



EMPLOYMENT LAW UPDATE – APRIL 2009

SOCIAL NETWORKING SITES

With the growth of social networking sites employers are recognising that they require a clear internet policy. The latest trend is the growth in the use of the site **"Twitter"**. What is unique about **"Twitter"** is that postings are permanently placed in the public domain, put simply they cannot be removed. An employer can attempt to limit the use of such a site by employees whilst they are at work but what about postings that are made outside of working hours in particular ones which may be damaging to the business if read by clients, suppliers etc ?

Given the possibility of the above it makes sense for employers to clearly state in their internet and disciplinary policies that bringing the company into disrepute through **"Twitter"**, blogging or social networking sites such as Facebook or My Space can lead to disciplinary action including dismissal.

LYING EMPLOYEES AND COSTS

Employers are becoming increasingly aware of the Employment Tribunal's power to make costs awards against employers or employees who act unreasonably in bringing or defending proceedings. In the case of **Daleside Nursing v Mathew** the Employment Appeal Tribunal held that where an Employment Tribunal found that an employee had lied about her Manager using offensive and racist language towards her and her discrimination claim was subsequently dismissed, the Tribunal was wrong to reject the employer's application for costs. The Employment Appeal Tribunal found that the employee had acted unreasonably in bringing and conducting the proceedings and it was therefore wrong in law to reject a claim for costs on that basis.

Employers should always ask their legal representative when facing a Tribunal claim whether there are grounds for making an application for the recovery of all or part of their legal costs against an employee and/or their representative.

EQUAL PAY TIME LIMITS AND NEW CONTRACTS

Local Authorities and the NHS are continuing to face extensive and expensive equal pay litigation. With the passing in to law later this year of the Equality Act private sector employers should keep track of appeal court decisions in this area. One such case being **Potter v North Cumbria Acute Hospital NHS Trust.** Here, the employer tried to defeat a number of equal pay claims by arguing that new comparators could not be added by way of an amendment as the time limit for bringing proceedings had been triggered and had subsequently lapsed following the introduction of new contracts of employment. The Employment Appeal Tribunal did not agree and held that the Employment Tribunal must determine what has actually taken place. In particular it must ask whether what has occurred is a variation to a contract or whether the parties intended to make a new contract. In this case it was held that the introduction of Agenda for Change containing new terms and conditions for employees in the NHS was a variation to existing contracts and did not constitute the introduction of new contracts and so the employees were allowed to amend their ET1's to add further comparators and proceed with their claims.

EXTENDING TIME LIMITS FOR BRINGING DISCRIMINATION CLAIMS

In the case of **Carter v London Underground Limited** it was held that an Employment Tribunal had the power to hear a discrimination claim which was issued over 12 months after the last act of alleged discrimination had occurred.

The reason given for the delay was that the employee had been suffering from severe depression which had a serious impact on her ability to take decisions about legal proceedings including whether to issue such proceedings. The Employment Appeal Tribunal took in to account that the act of alleged discrimination had played an important part in the employee's mental deterioration and went on to decide that the employer was not prejudiced by the delay in the issuing of the proceeding.

Given this case employers need to be aware that if an employee raises a discrimination claim and then alleges that they have been made ill as a result of the alleged discrimination this may allow them to bring a claim in the Employment Tribunal outside the normal time limits. However, each case will turn on its own facts.

RESIGNING EMPLOYEES

The important issue of whether a fundamental breach of an implied contractual term can be cured was addressed in the case of **Bournemouth University Higher Education Corporation v Buckland.**

Here the employee, a professor, resigned after his employer increased the marks that he awarded to students without his knowledge. The employee raised a complaint about this and a finding was made in his favour. The employee still resigned claiming that the implied term relating to mutual trust and confidence in his contract of employment had been breached and that he had been constructively dismissed. The employer argued that the grievance procedure had cured the breach of the implied term. This the Employment Tribunal did not accept but the Employment Appeal Tribunal did accept and so the employer was able to defeat the constructive dismissal claim.

This case illustrates that it is important for those conducting grievance hearings to address the employee's complaint and if it appears on balance that they have a grievance a finding in their favour may help avoid or defeat a subsequent constructive dismissal claim.

In the case of **Wilshaw and District Housing Association Limited v Moncrieff** the Employment Appeal Tribunal considered the type of conduct on the part of an employer which could constitute the final straw in a constructive dismissal case where it is claimed that there has been a breach of the implied term relating to mutual trust and confidence. Here it was held that a letter from the employer offering to deal with a grievance internally where there had been a previous offer to deal with the matter by way of external mediation, and a letter from the employer stating that they were considering dismissing the employee on the grounds of long term absence were not last straw incidents allowing the employee to resign and claim constructive dismissal.

It is sometimes the case that an employee will resign rather than be dismissed for long term absence due to sickness following a letter from an employer informing them that this may occur. This case should aid employers in defending subsequent constructive dismissal claims arising out of such resignations where it is claimed that standard letters of this kind are last straw incidents.

PART TIME WORKERS

The Employment Appeal Tribunal in the case of **Carl v The University of Sheffield** has determined that a part time worker bringing a claim under the Part Time Working (Prevention of Unfavourable Treatment) Regulations 2000 has to be able to point to a real full time worker comparator rather than a hypothetical one. Further, it is unnecessary to allege that the treatment that was meted out to them was solely on the grounds of their part time status, however, it must be the effective and predominant cause of the less favourable treatment.

In this particular case the Employment Appeal Tribunal rejected the comparator that the employee was relying upon as there were differences in the subjects they taught, job specifications, how they

	taught, skills, qualifications and educational achievement.
	<u>Blacklisting of Union members</u>
	In 2003 the Government decided against legislating against the use of blacklists to deny workers employment. The Government has now reversed this decision and will introduce regulations in the Autumn under the Employment Relations Act 1999.
	<u>Government Consultation on Agency Workers Directive</u>
	<p>On 8 May 2009 the Government will begin a consultation period which will run until the 31st July 2009 on implementing the EC Temporary Agency Workers Directive 2008/104 into domestic law.</p> <p>The <u>EC Temporary Agency Workers Directive 2008/104</u> requires that temporary agency workers be given equal treatment with permanent workers in terms of pay, working hours and holidays. In the UK this will only apply to workers who have been in the same job for 12 weeks and beyond. It is proposed that the Directive will not apply to those seeking permanent employment through employment agencies but only those taking up temporary work through an employment business.</p>
	<u>Belief in Climate Change can be a Philosophical Belief.</u>
	<p>The Employment Appeal Tribunal in <u>Nicolson v Grainger & ors plc</u> has held that a belief in climate change did amount to a philosophical belief within the <u>Employment Equality (Religion or Belief) Regulations 2003</u>. The EAT accepted that the employee's belief in the danger of climate change affected most aspects of his life, for example how he travelled, his choice of home and what he ate.</p> <p>The employee alleges that he was selected for redundancy on the grounds of his beliefs and a number of protected disclosures that he made in this regard.</p>
	If you require further guidance or support in relation to any employment or HR issue your organisation is currently dealing with, please do not hesitate to contact marlene.hession@fdl-law.co.uk