



“A Summer Update”

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A Review of Recent Employment Law

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STATEMENT OF FITNESS FOR WORK

- From 6 April 2010 “Sick” Notes have been replaced by “Fit” Notes.
- The aim of Fit Notes is to encourage discussion between the GP and Employee and between the Employee and Employer.
- Fit Notes look for opportunities that may exist for Employees to undertake work even though they may not be fully fit for work.



- The old style Sick Note used to be quite limiting; only stating whether an Employee was “Fit for work” or “Not Fit for work”
- The Fit Note does not have an option as being “Fit for work”
- Instead the Fit Note allows the GP to decide options of:
 - “Not Fit for Work”
 - or
 - “May be fit for Work”



The Fit note also includes sections for the GP to:

- give advice about the impact of the illness or injury; and
- suggest common ways to facilitate a return to work for the Employee.

In the Fit Note the GP's may suggest changes for including:

- A phased return to work
- Working different hours
- Performing different duties
- Having others assist with tasks
- Making changes to the workplace





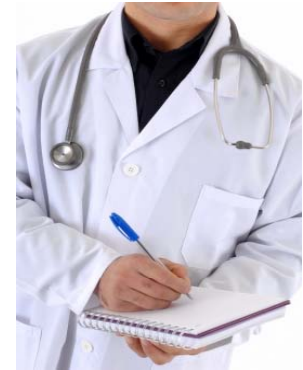
The Effect of Fit Notes:

Statutory Sick Pay:

The Fit note is evidence of incapacity for SSP provided the Employee is certified “Not Fit for Work” or where the Employee is certified “May be Fit for Work but the Employer is not able to implement any of the proposed adjustments.

Contractual Sick Pay:

The Fit note is evidence of incapacity for contractual sick pay provided the Employee is certified “Not Fit for Work” or where the Employee is certified “May be Fit for Work but the Employer is not able to implement any of the proposed adjustments.



The Effect of Fit Notes

Disability Discrimination:

- Employers already have a duty to make “reasonable adjustments” for disabled Employees.
- Fit Notes can help provoke discussions about “reasonable adjustments” earlier and may help get Employees back to work sooner.



Occupational Health

- Occupational Health Specialists are often used to make recommendations as to Employees fitness for work and rehabilitation.
- Fit Notes may not make much difference but they can allow for a GP to recommend a referral to Occupational Health advisers if they decide appropriate however all comments on the form are advisory and not binding.



Fit Notes: Other Considerations

- Allowing Employees back to work who “may be fit” may invalidate Employers Compulsory Liability Insurance.
- GP comments are advisory and not binding and it may not be appropriate to involve the GP in Employer / Employee discussions.
- If faced with a Tribunal Claim which includes Disability Discrimination, the Employers initial response to a Fit Note recommendations for adjustments may come under scrutiny. Employer must ensure that they react to, and justify the adjustments that can or cannot be made.



The Present Situation

- The situation is presently unclear as to interaction for holiday and sickness and more case law will hopefully clarify the situation.
- In relation to the Sringer and Pereda cases, The Department of Business, Enterprise and Regulatory Reform has commented

“the combined effect of the rulings is that a worker can choose to take their statutory annual leave at the same time as sick leave, or the worker can chose to take the missed annual leave at a later date. A worked who has missed out on statutory annual leave due to sickness may be able to carry over the missed leave to the next year.”



DISCIPLINARY PROCEDURES

London Borough of Brent v Fuller

Employment Appeal Tribunal held that when deciding whether to dismiss for gross misconduct, an Employer was entitled to take into account a previous similar incident for which no formal warning had been given.





Case Background

- Ms F was a school administrator.
- In May 2007 she intervened in an incident between a teacher and a pupil and was informed by the head teacher that she was not to intervene in such incidents.
- In October 2007, Ms F intervened in a more serious incident between a teacher and a pupil and made specific allegations against the teacher.
- Ms F was suspended and subsequently disciplined for gross misconduct.
- The school took into account the previous (informal) warning) given to Ms F by the head teacher.



- Employment Tribunal held Ms F had been unfairly dismissed.
- Employment Appeal Tribunal overturned the Employment Tribunal's decision and decided that the school was entitled to take into account the fact that Ms F had been alerted by the informal warning following the incident in May which was on the same facts as the incident in October.
- The Employment Appeal Tribunal made it clear that the informal warning was no more than background to the informal incident for which Ms F had been dismissed but that all relevant circumstances to an incident should be taken into account when deciding whether or not to dismiss.



Disciplinary Procedures Implications:

- The Employees subsequent conduct will have to be serious enough to constitute an act of gross misconduct justifying a dismissal.
- Employers are not entitled to “roll up” two or more less serious incidents to justify a charge of gross misconduct.
- Documentation of informal warnings is crucial to be able to rely on these warnings in the right circumstances.



RIGHT OF ACCOMPANIEMENT

Employees have a statutory right to be accompanied:

1. at a grievance meeting which deals with a complaint about a duty owed by the employer to a worker; and
2. at a disciplinary hearing where the disciplinary hearing could result in either: i) a formal warning being issued; ii) the taking of some other disciplinary action; or iii) the confirmation of a warning or some other disciplinary action (e.g. appeal hearings).



Who can accompany the employee?

Unless employment contract permits a broader right the companion may be:

- Fellow worker
- Trade Union Representative
- Office employment by trainee





Legal Representative as a Companion?

No definitive answer from the courts; recent case law has pointed to a right arising where the potential consequences of the hearing could prevent the employee from continuing in their chosen profession.



Kulkarni v Milton Keynes Hospital NHS Foundation Trust

- Court of Appeal considered whether a junior doctor facing serious disciplinary charges was entitled to be legally represented at his disciplinary hearing.
- Court of Appeal decided the Judge had a contractual right to be represented by a law instructed by his medical defence union.

- In order to have a fair trial at the internal disciplinary proceedings in this case, legal representation was permitted where the employee faced such a serious charges that could affect his ability to practise his profession in the future.
- Judgement also made obiter comments about ECHR about the right to practising one's profession being a civil right and likening the severity of the charges as being akin to criminal charges.



R v Governors of X School



The Background:

- A teaching assistant was accused of engaging in sexual conduct with a 15 year old pupil
- Teaching assistant sought legal representation at disciplinary hearing and appeal hearing but this was refused
- The outcome of the disciplinary proceedings would be likely to have an impact on separate statutory proceedings to determine whether he should be placed on register of people barred from working with people.



R v Governors of X School

Reliance on Article 6 of ECHR

- (1) In the determination of civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

- (3) Everyone charged with a criminal offence has the following minimum rights:
 - (c) to defend himself in person or through legal assistance of his choosing.



The ramifications of the disciplinary hearing were so serious that a fair trial could only be had if the teaching assistant was entitled to legal representation.

It was held that article 6 ECHR was engaged in statutory proceedings because:

- it concerned the Employee's civil right to practice his profession;
- the outcome of the employers disciplinary proceedings would have a substantial influence on the outcome of statutory proceedings



Right to legal representation outside of the public sector?

- These cases have referred to public sector employees.
- The private sector should be on notice as it may be appropriate in certain limited circumstances to allow legal representation if the circumstances are sufficiently serious, for example where an Employee could face criminal charges or be struck off by their professional body as a result of their alleged misconduct.
- All Employers should therefore ensure that their disciplinary procedures deal clearly with the right to legal representation.



SERIAL LITIGANTS

Mr John Barry – A serial litigant

- 35 Judgements in his name in the Register of Decisions

Mrs Keane – A serial litigant

- 51 year old accountant with significant experience
- applied for 20 positions for “recently qualified” accountants
- no genuine interest in the applications
- filed multiple claims in the Employment Tribunal for age discrimination



Keane v Investigo

Employment Tribunal held that:

- There had been no detriment suffered
- No direct or indirect discrimination as Mrs K did not want the jobs
- Her application had not been genuine
- The claims were misconceived and there had been an abuse of process



In the Employment Appeal Tribunal:

- Mrs K argued that the Employment Equality (Age) Regulations 2006 did not require application to be genuine
- Mrs K also sought to rely on *Centrium voor Gelijkheid van Kasen en voor Racisme bestijging v Firma Feryn NV* (challenging of job advertisement by anti-discriminatory body)



Employment Appeals Tribunal Held:

- Centrium case does not apply as “there is something in it which suggests that an individual claimant not affected by the declaration of (ageist) intent to discriminate could bring a claim”
- Application must be genuine
- If claims are made with an ulterior motive the costs award was correct



Serial Litigants:

Need to be alert to:

- Lack of genuine intent
- Lack of subjectivity in the application
- Over or under qualification
- Failure by the applicant to follow up application
- Shoddiness of application
- “Trigger happy” approach to litigation

Avoid recruitment traps by:

- Review wording in job applications





The Equality Act 2010. More Than Just Consolidation?

Martin Donoghue

Partner – Employment Unit



A Noble Aim.

- Everyone has the right to be treated fairly and the opportunity to fulfill their potential.
- Main employment provisions from October 2010, perhaps!



Protected Characteristics

- Harmonizes grounds on which discrimination will be deemed illegal.
- No new characteristics added, but some changed definitions.
- Age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation.



Direct Discrimination

- New definition.
- Discrimination *because of* a protected characteristic.
- Previously discrimination *on the ground of*....
- Does this mean conscious motivation or intent now required?



Association and Perception

- Associative discrimination expanded beyond disability discrimination.
- Perceptive discrimination now covered, but not for marriage or civil patrnership.



Dual Discrimination

- Illegal to discriminate because of a combination of two of age, disability, gender reassignment, race, religion or belief, sex or sexual orientation.
- Probably not a step forward, as previously a protected characteristic only had to be an effective cause, not the main or only cause.
- Government estimates 10% increase in discrimination claims.



Harassment

- **Associative and perceptive discrimination now covered.**



Disability

- Disability no longer has to affect specified capacities.
- Good bye Malcolm. Can now discriminate because of something arising from a person's disability.



Equal Pay

- Contractual clauses which hinder pay discussions aimed at establishing discrimination are void.
- Power to require private sector employers with 250+ employees to publishes differences in male and female pay – not before April 2013.



A Nest Without Feathers

Jennie Kreser

Partner – Head of Pension Unit



Outline

- What's the Story?
- Compulsion
- Cost
- When?





What's the Story?

- Due to Commence
2012
- End of an Era





Compulsion

- Auto Enrolment
- Qualifying Pension Arrangement
- Opting Out





Cost

- Contribution Rate
- Levelling Down
- Charging Structure





When?

- Phasing In From October 2012
- Issues for Employers
- Pension Regulator





Nest and Employment Law

Nicholas Lakeland

Partner – Head of Employment Law Unit



What is the present position ?

- S1 (4) ERA – “The statement shall also contain particulars of ...
- (iii) Pensions and pension arrangements..”
- Employees will have to be informed of new pension arrangements !



What to tell them?

- Do your current arrangements comply with NEST ? If so no change.
- If change then what ? Just NEST or something tailor made ?
- Employees will have less money in their pockets due to the salary deductions



Practical Steps

- Prepare Early
- Understand the requirements
- Decide what you want to do
- Inform the employees and explain it to them
- Change contractual documentation
- Prepare Payroll for the new regime