

XpertHR Weekly Podcast

Original XpertHR podcast: 31 July 2015

SUSAN DENNEHY: Hello and welcome to this week's XpertHR Weekly with me, Susan Dennehy. I am joined this week by employment law editor, Ashok Kanani. This week we are going to talk about some of the issues that arise during an employee's notice period and in particular some of the pitfalls employers need to be wary of. We will start by looking at minimum notice periods, annual leave and absent employees during the notice period, before moving on to look at summary and wrongful dismissal.

Welcome back to XpertHR Weekly, Ashok.

ASHOK KANANI: Good morning, Sue.

SUSAN DENNEHY: Can we start then by looking at the minimum amount of notice an employer has to give to terminate the employment contract? [0:00:42.9]

ASHOK KANANI: Yes, so the notice is generally governed by the contract of employment, subject to a statutory minimum. So the law is that an employer must give an employee who has at least one month's service but less than two years' service one week's notice. This rises by one week for each additional completed year of service until a maximum of twelve weeks' notice.

So for example, someone with five years' completed service must be given at least five weeks' notice. Someone with twenty years' completed service would be given the maximum twelve weeks' notice.

SUSAN DENNEHY: So the maximum is twelve weeks' statutory notice. And what if the contract of employment states a longer notice period of, say, for example three months? [0:01:30.1]

ASHOK KANANI: That would be fine. The contract of employment can allow for greater notice but the statutory minimum would apply where the contractual notice is less.

SUSAN DENNEHY: What about the employee? Do they have to give a minimum amount of statutory notice? [0:01:43.4]

ASHOK KANANI: Yes they do. The statutory minimum is one week's notice for employees who have been in employment for at least one month. Naturally the employee has to give the notice stated in the contract of employment, but however, unlike the employer, the statutory notice employees have to give doesn't increase with length of service.

SUSAN DENNEHY: So they only have to give one week from the employee side. You mentioned payment in lieu of notice. Where an employer dismisses an employee and pays him or her for the notice period but doesn't require the employee to work out the notice period, is there anything employers need to be wary of or have to bear in mind when making a payment in lieu of notice? [0:02:22.4]

ASHOK KANANI: Yes they do. A key point to bear in mind is that an employer wouldn't have the right to make such a payment unless the employment contract has a provision allowing for a payment of notice.

SUSAN DENNEHY: Can you just tell us a bit more about that? [0:02:36.5]

ASHOK KANANI: Yeah. If the contract doesn't allow a payment in lieu of notice, technically making such a payment would be a breach of the employment contract. An important point to note here is that case law has established that where an employer dismisses an employee in breach of contract, the employer might not be able to enforce any of the restrictive covenants that were set out in the employment contract, such as, for example, a non-competition clause.

So employers do need to be careful and check that the employment contract does allow a payment in

lieu of notice, because otherwise they could be faced with a situation where the restrictive covenants are unenforceable.

SUSAN DENNEHY:

So it may be wise for an employer to have a clause in employment contracts reserving the right to make a payment in lieu of notice if they want to make sure that any restricted covenants will be enforceable.

Is there anything the employer could do if the contract of employment does not include the payment in lieu of notice clause? [0:03:36.1]

ASHOK KANANI:

One option would be to place the employee on a period of garden leave. This is where the employee is sent home but is held down by the terms of the employment contract and the employee doesn't come into work during the notice period.

Another option is to agree with the employee an earlier termination date with a compensation payment in lieu of notice. If an agreement is made, then there wouldn't be any breach of contract.

SUSAN DENNEHY:

Let's move on then and look at annual leave. It's often one of the trickier areas to navigate. Does annual leave continue to accrue during the notice period? [0:04:11.2]

ASHOK KANANI:

Yes it certainly does, but it's important to separate statutory entitlement and contractual entitlement. Under the Working Time Regulations, employees will always continue to accrue the statutory minimum annual leave entitlement during the notice period. Whether they accrue an additional contractual amount does depend on the terms of the contract of employment because it is possible to exclude the accrual of annual leave during the notice period. How annual leave is treated during the notice period can also depend on custom and practice in the industry that the employer is operating in.

SUSAN DENNEHY: Yes, always important to remember that terms can arise by custom and practice.

Can an employee insist on taking holidays during the notice period? [0:04:56.3]

ASHOK KANANI: Yes, the usual holiday rules apply, so the employee must usually give reasonable notice. If it is going to be a problem for the employer, the employer can refuse the request for annual leave for business reasons. But employers should bear in mind that they will ultimately have to pay the employee in lieu of any untaken holiday entitlement on the termination of employment. Therefore it may be cost-effective for the employer to allow the employee to take holidays during that notice period.

SUSAN DENNEHY: On that point then, what if the employer wants the employee to use up holiday during the notice period? [0:05:32.7]

ASHOK KANANI: The Working Time Regulations allow employers to specify dates on which an employee must take some or even all of their statutory annual leave. So the employer must give notice to the employee which is double the number of leave days it wants the employee to take. So for example, the employer would have to give at least ten days' notice to compel an employee to take five days' leave.

SUSAN DENNEHY: And with contractual holidays, you say it will depend on what the contract says or what's arisen by custom and practice? [0:06:03.9]

ASHOK KANANI: Absolutely.

SUSAN DENNEHY: Sometimes you see a situation where the employee's taken too much holiday. What's the situation in that case? Can the employer reclaim the overtaken holiday from the final salary? [0:06:13.4]

ASHOK KANANI: Well where an employee has taken more annual leave than the entitlement accrued at the date of termination, only if there is an express provision

within the contract of employment or some other relevant agreement can the employer claw back the additional days taken. This was confirmed in the employment appeal tribunal case of Hill and Chapel, where the employer in that case was prevented from clawing back overpaid holiday on termination because there was no agreement allowing for this.

So employers should ensure that a right to claw back excess holiday is taken is reserved either in the contract of employment or some policy document.

SUSAN DENNEHY:

Moving on then to employees who are absent when given notice of dismissal, what's the situation on notice pay for an employee, for instance, who's on sickness absence? [0:07:05.8]

ASHOK KANANI:

Well the law is set out in the Employment Rights Act and it is a little quirky. An employee dismissed whilst on sick leave will still be entitled to notice but how much notice pay depends. That's because the law says that the employee must be given full pay for their statutory notice period unless the notice period in the employment contract is at least one week more than the statutory notice period.

So for example, suppose we have an employee with two and a half years' service who is on sick leave and has used up all the entitlement to sick pay and hence is receiving nothing at the moment. The statutory notice period would be two weeks. As long as the contractual notice is not one week more, i.e. three weeks in this example, the employee would get full pay for the entire notice period.

However, if the contractual notice period is one week more, so three weeks or more in this example, the employee would continue with zero pay during the notice period.

SUSAN DENNEHY:

That certainly sounds like a quirky bit of legislation indeed to know that you could be entitled to be paid so long as your contractual notice does not

exceed the statutory minimum notice by more than a week.

ASHOK KANANI:

Yeah

SUSAN DENNEHY:

And is that unique to sickness absence or are there any other circumstances where these provisions apply? [0:08:27.5]

ASHOK KANANI:

No, we have a similar situation for employees on maternity leave. So the employer must pay the employee on maternity leave normal full pay during the statutory notice period, unless the contractual notice, as we saw with sickness absence, is at least one week more than the statutory notice, in which case the employee could potentially receive nothing during her notice period.

However, where the employer does have to pay an employee on maternity leave the notice period, the law does allow employers to offset that employee's statutory maternity pay against the full pay.

SUSAN DENNEHY:

So they can reclaim their SMP from pay? [0:09:09.0]

ASHOK KANANI:

Yep.

SUSAN DENNEHY:

Shall we move on now and lastly look at summary dismissal, where an employer dismisses an employee without notice or payment in lieu of notice? So firstly, can you remind us in what circumstances an employer can dismiss an employee without notice? [0:09:22.0]

ASHOK KANANI:

Yes. Generally employers can only dismiss, and often will dismiss, an employee straight away without any notice payment when there has been some type of gross misconduct, for example, abusive behaviour, violence or theft. Employers should, of course, follow policy and ensure a proper investigation is carried out before making any decision on whether or not to dismiss an employee.

SUSAN DENNEHY:

So what should an employer be aware of when deciding to dismiss in these circumstances without notice? [0:09:48.5]

ASHOK KANANI:

The main thing to bear in mind is that an employee can always challenge an employer's decision to dismiss without notice in an employment tribunal as a wrongful dismissal claim. A wrongful dismissal claim is a claim for breach of contract and so unlike an unfair dismissal claim, there is no required length of service to bring a claim. If the employee does challenge the decision in an employment tribunal, the employer will have to show that the misconduct took place and that it was serious enough for the dismissal without notice.

Also it's worth keeping in mind that if a former employee is going to make a tribunal claim for wrongful dismissal, they are more likely to add other claims such as, for example, unpaid holiday, bonuses or even discrimination, which could make life a little more complicated for the employer.

SUSAN DENNEHY:

So it would be very wise for the employer to tie that up and ensure they've made all the correct payments in order to avoid the possibility of that situation occurring. What could be consequences for the employer if a tribunal finds that the employee has been wrongfully dismissed? [0:10:48.6]

ASHOK KANANI:

The tribunal would order the employer to pay the notice period and other contractual benefits that were not given because of the summary dismissal. As well as this, as we've already discussed, an employer who breaches a contract in terminating the employment might have difficulties in enforcing restrictive covenants.

So in practical terms, employers should ensure that the decision to dismiss without notice will stand up to scrutiny and set out clearly in the termination letter the payments being made,

including what is the notice pay and what is the holiday pay.

SUSAN DENNEHY:

Thank you very much, Ashok, for that very useful guidance and helpful, practical tips.

ASHOK KANANI:

Thank you, Sue.

SUSAN DENNEHY:

There are more resources on our website, including FAQs, a how-to, a quick reference guide and a suite of policies and documents dealing with payments in lieu, including a letter setting out the payments that Ashok just mentioned there. That brings us to the end of this week's XpertHR Weekly, which you've been listening to with me, Susan Dennehy. We are back again next Friday, but until then, it's goodbye from us.