MASSERS

EMPLOYMENT LAW UPDATE

August 2015

50-plus employment rate at record high

Figures have been released by the Government showing that there are more than 8.2 million people aged between 50 and 64 in employment. Further, the figures also show that the number of people in this age group who work rose by 50,000 during the last quarter. In addition, there are also more than 235,000 more people aged between 50 and 64 in employment than there were a year ago.

The Government is committed to changing perceptions of older workers amongst employers and promoting the business benefits of maintaining an age-diverse workforce.

Pensions minister, Baroness Altmann, said

"Record numbers of older people are bringing their skills, talents and experience into the UK workplace, which is good news for people's incomes, their future pensions and the overall economy. But with 735,000 vacancies in the economy today, businesses are still not making the most of the opportunities that this huge pool of talent has to offer.

As part of our one nation approach, this Government wants to see employers do even more to eradicate outdated misconceptions and age discrimination, so that employers realise the benefits when they retain, retrain and recruit staff who are over the age of 50".

Despite the Government's commitment, there are apparently 1.2 million people in the UK aged between 50 and the State Pension Age, who are currently unemployed or inactive but who would like to work. If half of these employees worked the Government claims it could boost GDP by up to 25 billion a year.

Cautionary tale for Social Media users

In the recent case of *The British Waterways Board – v Smith [2015] UKEAT/0004/15* the Employment Appeal Tribunal (EAT) held that it was fair to dismiss an employee made derogatory comments about his employer on Facebook. Mr Smith worked for the British Waterways Board (BWB) as a manual worker from 1 April 2005 to 4 June 2013 when he was summarily dismissed for gross misconduct. Mr Smith worked for a team responsible for the maintenance and general up keep of canals and reservoirs. The team worked on a rota pattern and was on standby for 1 week in every 5, during which employees were not allowed to consume alcohol.

Mr Smith made derogatory comments on Facebook about his Managers and work, and a claim that 2 years earlier he had been drinking whilst on standby.

Mr Smith subsequently claimed that he had not been drinking and that the comments that he had made were banter. However, he was summarily dismissed on the grounds of gross misconduct as his comments had undermined the confidence his employer or the public would have in him.

The Employment Tribunal found that although the BWB had followed a fair procedure, the decision to dismiss fell outside the band of reasonable responses which a reasonable employer might have adopted. The ET said BWB had not taken into account the mitigating factors of Mr

Smith's unblemished service record and that some claims made on Facebook had been exaggerated or were not true. BWB had also been aware of the comments for some time. The ET also found that there had been no emergency on the night in question and that BWB had not had any subsequent difficulty with employees drinking alcohol whilst on standby.

The EAT have since allowed the appeal and substituted a finding that the dismissal was fair. The EAT found that the Tribunal had substituted its own views for that of the employer when it held that BWB did not give weight to the mitigating factors. It was a matter for an employer to decide and BWB's decision had been within the range of reasonable decisions open to an employer.

The case highlights the fact that even when an employer failed to respond to an employee's earlier act of misconduct, it will not necessarily loose the opportunity to take action at a later date. The misconduct pre-dated dismissal by 2 years and the employer had known about it for some considerable time but the EAT did not criticise the employer for relying on it to dismiss the employee.

The case is a useful reminder to employers of the importance of maintaining an effective social media policy and to employees of the importance of exercising caution when posting on line.

Unison's challenge against Employment Tribunal fees dismissed

The Court of Appeal has recently dismissed Unison's appeals against its Judicial Review Applications challenging the legality of Tribunal fees.

Unison had unsuccessfully argued that fees prevented Claimants from having access to justice; that the regime was indirectly discriminatory; and, that the Lord Chancellor had failed to satisfy the Public Sector Equality Duty. Although the Court of Appeal was struck by the dramatic decline in the volume of claims being brought in the Tribunal it agreed with the High Court that the figures on their own were insufficient to establish that Claimant's were unable to pay fees and therefore were unable to have effective access to justice. Unison's appeal therefore failed due to a lack of evidence to the impact of these on individual Claimants.

Unison has sought permission to appeal to the Supreme Court.

Although the Judicial Review Application failed in the Court of Appeal, a formal review of the impact of Tribunal fees by the Ministry of Justice is also underway with completion of the review expected later in the year. Watch this space…..

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