CHILTERN HR

JULY 2013 NEWSLETTER

110 Butterfield, Great Marlings
Luton ▪ Bedfordshire ▪ LU2 8DL

T: (01582) 439 795
F: (01582) 439 796
E: philip.ivinson@chilternsolicitors.co.uk
www.chilternsolicitors.co.uk

1. New filtering rules for DBS checks

New filtering rules for criminal records checks came into force on 29th May.

What does this mean?

The new rules mean that convictions and cautions for less serious or older offences will no longer show up on Disclosure and Barring Service certificates. There are limited exceptions for job applications relating, for example, to national security or police vetting.

What should employers do?

Employers who are entitled to carry out criminal records checks should do so as normal.

Reference: The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013.

2. ACAS Code of Practice on Settlement Agreements

ACAS has published a Code of Practice on Settlement Agreements.

What does this mean?

Legislation, which will re-name 'compromise agreements' as 'settlement agreements' is expected to come into force later this summer. It will prevent pre-termination negotiations from being referred to in evidence in any unfair dismissal claim even if there has been no current employment dispute.

To accompany the legislation ACAS has published a Code of Practice designed to help employers, employees and their representatives understand the implications of the new legislation.

A copy of the Code of Practice can be found here http://www.acas.org.uk/media/pdf/n/o/Acas-response-to-Settlement-Agreements-Code-June-2013.pdf

3. Employee making multiple complaints was victimised

The Employment Appeal Tribunal has ruled that an employee who made a series of misguided complaints (ten grievances and eight sets of tribunal claims) which resulted in his dismissal was victimised.

What does this mean?

Grievances and tribunal claims are generally 'protected acts' as long as they are not made in bad faith and an employer unlawfully victimises an employee if it dismisses or subjects him to a detriment because of a protected act. The reason for the employee's dismissal, in this case, was that he had raised a number of grievances in the past, which had proved unjustified, and that, in his state of mind, he was likely to do so in the future. As a result, his victimisation claim succeeded.

What should employers do?

Employers faced with repeated unfounded complaints should, however frustrating it might be, still handle grievances properly and in a timely manner.

Employers could look at the bigger picture as it may be that the same employee is not working to standard or is having a negative impact on staff morale. In such cases, the employer may have a legitimate reason to address the employee's behaviour or performance quite independently of the employee's act of repeatedly raising grievances. Specific legal advice should also be taken before dismissing such an employee or taking action short of dismissal.

Reference: Woodhouse v West North West Homes Leeds Ltd

4. Use of covert surveillance

The Employment Appeal Tribunal has held that an employer's use of covert surveillance as evidence of an employee's misconduct did not make his subsequent dismissal unfair.

What does this mean?

It is arguable that an employee has no right to privacy when defrauding his employer (in this case the employee was claiming pay and pretending to be at work when he was actually playing squash). Furthermore, if the surveillance is carried out in a public place an employee cannot have a reasonable expectation of privacy. In general, employers are entitled to know where their staff are and what they are doing during working hours.

What should employers do?

Employers should not take this case as a green light for surveillance as a routine part of a disciplinary investigation. Covert surveillance should only be used in exceptional circumstances as an employer may ultimately need to show that it was proportionate or reasonable. Public authorities, such as this Council, could also be subject to an action in the civil courts for breach of the Human Rights Act.

Reference: City and County of Swansea v Gayle

5. Compulsory retirement age of 65 was proportionate

An employment tribunal has ruled that in this case, a compulsory retirement age of 65 was a proportionate means of achieving the legitimate aims of workforce planning and staff retention.

What does this mean?

A compulsory retirement age is directly discriminatory on grounds of age unless it is a proportionate means of achieving a legitimate aim. Legitimate social policy aims which could potentially justify an employer imposing a compulsory retirement age may include giving staff the opportunity of promotion after a reasonable period, so as to encourage staff retention, facilitating the planning of the workforce across individual departments through providing a realistic long term expectation of when vacancies will arise and limiting the need to expel senior staff by performance management so as to contribute to a congenial and supportive culture in the business.

However, even where legitimate aims can be shown, an employer will still need to show that their chosen retirement age was a proportionate (both appropriate and reasonably necessary) means of achieving those aims and that another age would not have been less discriminatory. In this case the tribunal said that the age of 65 was proportionate because the individual had consented to the mandatory retirement age when he signed a partnership deed, the default retirement age at that time was 65 and the state pension age was also 65. The tribunal did, however, say that they might have decided differently if they were looking at the application of that retirement age now because the default retirement age has now been abolished and changes to the state pension age are now planned.

What should employers do?

Employers should be aware that having a retirement age is now the exception and should take legal advice if they are requiring employees or partners to retire at a certain age to make sure that their practice can be justified in law.

Reference: Seldon v Clarkson, Wright & Jakes

6. Redundancy selection where staff have taken parental leave

The Court of Justice of the European Union has ruled that when selecting staff for redundancy an employer should not use different criteria for assessing staff who have been off work on parental leave.

What does this mean?

There is no automatic bar to making employees who have been on parental leave redundant so long as they are not dismissed or treated less favourably because they have been on leave. Redundancy selection criteria used for scoring should be absolutely identical for all workers whether they have taken parental leave or not, although it could be right to assess these workers over a different period of time from other workers if they were on leave immediately before the usual assessment date.

What should employers do?

Employers should take particular care when selecting staff for redundancy where some of the staff have taken family leave. They should seek legal advice if in any doubt.

Reference: Riezniece v Zemkopibas Ministrija

7. Dismissal still for redundancy though jobs remained

The Employment Appeal Tribunal has held that two employees were dismissed for redundancy even though their own jobs remained because the needs of the business for employees in other roles had reduced. However, the way the process was carried out was described by the tribunal as entirely subjective; those conducting the scoring were not able to explain their decisions and there was no meaningful consultation.

What does this mean?

Redundancy is the reason for dismissal where there is a diminution in an employer's requirements for employees to carry out particular kinds of work and the dismissals are attributable to that diminution. However, the dismissals can still be unfair if the employer gets the procedure wrong.

What should employers do?

Employers should take care when selecting staff for redundancy. They should be aware of, and plan for, each of the various steps in the process. If in doubt they should take legal advice.

Reference: Contract Bottling Limited v Cave & Another

8. Limited amnesia can amount to a disability

The Employment Appeal Tribunal has held that a loss of memory can amount to a disability even if it is just limited to one aspect of the past.

What does this mean?

In this case the employee's loss of memory was limited to just one aspect of her past. However, that loss had an adverse and long-term effect on a particular one off activity, job application, which required her to recall whether she had any previous convictions.

What should employers do?

If an employee or job applicant explains unacceptable conduct by reference to a medical condition, employers should be aware that 'disability' is a legal concept with a particular meaning and they should take specific legal advice about how to address the issue rather than relying on their own understanding of exactly what constitutes 'disability'.

Reference: Sobhi v Commissioner of the Police of the Metropolis