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Redundancy – Making the right selection

Unfortunately, many companies are now considering redundancies to manage a downturn in business.

When considering appropriate selection criteria the elements that may have been used in the past, such as length of service, now need to be reassessed to ensure they are not age discriminatory. Other selection criteria such as 'drive' and 'motivation', 'adaptability' and 'flexibility' are also at risk of being tainted by age.

The use of LIFO (last in, first out) was recently tested in Rolls Royce vs. Unite union. Rolls Royce had agreed selection criteria with the trade union that included length of service. However, RR then argued that it could not use this criteria, as it would amount to age discrimination.

The High Court agreed with Unite that the continuous service points were objectively justified, to achieve a legitimate business aim. (The aim being a peaceful redundancy

selection, respecting the loyalty and experience of the older employees). It also sought to protect older employees who could find it harder to get new jobs.

What should employers do?

Employers should ensure that they have a carefully planned redundancy process with a balanced selection matrix

The selection process used in any redundancy procedure should be objective and verifiable against attendance records, appraisals, disciplinary records etc.

It is advisable to avoid length of service criteria as part of the redundancy process. However, if used, the employer may be able to defend the use of this criterion if they can show it fulfils a legitimate business aim. However, we recommend it is only used as part of a wider selection matrix as the use of LIFO on its own as a sole method of selection is still likely to be age discriminatory.

Unemployment hits a 10-year high

Unemployment in the UK is at its highest level since September 1997, with 1.92 million people out of work in November 2008, according to the Office for National Statistics (ONS).

The ONSs' latest figures show that the number of jobless people rose by 131,000 between September and November last year.

What should employers do?

If you are experiencing a downturn you may wish to consider short-term working as an alternative to redundancy. To implement this you should have an express or implied

right to do so in the employment contract.

Short-term working can be appropriately used for 4 consecutive weeks or six weeks in any 13-week period, before an employee could claim to qualify for a redundancy payment.

When employees are not working, employers may have to pay statutory 'guarantee pay'. This is currently £20.40 per day for a maximum of 5 days in any 3-month period.



Witness provision – Acas Code for Disciplinary and Grievance Matters

The final version of the Acas code of practice for disciplinary and grievance procedures was published on 7 November. Once approved by Parliament, it will come into force on 6 April 2009.

The code states that an employer should now provide employees with a “reasonable opportunity” to call witnesses.

There was no reference to witnesses in the pre-2004 code. There are good reasons for this:

- A disciplinary hearing is not a court.
- Witnesses who are employees could feel compromised giving evidence against the employer.
- Employees could feel uncomfortable or being cross-examined by a colleague.

Although the new code does not give employees an absolute right to call witnesses, requiring employers to give employees a “reasonable opportunity” to do so means there is, in effect, a presumption that witnesses are appropriate in certain cases. It will

then be for the employer to argue that it was not reasonable to allow witnesses in the circumstances of that particular case.

The code also states that employees should be given an opportunity to “raise points about any information provided by witnesses”. It is not clear whether this means they should raise points directly with the person giving the evidence, by way of cross-examination, or more generally with the manager conducting the hearing.

What should employers do?

Disciplinary policies should be amended to allow the discretion to call witnesses advising that, where appropriate, witnesses may be called. This will allow flexibility and avoid an automatic right to call witnesses. Employers should also consider what support /training they give to managers when hearing these cases. Also, how they will deal with employees who may suffer from stress related conditions as a result of being called as a witness, or refuse to attend the proceedings.

Increase in Limits

From 1st February 2009 the compensation limits for Tribunal claims are as follows:

A weeks pay will increase to £350.00 (used to calculate redundancy entitlements, basic awards etc).

The maximum compensatory award will increase to £66,200.

The HMRC has also announced that from April 2009, statutory maternity pay, adoption pay and paternity pay will increase to £123.06.

Statutory sickness pay will increase to £79.15.

These increases are subject to Parliamentary approval.

We would be pleased to provide advice or assistance on any of the matters raised in this Newsletter.
Whilst every care has been taken in compiling these notes, we cannot be held responsible for any errors or omissions; the notes are not intended to be a substitute for specific advice.