EMPLOYMENT LAW SUPPORT

PROVIDING EMPLOYMENT LAW SOLUTIONS

July 2019 Update

Welcome to this month's update - where we discuss the latest legislation and guidance.

In this month's edition, we report on:

- If an employee makes a covert recording at work - is it misconduct?
- Investigating Grievances
- Personal Liability of Directors

If an employee makes a covert recording at work – is it misconduct?

Basically yes, except in very special circumstances, found the Employment Appeals Tribunal (EAT) in Phoenix House v Stockman.

Here the employee disclosed, during her successful unfair dismissal claim, a covert recording she had made during employment.

The employer argued that her compensation for unfair dismissal should be reduced, to reflect her conduct in making a covert recording as it was disingenuous.

The EAT rejected the Respondent's argument and gave observations on the varied circumstances in which covert recordings might be misconduct.
It is always good practice for an employee or employer to say if they intend to record a meeting.

It is generally thought of as misconduct not to be upfront about it, except in the most pressing of circumstances.

The purpose for making a covert recording (on both sides) may vary from attempting entrapment to guarding against misrepresentation by people later trying to argue they did not say things.

There may be occasions where what is recorded may be highly relevant, such as a meeting where a record is normally kept, to highly confidential or sensitive information relating to the business.

An employee may have been told not to record a meeting and still gone on to record it covertly. Employees may even record a meeting secretly without giving any indication they have done so.

Be aware that the court observed that an employee's covert recording is rarely an example of gross misconduct in disciplinary procedures.

Employers: make sure you are clear to employees covert recordings are not allowed.

Contact us: we can assist with policies and/or meeting support.

Investigating Grievances

Employers will often spend many weeks investigating a grievance, particularly if it is detailed.

Then having done all the hard work, they sometimes issue a decision letter which says little more than “I have decided not to uphold your grievance”.

Bearing in mind the time and emotion often invested by an employee in their grievance, without a proper explanation to the employee this can often lead to problems.

It is wise as an investigator to say what they believe happened on balance in relation to each allegation.

Refer to documents or other evidence in the report and either attach them to the report or put them in a separate file.

Basically, if the investigator cannot clearly set out their reasoning at the time of preparing the outcome letter, they are really going to struggle if it ends up in a Tribunal.

Even if the employee disagrees with the decision, if there is a proper explanation of why the decision was reached the employee can at least feel that there is logic to it.

A detailed decision is of great benefit if the decision is ever challenged. Contrast this with a manager trying to recall his rationale in an employment tribunal many months later when memories fade.

Tips: Don't just say 'not proven' when it's one person's word against another.
There's no such thing as 'not proven. The harasser won't be stupid enough to harass the complainant in front of 12 witnesses.

Using the words "Not Proven" / "Proven". It will kill your case in the Tribunal.

The very first question that the person who heard the grievance will be asked is did they believe the complainant.

They usually just flounder, because they have never had to enunciate their answer to that before.

Employers: make sure your managers write a detailed factual decision letter.

Contact us: we can help with grievances and disciplinaries.

Personal Liability of Directors

Can a director of a limited company be personally liable for company breaches of an employment contract?

Yes, found the High Court in *Antuzis v Houghton.* The Claimants were employed by the company in an exploitative manner, working extremely long hours and paid less than the minimum wage.

Payments were often withheld, and they were often not paid holiday pay or overtime.

A director is not generally liable a breach of contract where the director is acting properly with respect to the company.

If, however, the breach of contract has a statutory element (such as not paying the national minimum wage or holiday entitlements), this may suggest a failure by the director to comply with their duties to the company.

This could then make a director potentially liable (here to their employees) for this breach of contract.

Here the court found the directors were not acting properly because they did not honestly believe that they were paying the minimum wage, overtime and holiday pay.
They were therefore personally liable for the breaches of contract that they had induced.

Employers: as a director make sure you make the payments required to employees

Contact us: we can guide directors on managing their business

For more information or assistance Email: enquiries@employmentlawsupport.co.uk

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