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Employment Law BULLETIN

Welcome to our October employment law bulletin.

The Government has published details of its proposed statutory leave and pay for bereaved parents. If passed, new legislation will come into force in 2020.

The first data from the Government's Race Disparity Audit was published earlier this month. The aim of the audit is to provide data in order to examine how people from different backgrounds are treated across society. Labour market participation and income is one key focus of the audit, along with others, such as education, health, housing, crime and policing, and the criminal justice system.

In the interesting case of *NHS 24 v Pillar* the EAT has overturned the decision of an employment tribunal that a dismissal was unfair because the investigation report included details of previous incidents which had not led to disciplinary action. The EAT decision also offers guidance in this general area.

In *MM Packaging v Potter*, the Court of Appeal examined the meaning of "90 days of gross pay" agreed to by the employer in an ACAS COT3 Agreement settling a redundancy consultation claim. The Court concluded that the natural meaning of the phrase, set in the context of the negotiations leading up to the agreement, meant that 90 days meant 90 calendar days and not 90 working days as contended by the trade union and the employees.

Finally, in our client briefing we discuss best practice and policy in relation to employees who are being investigated by the police.

Finally, may I remind you of our forthcoming events:

Click any event title for further details.

What's New in Employment Law

- Breakfast Seminar, Leeds, 5th December 2017

In conjunction with ACAS

Understanding TUPE: A Practical Guide to Business Transfers and Outsourcing

•A full day conference, Cambridge 9th November 2017

Understanding TUPE: A Practical Guide to Business Transfers and Outsourcing

•A full day conference, Sheffield, 14th November 2017

Dr John McMullen, EDITOR **john.mcmullen@wrigleys.co.uk**

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1: Government publishes details of proposed statutory leave and pay for bereaved parents

Details of the Parental Bereavement (Pay and Leave) Bill have been published before its second reading in Parliament.

The proposed legislation will give all employed parents two weeks' leave if they lose a child under 18. Those parents who have been continuously employed for 26 weeks will also have the right to statutory parental bereavement pay. Employers will be able to claim back most or all of the statutory pay from the Government, depending on their size.

Current rules allow parents "reasonable" time off to attend to care for dependants in an emergency, including making arrangements following the death of a dependant. However, there is no statutory right to take leave following the death of a child.

The Government hopes that the new legislation will come into force in 2020 and estimates that the annual cost of statutory payments under this legislation would be between £1.3m and £2m.

2: Government releases Race Disparity Audit

The first data from the Government's Race Disparity Audit was published earlier this month. The aim of the audit is to provide data in order to examine how people from different backgrounds are treated across society. Labour market participation and income is one key focus of the audit, along with others, such as education, health, housing, crime and policing and the criminal justice system.

The audit highlights a significant disparity between the working age unemployment rate of white British people (of whom around 1 in 25 are unemployed) and that of black people, Pakistani and Bangladeshi people and those identifying as being of mixed ethnicity (of whom around 1 in 10 are unemployed). Broken down by age, the unemployment rate of white British people is almost half that of most other ethnic groups.

There is further disparity in the type of work undertaken by people of different ethnicities. More than 2 in 5 Pakistani and Bangladeshi workers work in one of the three lowest-skilled occupation groups, compared to 1 in 4 white British workers.

Pakistani and Bangladeshi workers, along with black workers, receive the lowest average hourly pay of the ethnicity groups identified. On average, Pakistani and Bangladeshi workers are paid £4.11 less per hour than Indian workers.

Damian Green, First Secretary of State, comments in the Foreword: "I expect local and national service providers to look at the data in the Audit and use it to identify where they most need to improve and where they really need to be offering a better service. And I know charities, academics, community groups and the private sector will also find this data valuable to inform their work to improve our country."

3: Including details of previous incidents in investigation report did not make dismissal unfair

In ***NHS 24 v Pillar*** the EAT overturned the decision of an employment tribunal that a dismissal was unfair because the investigation report included details of previous incidents which had not led to disciplinary action.

Ms Pillar was a nurse practitioner whose role involved taking and triaging phone calls from members of the public. Her decisions led to two "Patient Safety Incidents" (PSIs) in 2010 and 2012. She was not disciplined as a result of these PSIs, but was given a development plan and training.

In 2013, she wrongly directed a caller who had suffered a heart attack to an out-of-hours GP service rather than calling 999. This PSI was the subject of an investigation report which included reference to the two earlier PSIs. Following a disciplinary process, Ms Pillar was dismissed. She brought an unfair dismissal claim in an employment tribunal.

The tribunal found that the decision to dismiss on the ground of conduct was within the band of reasonable responses. However, it agreed with Ms Pillar that the dismissal was procedurally unfair on the basis that it was unreasonable to include details of the earlier PSIs in the report.

The EAT did not agree, and substituted a decision that the dismissal was fair. Lady Wise held that it was perverse of the tribunal to find that relevant material should have been left out of the report. Lady Wise made a distinction between the present case and previous case law suggesting that taking expired warnings into account would make a dismissal unfair. She noted that, in the case of *Thomson v Diosynth Ltd (2006)* CSIH 5, it was found that the claimant had a false expectation that warnings which had expired would not be considered in future disciplinary proceedings. In Ms Pillar's case, the previous PSIs had not led to disciplinary proceedings and so, Lady Wise held, there could have been no expectation that they would not be considered in future.

The EAT judgment indicates that the role of the investigating officer is to put all relevant information to the disciplinary officer who will then make a decision based on that information. The reasonableness of the investigation is only relevant where a lack of thoroughness leads to insufficient information being put before the decision maker. The EAT commented that the inclusion of the information in the investigation report had not prejudiced Ms Pillar by denying her the chance to offer mitigating evidence during the disciplinary hearing.

This case is a useful reminder of the tribunal's approach to procedural fairness. When considering whether a dismissal is fair in all the circumstances, a tribunal will consider whether the employer had reasonable grounds for its belief that an employee is guilty of misconduct and that belief must be based on a reasonable investigation.

Diosynth indicates that expired warnings should not be used to elevate an offence from one which would not result in dismissal to one which does. Once gross misconduct is found, however, an expired warning can be taken into account when deciding on sanction (*Airbus Ltd v Webb* [2008] EWCA Civ 49).

However, this is not a hard and fast rule as the tribunal will consider all of the relevant circumstances of the dismissal. For example, in *Stratford v Auto Trail VR Ltd* UKEAT/0116/16 on which we reported in January, the EAT held a dismissal was fair where an employer took into account expired warnings. In this case, the employee was dismissed for an offence which was not gross misconduct and at a time when he had no live warnings on his file. In its decision, the EAT took into account the fact that he had been disciplined for 18 different incidents over his 13 year service and that his employer reasonably believed that he would continue to break the rules in future.

4: Court of Appeal considers meaning of "90 days of gross pay" in COT3 Agreement

In ***MM Packaging v Potter and others*** the Court of Appeal considered the correct construction of a payment clause in a COT3 Agreement.

MM Packaging is a packaging manufacturer which suffered a downturn in work at its Bootle plant in 2011. A redundancy exercise was carried out which led to strike action. Ultimately, the factory was closed and 109 employees were made redundant. Some employees brought unfair dismissal claims and the union brought a claim for a protective award in view of the company's alleged failure to comply with its collective redundancy consultation obligations under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). A protective award under TULRCA is a maximum of 90 days' gross pay for each affected employee, calculated on a calendar basis (that is the gross pay the employee would receive in respect of 90 calendar days).

Settlement negotiations were entered into and led to a COT3 Agreement between the employees, the union and the company. The agreement made explicit reference in the recitals to the union's claim for a protective award and set out the agreed payments which included: "90 days of gross pay" and an enhanced redundancy payment for each employee.

When payments were made under the agreement, a dispute arose as to the correct calculation of "90 days of gross pay". The company made payment by reference to 90 calendar days' pay (a period which would include some non-working days). The employees and the union, on the other hand, argued that the sum should be determined by calculating one day's gross pay and simply multiplying this by 90. This calculation would result in pay equivalent to 90 working days, rather than 90 calendar days.

Some of the employees, with the support of the union, brought a breach of contract claim in the High Court. The High Court found in favour of the employees on the basis that the "natural reading" of the phrase "90 days of gross pay" was the pay of 90 working days. The judge found no reason to decide that the parties had intended the amount to be directly referable to the statutory maximum of a protective award (and so to be based on calendar days). He commented that it was open to the parties to make clear in the agreement if calendar days were intended (as was the case with the enhanced redundancy payment set out in the agreement) but that they had chosen not to do so.

The Court of Appeal allowed the company's appeal, holding that the High Court's construction of the agreement was not correct. Giving the leading judgment, Lord Justice Underhill stated that the meaning of the phrase "90 days of gross pay" should be determined simply by asking "what it means in the context of the facts known to both parties". Taking this approach, it was clear to him that an objective reader would understand that the parties intended the company to pay an amount equivalent to what the employees would have received as a protective award in settlement of the section 188 claim. He noted that the redundancy payment clause in the agreement referred to the statutory language of "a week's pay" and commented that this indicated to him that the intention was for the 90 days' pay to be calculated on the same basis as the statutory protective award.

This case highlights the need for careful drafting of settlement agreements and COT3 agreements in order to avoid disputes of this kind arising after settlement has been reached. Employers should be aware that settlement agreements cannot settle claims relating to a breach of the agreement itself and that unclear terms can lead to further litigation and dispute.

5: Client briefing: dealing with employees who are being investigated by the police

This client briefing just provides an overview of the law in this area. You should talk to a lawyer for a complete understanding of how it may affect your particular circumstances.

An employee is under investigation by the police: to what extent should the employer get involved? How should an employer deal with any parallel internal disciplinary investigations? And when should you report an employee to the police in misconduct cases? We set out below some helpful principles to follow when faced with these difficult issues.

Considering suspension and disciplinary investigation

There should be no knee-jerk reaction to suspend or dismiss the employee. A decision should first be made as to whether the criminal allegations have implications for the employment relationship. This may require an initial investigation including speaking to the employee and/or seeking information from the police. It is very important to maintain confidentiality in these initial investigations (see data protection considerations below).

Suspension should only be imposed if there is a risk to the integrity of your investigation, a risk of harm to customers or service users, to the employee, to other employees or to the organisation as a whole. Suspension without good reason is likely to be found to be a detriment to the employee (for example in a discrimination claim). If taking no immediate action poses an unacceptable risk, you should consider alternatives to suspension such as a change of role or place of work or increasing the level of supervision of the employee. If you decide to suspend, you should make a file note of the reasons for the suspension.

There may be cases where it is not necessary to commence an internal investigation if the criminal allegations have no impact on the employee's role or on their work with colleagues, customers or service users. For example, an allegation of reckless driving might have no link to an employee's ability or suitability to carry out their role. On the other hand, some allegations may give rise to unacceptable risks to the organisation, including reputational risks.

Should the organisation report an employee to the police or other agencies?

There will be some cases where information comes to light about the misconduct of a member of staff at work which clearly indicates that a crime may have been committed. In such cases, the employer should report the matter to the police. However, in many cases, the employer will be unclear as to whether the allegations amount to a crime. Should you report to the police in such cases?

The courts have considered this question and provide useful guidance. An employer who refers "suspect or frivolous allegations" to the police could by doing so breach the employment contract. Employers should be aware of the career consequences for an employee of being under the cloud of possible criminal proceedings. The Court of Appeal has stated that an employer should not refer allegations of misconduct by an employee to the police without "the most careful consideration" and only where there is a genuine and reasonable belief that the alleged conduct could be classed as criminal. You should take into account the strength of the allegations, the nature of the alleged offence and any concern for others in the workplace (including service users) when deciding whether to report the matter to the police.

You should also consider any particular duty on your organisation to report the employee to other agencies, for example where the employee works with children or vulnerable adults and safeguarding concerns arise from the police investigation.

How might criminal allegations impact on internal processes?

If you decide that the allegations do impact on employment, an internal investigation should be carried out before making a decision about disciplinary action. Any investigation should follow the statutory ACAS Code on Disciplinary and Grievance Procedures. This, and the non-statutory ACAS guidance, includes some assistance on dealing with criminal allegations.

It is good practice to make and maintain contact with the police in order to gain any relevant information and to ensure that the internal investigation does not interfere with the criminal investigation.

Where the allegations are potentially career ending, it is extremely important that the organisation ensures its investigation is thorough and its processes are fair and non-discriminatory. It is possible that the right to a fair trial (embodied in the European Convention on Human Rights) could be engaged in disciplinary proceedings in circumstances where the outcome of the process could lead to a professional being barred from the profession. It is normally the case that legal representatives are not allowed to attend disciplinary meetings. However, employers should consider carefully any request that the employee's lawyer attend the disciplinary hearing in cases which may lead to a professional bar.

You should bear in mind that the standard of proof in disciplinary proceedings is not as high as that for criminal trials. It is possible that an employee could be found not guilty in court where the evidence is not sufficient to prove beyond reasonable doubt that the employee has committed a crime. However, your internal investigation may provide evidence which indicates that it is more likely than not that the employee committed a breach and on that basis you may decide to proceed to a disciplinary sanction such as dismissal.

Because of the different criteria involved in the criminal and HR processes, it is important that employers do not simply rely on the decisions of the police, the CPS or on the outcome of criminal proceedings in making a disciplinary decision. The employer must come to its own decision based on the evidence before it (although this will include any information provided by the police). ACAS advises that, where a disciplinary process cannot await the outcome of a police investigation, an employer can complete the procedure based on its own investigation and hearing.

An employee may, often on the advice of their solicitor, refuse to respond to questions put to them in the disciplinary process on the basis that questions could prejudice an upcoming trial or police interview. In such a case, the employee should still be given the opportunity to put their case, perhaps by means of a prepared written statement. On occasions, a parallel police investigation may hold back an internal investigation as evidence may be held by the police and not accessible to the employer. In such cases, it may not be possible to carry out the investigation and disciplinary hearing until criminal proceedings have taken their course. This can leave employers in a state of limbo for some time, often with the employee on long term paid suspension.

There may come a point at which you will need to consider whether the disciplinary process can continue on the basis of evidence held by the employer. Tribunals recognise that employers may be placed in a dilemma in such cases. A tribunal is more likely to find that an employer has reasonably moved to dismissal before criminal proceedings are complete if there are compelling business reasons to do so. For example, if the financial, operational and staffing constraints of the organisation are such that it is necessary to bring closure to the internal process.

The police may wish to interview those who provided witness evidence to the internal investigation. Although witnesses can refuse to give evidence to the police, a court may order that documents are disclosed or issue a summons for a witness to attend a trial.

Data protection considerations

People working for your organisation, particularly those who may be fielding calls and dealing with requests on reception, should be aware that personal data relating to employees and others must be lawfully processed and that the provision to a third party of personal information could be in breach of data protection law.

In the case of criminal investigations, it is possible that the police will request personal information about the employee from the employer. The police should provide a “section 28/section 29(3)” information request form for this purpose. Information should not automatically be provided to the police. The request should be channelled to a senior decision-maker (for example the data protection officer or the CEO of the organisation) who can make an informed decision about whether sharing the information would breach the rules. Information requested by the police may be covered by exemptions, for example where the disclosure is made in the interests of preventing or detecting crime and/or capturing or prosecuting an offender. If an exemption is considered to apply, the employer may decide to disclose the data to the police.

Information about someone’s criminal record is sensitive personal data and should only be shared with the employee’s explicit consent unless an exemption applies. Where the organisation has a duty to report details of an employee’s criminal record to the DBS or to a prospective employer, such a disclosure will be permissible on the basis that the disclosure is required by law.

If you'd like to contact us please email john.mcmullen@wrigleys.co.uk

Wrigleys Solicitors LLP, 19 Cookridge Street, Leeds LS2 3AG. Telephone 0113 244 6100 Fax 0113 244 6101 If you have any questions as to how your data was obtained and how it is processed please contact us. Disclaimer: This bulletin is a summary of selected recent developments. Legal advice should be sought if a particular course of action is envisaged.