

Employment

August 2007

This months update deals with:

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- 88 seconds too late
- New decision on employer's liability for workplace stress
- National Minimum Wage increase
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An employer's contribution to an employee's illness does not make a subsequent dismissal unfair

In *McAdie v Royal Bank of Scotland* the Court of Appeal upheld the EAT's decision in finding that an employer can fairly dismiss an employee for ill-health capability despite the fact that the stress-related illness was attributed to the actions of the employer. When deciding whether the dismissal is fair, the key issue is whether the employer acted reasonably in all the circumstances. However, where employers are culpable they should be prepared to "go the extra mile" in finding suitable alternative employment and should be prepared to put up with longer periods of absence.

Mrs McAdie was an employee of the Royal Bank of Scotland ("the Bank") for 20 years when she went on long-term sick with a stress-related illness. This absence followed a grievance procedure relating to Mrs McAdie's transfer to another branch. Mrs McAdie alleged that in dealing with her grievance her manager had been "extremely intimidating and bullying".

The Bank activated their procedure for dealing with long-term sickness absence and were advised by occupational health professionals that Mrs McAdie's ill-health was as a result of management issues, that further medical treatment was unlikely to resolve the situation and Mrs McAdie was likely to remain away from work for the foreseeable future.

Following a meeting under the procedure, Mrs McAdie's employment was terminated on 12 week's notice on grounds of ill-health, a decision which was upheld on appeal. Mrs McAdie maintained throughout the process that her trust and confidence in the Bank had been destroyed and the only remedy was that she should leave the bank "with a clean reference and compensation". Mrs McAdie claimed unfair dismissal.

The Employment Tribunal found that the dismissal was unfair on the basis that the Bank had caused Mrs McAdie's health problems. The Bank successfully appealed the decision.

The Court of Appeal upheld the EAT's decision that although the Bank's culpability in her ill-health was a factor to consider, it did not mean that the employer could be prevented from ever effecting a fair dismissal.

The Court of Appeal agreed that the ET had misdirected itself and should have considered if it was reasonable for the Bank to dismiss Mrs McAdie taking into account all the circumstances including the employer's culpability. It was held that the decision was reasonable as the medical evidence was clear that Mrs McAdie was unfit for work and that there was no prospect of recovery. In the circumstances there was no alternative to dismissal.

88 seconds too late

In *Besley v National Grid* the EAT upheld a decision not to accept an unfair dismissal claim which was presented 88 seconds late. The Claimant was electronically submitting his claim 15 minutes before midnight on the last day for submission. He mistyped the web address and his claim form was sent 1 min and 28 seconds after midnight.

In upholding the decision the EAT stated that it was reasonably practicable for the claim to have been presented within time. Be warned – time limits must be followed!

New decision on employer's liability for workplace stress

In *Deadman v Bristol City Council* the Court of Appeal overturned the High Court's decision and found that the way in which the employer conducted an investigation into an allegation of sexual harassment did not amount to a breach of contract which caused the employee's

illness. It held that there was no contractual obligation for the employer to act sensitively when conducting an investigation and that the employer could not have reasonably foreseen that the employee would suffer psychiatric illness.

Mr Deadman was employed by Bristol City Council ("the Council") for 30 years. In 1998 he was accused of sexual harassment and the Council's procedure for Stopping Harassment in the workplace was invoked. The formal procedure stated that investigations should be dealt with sensitively. It also provided that the panel who investigated any complaints should consist of at least three members. The allegation against Mr Deadman was investigated by a panel with only two members and on this basis the Council set aside the findings. The Council decided there should be a fresh investigation into the complaint. Mr Deadman was informed of this new investigation by way of a letter left on his desk.

Mr Deadman claimed that he found the way the investigation had been handled very stressful and in particular the manner in which he had been informed of the fresh investigation. Mr Deadman was diagnosed by his doctor to be suffering from stress and depression and ceased work permanently as a result of this. He brought a claim in the High Court for damages for personal injury, alleging that the Council has breached its duty of care towards him and also claimed breach of contract in relation to the Council's failure to investigate the matter sensitively and follow its own procedure.

The Court of Appeal found that even though the policy stated complaints would be dealt with sensitively this was not a contractual obligation but merely an insight into standards which the Council considered appropriate to observe. The Council had not, however followed their own procedure in relation to the investigation of the complaint.

The Court then considered whether the Council had breached its duty of care towards Mr Deadman in relation to the investigation. The Court found that the most important question to address was whether the harm to the employee was reasonably foreseeable. Applying this principle the Court found that it was not reasonably foreseeable that the breach of procedure (appointing a panel of two rather than three members) would cause Mr Deadman to suffer depression.

The Court of Appeal held that as Mr Deadman had worked for the Council for over 30 years and had an excellent health record there was nothing to suggest that he would suffer psychiatric harm as a result of the operation of the procedure. Union did not indirectly discriminate against or victimise its members. The Unions will be very pleased about the outcome of GMB v Allen and Others as the EAT overturned the Tribunal's decision that the GMB had indirectly discriminated against some of its female members on grounds of sex. The GMB had encouraged some of its female members to agree a settlement (in the North-East equal pay litigation) which the Tribunal found seriously undervalued the women's claims.

The Tribunal found that this was indirectly discriminatory on grounds of sex and as a result of this finding, the Union were potentially liable to pay in excess of £31m in compensation. The EAT overturned this decision, finding that GMB's action was justified as a proportionate means of achieving a legitimate aim. The EAT also held that the GMB had not victimised the female members by failing to support their claims.

Members of the GMB who were employed by Middlesbrough City Council (the Council) had two conflicting objectives. There were female members who argued that they had equal pay. Members of the GMB who were employed by Middlesbrough City Council (the Council) had

two conflicting objectives. There were female members who argued that they had equal pay claims against the Council and that they were entitled to 6 years back-pay and other members whose jobs had been downgraded in the course of a job evaluation study and who wanted pay protection going forward.

The GMB realised that the Council had limited resources and was concerned that too much pressure for back pay could threaten the pay protection and future pay increases. They were also concerned that it could lead to redundancies or the Council contracting-out jobs. The Council offered the female members a settlement of their equal pay claims worth about 25% of their value. GMB recommended that the female members accept this because it was the best offer that could be achieved and that the alternative was lengthy legal proceedings which could lead to a loss of jobs. As a result, five claimants brought sex discrimination claims against the GMB and argued that they had been directly and indirectly discriminated against by GMB and that because they had sought to litigate, GMB had victimised them.

The EAT was critical of the methods used by GMB in respect of attempting to secure agreement to the offer, but nevertheless found that GMB had pursued a course that was proportionate to achieving a legitimate aim. The EAT thereby overturned the decision that the GMB indirectly discriminated against some of its female members on grounds of sex. It also found that there was no evidential basis to support the tribunal's decision that the GMB had victimised its female members by failing to support their claims, particularly as the members had instructed their own solicitors.

National Minimum Wage increase

The National Minimum Wage (Amendment) Regulations, 2007 (the Regulations) have now received Parliamentary approval and the

following increases will take effect from 1 October 2007:

Standard Rate (for workers aged 22 or over): £5.52 (rising from £5.35).

- Development Rate (for workers aged between 18 and 21): £4.60 (rising from £4.45).
- Young Workers Rate (for workers aged under 18 but above the compulsory school age that are not apprentices): £3.40 (rising from £3.30).

The Regulations also increase the accommodation allowance from £4.15 to £4.30 a day.

The Regulations have further clarified the position regarding "accommodation allowance". The Regulations provide that payments to (or deductions from wages by) housing authorities or registered social landlords for accommodation will not have to be treated as a deduction, unless the accommodation is provided in connection with employment by that authority or landlord.

The Regulations also add to the list of workers under who do not qualify for the NMW:

- Workers participating in the Programme Led Apprenticeships scheme in England.
- Workers attending work experience as part of a further education course.
- Workers participating in the Leonardo da Vinci Programme (a European Community vocational training scheme).
- Workers participating in the European Community Youth in Action Programme.

Extending Time

In the case of *Harris v Towergate London Market Ltd*, the EAT decided that an employee who claimed unfair dismissal well outside the

original time limit could rely on the extension of time limit provisions, despite the fact that she had not invoked the employer's appeal procedure and had instead sought to raise a grievance after the dismissal had taken effect.

Mrs Harris was employed by Towergate London Market Ltd as an insurance broker. She was dismissed for redundancy on 31 October 2005 following a selection process which scored her on performance and behaviour. The dismissal letter offered the opportunity to appeal.

Mrs Harris did not appeal but wrote to the employer on 26 January 2006 stating that she was raising a formal grievance in relation to the assessment criteria and that she was "entitled to a meeting to resolve this issue and to be accompanied by [her] trade union representative".

Since Mrs Harris was dismissed on 31 October 2005, her original three-month time limit for bringing a claim expired on 30 January 2006. However, Mrs Harris did not lodge her claim until 21 April 2006. She believed that the result of submitting a grievance before the end of January was that there would automatically be a three-month extension to the time limit taking her deadline for submitting a claim to 30 April 2006.

However, since her complaint concerned an express dismissal, the grievance procedure did not apply, so lodging a grievance had no effect on the time limit. In her evidence to the tribunal, Mrs Harris therefore argued that, although she had been advised to lodge a grievance, and had referred in her letter to a grievance, she had in reality lodged an appeal challenging her dismissal.

The tribunal rejected this argument and dismissed her complaint as having been presented out of time. Mrs Harris appealed to the EAT.

The EAT felt the correct question was not whether or not there was a formal appeal, but whether or not Mrs Harris believed, on reasonable grounds, that there was an ongoing procedure that she could use to challenge her dismissal.

The tribunal had heard evidence from Mrs Harris that she believed there was an ongoing procedure. On this basis, the EAT held that the tribunal should have found that Mrs Harris had a reasonable belief that there was a procedure in motion, thereby allowing for the time limit to be extended.

The appeal was allowed and the case was remitted to the tribunal to hear the unfair dismissal claim.

You're Fired!

.....And finally, Sir Alan Sugar is blamed for the increase in Employment Tribunal claims this year. The number of Employment Tribunal claims has steadily risen from 86,181 in 2004-05 to more than 115,000 in 2006-07 with the number for this year being expected to reach 132,000. A Scottish law firm has suggested that bosses are emulating Sir Alan's bullish performance on the BBC Television programme *The Apprentice* causing their ex employees to bring unfair dismissal claims.

An alternative (and more mundane) view is that employees are becoming more aware of their rights and in particular the Statutory Disciplinary and Dismissal Procedures

("SDDP") and that this is the cause of the increase. This is contrary to the one of the main objectives behind the introduction of the SDDP's which was to reduce Employment Tribunal claims by encouraging internal dispute resolution!

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