#84 HR Newsletter May 2016: Staff Handbooks & Policies

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Training Learning Impact

Are staff handbooks (or policies) contractual?

…and, more importantly, do you therefore need employees' permission to change then as you would their contract of employment?

A recent decision by the Court of Appeal provides a "helpful summary" of the circumstances in which employment terms set out in separate documents should be considered incorporated into employee's contracts, according to an employment law expert.

The appeal court upheld the High Court's finding that an absence management policy set out in a staff handbook formed part of the employment contract, and also set out the principles which should apply where the terms of documents at issue in similar cases in the future were unclear, Edward Goodwyn of Pinsent Masons, the law firm, said.

Goodwyn said that both employment lawyers and HR professionals were often asked to advise on whether employees had contractual rights to issues such as enhanced redundancy payments, defined benefit pensions or particular disciplinary procedures, which were sometimes referred to in 'handbook'-type documents rather than employment contracts.

"The employment relationship is governed by all manner of things including contracts, particulars of employment, policies, codes, offer letters and handbooks," he said. "Well-drafted documents will make it clear which parts of these documents are contractual and which are not. However, this is not always the case."

"Ultimately, the issue will turn upon the precise terms of the particular documents in each case. Where these are unclear, it is the contractual intention of the parties at the time that they entered into the contract which must be determined; and where the intention is not conclusive, the contractual intention is to be ascertained by inference from the other available materials," he said.

The Department of Transport (DfT) had appealed against a finding that an absence management policy had contractual effect. The policy prevented managers from taking disciplinary action against employees for frequent short-term sickness absence until a 'trigger point' of 21 days' absence in any 12-month period had been reached. The High Court's ruling affected seven employees all working for different 'agencies' within the DfT, each of which used slightly different versions of the handbook.

Upholding the High Court's judgment, the Court of Appeal confirmed that the policy was "apt for incorporation into the contract between employer and employee". It found that

wording used in the handbook which referred to "terms and conditions of employment relating to sick leave" and "management of poor attendance" had "a distinct flavour of contractual incorporation while, of course, preserving the question as to the aptness of any provision to incorporation".

"It seems to me that the introductory words to which I have referred above and the terms of the provision itself indicate that it is designed to confer a right on employees over and above the good practice guidance in the policy section of the handbook," said Lord Justice McCombe, giving the judgment of the court.

What does it all mean?

In your handbooks and policy documents, you must make clear that they are **"non-contractual"** by placing such a statement at the head of each separate policy or in the introduction of your handbook

This might not guarantee 100% exemption in a court ruling from a finding against you, but it will get you a long way down the road to winning.

(Extract from Pinsent Mason on line)