

# Spearing | Waite

Employment Law

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## Newsletter

News update for  
HR Specialists



**Kim Abbott**

### **Income Tax (Pay As You Earn) (Amendment) Regulations 2008**

Keen readers of our newsletters will remember the case of *Demibourne v HMRC* in which HMRC were able to charge an employer full tax and National Insurance contributions under the PAYE regulations, where the parties had wrongly viewed the employee as self employed, without giving credit for the tax and National Insurance contributions already paid directly by the 'employee.' In other words, under this loophole, HMRC could charge tax twice!

That loophole is about to be closed by virtue of *The Income Tax (Pay As You Earn) (Amendment) Regulations 2008*, which come into force on 6th April 2008.

### **Expired Disciplinary Warnings**

The Court of Appeal has held, in *Airbus v Webb*, that an employer may take expired disciplinary warnings into account when deciding whether to dismiss an employee.

Mr Webb had been given a final written warning for misuse of company time, which was stated to last for 12 months. One month after the warning had expired, he was caught watching TV during company time, with some colleagues and was dismissed. His colleagues, who had

not had a previous final warning, were not dismissed.

The Court of Appeal (overturning the ET and the EAT,) held the dismissal was fair. It stated that reliance upon an expired warning was a relevant factor in deciding whether the employer has acted reasonably, and may, in some circumstances, mean the dismissal is unfair, but does not inevitably mean that it is unfair. It further added that employers should not now expect to be able to rely on expired disciplinary warnings as a matter of course. It is the exception rather than the rule.

### **Mutual Trust and Confidence**

There has been an important decision handed down the high-profile case, *RDF Media Group v Clements*. Quite apart from the media interest owing to the personalities involved, (Mr Clements is a successful and influential TV producer and the husband of Kirsty Wark of BBC Newsnight fame,) from a legal perspective, it dealt in some detail with the implied term of mutual trust and confidence (arising in the context of a restrictive covenant dispute.)

There isn't space here to list all the arguments and counter arguments between the parties. Suffice it to say that

this was a bitter dispute and that the credibility of both parties was called into question.

It is authority for the following propositions:-

- a Board of Directors is entitled to discuss an employee in a negative manner without breaching the term of trust and confidence, as it is merely the brain of the company 'thinking aloud' and the obligation of trust and confidence does not go so far as to control thoughts;
- engaging in a campaign of vilification against an employee in the press, even on a non-attributed basis, will amount to a prima facie breach of trust and confidence, but there may be a rebuttal if the employee has, himself, first acted in breach of trust and confidence;
- there may be reasonable and proper cause to put out a press release, and even release confidential information to the press, when an employee resigns and is on garden leave;
- importantly, an employee is not entitled to accept a repudiatory breach of the trust and confidence term in circumstances where he is himself in repudiatory breach of the same term

This last point appears to give employers another defence in constructive dismissal claims. It seems (if this case is followed) that an employer will not normally be liable for constructive dismissal if the employee has also breached the term of trust and confidence. However, don't count your chickens yet. Permission to appeal has been granted on this point.

### **Modified Dismissal Procedure**

The Employment Appeal Tribunal has taken a relatively strict approach to the applicability of the statutory Modified Disciplinary Procedure in *O'Neil v. Wooldridge Ecotech Ltd.* It has held that

the Modified Disciplinary Procedure did not apply in a situation where the alleged gross misconduct occurred in the morning, the claimant's line manager consulted with other senior employees on the same afternoon, but the employee was not informed that he had been dismissed until the following morning.

The EAT stated that it was not satisfied that there had been a dismissal "at the time the employer became aware of the conduct or immediately after it" (the wording of Regulation 3 of the Employment Act 2002 (Dispute Resolution) Regulations 2004.)

Since the dismissal did not occur immediately after the employer became aware of the employee's misconduct, the employer had been obliged to follow the standard dismissal procedure. It had failed to do so with the result that the dismissal was automatically unfair. The EAT went on to find that, in any event, Step 1 of the modified procedure had not been complied with and there had not been a proper investigation. The extent that the original Tribunal had fallen into error was such that the matter should be remitted to a freshly constituted Tribunal.

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