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**There have been a number of important cases in recent months which may have an impact upon your business...**



## Reasonable investigation in disciplinary situations

How much investigation is it reasonable to carry out where misconduct is alleged? It's a question every employer asks from time to time because a great deal hinges on what is discovered, and what could be discovered, by carefully looking into all the circumstances. And employers know just how important it is to reach the right conclusions. In *Shrestha v Genesis* the employee argued that his employer hadn't done enough.

Mr Shrestha was a mobile worker; he travelled by car to visit clients in their homes and he submitted mileage claims. When his claims were audited, it was suspected that he had been over-claiming. At his disciplinary hearing, he explained that the high mileage was due to difficulties in parking, one-way road systems and roadworks.

The employer did not put each specific journey to Mr Shrestha and analyse the purported reasons for the additional mileage. Each journey was above the AA suggested mileage and it didn't seem plausible, the employer said, that they could all be justified in the way Mr Shrestha had sought to do. He was dismissed.

Mr Shrestha lost his unfair dismissal claim. The employer's investigation was reasonable, the Court of Appeal held. While an employer must consider every defence the employee puts forward, the extent to which these must each be investigated depends on the circumstances. An employer's reasonableness should be assessed by looking at the investigation as a whole.

Go to Top

## Sending email was repudiatory breach

Mr Williams was employed by Leeds as technical director when he was given notice of redundancy. His contract would terminate at the end of his 12-month notice period (as the Club later agreed), or earlier if he was guilty of gross misconduct.

Shortly after receiving his redundancy notice, he was summarily dismissed on the grounds that five years earlier he had sent obscene and pornographic material from his work email account to a friend at a different club. It was later discovered that Mr Williams had also forwarded the email to two other people – one of whom was a female receptionist at Leeds.

CLIFTON INGRAM LLP SOLICITORS

**For more information on these or any other Employment Law issues, please contact our Employment Team below.**


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**About Us**

Clifton Ingram LLP provides effective legal solutions to help businesses and individuals. We adopt a pragmatic and collaborative approach, providing you with effective legal solutions without resorting to jargon or 'legalese'.

Our team of more than 35 law professionals, many of whom are members of specialist organisations and legal panels, provide advice covering all key legal areas.


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He claimed wrongful dismissal, arguing that what he had done was not serious enough to amount to a fundamental breach of contract. The High Court held that it was. It was conduct which breached the implied term of mutual trust and confidence between Mr Williams and the Club. Relevant to this conclusion was:

- Mr Williams' seniority
- the nature of the images
- the fact that images were sent by a senior manager to a junior female employee
- potential reputational damage: dissemination of the images was readily identified with the Club.

In this case, it didn't matter that Mr Williams had not been given a copy of the Club's internet policy. It ought to have been obvious to him – a member of senior management – that the Club's email system should not be used to send obscene or pornographic images, the High Court held. So the Club had been entitled to dismiss him without notice, and Mr Williams' claim failed.

One interesting point in this case was the Court's finding that, before dismissing him, the Club had decided not to pay Mr Williams during his notice period and was actively looking for evidence of gross misconduct. Those facts didn't prevent the Club dismissing Mr Williams summarily when it discovered the misconduct, said the High Court. Nor did they prevent the Club from relying on misconduct discovered after dismissal in order to justify it.

Go to Top

**Problems if you run an April to March holiday year**

Being a moveable feast, Easter keeps us on our toes. This is going to cause issues for some employers over the next few years as they'll have to accommodate employees' extra days off. Here's why:

If you run an April to March holiday year and your contracts provide for 20 days' annual leave plus bank holidays (of which there are eight) then the dates on which Easter falls mean you'll have to do some adjusting. This year, Good Friday and Easter Monday fell on 3 April and 6 April. Next year, they'll be on 25 March and 28 March. Two Easters fall within one holiday year. But in 2017, Easter returns to April.

So for the holiday year 2015/16, there will be ten bank holidays. Conversely, in 2016/2017, there will only be six bank holidays. In that year, therefore, some employers will need to allow two extra days' leave to ensure that employees get eight, rather than six, public holidays. If that doesn't happen, five-day-week employees will not be getting their statutory minimum 28 days' annual leave entitlement.

So what to do? Well, you could simply top up leave as we've described. Or you could think about changing your holiday year to January to December. Or you could even look to make some contractual changes to provide for 28 days' leave inclusive of public holidays. Be mindful though that changing employees' contracts is a delicate process. It will need to be planned out and navigated very carefully; something we can help you do.

Go to Top

**Be careful what you ask for**

Since 10 March, there has been a new offence that will bite some employers.

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Under the Data Protection Act it's now a crime to ask someone to exercise their subject access rights to reveal data held about them by someone else and to reveal that data to a person. In other words, you could be prosecuted if you ask an employee, a job candidate or a contractor, for example, to request and disclose information about their convictions and cautions.

This doesn't mean that employers will always be denied access to these sorts of details. But you should use the checks available through the Disclosure and Barring Service rather than forcing someone to make a data subject access request. The latter is seen as an unfair way of an employer getting more information than they're entitled to. That's because subject access requests don't distinguish between spent and unspent convictions and so result in disclosure of all personal information (with a few exceptions).

Go to Top

**Shared Parental Leave**

Parents of babies expected on or after 5 April 2015 will be able to share up to 50 weeks off work (and 37 weeks shared parental pay), something which the government hopes will kick-start a feeling of empowerment among fathers to spend more time with their children.

It's estimated that 285,000 working couples each year will be eligible for the new leave arrangements. They'll need to comply with some fairly complicated notice arrangements, which includes giving their employers eight weeks' notice of the pattern of leave they plan to take.

We can help you with a shared parental leave policy, and update your staff handbooks to cover this important new right for employees. Plus we can help you with other family-friendly provisions coming into force now too, including surrogate parents' eligibility for leave, and wider rights for adoptive and other parents.

Go to Top

**Fit for Work?**

The newly launched Fit for Work (FFW) service aims to give clarity on employees' ability to do their jobs when they have been off sick.

Offering free occupational health assessment and return to work plans, FFW will be available to employers and employees as well as GPs, and it looks set to be a useful resource in the case of employees who have been on sick leave for four weeks or more. There will be two elements: a website and telephone line advice service; and a referral service. And it is intended to complement, rather than replace, employers' existing occupational health services.

http://fitforwork.org/

Go to Top

**Acas Code revised**

It may not strike you as momentous, but a change to the Acas Code could well change the way you handle workers' requests to be accompanied at disciplinary and grievance hearings.

It's in response to *Toal v GB Oils* in which the Employment Appeal Tribunal held that, in relation to disciplinaries and grievances, where a worker "reasonably requests to be accompanied at the hearing", there is now no reasonableness requirement relating to the identity of their companion. In other words, a worker doesn't need to be reasonable in choosing the person they'd like to attend the meeting with them – they can choose someone who will shout, stamp and scream, or who the employer might not want to attend for some other reason.

The *Toal* case found that workers have the right to be accompanied by any companion from one of the categories in section 10 of the Employment Relations Act 1999 (trade union officials, certified union reps and fellow workers). That, it seems, is now the only requirement.

**For more information on any these or any other Employment Law issues please contact Alison Gair on alisongair@cliftoningram.co.uk or 0118 978 0099.**

Go to Top