

LEGAL ALERT

EMPLOYMENT NEWSLETTER

THE NEW DISMISSAL PROCEDURES - ARE THEY WORKING?

All employers are hopefully now aware that the termination of employment suddenly became a lot more technical from October 2004. By way of brief reminder any employer contemplating dismissal must:

- inform the employee in writing of his considerations and invite him to a meeting to discuss
- hold a meeting
- give the employee a right of appeal and a further meeting

A failure to do so results in an automatically unfair dismissal and an uplift of up to 50% in any compensation awarded.

Employees in certain circumstances must raise a grievance before bringing a Tribunal complaint and this triggers further obligations on employers to react appropriately.

Early evidence is that the number of cases going to Tribunal has dropped significantly - which is the result the Government hoped for with these new procedures.

However, there are also indications that this may be because employers are having to settle cases quickly where they have slipped up in failing to follow the procedures and find they have no defence to a claim. We are certainly seeing a lot of that. This is particularly depressing where the employer may well have had a sound basis for dismissal but has omitted to write a "Step 1" letter or hold an adequate meeting with the employee.

One trap is that the procedures are not limited to misconduct dismissals. They need to become second nature in all dismissal situations.

Another, common mistake is to fail to spot when an employee is raising a grievance or to assume the issue has already been dealt with.

Often a few minutes advice would keep employers on the right track and prevent them from falling at the first hurdle.



HOLIDAY PAY - ALL CLEAR?

Something as fundamental in employment as holiday pay ought to be straightforward. Unfortunately, it isn't.

The case of **Kigass Aero Components Limited - v- Brown** had previously allowed employees off work due to sickness to designate part of their absence as paid holiday when entitlement to receive salary had otherwise run out.

The recent Court of Appeal case of **Ainsworth** has put a stop to that and also states that an employee absent during the holiday year has no right to a payment for accrued but untaken holiday on the termination of employment.

However, this case has its limits. It does not say that holiday entitlement no longer accrues during sick leave so that an employee returning to work following sickness absence has lost his entitlement. Nor does it satisfactorily deal with employees who

have been absent for only part of a holiday year on termination. Some reports in the media are over optimistic and caution is still required in this area.

Also, some employers regard an element of the employees' hourly rate as representing pay due for periods of holiday. There have been conflicting authorities on whether "rolled up" holiday pay satisfies the right to take paid holidays introduced by the Working Time Regulations 1998. The current position is that in England this is lawful provided there is an agreed and genuine addition to the rate of pay, the amount allocated to holidays is clearly identified and the employer keeps records of holidays taken. However, the Employment Appeal Tribunal in Scotland has come to the opposite conclusion and this issue still remains to be resolved.

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EMPLOYMENT STATUS OF AGENCY WORKERS

One of the prime attractions for many of engaging workers through an agency is that the worker will not be regarded as their or indeed anyone else's employee. Only employees enjoy full employment protection rights.

The Courts are, however, showing an increased willingness to imply the existence of a contract of employment between the worker and the end user including in cases where the worker has a contract clearly stating that he is neither an employee of the agency nor the client.

This appears at odds with established principles and creates significant uncertainty for "employers" who wish to dispense with the services of a particular agency worker. Should they then follow the statutory dismissal procedures and ensure that they could defend any unfair dismissal claim?

In one case there was said to be an "inexorable inference" that a contract of employment had arisen once a temporary worker had been working for a year or more.

It is unfortunate that the Courts are extending rights to workers on a case by case basis where the Government has thus far refused to do so.

SEX AND RELIGION

We are now starting to see reported some of the first cases brought under the recently introduced protection for employees against discrimination on the grounds of religion and sexual orientation

Sexual Orientation

A gay employee has succeeded in a claim where his manager referred to him as a "chutney ferret". The employee had not heard the remark himself but was told what had been said about him by a colleague. This was sufficient to violate his dignity at work.

In another case a gay employee was subjected to ridicule and derogatory comments from colleagues. The employer was found not to have taken the issue seriously despite being aware of the workplace culture which existed. They ought to have taken action despite the fact that the employee had asked them not to do so.

Religion

In *Williams-Drabble -v- Pathway Care Solutions Limited* a new rota was imposed on social workers requiring Sunday working. W-D was a practising Christian who habitually attended the local church's Sunday Service. W-D resigned rather than work Sundays. In the absence of any justification by the employer for imposing this requirement on W-D, she succeeded in a claim of discrimination on the grounds of her religion.

In a subsequent case a Muslim employee asked if he could take his 25 days annual holiday and another weeks unpaid leave to make a pilgrimage to Mecca. The employee took his leave (with the employer's apparent acquiescence) but was dismissed on his return. He also succeeded in a claim.

Both decisions remind employers that they need to consider requests to accommodate religious needs seriously, including where they might involve adjustments to working patterns

CAUTION ON COMPROMISE AGREEMENTS

Many employers take advantage of the ability to protect themselves from Employment Tribunal Claims by means of a Compromise Agreement. Usually this involves a payment to the employee and for such agreement to be valid the employee must be advised by an independent solicitor.

Employers in these circumstances quite reasonably expect the agreement to draw a line under any possible disputes. Indeed, it is standard to see a clause stating that the agreement is in "full and final settlement".

Unfortunately, the Court of Appeal in the case of *Hinton -v- University of East London* highlights the potential pitfalls with that approach.

In particular, to be effective, the agreement must focus on the particular claims which are intended to be settled. It is also recommended that standard form agreements are to be avoided. Where the agreement sets out a brief factual background and a legal description of the claims being compromised, it is much less likely to be successfully set aside by employees who decide to take the money but bring a claim anyway.

INCREASE TO NATIONAL MINIMUM WAGE

From 1 October 2005 the National Minimum Wage for workers aged 22 and over has risen to £5.05 per hour with a further rise proposed in October 2006 to £5.35.

The rate for workers aged 18 – 21 increases to £4.25 (£4.45 from October 2006).

The rate for workers aged 16 and 17 remains at £3.

AGE DISCRIMINATION - TIME TO GET READY

The Government has published draft Regulations which set out the scope of this new protection for all employees.

Undoubtedly, the new rules will involve a fundamental change in the way age is currently used as a consideration in employment decisions including recruitment, access to training, promotion and dismissal.

- **New default retirement age of 65**
- **Employers will have a duty to consider requests to work beyond the retirement age**
- **No upper age limit for unfair dismissal**
- **"Ageist" harassment will be unlawful**
- **Changes to calculation of statutory redundancy pay**
- **Insurance benefits must not be denied on the grounds of age (unless justified)**

Discrimination on the grounds of age may be defensible if an employer can justify that he is pursuing a legitimate aim. The Regulations lists a number of situations where discrimination may be legitimate. These include:

- **Health & Safety**
- **Facilitating employment planning**
- **Particular training requirements**
- **Encouraging and rewarding loyalty**

Protection applies to employees of all ages but the most controversial area is likely to be enforced retirement of those aged 65 or over.

Currently employees are unable to claim unfair dismissal if they have reached the age of 65. This exclusion will no longer apply. Instead, retirement at the default age of 65 will be a fair dismissal only if the retirement is a genuine

retirement and the employer has followed the duty to consider an employee's request to continue working.

If the employee believes dismissal was for other reasons he will be able to challenge the retirement as being an unfair dismissal. An employer will be in a stronger position in the case of a planned retirement with the employee under a heavy burden of proof if he wants to show an ulterior motive. For these purposes a retirement is planned if it takes effect at the age of 65 or if the employer has informed the employee of the retirement date at least six months in advance.

Indeed, employers will have to notify employees of impending retirement at least six months before retirement is due. At the same time they must also notify employees of their right to request to continue working longer. A failure to comply with these obligations can result in an award of up to eight weeks' pay.

If an employer fails to notify he has an ongoing duty to do so until two weeks before dismissal. If he fails to do so the dismissal will be automatically unfair!

The procedure to be adopted for considering requests to continue working beyond the retirement age is similar to that already in place in respect of requests for flexible working from employees with young dependent children.

Employers need to plan now for the changes particularly since there will be no transitional period and it is envisaged that the new procedures will apply to retirements from October 2006 onwards. Employers will shortly therefore be in a position of having to properly notify employees of pending retirement decisions.

These are clearly further significant burdens and technical requirements many employers will feel they could do without.

CHANGES IN DISABILITY DISCRIMINATION

In December 2005 a new Disability Discrimination Act will significantly widen the scope of those protected by the legislation and make it easier for workers to show that they fall within the definition of a disabled person. For example:-

- Many people with cancer, multiple sclerosis and HIV will be automatically "deemed" to be disabled from the point of diagnosis. Currently there is a need to prove that such conditions are of a particular progressive nature.
- The legislation currently covers those with mental illnesses only if they are clinically well recognised. This requirement is to be removed reflecting the fact that many people with quite serious mental illnesses may not have a clear diagnosis.

These changes follow previous extensions to the legislation to catch now all employers regardless of their size - previously only those employing more than 15 workers were covered.

In addition, there is a new offence of discrimination if a person suffers a detriment because of the fact of their disability rather than any consequences flowing from it, for example, in terms of how they can work. In such cases of "direct" discrimination there is no defence of justification available to the employer.

A specific offence of harassment on the grounds of disability has also now been created.

WORKING HOURS - 48 HOUR OPT-OUT PRESERVED

The ability of UK workers to agree to work beyond an average of 48 hours per week has been preserved. An interesting alliance of the UK, Germany, Poland, Austria and Hungary succeeded in blocking proposals in Europe for the scrapping of the "opt-out".

RIGHT OF ACCOMPANIMENT

In *Skiggs -v- Southwest Trains* it was confirmed that an employee did not have the right to be accompanied at a meeting held to investigate a formal grievance raised against him. The meeting was not a disciplinary hearing to which that right applied, even though it could have led to disciplinary proceedings.

Where the right does apply the law has been amended to make it clear that the companion has the right to put forward an employee's case and make submissions. The ACAS Code recommends as good practice allowing the companion to take as full a part as possible. He may not, however, answer questions addressed to the employee or interfere with an employer's ability to state its own case.



EMPLOYMENT PROTECTION SCHEME

Rollits' Employment Protection Scheme ensures you get specialist advice backed up by the security of insurance which covers:

- Employment Tribunal awards and settlements up to £100,000 for any one claim
- Your legal costs

The Scheme is extremely flexible and can be tailored exactly to your particular requirements. Some businesses, for example, are unable to withstand significant unbudgeted costs. Others may simply want to eliminate the risk of a "catastrophic" award. Larger businesses may want a solution which caps their employment spend.

You can choose to:

- Insure against awards and costs
- Insure awards only
- Vary the excess - for example £500 or £10,000

The level of premium reflects the type of cover chosen. Claims arising out of a specific TUPE transfer whether on the acquisition of a business or award of a services contract can also be covered.

Please contact Neil Maidment on 01482 323239, email neil.maidment@rollits.com if you would like any details or to obtain a quote.



SEXUAL HARASSMENT DEFINED

There is now for the first time a clear statutory offence of sexual harassment as a distinct category of sex discrimination.

The new definition recognises that unlawful harassment can occur both when someone "dislikes" or treats an employee less favourably because of their sex as well as when, for example, an employee actually pursues a woman because he is sexually attracted to her.

As a result, unwanted conduct violating a person's dignity or creating an offensive or humiliating environment will be caught when the conduct is either on the grounds of sex or of a sexual nature.

The intention of the harasser is not relevant. However, there has been some attempt to deal with the over sensitive complainant who takes offence unreasonably at a perfectly innocent comment. If the complainant's perception is unreasonable there will be no harassment although it must be said that this is unlikely to come to an employer's aid in many circumstances.

MATERNITY LEAVE AND BONUSES

It is not always clear whether an employer must pay a bonus to a woman who is on maternity leave. A case involving **ASDA** has given some recent guidance. The position can be summarised as follows:

If a bonus constitutes pay for work already done it cannot be withheld on grounds that the woman is on maternity leave at the time of payment.

A contractual bonus can be pro rated to reflect periods of maternity leave (except in respect of the two week compulsory maternity leave period).

Uncertainty remains with regard to discretionary bonuses and employers might be wise to pay such bonuses in full.

NB Tribunals will look behind the label used to describe a bonus scheme. Simply terming one as "discretionary" or "non-contractual" does not guarantee it will be regarded as such.

INFORMATION

If you have any queries on any aspect of employment law please contact:
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