

Employment Law Update

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this issue

- Mutual duty of trust and Confidence reinforced - page 2
- Clarity essential in disciplinary proceedings - page 3
- Employers pick up the tab for customer's harassment - page 3
- New government crackdown on compensation culture - page 4
- Simon Cowell claim thrown out - page 4
- And finally- page 4

Change to National Minimum Wage rates

From 1st October the following rates and age bands will apply for the purposes of the National Minimum Wage:

- £3.64 - for workers aged 16-17
- £4.92 - for workers aged 18-20
- £5.93 - for workers aged 21 and over.

Welcome

Welcome to September's edition of the monthly newsletter. The start of next month sees the introduction of around 90% of the Equality Act, the most comprehensive review of discrimination laws in 35 years. We have a mixed bag of employment news for you this month including guidance on the extension of the law of harassment under the Equality Act

Huge payout for whistleblowing claim

John Watkinson was the former chief executive of the Royal Cornwall Hospitals Trust (RCHT). He was dismissed following a statement he made to the hospital board in August 2008 in relation to the intended plans to move some cancer services and surgery from Truro to Plymouth. He suggested to the board that the transfer of the services may have been unlawful without a full public enquiry.

An Employment Tribunal ruled that his dismissal was '*automatically...procedurally and substantively unfair.*' Mr Watkinson was awarded an interim payment of £67,250.00 in respect of the Trust's failure to follow proper procedure and the tribunal has now ruled that he should also received £1.2 million for the whistle blowing part of the claim.

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Mutual duty of trust and confidence reinforced

It is a long established principle of employment law that the duty of trust and confidence between employer and employee is mutual. In the case of *McCormack v Hamilton Academical Football Club Ltd* the Club attempted to rely on the duty to justify the dismissal of their deputy manager Mr McCormack.

The Club were aware that he was an 'old school' manager and had a reputation for being a hard man and tough on his players. No written contract of employment existed, however it was agreed that he would receive in the region of £40,000.00 per year and his contract was for a fixed term. The Club dismissed Mr McCormack without notice and he issued proceedings for wrongful dismissal in order to claim the monies he said were owed to him under his contract.

The Club relied on a number of pre-season incidents in order to justify the decision to dismiss. McCormack was asked to take charge of the first team for a pre-season tournament in Oman. At the tournament it was alleged that, despite it being a family event, McCormack swore constantly at his players and opposition fans were mimicking his behaviour by barking like dogs. Mr McAvory, the director of the youth academy, rang the Club's absent manager Mr Reid and informed him '*John [McCormack] is running amok up here...he's like a madman at the side of the park*'. At the tournament the Club's chairman spoke informally to McCormack about his behaviour and it was alleged that McCormack looked back at the chairman in disbelief.

Most shockingly it was alleged that McCormack behaved inappropriately towards the Club's 21 year old female physiotherapist during the tournament. He was accused of making comments of a sexual nature in his team talk before and after the final, and requiring her to be present in the changing room following the final whilst the players showered and changed, despite her previously confirming that no players required treatment. It was also alleged that he deliberately got changed in front of her. McCormack denied getting changed in front of her and dismissed the comments as locker room banter.

The Club also relied on a further incident during a nutritional therapists talk to the team in which McCormack pulled away the chair of a player before he sat down causing him to fall, and the general bullying of players which included an alleged drunken rant which left an American youth player in tears.

The chairman dismissed Mr McCormack with the manager present. It was accepted that during the dismissal meeting the Club did not rely on any one specific incident to justify dismissal. No dismissal procedure was followed.

It would seem that the bar for gross misconduct in relation to Scottish football managers has been set quite high. The court found that taken in isolation no one incident was capable of justifying McCormack's summary dismissal and stated that such grave matters such as assaulting one of the players or burning down the stadium would amount to gross misconduct.

The court next considered whether the cumulative effect of McCormack's behaviour caused the Club to reasonably lose trust and confidence in him. The court considered that the employee would breach this term if it was clear that he 'did not care a hoot' about the job or if his conduct left 'the continuance of the contract of service impossible.'

The court held that McCormack's cumulative conduct did not merit summary dismissal, because the Club had not followed the incidents of misconduct up with formal action. The chairman had talked to him about his behaviour during the tournament but no formal action was taken against McCormack. The obligation of trust and confidence is a mutual one and the Club were under a duty to keep employees fully informed of any perceived deficiencies in their conduct during the course of their employment.

The decision in this case is a warning to all employers not to brush matters under the carpet until they can no longer be ignored. If you find an employee's behaviour unacceptable you should use your company disciplinary procedures and keep an accurate record of proceedings and the sanctions applied.



Clarity essential in disciplinary proceedings

The case of *Celebi v Scolarest Compass Group UK & Ireland Limited* involved a claim for unfair dismissal instigated when the statutory disciplinary procedures were still in force. Mrs Celebi was employed by Scolarest as a chef manager. On 14th November 2006 Mrs Celebi had collected £3,400.00 in cash, she completed the necessary paper work indicating that the money had been placed in a bag and given to a courier to take to the bank. The bank reported only receiving £400.00

Disciplinary proceedings were commenced by Scolarest. The initial letter inviting Mrs Celebi to an investigatory meeting described the issue as *"serious allegations: Loss of £3,000.00 cash banking/inaccuracy in banking."* The step one letter inviting her to a disciplinary meeting detailed three allegations: *"(i) incorrect reporting of stock figures; (ii) failing to follow financial procedures; and (iii) discrepancies in banking."* She was eventually dismissed for *"incorrect reporting of stock figures. Failing to follow financial procedures and discrepancy in banking during September and October 2006."*

Mrs Celebi's initial claim to the Employment Tribunal failed. She appealed and the matter was remitted back to the Employment Tribunal who again found her dismissal fair. She appealed again to the Employment Appeal Tribunal and this time round they found that her dismissal was unfair.

The EAT's justification for the finding of unfair dismissal was that the only oral evidence as to the reason for dismissal was that of the dismissing officer who believed that Mrs Celebi had 'stolen' the money. However, the letter inviting Mrs Celebi to an investigatory meeting did not expressly state that she was accused of stealing, it mentioned the 'loss' of cash. The EAT held that it is a fundamental part of a fair disciplinary process that an employee should only be disciplined in respect of a charge which has been put to them. Further, an employee may respond differently to an allegation of negligence than to an allegation of dishonesty and there was no evidence to suggest Mrs Celebi believed she was been accused of theft, which may have remedied the situation.

It may look as if the Appeal Tribunal were splitting hairs with this decision and in the vast majority of cases employees will know exactly what they are being accused of. However, in certain circumstances the correct labelling of the allegation of misconduct can alter the consequences of a proven allegation and may mean the difference between a fair and an unfair dismissal. The lesson for employers to learn from the decision in this case is the importance overall clarity within the disciplinary proceedings.



Employers pick up the tab for customer's harassment.

Under the Equality Act 2010 employers can be liable for acts of harassment towards their employees from third parties. Once the relevant provisions of the act are implemented employers caught out could face claims for discrimination attracting potentially unlimited compensation. Under the new legislation employers are subject to a 'three strikes and you're out' scenario. In other words if an employee is subject to three separate acts of harassment by a third party they could have a claim against their employer and, to make matters worse, the acts of discrimination do not have to be by the same person.

The legislation will cause greater concern in certain areas of industry, for example drinking establishments and where tempers may flare, for example towards traffic wardens. However, wherever staff may have contact with third parties employers should be wary.

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Case against Simon Cowell thrown out

As detailed in a previous newsletter, Emma Czikai, a contestant on Britain's got talent lodged a disability discrimination claim against Simon Cowell, his production company Simco and Freemantle Media. An Employment Tribunal at a pre-hearing review held that her case cannot be heard by an Employment Tribunal because she lodged her claim out of time and Cowell was not her employer - yet another occasion when she hasn't got through!

New government crackdown on compensation culture

The Prime Minister has appointed Lord Young to undertake a "review of the operation of health and safety laws and the growth of the compensation culture."

It is expected that the following changes will be proposed:

- Lawyers charging success fees in "no win, no fee" agreements should no longer be able to recover these fees from defendants.
- Members of the emergency services should not be sued when they have risked life and limb to save others.
- Teachers no longer required to fill in large numbers of risk assessment forms before school trips. A simple consent form, signed by parents, should be all that is required.
- Small shops, offices and other low risk workplaces should be exempt from complex paperwork to meet risk assessment and other health and safety criteria.

And Finally....

We hope that you have enjoyed this month's newsletter. The next few months look set to be eventful for employers and employment lawyers, as we all get back to business following the summer holidays and get to grips with the finer points of the Equality Act. In preparation for the new Act you should examine your procedures for dealing with sickness absence and recruitment as well as being aware of new laws protecting discrimination by perception and association and the extension of harassment laws. You should also take this opportunity to update your Equal Opportunities Policy. If you need any advice regarding the changes or wish to update your contracts, handbooks, policies and procedures please contact us.

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