SPRING 2011

MOSS SOLICITORS

LEGAL REVIEW

Your quarterly legal bulletin on news & views from Moss Solicitors LLP

The Equality Act 2010 - Codes of Practice

Following the introduction of the Equality Act 2010, the Equality and Human Rights Commission has produced statutory Codes of Practice on employment; services, public functions and associations; and equal pay.

The Codes set out what the legislation means and draw on precedent and case law to explain the implications of the measures contained in the Act.

The Codes of Practice can be found at: www.equalityhumanrights.com/legal-and-policy/equality-act/equality-act-codes-of-practice/.

Moss Solicitors LLP
80 -81 Woodgate
Loughborough
Leicestershire
LE11 2XE
Tel: 01509 217770
Fax: 01509 233698
Email: enquiries@moss-solicitors.co.uk web:
www.moss-solicitors.co.uk

Gross Misconduct and Breach of Contract

When an employee is sacked for gross misconduct, has the employer breached its contract of employment?

This was the question before the courts in *Dunn and another v AAH Ltd.* Stephen Dunn was the Managing Director of AAH Ltd., one of a group of companies of which the head company, Celesio AG, was based in Germany. Mr Dunn had failed to inform AAH of a fraud of which he had been aware for five months.

When his employer discovered this, Mr Dunn was sacked for gross misconduct. He then sought compensation.

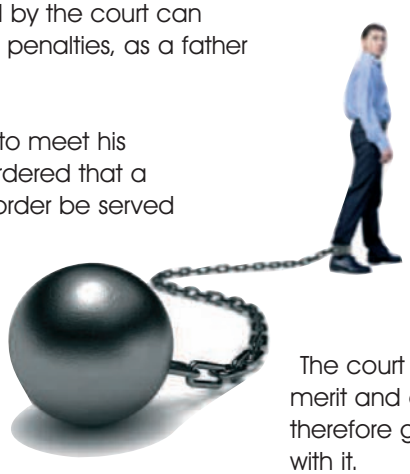
Celesio had in place a set of mandatory Risk Management Guidelines for the directors of its subsidiary companies to follow. These obliged subsidiary directors to report immediately any potential risks to Celesio. In addition, Mr Dunn's contract of employment obliged him to 'perform all the duties and exercise all the powers of his office to the best of his ability and …comply with all lawful directions and instructions given'.

The argument went all the way to the Court of Appeal, which ruled that Mr Dunn had repudiated his contract because his behaviour was such that it undermined the employer's trust and confidence in him to such an extent that it was no longer reasonable for AAH to continue to employ him.

Father Who Failed to Pay Faces Prison

Persistent failure to pay maintenance payments ordered by the court can lead to substantial penalties, as a father discovered recently.

After a history of failing to meet his obligations, the court ordered that a suspended committal order be served on the man, so that he would make good the considerable arrears of maintenance that had built up.



He failed to pay the amount outstanding and appealed against the order.

The court ordered him to file documents to substantiate his case by a given date. He failed to do so and did not appear before the court, offering the excuse that he was looking for employment.

The court regarded the appeal as lacking merit and confirmed the order. The man will therefore go to prison if he does not comply with it.

MOSS SOLICITORS UPDATE

Unfair Dismissal – Time Off Work for Dependants

Section 57A(1) of the Employment Rights Act 1996 (ERA) entitles an employee to take a reasonable amount of time off work in order to take action which is necessary for dependants, for example if they are ill or injured or if there is a disruption in the care arrangements made for them. It is automatically unfair dismissal to dismiss an employee for seeking to exercise his or her statutory right to take unpaid time off work in these circumstances.

In a recent case, an employee has been awarded £8,705 in compensation by the Employment Tribunal (ET) after she was dismissed for taking time off work to care for her son.

Alison Balch commenced part-time work at a Royal Mail delivery and sorting office in Aberdeen. During her six-month trial period she called in sick seven times on account of her son's asthma. At the end of the period, she was dismissed 'on the grounds of failure to demonstrate suitability for employment in particular regarding your poor level of attendance'. Ms Balch was given no formal warning concerning her attendance, however.

The ET heard that Ms Balch should have been given a performance review by her line manager after she had completed three months' work. Although a review of her work was prepared at that time, it was not given to Ms Balch until her six-month review took place. The six-month report was also critical of her attendance record. She had explained that her absences were necessary because her five-year-old son suffered from asthma, but she was dismissed from her job.

In addition, neither Ms Balch's contract of employment nor the company's procedures made any mention of an employee's right to take time off to help dependants.

The Employment Judge found that the principal reason for Miss Balch's dismissal was that she had taken time off work in order to take action necessary to help her son when he was ill and ruled that she had been unfairly dismissed.

Employers should note that under the Equality Act 2010, it is unlawful to discriminate against a fit employee because they have taken time off work to look after a disabled child. A child under the age of six may be deemed disabled under the Act even where their impairment does not have a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities if the condition would have that effect on a person aged six years or over.

Income Splitting – HMRC Appeal Decision

A recent case shows that HM Revenue and Customs (HMRC) will seek to apply legislation relating to settlements if it suspects couples of income splitting. It highlights the need to take expert advice where various classes of shares are created.

Both the husband and wife had invested half the money required for the start up of a business and set up a share structure involving the issue of different classes of shares. The shares had different rights and varying dividends were paid to each of them over time.

The couple agreed that the wife would receive far fewer 'A' shares than her husband in return for her investment. However, she was also issued with some 'B' shares, which received dividends in their own right. The husband had day-to-day control of the business but the wife stood to receive far larger dividends than he did. These dividends were paid to her, however, on the understanding that they would be paid across to her husband in order to repay loans taken out to purchase the business. They were both jointly liable for the loans. This somewhat complicated the situation.

HMRC argued that these arrangements constituted 'income splitting' and the effect was to set up a 'settlement' for the wife. Income tax assessments were raised to assess the wife's income as if it were her husband's.

The court agreed to an extent with HMRC, but did not find anything uncalled-for in relation to the 'B' shares as the returns on them were less than the wife's investment warranted. Although the court did in part support the case put forward by HMRC, the net return to them of £6,000 was considerably less than originally sought.

HMRC recently announced that they intend to appeal the decision.

This case shows the approach that HMRC take to such schemes. If you need advice on any aspects of share structure, we can help.

£41.5 Million Divorce – Wife Refused Appeal

Hedge fund tycoon Vipin Sareen and his wife Beatrice have been ordered by an Appeal Court judge to stop their costly court actions as neither is going to end up lacking assets.

The couple married in 1987 and acknowledged the breakdown of their marriage 20 years later, when Mrs Sareen presented a divorce petition in September 2007. But it wasn't until the end of the tax year in March 2008 that Mr Sareen, on advice from tax counsel, made an offer to transfer assets valued at £34 million to his wife, from family assets totalling some £100 million. He hoped that she would accept the payment in full and final settlement.

In the event, Mrs Sareen did not. Instead, she initiated a series of costly hearings in an attempt to increase her share of the family fortune. Hearings took place over several months in 2009. The judge attached great importance to the voluntary division of assets effected by Mr Sareen but asked himself the question 'does fairness require me to order more to the wife?' Answering that question in the affirmative, he ordered a further capital payment amounting to £7.5 million.

Even though this increased the settlement to £41.5 million, Mrs Sareen was still not happy and sought permission to appeal. Counsel for Mrs Sareen argued that the court should not have placed such importance on the voluntary division of assets and the judgment was unfair to her as it excluded assets that were in existence in March 2008 but had not been included in the schedule that assessed her share at £34 million. Moreover, the proposed settlement did not take into account assets generated since that date.

The Appeal Court judges were not impressed by these arguments, stating that the original trial judge's reasoning was 'impeccable'. He had noted assets, worth £3 million and £4 million, that were not taken into account in March 2008 and rejected arguments from Mrs Sareen's counsel that these assets were considerably undervalued. Dismissing the application for leave to appeal, Lord Justice Thorpe said that the resulting figure of £7.5 million was clearly within the judge's discretion.

When Does a Covenant Lapse?

When a property has a restrictive covenant placed on it, the covenant may run without cessation, or it may lapse when some event occurs or after a set period of time. The precise effect of the covenant will depend on the wording in each case.

In a recent case, the interpretation of a covenant was at issue. The covenant prohibited the use of a property 'for any trade, manufacture or business'…and prohibited at any future date the erection of any advertisement except an advertisement for sale of the property. The covenant could be breached only with the 'previous consent of the vendor'.

The original vendor of the property, who had conveyed it subject to the covenant, died. The purchasers went to court to obtain a discharge of the covenant on the basis that it had lapsed on the vendor's death. In making its decision, the court considered the wording of another covenant contained in the documents of sale. This prevented building from being carried out on the property without the approval of the vendor or 'the owners for the time being of the vendor's adjoining property'. The court considered that it would be unusual for the covenant regarding the use for any trade to be limited to the vendor's lifetime when the prohibition on building was absolute. It therefore ruled that the covenant had not lapsed, but had become absolute.

£9 million compensation for brain-damaged twin

The parents of a young girl who suffered severe brain damage as a result of a lack of oxygen during her birth have secured a settlement worth £9 million in compensation for her injuries.

Amy Smith, now 8 years old, was born twenty minutes after her twin sister at the Northwick Park Hospital in West London. The delay caused oxygen starvation to her brain with the result that she suffers from cerebral palsy and learning difficulties. Her condition is such that she will require constant care for the rest of her life. In particular, she has very little sense of danger, which means she has to be watched over at all times.

The Hospital accepted that it had been negligent in its treatment of Amy. Had she been born 15 minutes earlier, the damage to her brain could have been avoided.

Amy's parents brought a personal injury claim on her behalf. A settlement in compensation was agreed at a hearing of the High Court, which ordered a lump sum award of £3.29 million and annual index-linked payments for the rest of Amy's life. The money will enable her parents to make alterations to the family home to accommodate Amy's needs and to pay for the round-the-clock care she requires.

Medical negligence claims against the NHS are handled by the NHS Litigation Authority. In 2009/10, 6,652 claims of clinical negligence and 4,074 claims of non-clinical negligence against NHS bodies were received by the Authority. This compares with 6,088 claims of clinical negligence and 3,743 claims of non-clinical negligence in 2008/09.

Carer Jailed for £10,000 Theft

The newspapers have recently reported several incidences of the exploitation of vulnerable elderly people. In one such case, Stevenage care worker Jo-ann Tharle has been jailed for the theft of savings of more than £10,000 from an elderly man in her care.

Ted Tyler, of Datchworth Village in Hertfordshire, was 83 when his main carer, Ms Tharle, set up a savings account in his name and transferred his £14,000 savings into it. She also obtained his debit card and used it for her own purposes. In all, a total of £10,650 was stolen on 35 separate occasions between 13 May and 30 October 2008.

Giving evidence at St Albans Crown Court, Marion Cooper, a friend of Mr Tyler, said that Ms Tharle began to drive a wedge between Mr Tyler and his niece Veronica, who used to see him every day. According to Ms Cooper, Ms Tharle told Veronica not to keep seeing Mr Tyler because it upset him. After this, she stayed away. Veronica had been named as the sole recipient of Mr Tyler's estate when he died, but Ms Tharle arranged for the RSPCA to become the beneficiary and hoped that the small sum that remained in his account would not be noticed.

The deception was only uncovered after Mr Tyler's death in November 2008, when his executor, examining his bank account, noted many large transactions that were out of character.

Sentencing Ms Tharle to 18 months in prison, Judge Martin Griffith described the crime as 'a grievous breach of trust'.

If you are concerned that a vulnerable member of your family may be being exploited in a similar way, we can advise you of steps you can take to protect them.

Disability-Related Discrimination – Landlords and Tenants

One of the changes made by the Equality Act 2010, the main provisions of which came into force on 1 October 2010, is to make it easier for a claimant to establish a case of 'disability-related discrimination', which was made more difficult following the decision in *London Borough of Lewisham v Malcolm*. In that case, the House of Lords ruled that a disabled tenant who was evicted from his flat for breach of the terms of his tenancy agreement (he had sub-let the flat in contravention of the lease terms) had not suffered discrimination despite the fact that he suffered from schizophrenia. The Court ruled that the Council, which was unaware of his condition, would have treated any other tenant the same way.

The Act replaces the concept of disability-related discrimination with a new protection from discrimination arising from disability. This means that a person discriminates against a disabled person if they treat them unfavourably because of something arising from, or in consequence of, their disability, with no requirement for a comparator. In circumstances similar to those in Malcolm, a landlord would have to show that the treatment of a disabled tenant was a 'proportionate means of achieving a legitimate aim' in order to defeat a claim of disability discrimination against them. The Act does, however, provide a defence where the landlord can show that it did not know, and could not reasonably have been expected to know, that the tenant had a disability.

The Act also contains a new right for disabled tenants of residential or mixed-use premises, whereby they can request that the landlord make physical changes to the common areas of a building, such as hallways and stairs, in order to meet their needs, where such changes are reasonable.

In such circumstances, the landlord and the disabled person must agree in writing the rights and responsibilities of each of them with regard to the adjustments being made. The agreement must include the responsibilities of each with regard to:
a) the cost of any work to be undertaken;
b) other costs arising from the work; and
c) the restoration of the common parts to their former condition if the disabled person stops living in the premises.

The landlord can insist that the disabled person covers the cost of the adjustments, and of any restoration work should they vacate the premises.

MOSS
SOLICITORS
80 -81 Woodgate, Loughborough, LE11 2XE
Tel: 01509 217770 **Fax:** 01509 233698
Email: enquiries@moss-solicitors.co.uk
web: www.moss-solicitors.co.uk

WOODGATE
FINANCIAL PLANNING LTD
an associated business of Moss Solicitors LLP
80 -81 Woodgate, Loughborough, LE11 2XE
Tel: 01509 635467 **Fax:** 01509 233698
Email: enquiries@woodgatefs.co.uk
web: www.woodgatefs.co.uk