CHILTERN HR FEBRUARY 2015 NEWSLETTER

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1. Fit for Work has launched an advisory service

The Government's new Fit for Work service has launched an advisory service intended to help people with a health condition stay in or return to work.

The service enables employers and employees to obtain free, expert and impartial work-related health advice via Fit for Work's new website www.fitforwork.org and a telephone advice line, 0800 032 6235.

The website includes comprehensive guidance for employers on managing sickness absence including guidance on specific health conditions.

2. Duty to make reasonable adjustments was not triggered

The Employment Appeal Tribunal has held that an employer's duty to make reasonable adjustments for a disabled employee, who was on long term sick leave, was not triggered as the employee was unfit to return to work.

What does this mean?

Where an employee is on sick leave the duty to make reasonable adjustments, for example, agreeing a phased return to work is not triggered until there is an indication that the employee will be going to return to work.

In this case the employee had not given a return date or any sign that she would be returning to work at a particular time and her medical certificates continued to state that she was unfit for work.

The Employment Appeal Tribunal also said that the onus had been on the employee to suggest adjustments such as a lower grade less demanding role, with a phased return, if she became fit to do some work.

What should employers do?

Employers should always handle long term sickness cases cautiously and take specific legal advice.

3. Supporting employees suffering from domestic violence

Public Health England has published a toolkit www.16daysofaction.co.uk/toolkit/ to help businesses support employees who are suffering from domestic violence.

Public Health England estimates that one in four women and one in six men will experience domestic abuse at some point in their life and that 75% of victims are targeted at work, through resources such as phones and email.

The toolkit explains employers' responsibilities regarding domestic violence and includes guidance for line managers explaining how they can support an employee affected by domestic violence. It also contains information on the physical, emotional and financial consequences of domestic violence.

4. Revised ACAS Code of Practice on Disciplinary and Grievance Procedures

ACAS has published a draft revised Code of Practice on Disciplinary and Grievance Procedures.

The draft revised Code of Practice, which currently awaits Parliament's approval, provides new guidance relating to a worker's right to be accompanied at disciplinary and grievance hearings.

New paragraphs 14 to 16 and 36 to 38 have been inserted and confirm that:

- employers must agree to a worker's request to be accompanied by any chosen companion who is a fellow worker, trade union representative or official;
- workers can change their mind on their choice of companion;
- employers should be given enough time to make any necessary arrangements to enable the chosen companion to attend the meeting, although a request to be accompanied does not have to be in writing or within a particular time frame;
- workers should, where possible, provide their employer with the name of the companion and specify whether it is a fellow worker, trade union representative or official;
- if a companion is not available the time proposed for a hearing, an alternative time must be arranged by the employer that is reasonable and within five days of the original date.

A copy of the draft revised Code of Practice can be found here http://www.acas.org.uk/media/pdf/l/s/Acas-response-to-the-public-consultation-on-the-revised-paragraphs-of-Acas-code-of-practice-discipli.pdf.

It is 5 years since the Code of Practice was last reviewed and the Government has asked ACAS to undertake a wider consultation on the Code of Practice as a whole.

5. Dismissal for offensive tweets was potentially fair

The Employment Appeal Tribunal has held that dismissal of an employee for tweeting non-work related offensive comments from a personal Twitter account was potentially fair.

What does this mean?

The question as to whether it is reasonable to dismiss an employee for posting offensive comments out of working time and not related to work on a personal social media account which does not specifically associate the employee with his employer will depend on the facts of the specific case.

In this case the employee's dismissal was *potentially* fair because he was employed in a senior position, he allowed 65 of his employer's retail stores to follow his Twitter account, and made no attempt to use the restriction settings so his tweets were publically visible by default meaning that his tweets could be seen by staff and potentially customers who followed the stores' own Twitter accounts.

A tribunal will now have to decide whether the dismissal, in this case, was in fact unfair, i.e. whether it fell within the range of reasonable responses. In doing so the Employment Appeal Tribunal has said that it is not necessary to show that the tweets had caused any actual offence – the question is whether the employer had been entitled to reach the conclusion that the tweets might have caused offence. It also said that the tribunal should focus on whether the tweets were offensive and whether other staff or customers might have read them.

The Employment Appeal Tribunal did, however, appear to suggest that Twitter has a more public nature than Facebook, making dismissals relating to offensive tweets easier for employers to defend.

What should employers do?

Whether a dismissal is fair or unfair will depend on the specific facts of a particular case and, therefore, for this reason specific legal advice should always be taken.

6. Employee who worked remotely from abroad was protected against unfair dismissal

The Employment Appeal Tribunal has held that an employee of a British company, who had been allowed to work remotely from Australia for family reasons, was entitled to bring unfair dismissal and whistleblowing claims in an English employment tribunal.

What does this mean?

The fact that the employee, in this case, was a 'virtual employee' who had been allowed to work remotely in Australia for family reasons rather than a 'physical employee' in London, did not make her situation different from that of an employee posted to work abroad or mean that she fell outside the protection of the Employment Rights Act 1996.

In reaching its decision the Employment Appeal Tribunal took into account the fact that the work that she performed in Australia was for the benefit of the employer's London operation, the fact that the employer did not dispute the employee's contention that she had no right to bring her claims in Australia and the fact that she had previously brought a grievance that was handled in London under the employer's staff handbook.

What should employers do?

Employers who employ staff who work remotely from other countries should bear in mind that such employees will not lose their right to bring claims under the Employment Rights Act 1996 simply because they were not 'posted abroad'. There are other matters which will be taken into account and each case will, however turn on its facts so specific legal advice should be obtained in such circumstances.

7. Guide to data protection updated

The Information Commissioner's Office has updated its guide to data protection.
The guide to data protection https://ico.org.uk/for-organisations/guide-to-data-protection is for those who have day to day responsibility for data protection and gives practical examples and guidance on specialist topics including employment.

The updated guide now sits on one page of the Information Commissioner's Office's website and contains an index that links to the different sections of the guidance, as well as a link to a full PDF version of the guide. Both versions of the guide include latest guidance and should be used as a replacement for all versions of the guide.

8. Work of part-time workers' comparators was not the same or broadly similar

The Employment Appeal Tribunal has upheld a tribunal's decision that a trio of part-time workers were not engaged in the same or broadly similar work as their full-time comparators. Accordingly, the part-time workers were not treated less favourably on the ground of their part-time status.

What does this mean?

In this case it was held that even though 85% of the work done by the two groups was the same and that this was of high importance, the 15% of the work that the full-time comparators did that the part-time workers did not do was of such importance that it could not be said that the two groups were engaged in the same or broadly similar work. However, each case will be judged on its particular facts.

What should employers do?

If a worker complains of unfavourable treatment, the employer should obtain specific legal advice if it is unable or unwilling to resolve the matter with the worker.