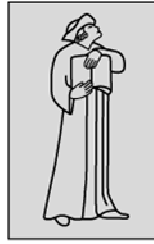


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## EMPLOYMENT LAW NEWSLETTER

JUNE 2006

### STATUTORY DISMISSAL PROCEDURES

Important guidance as to the approach to be taken by employers in order to ensure compliance with the statutory dismissal procedures has been provided by the EAT in ***Alexander v Bridgen Enterprises Limited*** [2006] IRLR 422. The statement that must be provided by the employer under step 1 of the standard procedure need do no more than state the issue in broad terms. All that the employee needs to be told is that he is at risk of dismissal and why. In a conduct case this may require no more than identifying the conduct at issue. In other cases, it may require no more than identifying that it is, for example, lack of capability or redundancy. At step 2 the employer must inform the employee of the basis for the grounds given in the statement. This may be done in writing or orally. In a misconduct situation this will mean putting the case to the employee in sufficient detail that they employee is able to properly put his side of the story. In a redundancy situation, this will involve providing information as to why there is a redundancy situation and why the employee is being selected. To comply with step 2, *the employer must notify the employee of the selection criteria which has been used and the assessment of the employee before the step 2 meeting*. It is not necessary to provide the assessments of other employees, although a failure to provide such information may, in certain situations, render the dismissal unfair. In the ***Alexander*** case, the employees, were only provided with their own assessments as they were leaving the step 2 meeting and after the decision as to their employment had already been made. This rendered the dismissal automatically unfair.

### POLKEY REVERSAL

The Polkey reversal provisions set out in section 98A(2) of the ERA 1996 were considered in ***Alexander*** (above). The same provision was also the subject of a different EAT appeal in ***Mason v Governing Body of Ward End Primary School*** [2006] IRLR 432. Judgment was given in both cases on the same day, with a narrower interpretation of the section's application being adopted in ***Mason***. Both decisions agree that section 98A(2) does not apply to breaches of the statutory dismissals procedure. In ***Alexander*** it was held that the section applies to all procedures which ought to be taken by an employer before deciding to dismiss. In ***Mason*** it was held that "the procedure" is restricted to a procedure of the employer. Such a procedure, however, can be written or unwritten, contractual or non-

contractual, contained in an agreement or policy which relates to the dismissal of employees and which has not been followed.

## **GRIEVANCE**

More guidance as to what is a “grievance” for the purposes of the statutory grievance procedure. A grievance is properly made if the employer, on a fair reading of the statement and having regard to the particular context in which it is made, can be expected to appreciate that the relevant complaint has been raised. If the statement cannot in context fairly be read as raising the grievance which is the subject matter of the tribunal complaint, the tribunal cannot hear the claim: **Canary Wharf Management Ltd v Edebi** [2006] IRLR 416, EAT.

## **EMPLOYMENT STATUS**

A claimant who worked as a home worker for a local authority over a 10 year period under a succession of individual teaching engagements was an employee even though there was no obligation to offer her work and no obligation to undertake any particular engagement. The Tribunal was entitled to find that the gaps between each engagement were on account of temporary cessations of work and therefore bridged by the provisions of section 212(3)(b) of the ERA 1996. Where there is a series of individual engagements, all that is necessary to establish sufficient mutuality of obligation thereby making each engagement a contract of service is that, once the contract was entered into and whilst it continued, the worker was under an obligation to do the work and the employer was under an obligation to pay for the work being done: **Cornwall County Council v Prater** [2006] IRLR 362, CA. The fact that a worker was paid by an employment agency and had an agreement with the agency to provide services to the end-user did not preclude the existence of an implied contract of employment between worker and end-user: **Cable & Wireless plc v Muscat** [2006] IRLR 355, CA.

## **DISABILITY DISCRIMINATION**

The DDA does not impose an absolute obligation upon an employer to refrain from dismissing an employee who is absent on grounds of ill health arising from disability. An employer may take into account disability related absences in operating a sickness absence procedure. The question as to whether the employer acts unlawfully by taking such disability related absences into account will usually depend on whether or not the employer is justified: **Royal Liverpool Children’s NHS Trust v Dunsby** [2006] IRLR 351, EAT.

## **SEX DISCRIMINATION**

When selecting a comparator group of employees in an indirect sex discrimination claim, the entire advantaged group should be chosen. A section of the comparator group should not be arbitrarily excluded: **Cheshire and Wirral Partnership NHS Trust v Abbott** 10.5.06, TLR, CA.

## WITHDRAWAL OF PROCEEDINGS

Where a claim is withdrawn, the party against whom that claim or part of a claim is withdrawn is generally entitled to have the proceedings dismissed pursuant to rule 25(4) of the Employment Tribunal Rules of Procedure 2004. There are circumstances, however, where there will be good reasons for withdrawing and bringing a claim in a different way. Dismissal would preclude that course of action. The questions for the Tribunal to determine, when considering an application under rule 25(4), are: is the withdrawing party intending to abandon the claim and, if the withdrawing party is intending to resurrect the claim in different proceedings, would that amount to abuse of process. If the answer to either question is yes it will be just to dismiss the proceedings. If the answer to both questions is no, the proceedings should not be dismissed: ***Verdin v Harrods Ltd*** [2006] IRLR 339, EAT. Once a claimant has served a notice of withdrawal of a claim upon the respondents a Tribunal does not have jurisdiction to set it aside: ***Khan v Heywood & Middleton Primary Care Trust*** [2006] IRLR 345, EAT.

## SETTLEMENT

An ACAS officer is under no duty to advise on the merits of a claim before an employee enters into a binding COT3 settlement agreement: ***Clarke v Redcar & Cleveland Borough*** [2006] IRLR 324, EAT.

The Thomas More Chambers' Employment Law Group provides a full complement of employment law services, ranging from representation, for both employers and employees, at all tribunal and court levels; legal advice on all areas of employment law; and drafting (from contracts of employment to settlement agreements). If you would like further details of the services provided and/or information about our fee structure, please contact our Employment Law Clerk, Nick Bryant, on 020 7404 7000 or email [clerks@thomasmore.co.uk](mailto:clerks@thomasmore.co.uk).

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