THE EMPLOYMENT TEAM AT THACKRAY WILLIAMS

Whether advising an employee on a compromise agreement, assisting an employer managing a termination, giving complex restrictive covenant advice or representing a client in tribunal proceedings we aim to understand the needs of our clients and to deliver a first class service including advice which is understandable, practical, and both technically sound whilst commercially aware.

Victoria Wright
Victoria is a Partner, Notary Public and head of the Employment Department. Victoria advises SMEs, established businesses and charities as well as employee clients including senior executives, professional sportsmen. This involves handling claims in the Employment Tribunal, Employment Appeal Tribunal and High/County court. Victoria also advises clients on avoiding court or the tribunal by providing practical solutions to problems and negotiating settlements. She is a member of the Employment Lawyers Association.

Lisa Judd
Lisa has over 6 years post qualification experience specialising in all aspects of employment law, representing both employers and employees, from a large variety of professions and business sectors. Indeed Lisa is regularly appointed to act by various legal expenses insurers. She is a member of the Employment Lawyers Association, has run and presented employment law seminars for employers, and has had a number of employment related articles published.

Emma Thompson
Emma is an employment law specialist who advises both employers and employees on disciplinary and grievance procedures, compromise and severance agreements, redundancy and unfair dismissal. Emma contributes to articles and publications on a variety of employment law related subjects and is a member of the Employment Lawyers Association.

FACTS AND FIGURES: an employment law update

National Minimum Wage (from 1 October 2008)

Adults (workers aged 22+)	£5.73 ph
Development Rate (workers aged 18–21)	£4.77 ph
Young People (workers aged 16–17)	£3.53 ph

Statutory Pay

Statutory Maternity Pay (basic rate) – £117.18 a week or 90% of normal weekly earnings if lower

Statutory Paternity Pay – £117.18 a week or 90% of normal weekly earnings if lower

Statutory Sick Pay – £75.40 (standard rate)

New Law

5 October 2008	Sex Discrimination Act 1975 (Amendment) Regulation 2008: further rights for pregnant employees.

For advice on...

- Unfair dismissal
- Redundancy
- Wrongful dismissal
- Discrimination
- Maternity/Paternity rights
- Flexible working
- Part-time Workers Regulations
- Working Time Regulations
- Equal Pay Act claims
- Employment contracts
- Minimum wage
- Advising directors/senior employees
- Health and safety
- Restraint of trade/ confidentiality clauses
- Injunctions
- References
- Sickness and sick pay
- Compromise and severance agreements
- Transfer of undertakings (TUPE)
- Employment Tribunal claims
- County Court and High Court claims

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Ins & Outs

Employment Law Newsletter from thackray williams

Winter 2008

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"the lesson for employers must be to take care when giving warnings and in particular to tailor them to the circumstances..."

UNFAIR DISMISSAL AND EXPIRED DISCIPLINARY WARNINGS

Mr Webb had been employed by Airbus since 1990. In August 2004 Mr Webb was given a final written warning for misuse of company time, which was stated to last for 12 months. Three weeks after the warning had expired, he was caught watching TV during a night shift with four other colleagues. He was subsequently dismissed and his colleagues who were involved in the same incident were made subject to a final written warning.

The Tribunal held that although dismissal would have been fair had all been dismissed, it was not permissible to distinguish Mr Webb in this way because once the final written warning had expired; he had to be treated as someone with a clean record. Further, in light of the precedent on 'expired final warnings,' Mr Webb's previous final warning should be disregarded for all purposes and in all circumstances.

This case then went to a higher court – the Court of Appeal and it concluded that the leading authority on 'expired final warnings' was distinguishable. In the case of Airbus it was unanimously accepted by the Tribunal that the reason for Mr Webb's dismissal was that he was guilty of gross misconduct on 20 September 2005, not that he had received a warning for his July 2004 conduct. The Court of Appeal held that the dismissal was fair.

SO WHAT DOES THIS MEAN FOR EMPLOYERS?

An employer may take expired disciplinary warnings into account when deciding whether to dismiss an employee. The word 'may' should be given careful consideration by employers and the Court signalled that employers should be cautious when applying this decision in practice. Employers should not now expect to be able to rely on expired disciplinary warnings as a matter of course.

The lesson for employers must be to take care when giving warnings and in particular to tailor them to the circumstances. Paragraph 24 of the ACAS Code of Practice on Disciplinary and Grievance Procedures indicates that although final warnings should normally have a time limit of 12 months, that need not always be so. There is no reason why the warning should not be longer if the nature of the misconduct justifies it, and in particular if the imposition of a penalty is an act of leniency. Also, an employer should not be afraid to extend the period of warning with respect to a later act of gross misconduct, which is the same or substantially the same as that for which the earlier final warning was given.

In theory, this is an important decision for employers as it provides them with scope to take into account employees' earlier misconduct when deciding whether to dismiss an employee for subsequent misconduct, even where the previous misconduct is subject to an expired warning. The true impact however, is yet to be seen and in the meantime employers should act with caution when relying on expired disciplinary warnings as a reason for dismissal and if uncertain should seek legal advice.

For more information about unfair dismissal contact Emma Thompson on 020 8290 0440 or email emma.thompson@thackraywilliams.com

ILLEGAL WORKING

THE LAW AND THE FINE

The Immigration, Asylum and Nationality Act 2006 places an obligation on employers to prevent illegal migrants working in the UK. From 29/2/2008 anyone who employs someone who is not entitled to work in the UK and who is subject to immigration control can be fined up to £10,000 per worker.

WHAT CAN YOU DO?

To avoid liability to pay a fine an employer can establish an excuse or defence if it can show that it has checked certain original documents and retained copies before the worker starts work.

WHICH DOCUMENTS?

A document from List A will provide an employer with an excuse throughout the employment.

A document from List B will mean that an employer will have to repeat the check at least once every twelve months, or until the worker can provide a document from List A.

You should always consult an up-to-date copy of List A and List B from the Border and Immigration Agency which can be found at: www.ind.homeoffice.gov.uk

"...from 29/2/2008 anyone who employs someone who is not entitled to work in the UK and who is subject to immigration control can be fined up to £10,000 per worker..."

DO REMEMBER THAT YOU SHOULD CARRY OUT YOUR CHECKS BEFORE THE WORKER STARTS TO WORK FOR YOU

Avoiding discrimination?

In a nutshell, have a clear policy which you always follow (and ensure others in the organisation do so) and treat ALL workers the same, irrespective of race, nationality or background. Make sure that you require a document(s) from either List A or List B from all applicants, see the original, keep a copy and remember to diarise to recheck the document if it is from List B.

Points to note.

- Do remember that you should see the original document and satisfy yourself that it is genuine and not a forgery. Of course, this can be difficult as how many people have seen for example, a biometric immigration document or a Norwegian national ID card?
- It may not necessarily be good practice to rely upon evidence from a previous employer as they may have carried out their checks before the Act came into force. It would be advisable to double check and ask to see original documents yourself (and keep copies).
- The Data Protection Act 1998 will apply to your record keeping so do be aware that compliance with one Act does not necessarily ensure compliance with another.
- If you are involved in the purchase or transfer of a business, you should carry out immigration status checks as part of your due diligence.

For further information about this or any other employment issue contact Lisa Judd on 020 8290 0440 or email lisa.judd@thackraywilliams.com

INTERNET, BLOGGING AND FACEBOOK – WHAT CAN AN EMPLOYER DO?

Q How do I stop employees wasting time on the internet while at work?

A An employer can prevent employees from using its IT equipment for personal use. An employer should have a clear policy on internet use which covers what is and is not acceptable. For example, some employers allow a limited amount of time to be spent surfing the internet during lunch hours. Furthermore, some employers will block access to certain websites and only allow access to websites which it 'approves'. Remember that if your policy states that internet access is tolerated during the employee's 'own' time, do be clear what is meant by this as otherwise, although an employer may have a policy, factual disputes can arise over how it is implemented.

Q Can I stop my staff using social networking sites?

A Yes, if you have an IT policy, it should state what is not acceptable. You should make it clear that breach of the IT policy is a disciplinary offence and that action will be taken against an employee who breaches the policy. A 'first offence' under the IT policy would usually result in a verbal or written warning. Dismissal could result if an employee constantly breached the policy and the statutory disciplinary procedure was followed. From a practical point of view, if you suspect that employees are using networking sites in breach of the IT policy, it is worth reminding them what the policy covers and to state that if there are any breaches in future, that disciplinary action will follow. You will then have given a 'last warning' effectively and an employee who still breaches the policy cannot be surprised if disciplinary action is taken. Make sure that you keep records of when reminders are issued and it is usually a good idea to get each employee to sign a receipt.

"...an employer should have a clear policy on internet use which covers what is and is not accceptable..."

Q What can I do if I discover that an employee has posted untrue statements about the company on a blog?

A An employer can take action for defamation against the employee and could also take disciplinary action, which could lead to the employee's dismissal. An employer needs to balance an employee's right to freedom of expression and comments that are untrue, defamatory or disparaging. If an employee revealed pricing structures on a blog, then an employer could seek an injunction, take disciplinary action for breach of confidentiality and may well seek damages. On the other hand, an employee may simply post comments or opinions that the employer does not take kindly to. Unless the comments breach the implied duty of trust and confidence, the employer may have to allow the employee to express his opinions.

Q I've heard that some employers are checking candidates' facebook sites before they offer someone a job – can they do this?

A If a prospective employee publically provides information about themselves, they cannot then complain if an employer decides to look at the material. The risk for an employer who does review candidates on Facebook is that they are potentially discriminating against the candidate. For example, if a candidate said they were homosexual on Facebook and this fact resulted in the employer deciding not to offer a job, this is discrimination. It will however be very difficult for the candidate to prove what the prospective employer has done and that the posting about their personal life caused the employer to discriminate. It would not be considered good recruitment practice to use these sites to obtain information about candidates.

For further information about this or any other employment matter contact Victoria Wright on 020 8290 0440 or email victoria.wright@thackraywilliams.com