extra shift.

He called B at home who happened to be very drunk having had a *"bad day"*. B was under the impression that A was mocking him because of his drunken state and, soon after, got on his bicycle, cycled to the workplace and seeing A in the front garden, attacked him.

In the second case, X was MD of a small manufacturing company and Y was one of its employees; a powder coater whose job involved loading bed frames onto a conveyer belt to go into an oven. In order to make efficient use of the oven, the frames had to be fed in regularly and Y had previously been reminded he needed to do that. On the morning of X's assault, he noticed Y had only placed two items in the oven. He walked over to Y in order to assist him in loading more furniture onto the conveyor belt, with the result that Y then threw him onto a table 12 foot away fracturing a vertebrae.

The common feature of both of these cases was that there was a violent response by an employee to a lawful instruction. In the case of A and B the Court of Appeal held that the employer was not vicariously liable. B's violence was a response to a routine and proper request that he volunteered for a night shift, however, that request was received at home. He then got on his bicycle and rode to the workplace in order to inflict serious violence on A. The Court concluded that this was an independent venture of B's own which was quite separate and distinct from his employment. The request to work an extra shift was no more than a pre-text for an act of violence that was unconnected with B's work as a health assistant.

In the case of X and Y, the Court concluded that Y had reacted in a spontaneous and violent way to a lawful instruction given in the workplace. Y had acted in immediate response to a workplace instruction and that was sufficient to place vicarious liability on X.

The Court stressed that every case has to be determined on its own facts. The essential issue is, however, whether what the employee did was closely connected with the normal performance of his duties in the workplace.

[Weddall v Barchester Healthcare Ltd]

The Olympics: employment considerations

Staffing levels

- Employers should anticipate an elevated level of demand to take holiday during the Olympic period from employees wishing to watch the Games or to escape the inconvenience of travelling during peak periods.
- Having regard to their minimum staffing requirements employers must consider their approach to such holiday requests; if normal holiday application procedures are to apply staff should be reminded of the relevant procedures on a regular basis. If new procedures are to be put in place then these should be drawn to the attention of staff in good time.
- Some employees will already have purchased tickets for Olympic events before booking leave; in some cases employees may not be granted their leave request but may be tempted to 'pull an Olympic sickie'; as a pre-emptive measure employees must be reminded of absence notification procedures and warned that employees who are suspected of malingering may be subject to the company's disciplinary procedures.
- Some employees may have been granted volunteer positions at the Olympics. Employers must decide whether such employees will be required to book holiday in order to carry out their volunteering role and, if so, whether they will be given priority over non volunteer applicants for holiday. Alternatively employers may wish to consider allowing volunteers to take paid or unpaid leave in order to carry out their role. Whatever approach is adopted employers should seek to apply their policies consistently and will need to ensure that remaining staffing levels are sufficient for their business needs.

Flexible working

- Employers should give some thought to whether flexible working arrangements could alleviate or remove the potentially disruptive aspects of the Games, e.g. transport disruption at times of peak travel, employees wishing to watch key Olympic events scheduled during working hours.
- Flexible hours working and home working may be options depending on business needs. In all cases it is important that the terms of the arrangements are clearly delineated to employees.

- If flexible working is not a possibility staff should be advised that they are expected to work their normal hours and to plan their journeys to work to accommodate any transport delays. Employers must also decide what approach they will take in relation to employees who are delayed beyond their control; for example will they have to make up time lost?
- It may be necessary to introduce on a temporary basis different working hours and/or shift patterns; for example if transport restrictions mean that deliveries will take place at times when staff are not usually rostered (e.g. in the middle of the night) arrangements will have to be put in place to deal with this.
- The extent to which new working hours can be imposed on staff or will have to be mutually agreed will depend on the contractual terms and/or the provisions of any applicable collective agreement. In all cases employers should consult with staff sufficiently in advance of the new regime to avoid claims that the employer is in breach of express or implied contractual terms.

Watching the Olympics during the working day

- Many employees will be tempted to watch or listen to the Olympics during working hours; in many cases this may cause severe disruption to computer systems (and therefore business continuity) if large numbers of staff are simultaneously viewing the Games on the Internet. The work of employees watching or listening to events may also suffer if they are not fully focussed.
- Employers must communicate clearly to staff what is or is not permissible in relation to viewing the Olympics in the workplace and the disciplinary consequences of any breach of its policies in this regard.
- One practical way of reducing the temptation to flout an employer's rules is to place televisions and/or radios in staff communal areas such as the canteen for viewing at pre-arranged times and to require employees to make up time spent viewing the Olympics.

ACAS has also produced guidance for employers in relation to employment issues that may arise in the context of the Olympics. This guidance can be found here.

Redundancy: when is a refusal of alternative employment unreasonable?

When an employer is proposing to make an employee redundant as part of the individual consultant process prior to termination, the employer must consider whether there is any suitable alternative employment within the company or an associated company which it can offer to the individual.

If, prior to the termination of his existing employment, the redundant employee receives an offer of alternative employment but refuses that offer then the employment will terminate on the expiry of the notice and he will be entitled to receive a statutory redundancy payment unless the offer constituted suitable alternative employment and the employee acted unreasonably in refusing it.

What is suitable alternative employment and what is an unreasonable refusal? These were issues recently considered by the Employment Appeal Tribunal (EAT) in the context of a matron who had worked in the community since 1985. She was put at risk of redundancy and offered a number of options: one was to work in a lower grade but, again, in a community setting and another option was to work in a hospital as a matron at the same grade. She worked in the junior position on a four week trial period basis but rejected that position after the trial. She then resigned and claimed her redundancy payment. She rejected the offer of the hospital matron position on the grounds that her career path and qualifications were in community nursing, she had not worked in a hospital setting since 1985 and did not wish to do so.

After the alternative employment was rejected, the employer refused to a make a redundancy payment on the grounds that it had been an offer of suitable alternative employment and the employee had unreasonably refused it. Shortly after she was made redundant the employee emigrated to Canada.

The EAT overturned the Tribunal's decision that the refusal of the alternative employment been unreasonable. It held that the question had to be considered from the subjective perspective of the employee not the perspective of a reasonable employee. The reason for rejecting the employment was because the employee had maintained a career path outside the hospital sector for many years and did not wish to work there again. The employee had not applied for a job in Canada until after she refused the alternative employment. It held that the employee's desire not to work in a hospital setting did provide her with a sound and justifiable reason for turning the offer down. She was, accordingly, entitled to receive a statutory redundancy payment.

This case illustrates that when an offer of alternative employment is made to a potentially redundant employee a two-fold test has to be applied: whether the job is a suitable alternative is assessed from an objective perspective (similarity of pay, location, responsibility etc) but whether a refusal of that job is reasonable is assessed from the subjective perspective of the individual employee and their own personal circumstances.

[Readman v Devon Primary Care Trust]

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