BBi Alternative Solutions
Health & Safety : Human Resources : Training : Risk Management

Human Resources - August 2008

RISE IN "AGE CLAIMS" PREDICTED AS REDUNDANCIES START TO RISE

In the three months to June, the number of people over 50 and in employment dropped by 9000 whilst no other group over the age of 25 experienced such a drop. Over the same period, the number of redundancies rose by 14,000.

The Age and Employment Network (TAEN) has seized on these figures. Chris Ball, the chief executive of TAEN, said: "As we suspected, with the job market turning down and employers shedding staff, it appears to be older workers and particularly older women who are bearing the brunt of many lay-offs"

As we all know, any age discriminatory features by which individuals are selected for redundancy will be unlawful unless they can be objectively justified and are deemed to be proportionate. But even so, TAEN thinks that age discrimination will still bias redundancy decisions.

"Even though the Age Regulations mean that using an individual's age as the basis for selection for redundancy is likely to be unlawful, it is the way that many employers have traditionally tackled the task when they have needed to cut staff numbers" commented Ball,

"Employers need to remember that employment tribunals can award uncapped compensation in respect of any successful age-discrimination claim. And, even though we have not seen the explosion of claims that some employment lawyers and business organisations were forecasting before the legislation came into force, we do expect the numbers to rise as more redundancies occur."

HUMAN RESOURCES - SUPPORTING YOUR BUSINESS

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EMPLOYERS URGED TO SEEK LEGAL ADVICE BEFORE EMBARKING ON REDUNDANCIES

In a recent CIPD survey of 1,200 firms, the number of employers planning redundancies increased from 22% to 27% between the second and third quarters of this year.
These findings made sobering reading and its important that employers take a careful planned approach to redundancy.
Consideration should be given to full staff meetings and consulting with elected staff representatives, and there must always be one-to-one meetings before any written notice.
Staff must be given the opportunity to respond to being placed at risk of redundancy and alternative ways in which they could keep their job should also be discussed with them.
It's also important to talk with the staff who are staying so as to quell any fears and concerns and to explain what the future growth plans of the business are.

EXPIRED DISCIPLINARY WARNINGS

A recent Court of Appeal decision has confirmed that you can take into account expired disciplinary warnings when deciding to dismiss an employee. In this particular case, the claimant had been given a final warning for misuse of company time (this to run for 12 months). One month after this warning expired, he and four colleagues were caught watching television in company time and he was dismissed but his colleagues (who had no previous warnings) were not. The Court of Appeal held that this dismissal was fair and that reliance on an expired warning was a relevant factor when deciding whether the employer acted reasonably. This case does make time limits for warnings somewhat less rigid but our advice is still that disciplinary warnings are not expressed to be subject to any time limit.

HEALTH & SAFETY AND DISCRIMINATION

In the recent case of Stevenson v JM Skinner the Employment Appeal Tribunal ruled that an employer's failure to carry out a risk assessment of a pregnant employee can amount to sex discrimination but where an assessment is carried out, there is no requirement for it to be confirmed in writing to the employee.

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WHEN IS AN AGENCY WORKER REALLY AN EMPLOYEE?

The Court of Appeal has recently supplied clarity on this matter. Employment tribunals need to decide a matter of fact, whether it is 'necessary' to imply a contractual relationship between the agency worker and end user. Where there is a proper agency / worker / end user relationship in place, it will now be rare for the worker to be deemed an employee of the end user.

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CLAIM FOR SEXUAL ORIENTATION

The Employment Appeal Tribunal (EAT) has ruled that Homophobic gibes against a heterosexual man are not prohibited under the Sexual Orientation Regulations 2003. In this case, the claimant faced gay innuendo gibes from colleagues who knew he wasn't actually gay. It was ruled that the 2003 regulations do not cover this form of homophobic banter but the claimant has been given permission to appeal.

GRIEVANCE COMPLAINTS

Employment Tribunal rules regarding grievance complaints and disciplinary proceedings are going to change in the next year but in Bottomley v Wakefield District the Employment Appeal Tribunal confirmed that the definition of what actually amounts to the raising of a grievance complaint is very wide. In this case, a number of employees brought equal pay claims after the housing function where they worked was transferred to a private sector provider. Before bringing the claims in the Employment Tribunal they raised grievance complaints against the Council and sent copies to their new private sector employer. The new employer argued that in simply copying it in on the complaints (rather than addressing it to them), the employee's had not raised a valid grievance. The Employment Appeal held that the employees had satisfied the requirements and could therefore bring their claims.

AGE RELATED BENEFIT DISCRIMINATION

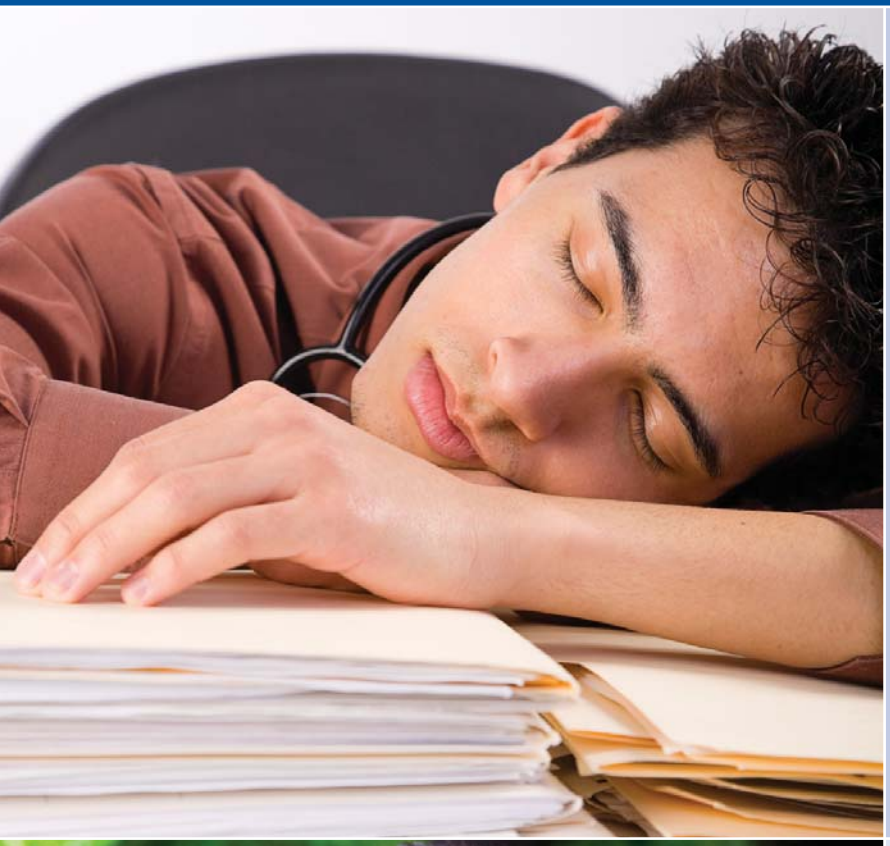
In Swann v GHL Insurance Services UK Limited, an Employment Tribunal has made an important decision regarding the provision of age related benefits and how they interact with the Age Discrimination legislation. In this case staff had been provided with a fund with which to purchase items from a flexible benefits package including an option to join a private health insurance scheme, the premiums of which were calculated according to age and gender. Being more disadvantageous to older members, the scheme was, on the face of it, discriminatory. However, the Tribunal decided that the employer had satisfied the defence of 'justification' in that it had made all reasonable efforts to offer its employees a benefits package that was as advantageous as possible to all staff. The tribunal found that the benefits package would be likely to have the desired beneficial effect on recruitment and retention of staff, claimed as justification by the employer.

CONTRACTOR OR EMPLOYEE?

In Enfield Technical Services Limited v Payne, the Court of Appeal has held that the contracts of two employees who had previously been treated as self-employed were not illegal (so they could bring claims as employees). The employees had actively participated in the labelling of their status as self-employed in the contracts and had benefited from the subsequent tax advantages but this did not prevent them from subsequently claiming the advantages of being employed. This will always be the case unless there is misrepresentation of the underlying facts to HM Revenue and Customs.

INTIMIDATION OF LITIGANTS

There have been two recent cases that dealt with the issue of intimidation of Claimants at the tribunal. In the first case the former employer had its defence struck out for threatening the Claimant in the Employment Tribunal car park. It was therefore prevented from defending the claim made against it by the Claimant.
The second case involved a Respondent who threatened a Claimant outside the lifts at the Southampton Employment Tribunal. The former employer used what was described as unpleasant and threatening language. And the Employment Appeals Tribunal found that threats outside of the lifts at an Employment Tribunal could not form part of the proceedings.



WORKING TIME REGULATION COMPENSATION

In Miles v Linkage Community Trust an employee who worked in a care home brought a claim on the basis that he did not always have at least 11 consecutive hours' rest between shifts. The Tribunal declared that the Working Time Regulations had been breached but decided that no compensation should be awarded. It confirmed that any award of compensation is a matter of discretion for the Tribunal and it is not to be used as a punitive measure against the employer. It also held that the right to compensation only arises once the employee has complained about his treatment and the employer has subsequently refused compensatory time off. It does not apply all the way back to when arrangements in breach of the Regulations were initially put in place.

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DEPENDENTS' LEAVE

There is now clear guidance for dealing with employees' statutory right to take emergency time off to look after dependents. In the case of Cortest Limited v O'Toole an employee had requested one to two months' leave to care for his children due to a domestic crisis. The Employment Appeal Tribunal ruled that emergency leave is intended to cover emergencies and enable the employee to deal with an immediate crisis and set up alternative arrangements. It is not intended to cover situations where employees require substantial time off to care for dependents themselves.

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GRIEVANCE PROCEDURES

The statutory dismissal and grievance procedures are to be repealed in April 2009 and Employers will have to follow ACAS guidelines which are thought to be less prescriptive and more flexible than the statutory procedures.

In the meantime, law is continually being refined in this area and in Clyde Valley Housing v MacAulay, the Scottish Employment Appeal Tribunal seemed to accept pretty much any sort of complaint as having met the statutory requirement to raise a grievance before a claim is accepted by a Tribunal. The Tribunal supported the employer's defence that a proper grievance complaint had not been lodged by the claimant before bringing her claim. Ms MacAulay resigned from her employment and her solicitors wrote to the employer setting out a number of allegations. The employer requested clarification of the allegations but these were not forthcoming so they wrote informing Ms MacAulay that they could not deal with the grievance complaint. The Tribunal confirmed that Ms MacAulay could not bring her claim because she did not set out her grievance before making an application to the Employment Tribunal.

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Over the last couple of years the number of cases reaching Tribunal has hugely increased, it is thought to be by more than 50%. Many of you may have experienced this for yourselves, the increases being driven by disputes about equal pay, unfair dismissal, age, sex, race and disability discrimination.

With this being high on the agenda, we are able to offer our clients with not only hands on consultancy but also, an insured/legal expenses cover of up to £75,000 per claim.

For further information please contact Michelle Brinklow at BBi Alternative Solutions:

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RACE DISCRIMINATION

A police officer brought a claim of victimisation (allied to race discrimination) because notes about his behaviour had been made by his colleagues in their personal notebooks. His colleagues were aware that he had made previous claims of race discrimination, and were advised by their superior to note down any incidents and problems involving him because his behaviour had been problematic at times. The Employment Appeal Tribunal held that since the accuracy of the records kept had not been challenged and no inappropriate action had been taken by the employer as a result of the records, there could not have been any justified sense of grievance and the claim therefore failed. Whilst this decision is useful to employers, care must still be taken to take notes so as to avoid claims of discrimination or a breakdown in trust and confidence.

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