

HR FAQs

GOODMAN DERRICK LLP

Employers and their Human Resources advisers face constant difficulties in trying to avoid the potential pitfalls posed by current employment law. This bulletin aims to address, in a practical way, some issues commonly dealt with by Human Resources departments and to give realistic guidance on how to reduce the risk of employment related litigation in these areas.

LEGISLATION UPDATE

National Minimum Wage (NMW)

From 1 October, the NMW hourly rates increased to £5.73 (for those aged 22 and over), £5.53 (aged 18-21) and £4.77 (aged 16-17).

Maternity Leave

Women whose babies are born after 5 October, are now entitled to the same terms and conditions of employment during additional maternity leave (i.e. the second 6 months of leave) as when they were on ordinary maternity leave.

Employer's Liability Insurance

From October it is now acceptable to have an electronic copy of the employer's liability insurance certificate available instead of displaying a hard copy.

FAQs - FOCUS ON REDUNDANCY

Redundancy

Q: We have an employee who we are not very happy with. Can we make him redundant?

It is a common misconception that redundancy is a sort of "catch all" reason for dismissal which can be used to avoid addressing sensitive issues of misconduct or performance. However, a genuine redundancy will only exist in certain situations.

These are that you:

- Are ceasing or intending to cease to carry on the business for the purposes of which the employee was employed by it (i.e. a business closure);
- Are ceasing or intending to cease to carry on that business in the place where the employee was so employed (i.e. a workplace closure); or
- Have a reduced requirement for employees to carry out work of a particular kind or to carry out work of a particular kind at the place where the employee was employed to work (i.e. a reduced requirement for employees).



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Even if you can show that a redundancy situation exists, you will need to ensure that the dismissal is fair procedurally.

Broadly speaking, a fair procedure will include:

- clear planning of the redundancy process and proper consideration of the reason for the redundancy situation;
- identification of the correct pool of employees at risk;
- notification to the employee(s) of the “risk” of redundancy before any decision is made;
- consultation with the employee(s) at risk;
- application of fair objective criteria on which to select this individual for redundancy;
- considering of ways in which to avoid or minimise redundancy, for example by redeployment to an alternative position in the organisation; and
- ensuring that the 3 step statutory dismissal procedure is followed.

Unfairly targeting this individual could leave you exposed to a claim for unfair dismissal and possibly discrimination (depending on the circumstances). It will generally only be possible to show that only one person is at risk of redundancy if you are planning to eliminate only his particular role and there is no one else who does the same role who should be included in what is generally known as the “pool” of employees at risk.

It may be more appropriate to consider initiating disciplinary proceedings on grounds of performance or conduct or both (as appropriate) to try to address the particular issues that you have.

Employment Contracts and Staff Handbooks

Q: Our Staff Handbook contains a number of discretionary entitlements, such as enhanced redundancy pay. Is there a risk that this could be deemed to be a contractual entitlement?

Yes, simply putting such a scheme in the Staff Handbook rather than in the contract of employment or terming it as “discretionary” will not necessarily mean that it is non-contractual.

Firstly, if the policy is applied consistently over a significant time period it is likely to become a term implied by “custom and practice”. To become such a term, it must be notorious, certain and reasonable. Publication of the enhanced redundancy scheme within the Handbook will ensure that it is notorious and if it provides for a specific calculation to be made upon redundancy, this is likely to give the term certainty. Even if it has not been applied consistently, you will have to be reasonable in the exercise of your discretion and consider in good faith whether to make an enhanced redundancy payment in accordance with the policy. If you vary the application of the policy, be prepared to provide evidence that you have not exercised your discretion irrationally or perversely.

Secondly, the way that it is termed within the Handbook may indicate it is contractual rather than discretionary. The recent High Court case *Harlow v Artemis International Corporation Ltd* considered this very issue. In that case, the employee’s contract was set out in a letter which stated “All other terms and conditions are as detailed in the staff handbook as issued to you, and subject to its most recent update”. The handbook contained an enhanced redundancy policy which the employee claimed was a contractual entitlement. During the course of his employment, the handbook had been replaced by the intranet which contained a folder “HR Policies and Procedures” in which the redundancy policy could be found.

The court took the view that not only was the redundancy policy included in the staff handbook (even though this was now an intranet), it also had contractual effect as it was included in the HR folder

with other policies that had contractual effect, such as sickness and holiday pay. Furthermore, the policy made reference to “entitlement” to the enhanced payment which set it aside from other policies which were merely “procedural, inspirational or discretionary”.

However, remember that even if you word your policy carefully and keep it separate from contractual entitlements or arrangements, it will almost certainly become contractual as a term implied by custom and practice if it is applied consistently over the years.

Discrimination

Q: We offer an enhanced redundancy payment which generally rewards age and length of service. Is this discriminatory?

The Employment Equality (Age) Regulations 2006 contain a specific exemption for enhanced redundancy schemes based on age and length of service provided the enhanced payment is calculated in accordance with the multipliers used to calculate a statutory redundancy payment. Statutory redundancy pay is calculated using multipliers based upon age bands as follows:

- Half a week’s pay for each year of work between the ages 18 and 21;
- One week’s pay for each year of work between 22 and 40; and
- One and a half weeks’ pay for each year of work over 40.

A week’s pay is currently capped at £330.

Provided your enhanced redundancy scheme follows the same multipliers but, for example, does not cap the amount of a week’s pay or it provides an enhanced amount of a week’s pay, it will be permitted under the Age Regulations.

If your scheme does not follow these multipliers it will be potentially either directly or indirectly discriminatory on grounds of age and you will need

to be able to objectively justify such a scheme. The test for justification is that the treatment or provision should be a proportionate means of achieving a legitimate aim, i.e. that it is an appropriate and necessary means of achieving a real and reasonable business need. The benefits of the aim must outweigh the discriminatory effect and there should be no reasonable less discriminatory option available. This can often be hard to assess and each scheme will be different in terms of payments made and justifications given. However, the Employment Appeal Tribunal gave some useful general guidance in the recent case of *MacCullough v Imperial Chemical Industries plc*. It accepted that the following aims could be legitimate in terms of an enhanced redundancy scheme:

- Encouraging and rewarding loyalty by linking a redundancy payment to length of service;
- Paying more to older workers because they would be more vulnerable in the employment market if made redundant;
- Retaining a popular scheme which encouraged older workers to leave, giving greater opportunities to others and making it easier to manage change.

Note that the Employment Appeal Tribunal did not accept that it was a legitimate aim for an employer to honour its contractual obligations, holding that a scheme, if discriminatory, must be changed.

Generally speaking, provided the difference between payments to older employees is not so much greater than those made to younger employees, it will be easier to show that any justification is proportionate but you will need to consider objective justification carefully.

If your scheme is discriminatory, what compensation could an employee expect to receive? This issue was considered recently by the employment tribunal who held that the right approach was to ask what would have happened had the employer considered the disparity and rectified it and compensation should be based on what is fair and equitable.

This guide is for general information and interest only and should not be relied upon as providing specific legal advice.

Termination

Q: We need to make a number of individuals redundant but would like to ensure that no claims are brought as a result. How can we safely introduce a Compromise Agreement?

Even where you have gone through a careful planning process and taken steps to ensure that your redundancy procedure is fair, reasonable and non-discriminatory, many employers would like the added reassurance of a clean break with departing employees, to be sure that they will not have to address potential claims. However, in most cases it is not possible to simply make a payment to an employee for a written promise that they will not issue tribunal claims against you. Statutory employment rights such as unfair dismissal claims and discrimination claims can only be waived in a prescribed form, by means of a Compromise Agreement.

A Compromise Agreement is essentially a document setting out the terms of settlement of potential employment disputes in return for a payment of compensation to the employee. The employee is required to take independent legal advice on the terms and effect of the agreement and on their right to pursue claims against their ex-employer, in order to make the agreement binding.

It sounds simple and easy. However, introducing a Compromise Agreement in the wrong way may result in a claim for constructive unfair dismissal, if the employee is essentially given no option but to take an offer or leave. Furthermore, even if you state that the offer is made “without prejudice” (i.e. that it cannot be used as evidence), the application of this protection is becoming more limited in practice and will only be available in circumstances where there is an actual dispute in existence. In other words, you should not use a Compromise Agreement in order to bypass an appropriate dismissal procedure unless you are prepared to offer enough in compensation under the agreement to make it pointless for the individual to pursue claims.

You will certainly be in a stronger negotiating position if you introduce the agreement having already followed a fair and reasonable redundancy procedure. If you want to use the offer of a compromise earlier in the process, you should do so informally as a guide to what individuals might expect if their redundancy is confirmed following the consultation process with clear assurances that no decision has yet been made as to the termination of employment.

Further information and guidance about how to follow a fair and reasonable redundancy process with a minimal risk of claims is covered in our Redundancy Seminar which, due to demand, we are going to re-run in February 2009.

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