

EMPLOYMENT REVIEW

Supporting you and your business



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Managing a Redundancy or Restructuring Strategy

With fears of an economic recession looming, one of the many unfortunate side effects for businesses is the prospect of having to restructure and make redundancies. In turn stressful, painful and demoralising for those involved, the mere utterance of the word “redundancy” also has the potential to have a devastating effect on morale, motivation and the general effectiveness of the business operations.

For many employers it may be the first time that they have considered making staff redundant. For HR staff it may be the first time they have to devise and implement the process. There is therefore the risk that those facing difficult decisions for the first time, will be unaware that they have to follow fair redundancy procedures to avoid unfair dismissal claims being successfully brought by employees.

Furthermore, the effects of badly managing a redundancy exercise can be far reaching in terms of adverse publicity and the negative impact on corporate branding.

Crucially, there is also the very real risk of legal proceedings, if dismissals are not handled fairly.

For any dismissal to be fair, the employer must not only have a fair reason for dismissal - in this case a genuine redundancy situation - but must also act reasonably in treating it as a sufficient reason for dismissal.

The keys to a fair redundancy dismissal are “meaningful” consultation and the requirement to offer any suitable alternative employment. If the employer is part of a group of companies, the search for alternative employment should be group wide, and the employer should not make the mistake of “assuming” that a potentially redundant employee will not accept a job that involves less pay or demotion. The employer must also consider any alternatives to dismissal, such as part-time working, job sharing or other cost-cutting measures. In any event the whole purpose of consultation is to explore proposals as an alternative to redundancy, and if the whole process takes less than one week, it is probable that a tribunal would rule that “meaningful” consultation had not taken place.

The employer should seek to give as much warning as possible of an impending redundancy situation and, even where the collective consultation rules do not apply – i.e. where there are less than 20 redundancies being considered – it will add to the fairness of the procedure to notify and consult with any relevant employee or union representatives, sooner rather than later.

Where the position to be made redundant is stand alone, in theory selection criteria will not apply. However where it is necessary to select individuals from a group, the employer should establish criteria for selection for redundancy and apply those criteria fairly. Criteria should be objective and not depend solely on the opinion of the individual making the selection. They could include factors such as skills, efficiency, experience, disciplinary and attendance records - although care must be taken when using attendance records not to discriminate on grounds of disability.

This bulletin provides a precis of the main points to consider. However it is not possible to include all the factors that require consideration when contemplating a downsizing exercise, but we do offer comprehensive on or off site support to employers. Our consultants have considerable experience of actively managing redundancy programmes, working with clients at all stages of the re-organisation process.

Key areas of focus are:

- **Establishing the genuineness of the redundancy**
- **Assessing the viability of potential alternatives to redundancy**
- **Communication – managing what, when, how and to whom information is relayed**
- **Consultation – collective or individual**
- **Selection - identifying appropriate 'pools' for selection and helping to ensure a fair process is adopted and applied**
- **Fall Out - Managing Appeals and defending any Employment Tribunal Claims**

For further advice or assistance, please contact us in confidence on the number below.

Ambiguous Resignations

Many of our advice calls follow situations in the workplace where tempers have flared and people have reacted hastily. So what should an employer do when an employee walks out after an argument with his boss?

Q If an employee resigns after an argument with his Manager, should the Company accept the resignation at face value?

A It depends on the way in which the resignation was given and whether the words or actions of the employee were ambiguous. If the resignation was in the heat of the moment, the employer would be advised to allow a cooling-off period to ascertain if the employee really meant to resign. This would normally be only a day or two, but it will depend upon the individual circumstances. If the employer fails to allow a cooling-off period and immediately accepts the resignation, then a tribunal could conclude that the employee had not resigned, but was dismissed by the employer.

Q What happens when an employee's resignation is ambiguous?

A If an employee storms out after an argument saying "I've had enough" – or worse - it is usually unclear as to whether or not they have actually resigned. In determining what the employee meant, it is necessary to consider the circumstances and what led to the actions that the employee took. If the employee fails to contact the employer, the employment will usually be considered to continue until the employee is dismissed or expressly resigns.

Q What happens if the words or actions of the employee during the argument were inappropriate and unacceptable?

A There may be situations where the conduct alone is sufficient to amount to a resignation, but if not, and the employee is to remain in employment, the employer may have to consider taking disciplinary action.

Q Can the employee withdraw a resignation in these circumstances?

A The employee does not have the right to unilaterally withdraw any resignation once given. The employer can consider any such request made by an employee, and depending on the circumstances, may decide to agree to the employee withdrawing their resignation. However, as indicated above, caution should be exercised if the employee has resigned in the heat of the moment – possibly suggesting they don't really want to leave their job.

Q What if an employee who is not particularly valued wants to withdraw their resignation?

A There is no additional requirement on an employer to allow an unpopular employee to retract their resignation. The rules that are set out above will still apply.

Q Should the employer allow a cooling-off period following any resignation?

A Usually not. An employer can safely accept a resignation, without being expected to give the employee time to think about it. The contract of employment should specify what notice is to be given, in what format, and to whom it should be delivered. Where an "angry" resignation is involved, and the resignation is given verbally, the prudent employer will always confirm acknowledgement of the resignation in writing.

Q Could a resignation given in the circumstances described above, have an impact on an employee's references?

A Any reference provided by an employer should be accurate, fair and not misleading. It would be acceptable to state in these circumstances that the employee simply resigned.

Q What if the employer does not want the employee to resign?

A Just as the employee cannot voluntarily withdraw a resignation he cannot be made to retract it either. The most difficult situation is where an employer is relieved that an employee has resigned, but the employee wishes to retract the resignation. Provided the resignation was unambiguous and there are no special circumstances as described previously, the employer is free to refuse to agree it to being withdrawn. Even if the employee were able to retract the resignation, there may be a question as to whether the nature of the argument may have made it impossible for the working relationship between the employee and the Manager to continue. There may also be the question of disciplinary action.

Forthcoming Legislation Changes

National Minimum Wage increases

The **National Minimum Wage** increases take effect from 1st October 2008. The new rates are as follows:

Workers aged 22 and over	-	£5.73 per hour
Workers aged 18 – 21	-	£4.77 per hour
Workers aged 16 and 17	-	£3.53 per hour

Distinction between ordinary and additional maternity leave to be removed

Following the publication of the draft **Maternity and Parental Leave and the Paternity and Adoption Leave(Amendment) Regulations 2008**, women whose expected week of childbirth begins on or after 5 October 2008 will have the right to the same terms and conditions during additional maternity leave as they currently enjoy during ordinary maternity leave.

Time off for Training

The **Education and Skills Bill**, which has recently completed the committee stage in the Lords, would (if enacted) oblige employers in England and Wales to release young people for education or training, and check whether a young person is participating in education or training before employing them. This is likely to come into effect by the end of 2008.

Repeal of Statutory Dispute Resolution Procedures

The **Employment Bill** will repeal the statutory dispute resolution procedures and implement a package of replacement measures to encourage early/informal resolution via ACAS. This is likely to be implemented in April 2009.

Statutory Holidays

From April 2009, the statutory minimum paid holiday entitlement will increase from 4.8 to 5.6 weeks (24 to 28 days for those working a five-day week).

Government consults on flexible working

The Government has launched a consultation on ways of helping businesses deal with flexible working requests, following its announcement that the right to request flexible working will be extended to parents of children aged 16 and under.

Tips paid through payroll to be excluded from the national minimum wage

Changes are to be made to the national minimum wage legislation so that tips can no longer be used to 'top up' staff wages to meet the statutory minimum rate. The change is anticipated to take place in 2009. Consultation on implementing measures will be undertaken in autumn of this year and will be followed by guidance for both employers and employees.

Currently, tips and gratuities given directly to workers by customers do not count towards discharging the employer's liability to pay the minimum wage. However, where cover charges, service charges, tips and/or gratuities are paid by the employer to the worker via the payroll, the tip can count towards the minimum wage. The proposed changes will stop employers using gratuities and service charges processed in this way to 'top up' staff wages to meet the minimum hourly rate.

New Whistleblowing guidance urges businesses to update their policies

New guidance on whistleblowing has been issued by the British Standards Association and 'Public Concern at Work'.

Although it is 10 years since the Public Interest Disclosure Act was passed, recent research suggests that only 40% of employees in UK businesses feel comfortable reporting misconduct on the part of colleagues or superiors.

Whistleblowing is now seen across both private and public sector organisations as an essential element of risk management. By implementing a sound whistleblowing policy in the workplace, employers can resolve issues they previously were unaware of - thus increasing business efficiency and productivity - and possibly helping to combat crime and fraud.

Organisations that follow the new Code of Practice stand to benefit in a number of ways, including:

- Deterring wrongdoing
- Demonstrating to stakeholders and regulators that they are accountable and well managed
- Reducing the risk of anonymous and malicious leaks
- Minimising costs and compensation from accidents, investigations and litigation

According to Mike Low, Director of BSI British Standards, "Every organisation faces the risk of something going wrong. Rather than shying away from whistleblowing, good organisations know that allowing employees to raise issues in a supportive environment brings real benefits."

For assistance with developing a Whistleblowing Policy, please contact us on the number below.



Case Law Update

We are continually looking to ever-changing case law in order to interpret key points of legislation, particularly in relation to new legislation, so that we can identify the impact on employers.

Coleman v Attridge Law and anor, European Court of Justice

ECJ rules that discrimination by association is unlawful

Background

The EC Equal Treatment Framework Directive sets out a framework for eliminating inequalities in employment or occupation based on any of the following grounds - religion or belief, disability, age and sexual orientation - and requires Member States to introduce

laws outlawing discrimination on those grounds. In the case below, the European Court of Justice considered whether the disability provisions of the Directive protect employees who suffer discrimination owing to their association with a disabled person.

Mrs C had been employed by AL since January 2001. She was the primary carer for her son, who was disabled within the meaning of the Disability Discrimination Act 1995. In March 2005, she accepted voluntary redundancy and subsequently brought an unfair constructive dismissal claim and claims under the DDA based on various allegations of harassment and less favourable treatment. She alleged that the discriminatory treatment included refusing to allow her to return to her existing job after coming back from maternity leave; calling her 'lazy' when she sought to take time off to care for her son; refusing to give her the same flexible working arrangements as her colleagues with non-disabled children; and alleging that she was using her child to manipulate her working conditions. Mrs C argued that she had suffered discrimination by association with her son's disability.

Decision

In determining whether Mrs C was entitled to bring a DDA claim based on association with a disabled person, the tribunal held that on literal reading the DDA did not cover such discrimination. However, the tribunal thought that the Directive suggested that Mrs C's treatment should be covered and decided to stay proceedings and refer the question to the ECJ as to whether the Directive only protects persons who are themselves disabled.

AL appealed against the tribunal's decision to make a reference to the ECJ, arguing that whatever the true interpretation of the Directive, it was not possible to construe the DDA in such a way as to cover associative discrimination. The EAT disagreed and held that the reference to the ECJ should accordingly go ahead.

The ECJ held that associative discrimination fell within the Directive's protection. The principle of equal treatment enshrined in the Directive does not apply to particular types of person, but to the particular grounds of discrimination set out in Article 1. To this end, it is not limited to people who themselves have a disability.

The ECJ went on to say that the objective of the Directive – to combat discrimination on certain grounds – would be undermined, and the Directive's protection greatly reduced, if a claimant in Mrs C's situation could not claim direct discrimination. The Court went on to say that in line with the usual burden of proof rules, if Mrs C could establish facts from which it could be presumed that there was direct discrimination or harassment, then the burden would pass to AL to refute the allegation of discrimination by showing a reason for the treatment unrelated to disability or to Mrs C's association with a disabled person.

This case will now return to the tribunal for it to determine whether, on the facts of the case, Mrs C was actually discriminated against and harassed by her former employer on the ground of her association with her disabled son.

Comment

Employers will need to be wary of associative disability discrimination, as workers could claim unlimited discrimination damages from their employers because of their association with people covered by a range of equality laws. The case could have huge ramifications, not just for carers, but for employees connected to people covered by other discrimination laws, such as sexual orientation, religion and age.

The ECJ's decision, however, was limited to direct discrimination and harassment, and does not address whether indirect discrimination can be by association with a disabled person. Nor does the case mean that the DDA must be interpreted as imposing a duty upon employers to make reasonable adjustments, such as making changes to hours or place of work, to accommodate the needs of employees who care for disabled people. The ECJ stated that "such measures are designed specifically to facilitate and promote the integration of disabled people into the working environment and, for that reason, can only relate to disabled people."

London Borough of Lewisham v Malcolm

House of Lords overturns decision on Disability-Related Discrimination

A long-standing authority on how to decide claims for disability-related discrimination has been overturned by the House of Lords making it harder for employees to succeed in such claims.

One of the more complex matters under the Disability Discrimination Act 1995 is identifying an appropriate comparator for cases of disability-related discrimination. In *Clark v TDG Ltd t/a Novacold* 1999 the Court of Appeal held that the comparator need not be 'in the same or similar circumstances' as the disabled complainant. Thus, an employee dismissed for sickness absence arising from a disability would be compared with a person who has not been absent from work (and who would not have been dismissed) rather than a non-disabled person who has also been absent. Establishing less favourable treatment is therefore relatively straightforward.

But the House of Lords has recently taken a very different view of the comparative exercise required by the DDA and the consequences of this are potentially dramatic.

Comparator test overruled

In a recent housing case - **London Borough of Lewisham v Malcolm** – it was found that a schizophrenic tenant of a council flat who sub-let the premises was not discriminated against when the local authority sought possession of the flat. Their Lordships considered a number of matters pertaining to the DDA, but it is their findings on the correct comparator which are of the greatest significance. By a majority they concluded that *Novacold* was wrongly decided. Instead, the correct approach was to compare the treatment of the complainant with that of a non-disabled person who is otherwise in the same circumstances – i.e. a tenant who had also sub-let his flat, but who was not disabled.

Their Lordships made it clear that the concept of disability-related discrimination must be interpreted consistently across the Act. As a result, this case will be binding in cases of disability-related discrimination in employment under S.3A.

Implications

Although this is a housing case, the decision has far-reaching implications in the employment context. Employers will now have more freedom to dismiss absent disabled employees, even if the absence is disability-related, so long as they can show that a non-disabled employee with the same level of absence would have been treated in the same way.

Tribunals will now be obliged to apply the stricter comparator test in S.3A claims, meaning that claimants will rarely clear the initial hurdle of showing less favourable treatment. In practice, we expect more claimants will frame their complaints in terms of failure to make reasonable adjustments under S.6. So, an employee dismissed following prolonged disability-related sickness absence might argue that it would have been a reasonable adjustment to discount any disability-related absences.

Health and Safety

DRIVING AND DISTRACTIONS

A leading barrister has warned that new tougher offences allowing the courts to imprison drivers who cause death by careless driving could lead motorists caught up in such incidents to blame their employer.

Under new Road Safety Act laws, which came into effect on 18th August 2008, drivers who kill while distracted by carrying out an **avoidable activity** at the wheel could face up to five years imprisonment.

Activities described as avoidable distractions include:

- Calling or texting on a mobile phone
- Drinking and eating
- Applying make up

Previously, the maximum sentence for those convicted of causing death by careless driving was a £5,000 fine and licence penalty points.

The threat of a long prison sentence could now tempt motorists charged with such an offence to deflect responsibility onto another party – and employers could be the first they blame. “Blaming employers for causing them to hurry, make business-related phone calls, or drive when tired may all figure in future cases” warns barrister Kevin McLoughlin.

Employers should review their driving policies to ensure they contain clear statements of principle in relation to observing Road Safety Laws. For further assistance please contact us on the number below.

STUMBLING, FALLING AND SLIPPING.

With specific reference to the increasing number of injuries caused by stumbling, falling and slipping incidents, the Health and Safety Executive are currently undertaking the ‘Shattered Lives’ and ‘Watch Your Step’ campaign.

Falling over at work can often be seen as being funny, but it’s not so funny if you are the person who fell. This type of injury can account for over 11,000 major workplace injuries per year.

The vast majority of stumbling, falling and slipping 'accidents' are preventable. With a little thought the risks can be reduced.

- Wet, dirty or dusty floors – should be dried and/or cleaned
- Damaged or uneven floors –should be repaired
- Obstacles or obstructions should be removed as a matter of course
- Colleagues and employees should be trained in safe working practices

It's easy and cost effective to prevent accidents and there are a number of things employers can do to help make the workplace safer.

For assistance with implementing proper management systems and carrying out risk assessments please contact us on the number below.



Right to Reply

If you have any comments or feedback regarding this newsletter or would like to highlight a specific topic you would like covering in our next issue, please e-mail the details to us. If there are other individuals in your organisation who you feel would benefit from receiving future newsletters, please forward the details to the e-mail address below.

EML's consultants are on hand to assist you and provide a tailor made service to support your organisation in effectively managing human resource or health & safety issues. Please contact any of our consultants on the contact number below if you would like to discuss any specific problem.

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