

LEGAL ISSUES IN OCCUPATIONAL HEALTH Update – July 2004

Many employers feel that the scales are currently weighted against them with an ever-increasing cascade of legislation in the realms of health and safety and employment law. The situation can often feel confusing and very complex. We hope that the issues that we have tackled below give you some clarity on this difficult subject. We have attempted to address the basics on the understanding that if we can get these right then we can move on having achieved a good foundation with regards to our decisions.

The Employers ‘Duty Of Care’ – The Reasonable Man

In the UK we have a legal system that encourages adversarial combat, and this further encourages employees, particularly in the current practice of ‘no win no fee’ actions, to rub salt into employers’ wounds. In addition, the employer often has to deal with the Health and Safety Executive and other sanctions.

Current health and safety legislation requires that the employer must undertake their ‘duty of care’ and this is described as a ‘reasonable duty of care’. What is reasonable you may well ask. In legal terms, reasonable is what would be undertaken by a reasonable man on the Clapham omnibus. I am not sure whether they have omnibuses in Clapham anymore, but certainly this is meant to underline the issues of:-

1. Foreseeability;
2. The state of current knowledge;
3. The behaviour of a ‘reasonable’ employer. This is illustrated by a 1950’s case *Stokes -v- GKN*, which we will look at later.

The key is a risk assessment undertaken by a competent individual. Competence in legal terms is in fact defined in health and safety legislation. A competent individual is one who has undergone training in a particular area of expertise, who has experience within that area of expertise and may have a qualification. The role of the risk assessment is to identify:

1. Likelihood;
2. Seriousness;
3. Obviousness;
4. Incumbent risk factors;
5. Assesses the cost of reducing the risk.

The Principle Of Terminating An Employee's Contract To Maintain Their Own Health, Safety And Welfare

This is a difficult decision that is frequently faced by employers. Current health and safety legislation is becoming increasingly stricter and specific, and employers find themselves in almost impossible situations where from time-to-time employees develop health issues that may well be exacerbated by the work that they are required to do.

The case of *Coxall -v- Goodyear* confirms that an employer is able to terminate an employee's Contract of Employment in order to maintain their own health, safety and welfare while at work. In this case the employer was in fact found liable because the employee was not dismissed when the medical evidence advised it.

The case of *Bolam & Friern (1957)* goes on to underline the requirement for the employer to act in accordance with established medical practice and to make themselves aware of what such established medical practice is.

The Behaviour Of A Reasonable Employer

Employers are now having to deal with difficult issues such as work-related stress. There have been a number of Court of Appeal Judgements that have made this whole area quite confusing.

In April 2004, the case of *Barber -v- Somerset County Council* set out the Court of Appeal's Guidance on an employer's duty in respect of work-related stress. This case referred to a previous case of *Hatton -v- Sutherland*, which set out a sixteen-point guidance for employers requiring them to make complex decisions about stress, including the controversial suggestion that employers may relieve themselves of responsibility with regards to stress in the workplace by offering a counselling service. However complex the recent Court of Appeal Guidance has become, both of the above cases reiterate the traditional criteria applied to occupational health, and particularly to employers' liability, that of the behaviour of a 'reasonable' man - this mythical man on the Clapham omnibus. A key case is the *Stokes -v- GKN* case of the 1950's.

Mr Stokes died from cancer of the scrotum caused by machine oil soaking through his overalls. Machine oil contains hydrocarbons, which are a well known and well documented cause of scrotal cancer. The Company Doctor at the time was aware of the dangers of machine oil, because another employee had died of scrotal cancer at GKN some years previously. The behaviour of a reasonable employer centres around the crucial question of what indications of impending harm are sufficient to create a duty on the employer to take steps to prevent it. Again there are no specific rules or regulations and it comes down to the behaviour of a reasonable employer.

Occupational Health Staff Can't Get You Off The Hook – The Importance Of The Personal Risk Assessment – Paul -v- National Probation Service (EAT)

This is a pre-employment case centring around the Disability Discrimination Act 1995. Mr Paul was not confirmed for a post with the National Probation Service because his pre-employment questionnaire indicated that he had a history of psychiatric illness and this was confirmed with the General Practitioner's report obtained by an Occupational Health Nursing Advisor.



Mr Paul appealed to the Employment Tribunal and the decision of the National Probation Service was upheld. Mr Paul took his case to the EAT. The EAT took the view that Mr Paul had been treated less favourably on the grounds of his disability, in that he had been refused employment because of the medical assessment and overturned the decision of the Employment Tribunal. The EAT took the view that the Employment Tribunal should have considered whether the National Probation Service failed to take reasonable steps to prevent Mr Paul being disadvantaged; for example could Mr Paul have been gradually introduced into his role? Could he have been given extra support or extra training or extra supervision?

The EAT considered that the National Probation Service had not examined the means of preventing such disadvantages.

The EAT referred to the Code of Practice issued under s.53(6) of the Disability Discrimination Act, and also consider the case of *Ridout -v- TC Group*, which also stressed the importance of the code. The EAT noted that in cases involving a risk assessment the Disability Discrimination Act 1995 did not confer upon tribunals a general power to decide whether an employer's assessment of that risk was correct (*Post Office -v- Jones*). Where the risk assessment is properly conducted and not merely an assertion of reasonableness, the Employment Tribunal cannot substitute its own views of medical evidence if the reason advanced by the employer is both material and substantial. Mr Paul argued that the tribunal had failed to consider the Code of Practice of the Disability Discrimination Act or make reasonable adjustments. This was because the tribunal had incorrectly identified the "arrangement", which was the satisfactory occupational health assessment, as being compatible with an appropriate risk assessment.

Conclusions & Comments

- Advice from an occupational health expert simply that an employee is unfit does not mean that the employer's duty of care to make reasonable adjustments had been waived. The occupational health advice has to be competent. The reports from the medical practitioners concerned again have to be competent and appropriate. In the case of Mr Paul the report was from a General Practitioner who had very little contact with the patient. Mr Paul was under the care of a Psychiatrist. The EAT indicated that the Psychiatrist's report would have been a more appropriate route.
- The EAT confirms the fact that it is the occupational health specialist who determines fitness and went on to confirm the responsibility of the employer's management in properly conducting a risk assessment.

The pre-employment process, particularly in complying with the Disability Discrimination Act, is therefore in two parts; firstly for the employer to use a competent occupational health service to identify issues; secondly to properly conduct a detailed personal risk assessment to identify reasonable adjustments to the post to comply with the Disability Discrimination Act. This case emphasises the importance of ensuring that risk assessments are properly conducted and it argues that if they are not tribunals are entitled to substitute their own view of medical evidence (*Post Office -v- Jones*).

