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

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AGE DISCRIMINATION AND REDUNDANCY – 'LAST IN, FIRST OUT'

Until the introduction of age discrimination legislation, the redundancy policy of "last in - first out" was fairly standard practice in some industries.

This issue was highlighted in the case of Rolls Royce plc v Unite, where Rolls Royce argued that some elements of collective agreements with the union protected employees with longer service, but it did not have to comply with these, as they were discriminatory against younger employees.

The High Court ruled that, where all other criteria were found to be equal, younger workers were more likely to be selected for redundancy, and that length of service as one of the criteria for redundancy did indeed discriminate against younger workers.

Clarifying their decision, the High Court stated that if the redundancy selection criteria had just been "last in - first out", then that may be unlawful. The important point was that in this case it was just one element of a wider set of redundancy selection criteria.

Explaining further, the Court pointed out that the criterion of length of service did not make the whole selection criteria unlawful as it served a justifiable aim of the employer, aimed at rewarding the loyalty and experience of longer-serving employees and also protecting older employees from being placed back in the labour market at a time when they would experience particular difficulty in securing new employment.

WORKING TIME REGULATIONS - REST BREAKS

The Employment Appeal Tribunal, in the case of Commissionaires Management v Hughes, held that an employee is only entitled to one rest break, which must be taken during the first six hours of work. Also, there is no entitlement for further breaks to be taken after that, even if 12 hours are worked.

Where a worker cannot take a rest break at the correct time (i.e. within the first 6 hours of work), a proper compensatory rest break must be offered. In addition, it is not enough to let employees take the break at the end of a shift, or to have it included as part of the break between shifts.

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DISABILITY AND DISCRIMINATION - CONFUSION OR CLARITY?

The recent case of London Borough of Lewisham v Malcolm has given rise to concern for HR professionals and employment lawyers.

The House of Lords found that for an act to amount to discrimination there needed be a close connection between the disability and that act (although this case dealt with a dispute between Landlord and Tenant rather than a specific employment issue).

In this instance it held that Lewisham Council had acted legally in evicting a schizophrenic man who had breached his lease by sub-letting his house. The Lords accepted that Mr Malcolm would probably not have sub-let the flat was it not for his schizophrenia. However, it recognised the Council's claim that any defaulting tenant would have been treated in the same manner. The Lords used the example that in the case of a non-disabled tenant who had sub-let a property that the Council would have treated him in a like-minded manner.

This decision now raises the possibility that if an employee is dismissed for reasons of long-term sickness absence, resulting from their disability, it can be held that the dismissal was as a consequence of their absence from work and not because of their disability; so all employees would be treated in the same way if the circumstances were the same. However, it is worth noting that before any dismissal takes place, all reasonable adjustments would need to be considered.

Following this case there has been a great deal of confusion, and calls have been made to amend the Disability Discrimination Act. Considering this situation, it may be wise not to rely entirely on this decision and its implications until there is further clarification.

TAKING TIME OFF TO CARE FOR DEPENDANTS - NECESSARY OR NOT?

Under emergency leave legislation, the issue of how urgent a situation has to be for an employee to legitimately take time off was considered in the case of Royal Bank of Scotland Plc v Harrison.

Mrs Harrison was disciplined by RBS for taking a day off as "emergency dependents leave" after it had refused the request. The situation arose because Mrs Harrison's child-minder told her on the 8th December that she could not cover 22nd December.
As she was unable to organise alternative cover, Mrs Harrison asked her employer, RBS, for the day off on the 13th December but RBS refused her permission on the 20th December.

As a result, Mrs Harrison took the issue to an employment tribunal. In its defence RBS maintained that the right should only arise in a "sudden and unexpected emergency", and because they had given her two weeks' notice, the case did not fit the criteria.
The employment tribunal found in Mrs Harrison's favour, stating that she had suffered a detriment and was entitled to the time off, confirming that the right provides for such time off as is necessary to deal with such cases where there is unexpected disruption to care for dependants.

In disputes of this nature, consideration should be given to the time period between when the employee is aware of the risk of disruption and it actually taking place, and also the extent to which alternative arrangements have been sought in that time.

In this case the leave was found to be "necessary". Importantly, it also found that there is no need to include a time element into its meaning and that a situation need not be "sudden" for it to be deemed "necessary".

AGE DISCRIMINATION AND REDUNDANCY - ENHANCED REDUNDANCY BENEFITS

Similar age discrimination issues, with particular interest to age-related enhanced redundancy payments, were raised in the case of MacCulloch v Imperial Chemical Industries.

In this case, ICI operated a redundancy scheme in which employees were entitled to a severance payment, over and above the statutory requirement, based on their age and length of service. The resulting severance payments varied widely as a result of the formula applied.

As a consequence, Miss MacCulloch claimed that the scheme had disadvantages, resulting in 'direct discrimination' as it was directly related to age, and also 'indirect discrimination' as it was calculated by length of service, indirectly using age as a significant element.

At the Employment Tribunal both claims were dismissed, Miss MacCulloch then lodged an appeal to the Employment Appeal Tribunal (EAT).

Similarly to the case above, the EAT found that the scheme had several legitimate aims: making larger payments to workers who were likely to be more vulnerable in the job market, operating a scheme that increased opportunities for junior employees, and also encouraging and rewarding loyalty.

On the other hand, the EAT found that the Employment Tribunal did not take into consideration if there was a fair balance between the reasonable business needs of the Company and the scheme's discriminatory effects. For example, under the existing scheme, Miss MacCulloch (aged 36 with 7 years' service) was entitled to 55 percent of her gross salary whilst a colleague with 10 years' service, aged 51, was entitled to 175 percent of gross salary.

The EAT stated that the Employment Tribunal had failed to consider whether the degree of difference in the benefits available, taking account the length of service, was thought reasonably necessary to achieve the scheme's objectives. As a result, the EAT referred the case back to the Tribunal to consider this point.

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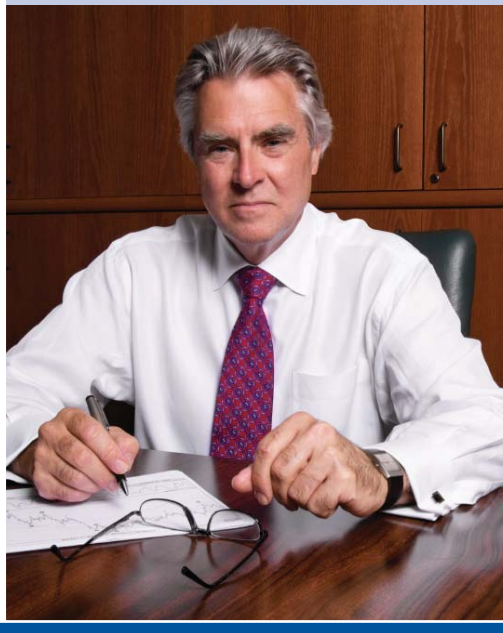
DEGREES OF AGE DISCRIMINATION

The subject of Age discrimination legislation was considered by the Employment Appeal Tribunal (EAT) in the case of Chief Constable of West Yorkshire Police v Homer.

In this case, Mr Homer, aged 61, claimed that he was put at a significant disadvantage by the requirement that an employee had to have a law degree to be entitled to be graded at a higher pay scale. He contended that, given his age, he could not have obtained a degree studying part-time before he retired.

The EAT held that the requirement of a law degree was not something required only of those over a certain age; nor was it more difficult, in principle, for an older person to obtain the qualification than it was for a younger person. The EAT stated that these circumstances were "the inevitable consequence of age; not a consequence of age discrimination".

Nonetheless, the EAT did warn that, in order to be lawful, employer's requirements of this nature must be a proportionate means in realising the objective of recruiting and retaining appropriately skilled and qualified staff.



INCREASES TO LEAVE, SMP, SPP, SAP AND SSP

Increases to statutory minimum annual leave

The statutory minimum annual leave entitlement is set to increase from 4.8 weeks to 5.6 weeks as of 1st April 2009, raising the current statutory minimum of 24 days including bank holidays, to 28 days including bank holidays.

Increases to SMP, SPP and SAP

As of 5th April 2009 the standard rate of statutory maternity pay, statutory paternity pay and statutory adoption pay are set to increase from £117.18 to £123.06.

From 5 April 2009 employers who do not qualify for Small Employer's Relief (SER) can recover 92 per cent of the SMP/SPP/SAP paid to their employees.
Employers who do qualify for SER can recover 100 per cent of the SMP/SPP/SAP paid to their employees plus 4.5 per cent compensation.

SSP to rise from 6th April

The weekly rate for sickness absence commencing on or from 6th April will be £79.15.

NEW TRIBUNAL AWARDS

As of 1st February 2009 the limit of the compulsory award for unfair dismissal will increase from £63,000 to £66,200.
Other changes coming into force on the same date through the Employment Rights (Increase of Limits) Order 2008 include:

- An increase in the maximum amount of a "week's pay" for the purposes of calculating a basic or additional award of compensation for unfair dismissal or redundancy payment from £330 to £350; and
- An increase in the maximum amount of guarantee payment payable to an employee in respect of any day from £20.40 to £21.50.

The new limits are applicable where the event that gives rise to the award or payment occurs on or after 1 February 2009.

Increases in employment tribunal award limits and other amounts payable under employment legislation, effective from 1 February 2009

Relevant statutory provision	Subject of provision	Old limit - 1 Feb 2008	New limit - 1 Feb 2009
Trade Union and Labour Relations (Consolidation) Act 1992, section 145E(3)	Amount of award for unlawful inducement relating to trade union membership activities, or for unlawful inducement relating to collective bargaining.	£2,900	£3,100
Trade Union and Labour Relations (Consolidation) Act 1992, section 156(1)	Minimum amount of basic award of compensation where dismissal is unfair by virtue of the Trade Union and Labour Relations (Consolidation) Act 1992, section 152(1) or 153.	£4,400	£4,700
Trade Union and Labour Relations (Consolidation) Act 1992, section 176(6A)	Minimum amount of compensation awarded where individual excluded or expelled from union in contravention of the Trade Union and Labour Relations (Consolidation) Act 1992, section 174 and not admitted or readmitted by date of tribunal application.	£6,900	£7,300
Employment Rights Act 1996, section 31(1)	Limit on amount of guarantee payment payable to an employee in respect of any day.	£20.40	£21.50
Employment Rights Act 1996, section 120(1)	Minimum amount of basic award of compensation where dismissal is unfair by virtue of the Employment Rights Act 1996, section 100(1)(a) or (b), 101A(d), 102(1) or 103.	£4,400	£4,700
Employment Rights Act 1996, section 124(1)	Limit on amount of compensatory award for unfair dismissal.	£63,000	£66,200
Employment Rights Act 1996, section 186(1), paragraphs (a) and (b)	Limits on amount in respect of any one week payable to an employee in respect of debt to which the Employment Rights Act 1996, Part XII applies and which is referable to a period of time.	£330	£350
Employment Rights Act 1996, section 227(1)	Maximum amount of 'a week's pay' for the purpose of calculating a redundancy payment or for various awards including the basic or additional award of compensation for unfair dismissal.	£330	£350

RELIGIOUS BELIEF

In London Borough of Islington V Ladele; The Employment Appeal Tribunal held that discrimination on the grounds of religion had not occurred towards a registrar who was disciplined for refusing to perform civil partnership ceremonies between same-sex couples, due to her Christian religious beliefs. Since December 2005, when The Civil Partnership Act 2004 was introduced, all registrars were required to conduct civil partnership ceremonies. As this was required of all registrars and all employees were being treated in the same way, the EAT found that there were no grounds of direct discrimination, as the provisions on direct discrimination in the Employment Equality (Religion or Belief) Regulations 2003, provide for protection of less favourable treatment.
In considering indirect discrimination, it was accepted that Ms Ladele was at a particular disadvantage compared to those who did not share her religious beliefs. However, the requirement was a proportionate means of achieving the legitimate aims of promoting equal opportunities and fighting discrimination. The employer was entitled to decide that Ms Ladele could not pick and choose which duties she would perform depending on her religious views, at least in circumstances where her personal stance involved discrimination on the grounds of sexual orientation.
In addition, the EAT found that the employer's actions, while at times insensitive, did not constitute harassment on the grounds of religious belief.

SUPPORTING REDUNDANCY 'SURVIVORS' TO ENSURE SURVIVAL OF THE BUSINESS

Any redundancy exercise will impact all associated with it, including those who survive and remain with the business. These employees, who are vital to the ongoing success of the business, would have experienced uncertainty, possible loss of friends and relations and witnessed the reactions of colleagues who have lost their jobs.

Many surviving employees can experience survivor syndrome, which can have the following negative impacts on performance;

- lower morale and commitment
- reduced loyalty to the employer
- reduced motivation
- lower performance and productivity
- poorer customer focus
- increased stress levels
- greater risk-avoidance and slower decision-making
- a disinclination to learn new skills
- increased absence.

Employees may also be more inclined to seek alternative employment, which could result in;

- Loss of skills and knowledge to a competitor
- Loss of skills and knowledge needing to be retained by the company from the redundancy process.

Avoiding the risk of survival syndrome during the redundancy programme.
Conducting a fair and effective redundancy process supported by open communication is vital, as many of the strong emotions held by the surviving employees will be associated with their perception of how the redundancy programme has been conducted by the employer.
Incidences of survivor syndrome can therefore be avoided, or at least greatly reduced, if employers ensure that they manage redundancies as fairly, objectively and humanely as possible.

In addition to complying with the law on redundancies, employers should:

- develop a communications strategy ensuring that all members of staff are given frequent updates on the aims and progress of the redundancy programme
- ensure that consultations about the redundancy exercise are sincere, and that suggestions about avoiding or minimising job losses are given due consideration
- agree selection criteria for redundancy that are objective and accepted as fair, and ensure that managers apply the criteria in an objective manner
- treat those who are being made redundant with respect
- provide redundant staff with as much help as possible in finding another job.

Continuing to avoid survival syndrome after the redundancy programme.
Once the redundancy programme has been completed, employers should acknowledge the redundancy survivors, to avoid them feeling unsupported and 'taken for granted', and aim to support them with any changes to their job role, increase of workload and changes caused by any restructuring.

To help avoid this, employers should;

- ensure that the survivors are kept fully informed about the redundancy exercise, and its implications for them and the organisation
- consult with the survivors about the consequences of the redundancies for them and their job, and seek to agree the best way forward
- convey the organisation's appreciation of the survivors' efforts to make a success of the post-redundancy changes, and acknowledge that they went through a difficult time during the redundancy phase
- show that they understand that jobs and workloads are likely to change as a result of the redundancies

The following practical support is also recommended;

- ensure that employees and their line managers meet to discuss how the impact of the redundancies can best be addressed
- provide guidance to survivors about their role and workload, and the future shape and strategy of the organisation;
- organise any training that survivors require to perform effectively under the changed conditions
- consider other options such as providing counselling for employees suffering from stress

Measuring how well survivor syndrome has been avoided can be done in the following two ways;

- Considering the hard measures such as: changes in resignation rates, trends in absence levels, performance appraisal scores, productivity metrics and customer satisfaction scores.
- Analysing the soft indicators - for example, feedback from employee attitude surveys and the views of line managers and senior managers about how effectively their teams are working.

STRESS AT WORK – CAUSE AND EFFECT

Employers should be aware that employees will now find it easier to argue the case that the employer should respond more comprehensively to issues relating to the impact that some working conditions can have on their well-being and health.

Following the Court of Appeal decision in the case of Dickens v O2 plc, it appears easier for employees to argue that the employer should have foreseen that by allowing them to carry on working in a way that was making them suffer ill health, that this was likely to lead to a serious illness.

The Court found that concerning the issue of foreseeability, it was sufficient that the employee had been coming into work late on a regular basis, had complained about the stress of her job on previous occasions, and had informed her line manager that she did not know how long she could keep going before she would become ill.

The Court decided that in these circumstances should have acted by sending the employee home, pending an urgent investigation by occupational health, whether she had been signed off sick by her GP or not.

An important point to note was the Court held that the basic suggestion of confidential counselling for the employee was an inadequate response to a situation where an employee was complaining of severe stress.

In conclusion, the Court inferred a sufficient causal connection between the employer's breach of its duty to the employee and the illness, identifying that the employer had failed on a number of occasions to address her problems, and this had materially contributed to her illness.

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.

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WORKING TIME REGULATIONS AND HOLIDAY DATES AGREEMENT

The Employment Appeal Tribunal (EAT) considered, in the case of Industry & Commerce Maintenance v Briffa, whether the employer was acting lawfully when it gave Mr Briffa one week's termination notice of his employment and also required him to use up his outstanding entitlement of 4 days' holiday in his last week.

The employer had been found to be in breach of the Working Time Regulations (WTR) at an employment tribunal, failing to give "double the amount of time to be taken" in their notice to the employee as Mr Briffa was not given the required 8 days' notice.

The EAT found that this feature of the WTR can be varied or excluded by a "relevant agreement" and, that in this particular case, there was a contractual term allowing the employer to insist on the leave being taken without giving the notice. The EAT also highlighted that the policy behind the WTR is "to ensure that workers take sufficient holiday with pay" and that "has been fulfilled in this case".

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