

NEW GOVERNMENT ISSUES EMPLOYMENT LAW PROPOSALS

On the 20th May the new Conservative/Liberal Democrat Government issued its written Agreement setting out the policy priorities for the next five years. The Agreement includes a range of policies, or aspirations, which directly affect employment law and it remains to be seen how many of these proposals reach the statute book. The devil is always in the detail so now is not the time for detailed analysis, but the eye catching proposals in the pipeline include:-

- An extension of the right to request flexible working to *all* employees regardless as to whether the employee has children/dependents.
- A system of flexible parenting leave, with the stated aim of encouraging shared parenting from the earliest stages of pregnancy (no further details are given as to how the parental leave will be split between mothers and fathers).
- A review to set the date at which the state pension age will rise to 66, which will be no earlier than 2016 for men and 2020 for women.
- The establishment of an independent commission to review the long term affordability of public sector pensions, while protecting accrued rights.
- The default retirement age (currently 65) to be phased out.
- The abolition of the "Service Provision Change" provisions when there was a transfer of an undertaking, for example a tendering process; and
- Introduction of a "one in, one out" rule whereby no new employment regulation is introduced without a corresponding reduction, to a greater degree, of other employment regulations.

Time will tell whether or not the government succeeds in reducing the burden of regulation on British business.

MISCONDUCT AND CRIMINAL PROCEEDINGS THE: EMPLOYERS DILEMMA

Serious misconduct by an employee can give rise to a criminal investigation or even a criminal trial. In these cases should the employer plough on with its own internal disciplinary process or await the outcome of the criminal investigation, even though that may take many months?

The Employment Appeal Tribunal examined the issue of fairness in the case of *Secretary of State for Justice -v- Mr Mansfield*. Mr Mansfield, a Prison Officer, was suspended following an allegation that he had planted drugs on a particular prisoner. The internal investigation against Mr Mansfield stopped following the initiation of a police investigation and the commencement of proceedings in the Crown Court. Some 12 months later a verdict of not guilty was entered. A further 9 months later, Mr Mansfield was dismissed following a disciplinary hearing. The EAT ruled that delay can make a dismissal unfair if it is substantial and there is no good reason for it. However the EAT also concluded that Mr Mansfield would not have been advised to submit himself to questioning in a disciplinary hearing in regard to matters that were the subject of a pending criminal trial. So the decision to postpone the hearing whilst the criminal proceedings took their course was entirely proper. Mr Mansfield was unable to point to any *specific* prejudice caused to him by the delay.

The EAT went on to reiterate the long standing principle in employment law that it is sufficient for an employer to prove that any decision to dismiss an employee was made on reasonable grounds after a reasonable investigation. It is open to an employer to make the findings on the balance of probabilities; in other words, whether it is more likely than not that the employee committed the act she/he was accused of.

Every case should be treated on its individual facts, and there is no general rule that an employer should refrain from instituting disciplinary proceedings in relation to acts which might, or do, form the basis of subsequent criminal proceedings. Many employers will not be able to bear the cost of suspending an employee on full pay for the duration of the criminal proceedings and, of course, acquittal in criminal proceedings does not prevent an employer from reaching the conclusion that it is entitled to dismiss the employee.

ARE EMPLOYERS BOUND BY THE HUMAN RIGHTS ACT?

Now that the dust is settling after the General Election, it appears that the Human Rights Act has survived, for the time being at least. This Act transposes into UK law the European Convention of Human Rights which contains a variety of fundamental rights, one of which is the right to a fair trial.

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As any lawyer will tell you, most employers do not need to worry about the Human Rights Act because it only applies to public bodies. In other words a central or local government organisation. But note that a private body that undertakes a public function may well fall within the ambit of the Human Rights Act.

In *Power -v- Greater Manchester Police*, Mr Power wanted, but was unable, to cross examine witnesses of his former employer, including an officer who had herself been dismissed, at the Employment Tribunal Hearing. Mr Power felt that this was a denial of his right to a fair trial. The EAT disagreed, restricting the application of the right to a criminal case, not an Employment Tribunal.

Employers should also be wary of denying an employee in a disciplinary hearing the right to cross examine witnesses. Larger employers and public bodies should also carefully consider any request from an employee to be legally represented in disciplinary proceedings, particularly if the outcome of the proceedings could result in a loss of professional status.

Forthcoming Employment Law Seminars

Thursday 10th June 2010 at Newark
8.30am to 10.30pm
'Immigration Law for Employers'

Tuesday 15th June 2010 at White Hart, Boston
8.30am to 10.30am
'Immigration Law for Employers'

Thursday 8th July 2010 at Newark
8.30am to 10.30am
**'11 ways to avoid an
Employment Tribunal claim'**

*For further details and to confirm your place
please contact Laura Forsyth on 01636 673731
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