Cox Cooper Ltd
Solicitors

Summer 2015

Your quarterly bulletin on legal news and views from Cox Cooper Solicitors

Employment Law UPDATE

Collective Redundancy Consultation

In last quarter's newsletter, we reported on the opinion of the Advocate General in the case of *USDAW and Another v WW Realisation 1 Limited (in liquidation) and Others.* The Court of Justice of the European Union (CJEU) has now confirmed that, when assessing the number of employees being made redundant across multiple sites for the purposes of the collective redundancy consultation requirements, each of the employer's establishments must be looked at separately.

Under Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992, employers have a duty to consult with appropriate representatives of employees concerning forthcoming redundancies if 20 or more employees are to be dismissed at one establishment within a 90-day period. Failure to do so can lead to a protective award requiring the employer to pay each affected employee 90 days' gross pay.

The Employment Appeal Tribunal (EAT) had ruled that the words 'at one establishment' should be deleted from the Act in order to give effect to EU Council Directive 98/59EC, which it is intended to implement, and protective awards were payable to former employees of Woolworths and Ethel Austin who had worked at stores with fewer than 20 members of staff.

Permission to appeal against the EAT's decision was granted, and the Court of Appeal sought the opinion of the CJEU.

In the CJEU's view, where an undertaking comprises several entities, it is the entity to which the workers made redundant are assigned to carry out their duties that constitutes the 'establishment', not the business as a whole. The term 'at least 20' requires account to be taken of the redundancy dismissals in each establishment considered separately.

Whilst member states are entitled to increase the level of protection afforded to workers when there are to be collective redundancies, they are nonetheless bound by the 'autonomous and uniform interpretation' given to the term 'establishment' in EU law.

We can advise you on any redundancy matter.

Timing Can Be Everything in Employment Cases

Employment proceedings are subject to strict time limits and those who sit on their hands before seeking legal advice will often sacrifice the opportunity to enforce their rights. In one striking case, a worker came within an ace of having a crucial appeal rejected without a hearing after documents were filed ten minutes after the deadline *(Farmer v Heart of Birmingham Teaching Primary Care Trust and Others)*.

The man wished to challenge an adverse decision of an Employment Tribunal and had 42 days in which to lodge a notice of appeal with the Employment Appeal Tribunal (EAT). Owing to an unusual combination of circumstances – including illness and an office move – that deadline was missed by a matter of minutes.

The EAT observed that the time limit was strict and not a target merely to be aimed at. Under the rules, a notice of appeal which had almost finished coming off a fax machine or through the email system when the deadline expired would be viewed as out of time. However, noting that a full and honest explanation had been given for the brief delay, the EAT agreed to extend the deadline by half an hour, thus enabling the man's appeal to be considered on its merits.

For advice on making sure any employment issues you have are dealt with in the correct way, contact us.

Final Warnings Must Be Given in Good Faith to Have Any Effect

In *Way v Spectrum Property Care Limited*, the Court of Appeal has ruled that final warnings given in bad faith cannot be relied upon when assessing whether or not there was sufficient reason for dismissing an employee.

Mr Way worked for property service company Spectrum Property Care Limited as an electrical contracts manager. In December 2010 he had been given a final warning in respect of alleged breaches of the company's recruitment policy. He was said to have assisted his ex-partner's son to obtain a position with the company. The letter confirming the outcome of the disciplinary hearing stated that the conduct improvement expected of him was to ensure that he was fully familiar with the group's policies and procedures as detailed in the staff handbook. That warning was still on his file when he was later found to have used his work computer to send inappropriate emails. A subsequent disciplinary hearing found that he had sent offensive emails in breach of the company's computer usage policy and, in the light of the 'live' final written warning, the decision was taken in December 2011 to dismiss him for gross misconduct.

Mr Way brought a claim for unfair dismissal. In rejecting his claim, the Employment Tribunal (ET) found that the disciplinary procedure followed was fair and reasonable and that dismissal was within the band of reasonable responses available to Spectrum in the circumstances. The ET did not address Mr Way's claim that the final warning given to him in 2010 had been given in bad faith. His contention was that the disciplinary proceedings had been initiated to cover up a more senior employee's part in the matter and that he was told not to appeal against the warning and 'it would pay him to forget about the whole thing and move on'.

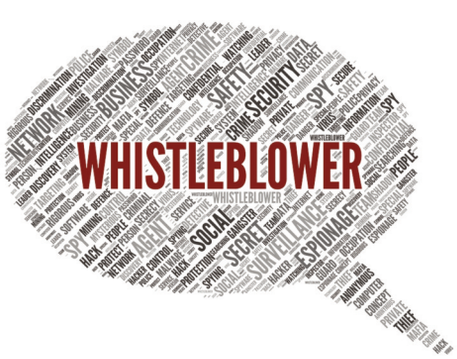
The ET's ruling was subsequently upheld by the Employment Appeal Tribunal (EAT). Although the EAT acknowledged that the ET had failed to address Mr Way's allegation that the final written warning had been given in bad faith, it concluded that the failure to address the issue had not affected the outcome of the case. In its view, the warning meant that dismissal was almost inevitable and its fairness could not be doubted.

In allowing Mr Way's appeal, however, the Court of Appeal described the EAT's decision as having 'a degree of illogicality'. Furthermore, it had reached for itself a decision which it was for the ET to make. The ET had been wrong to refuse to consider Mr Way's arguments. A final warning given in bad faith could not be relied upon for the purpose of determining whether there was a good enough reason to justify dismissal and Mr Way's case was sent back to a freshly constituted ET for reconsideration.

We can advise you on how to deal with any disciplinary matter.

Whistleblowing – List of Prescribed Persons and Bodies

The Public Interest Disclosure Act 1998 – often referred to as the 'Whistleblowing' Act – gives workers legal protection when disclosing information relating to crimes, breaches of a legal obligation, miscarriages of justice, dangers to health and safety or the environment and to the concealing of evidence relating to any of these.



Where someone decides to blow the whistle to a prescribed person rather than their employer, it is important that they choose the correct person or body for that particular issue.

The Department for Business, Innovation and Skills has recently updated the list of prescribed persons and bodies to whom a disclosure can be made. Each entry contains a brief description of the matters that can be reported to that prescribed person or body.

In addition, a person may choose to blow the whistle to their legal adviser, in the course of obtaining legal advice, or to a member of the House of Commons about any matter specified in the Public Interest Disclosure (Prescribed Persons) Order 2014. Contact details for Members of Parliament can be found on the UK Parliament website www.parliament.uk.

The updated list of prescribed persons and bodies can be found on the Government website www.gov.uk.

Type 2 Diabetes and the Definition of Disability

Whilst people suffering from cancer, multiple sclerosis or HIV are automatically deemed to be disabled for the purposes of the Equality Act 2010, in the case of other illnesses, whether or not a worker is disabled will depend on whether or not their condition has a long-term substantial adverse effect on their ability to carry out normal day-to-day activities. Where the effect is reduced or controlled by medication or medical treatment, its impact must be measured without reference to those improvements.

In *Metroline Travel Limited v Stoute*, the bus company employer sought to set aside a decision made by the Employment Tribunal (ET) at a preliminary hearing that Type 2 diabetes necessarily constituted a disability within the meaning of the Act.

Mr Stoute, who managed his condition by following a diabetic diet – for example, avoiding sugary drinks – had been dismissed from his job as a bus driver for gross misconduct and pursued claims for unfair dismissal, discrimination arising from disability and failure to make reasonable adjustments to ensure that he was not at a disadvantage compared with non-disabled people. The ET concluded that he was disabled as without managing his blood sugar levels through monitoring his diet, he could well suffer hypoglycaemic attacks.

Mr Stoute's claims were all subsequently dismissed at a full hearing of the ET. However, Metroline was concerned that other employees suffering from Type 2 diabetes would seek to be recognised as having a disability and appealed against the ET's initial ruling.

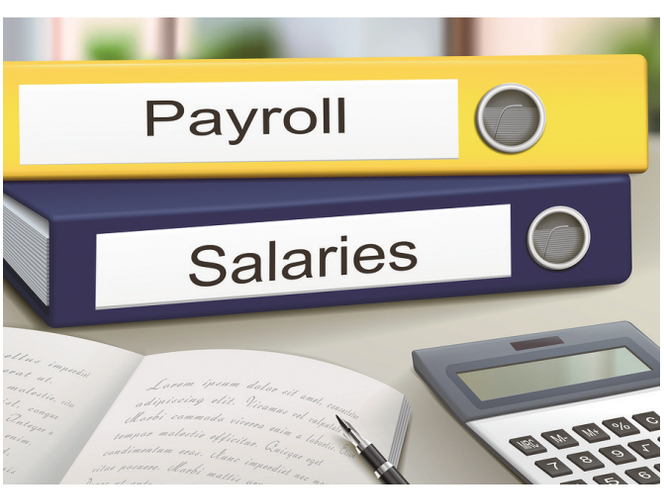
The Employment Appeal Tribunal (EAT) ruled that Type 2 diabetes does not amount to a disability per se. In reaching its decision, it referred to paragraph B7 of 'guidance on

matters to be taken into account in determining questions relating to the definition of disability', issued by the Office for Disability Issues. This states that 'account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have a substantial adverse effect on his or her ability to carry out normal day-to-day activities'.

In the EAT's view, the ET's decision was wrong. Abstention from sugary drinks cannot be regarded as medical treatment and there was nothing to suggest that there had been any substantial interference with Mr Stoute's normal day-to-day activities. The ET's decision would mean that any person with Type 2 diabetes controlled by diet would be regarded as disabled under the Act. It would also mean that people with conditions such as lactose intolerance or nut allergies would have to be regarded as disabled.

Cases such as this are 'fact sensitive'. Contact us for advice on your individual circumstances.

ACAS Publishes Revised Guidance on Calculating Holiday Pay



Following recent court judgments on the rules that apply when calculating holiday pay, the Advisory, Conciliation and Arbitration Service has published revised guidance on this topic.

In particular, commission must be factored into holiday pay for the four weeks' statutory annual leave required by EU law *(Lock v British Gas Trading Limited)* and holiday pay for this period should also reflect non-guaranteed overtime that is routinely worked *(Bear Scotland Limited v Fulton)*.

The guidance (see www.acas.org.uk/holidaypay) also covers how holiday pay should be calculated in relation to work-related travel and for workers with differing working patterns, holiday pay and sickness, payment in lieu of holidays and the limits imposed by the Government in relation to claims for deduction of wages.

If you would like assistance updating your holiday pay procedures to take account of recent developments in the law, contact us.

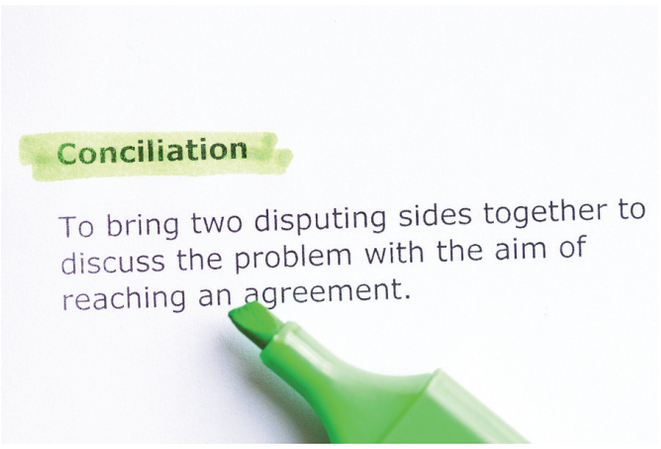
Early Conciliation – ET Has No Power to Waive Requirements

For Employment Tribunal (ET) claims lodged on or after 6 May 2014, it is a legal requirement, unless an exemption applies, for the claimant to first notify the Advisory, Conciliation and Arbitration Service (Acas) by completing an Early Conciliation (EC) notification form. ET claims will not be accepted unless this procedure has been followed and a formal EC certificate has been issued.

As more cases go through the system, the impact of the EC arrangements is becoming clearer.

In *Cranwell v Cullen*, Miss Cranwell had failed to notify Acas before presenting her sex discrimination claim. She had ticked the box to say that one of the exemptions applied. However, the exemptions are strictly specified and this was not in fact the case. Her claim was therefore rejected by the ET.

The Employment Appeal Tribunal upheld the ET's decision. In doing so, Mr Justice Langstaff expressed sympathy with Miss Cranwell's position. She may well have thought that conciliation would involve her in talking to her former employer, who was subject to an injunction prohibiting him from contacting her, whereas it was highly likely, given the circumstances of her case, that an Acas EC Officer would have concluded that there was no point in further conciliation and granted the appropriate certificate. However, the obligation placed on the ET by the rules that apply to EC is 'in absolute and strict terms'. Any exemption from the requirement to obtain an EC certificate must be



one of those prescribed and there was nothing in Rule 6 of the Employment Tribunal Rules of Procedure to provide the necessary discretion to prevent the rejection of a claim that is defective in this regard.

The question is one of the law that is applicable and it therefore followed that Miss Cranwell's claim was rightly rejected by the ET.

Acas is in the process of surveying users in order to gain feedback to support continuous improvement of the EC service and the survey findings are expected soon.

We can advise you on any employment law matter.

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