An update on recent UK caselaw

Further guidance for employers on the new dismissal and grievance procedures

We begin this month’s Employment Update with further information on the new procedures which came into force on 1 October 2004 as the Employment Act 2002 (Dispute Resolution) Regulations (“the Regulations”) in relation to which we sent out a short guide, giving an overview of the dismissal, disciplinary and grievance procedures, earlier last month.

In addition to the new DTI Guidance on the Regulations (available on their website at www.dti.gov.uk/er/resolvingdisputes.htm), ACAS have now published some flow charts which help to explain the operation of the new statutory dismissal and grievance procedures in a user-friendly fashion. These are available at the ACAS website (www.acas.org.uk).

Parental leave: recent guidance

The first case we look at this month is that of South Central Trains Ltd v Rodway [2004] which has provided some useful reminders for employers on the operation of the Maternity and Parental Leave etc. Regulations 1999 (“the 1999 Regulations”). The 1999 Regulations allow an employee the right to apply for periods of parental leave (up to 13 weeks per child) in certain circumstances where they have family responsibilities. In particular, this case looked at whether one day’s parental leave can be taken at a time (instead of blocks of one week, as stated in Schedule 2 to the Regulations) by an employee who applies for leave under the 1999 Regulations.

Mr Rodway applied for a day off to look after his son. Two days before he was due to take the day off, he was told by his employer that he could not take 26 July 2003 as parental leave because his job could not be covered. He informed the employer that he would have to take the day off come what may. After having taken the day, Mr Rodway was charged under his employer’s disciplinary code with the disciplinary offence of being absent without permission. Following the disciplinary hearing the charge was withdrawn and Mr Rodway was given a warning about his non-attendance for duty.
Under the Employment Rights Act 1996 ("the 1996 Act"), employees are protected from adverse actions or conduct against them by their employers when they seek to exercise their rights to leave under the 1999 Regulations. The 1999 Regulations state that employees should not be subjected to "any detriment by any act, or any deliberate failure to act, by his employer" done for a reason connected to the various rights relating to pregnancy, paternity and, relevant in this case, parental leave, under the 1999 Regulations. Mr Rodway brought an action claiming that the disciplinary proceedings for unauthorised absence constituted a detriment, since the disciplinary hearing was founded on a disagreement about his legitimate entitlement to parental leave under the Regulations.

At an initial hearing, the Employment Tribunal found in Mr Rodway's favour. Contrary to the wording of the Regulations that parental leave should be taken in blocks of no less than one week, the Tribunal approach was to look purposively at the aim of the original Directive. This wording allows for "better organisation of working hours and greater flexibility", and to allow for the "reconciliation of work and family life". One of the reasons behind the 1999 Regulations is to allow parents flexibility to take parental leave for the purpose of caring for their children. Therefore, the Tribunal stated, there will be countless occasions when a parent does not need to take an entire week's parental leave. Being forced to apply for one week's unpaid leave would act as a powerful disincentive to a parent who only wanted to take one day's unpaid leave.

The EAT overruled the Employment Tribunal, albeit on a majority decision. There was no dispute that Mr Rodway was entitled to parental leave. There was no dispute that Mr Rodway correctly followed the required procedure to request parental leave. However, what he wanted was one day's parental leave and no more. In considering this the EAT looked at the Regulations which plainly state that "an employee may not take parental leave in a period other than a period which constitutes a week's leave for him..." (para 7, "Minimum Periods of Leave", Schedule 2, the 1999 Regulations).

The EAT stated that the wording of the paragraph and its heading were conclusive as to the intention of the 1999 Regulations in this respect. Nor had Mr Rodway suffered any detriment. There was no dispute about the extent of the parental leave entitlement. Since Mr Rodway could not lawfully take a day off for parental leave, but had to take five days under the 1999 Regulations, the subsequent disciplinary action taken against him by the Appellant was lawful. There was no detriment suffered by Mr Rodway within the meaning of the 1996 Act.

In conclusion, this is useful clarification as to the accepted position in taking time off for parental leave under the 1999 Regulations. This might change, given that in this case, leave to appeal to the Court of Appeal was given. This case also highlights some general points about the 1999 Regulations for employers. The 1999 Regulations only give employees the right to apply for parental leave, not guaranteed leave. Employers should ideally make sure employees are aware of their basic rights under this legislation. In considering requests under the 1999 Regulations, employers must clearly consider these fairly and
transparently, following the appropriate consultation and notification provisions in the 1999 Regulations. To do otherwise may well lead to grievances being raised and claims in the Tribunal. If you require any further information on the application and effect of the 1999 Regulations, please contact our Employment team.

**Pregnancy and unfair dismissal: recent caselaw**

In the second case this month we focus again on the 1999 Regulations, this time in relation to the topic of pregnancy. Under the 1996 Act, unfair dismissal is a statutory right normally available to employees who have obtained continuous employment for more than one year. Employers should always be aware, however, that there are certain situations where liability can arise automatically without the statutory requirement for continuous employment. An example is where the employer dismisses the employee on grounds relating to pregnancy.

The case of Ramdoolar v Bycity Ltd [2004] provides such a reminder. It illustrates the commonsense point that in order to be liable for automatically unfair dismissal for a reason connected with pregnancy, the employer must have knowledge of or belief in the fact of pregnancy. If the position were otherwise the employer would be placed in a very difficult position. This case explored whether any other approaches to employer knowledge were acceptable.

Mrs Ramdoolar had worked for just under three months for Bycity Ltd prior to her dismissal. As a result, she had not worked for sufficiently long to bring an ordinary unfair dismissal claim. However, she claimed that her dismissal was automatically unfair under the Regulations because it was for a reason connected with her pregnancy. She claimed that her dismissal was automatically unfair because it was for a reason connected with her pregnancy. She claimed that she told her employer of her pregnancy on the day she found out that she was pregnant. Her employer contended that at no time did she tell them that she was pregnant and at no time did they know or believe that she was. They dismissed her because she was simply unable or unwilling to adequately perform the routine tasks required of her and also, on occasion, had been late for work for which she had given an explanation other than pregnancy.

Faced with what the Tribunal termed a stark conflict of evidence, it found in the employer’s favour. In the EAT, however, Mrs Ramdoolar’s lawyers challenged the traditional approach followed in Del Monte Foods Ltd v Mundon [1980], (namely that in order to be liable for automatically unfair dismissal for reason connected with pregnancy, the employer must have knowledge of or belief in the fact of pregnancy). They proposed a new standard of knowledge; namely that if an employer ought, by reason of symptoms or behaviour displayed by the employee, to have known that she was pregnant, then, if he dismissed her for a reason that in fact turned out to be connected with her pregnancy the dismissal is automatically unfair.

The EAT noted that in looking at all other instances of automatically unfair dismissal under the Regulations, other than pregnancy, actual knowledge or belief on the part of the employer is required of the circumstances before the dismissal can be treated as automatically unfair. In their view it would be curious to find such an anomaly in relation to one significant provision that did not require such knowledge or belief in a statutory...
Employers should, however, note one possible caveat. In its judgement the EAT reflected on a hypothetical set of facts where an employer detects the symptoms of pregnancy and fears the consequences. If the employee is in fact pregnant and the employer dismisses her before his suspicion can be proved right (but neither knowing nor believing her pregnant, simply suspecting that she is), in these circumstances the EAT stated that a dismissal was likely to be automatically unfair.

Mandatory retirement age remains in force

In an important judgment, the Court of Appeal confirmed that the mandatory retirement age does not contravene EU law. For the moment anyway, this test case (*Rutherford v DTI (no. 2) [2004]*) preserves the ‘status quo’.

Mr Rutherford, aged 67 at the time of his dismissal, had fallen foul of the current upper qualifying age in the 1996 Act for unfair dismissal or redundancy payments if over normal retirement age (in his case, 65). He claimed that this age limit contravened EU law as it had an adverse effect on more men than women. The Court of Appeal thought otherwise: they held that, on considering the statistics for the entire workforce, the difference between the proportion of men affected by the upper qualifying age and the proportion of women was negligible.

As a result, the limitations on unfair dismissal in relation to normal retirement age remain in force for the moment. However, employers should be aware that this may change when the government brings out its draft regulations relating to age discrimination later this year. Age discrimination is set to be one of the big employment topics for 2005 and we will keep you up-to-date with developments.