

M&P
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REVIEW



**References,
Notice Periods and
other Labour Law
Developments
to Watch**


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July 2011

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july 2011



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Introduction

Welcome to our electronic news review published by M&P Legal. We hope that the publication is of interest to recipients. Please contact any of the individuals listed on the contact us page with comments for future articles.

  
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Advocate John T Ayccock reviews

some recent employment law decisions from the United Kingdom which may provide pointers to the way employers operate in the Isle of Man.

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In the Isle of Man we have the distinct advantage of not being bound by case law decisions from the United Kingdom, even though in many respects the laws are similar. Primary Manx case law, statute and custom and practice will always be the first port of call when our courts and tribunals determine Manx cases. But British, Irish, offshore and Commonwealth cases are frequently quoted in our courts and tribunals for their persuasive value (in the absence of primary Manx authority).

Isle of Man employment law does differ from the United Kingdom largely because we are not European Union members and therefore do not have to incorporate into our law EU directives. But many principles of British and Manx employment law are similar, particularly in employment contract disputes. It is always interesting therefore to keep a close eye on developments in our neighbouring jurisdictions. Three recent English cases give those dealing with human resources matters in the Isle of Man some food for thought and what's more, none involves Facebook, Twitter, YouTube or LinkedIn!

Beware what you say after giving a reference

Firstly, references given to a departing former employee can often present headaches for the HR department. Most of those in business who give references will be aware of the duty of care needed when

giving a reference. This arose from a well known English case in the mid 1990s which for the first time permitted an employee to claim against a former employer for a negligently prepared reference. As a result of this principle, many employers now tend to give a certificate of service with the bare minimum details rather than a detailed reference.

Another case from England earlier this year, however, has extended the principle to apply not only to formal references but to other statements an employer may make about a former employee outside the formal reference. Thus in *McKie v Swindon College* an employee of the College left to join Bath University and when he left he was given a good reference. Nonetheless a subsequent email from HR at Swindon College was sent to the new employer making untrue derogatory comments about Mr McKie which ultimately cost Mr McKie his job at Bath University.

The High Court in England ruled that a duty of care applied because the damage sustained was foreseeable and the relationship was sufficiently proximate. There was a causal connection between the negligence in sending the email and the damage claimed. Beware therefore that the duty of care does not end with the reference.

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When does the notice period start?

Secondly, another common point that can arise on the termination of an employment contract is the calculation of when termination actually takes place and particularly when notice periods start and therefore expire. This has a significant consequent effect on the strict three month time limit for applying to the Employment Tribunal to claim unfair dismissal. An Employment Appeal Tribunal (“EAT”) judgment from England in April 2011 has confirmed that where contractual notice is given, the time runs from the day after the notice is given, unless the contract provides otherwise. This applies to either oral or written notice.

In *Wang v University of Keele*, the claimant was given three months’ notice of termination by an email received and read on 3 November. He worked his notice and was paid until and ceased work on 2 February which was understood to be the end of the three month notice period. He then presented a claim to the tribunal for unfair dismissal on 2 May. The Employment Tribunal in England at first instance dismissed the claim as being out of time because if the effective date of termination was 2 February the three month expiry of the statutory limit was 1 May, not 2 May. But the EAT overturned this indicating that the notice of termination starts on the following day so the notice ran from 4 November with

the dismissal taking effect on 3 February. That meant that the three month time limit for unfair dismissal expired on 2 May and Mr Wang was therefore in time to make his claim.

The EAT also indicated that if the giver of the notice makes the dismissal date ambiguous then the notice should be construed in favour of the recipient. There is a lesson therefore in this for all of those who deal with notice periods to ensure clarity of the effective date of termination and to apply the rule as to the time running from the day after the notice is given.

Duty to report one’s own misconduct

Finally, a case from England in 2010 reminds us of the onerous duties carried by the office of director. A team of employees moved en bloc to a competitor employer and the former employer then claimed breach of restrictive covenant and fiduciary duty against the team of employees and also claimed inducement of breach of contract and conspiracy against the new employer. The case involved allegations of the team soliciting clients and other employees away from the former employer while still employed (which would normally be a clear breach of the implied duty of fidelity). In the circumstances of the case, although there had been some breaches of enforceable restrictive covenants, no loss could be proved thus the employees were

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not liable for breach of contract or fiduciary duty. The court highlighted however that if an employee is a fiduciary such as a director then there is a duty to report one's own misconduct or that of fellow employees. It is an interesting and I think not very well known point that applies to the board of directors that they must inform the company of their own wrongdoing. Failure to do so is a breach of the fiduciary duty a director owes to the company. This could apply also to those acting as directors even if not formally appointed as such.

The High Court in Lonmar Global Risks Limited v West and Others however found there to be no fiduciary duty arising simply from the relationship of employer and employee and also found there to be no evidence of inducement of breach of contract or conspiracy in respect of the new employer and the departing team.

It will be interesting to see whether any of the above propositions are used on a persuasive basis in Manx employment cases.

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