

HR FAQs

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.

Discrimination

Q We have received a questionnaire under the Sex Discrimination Act 1975 from an employee. We don't think that there is any substance to the brief allegations made in it and the employee has not issued a claim. Do we need to respond to it?

All areas of discrimination law provide that a claimant, or potential claimant, is able to submit a questionnaire regarding alleged discriminatory treatment to a respondent or potential respondent.

The importance of such questionnaires is often underestimated and it is common for an employer to respond hastily with a denial of the allegations made. This strategy is risky and can return to haunt a respondent in a later tribunal claim if there are any inconsistencies between responses made in a questionnaire and any other documentary evidence or witness statement.

There is no need for a claim to have been issued. A questionnaire may be served within 3 months of the date of the act complained of (extended to 6 months if a statutory grievance procedure has commenced). If a claim to an employment tribunal has already been issued,

a questionnaire may be served up to 21 days after the date the claim was presented.

The response to the questionnaire should be made within 8 weeks (or, in the case of a questionnaire under the Race Relations Act involving colour or nationality, within a "reasonable period"). As to whether any response should be made at all, or what sort of response, a potential respondent should note that, whilst a tribunal cannot order a response, it may draw an inference that there has been unlawful discrimination where it appears that (i) any omission to reply to a question within the time limit has been deliberate or without reasonable excuse; or (ii) the reply given to any question is evasive or equivocal. Accordingly, a failure to respond can be sufficient to establish a prima facie case of unlawful discrimination which the respondent will be required to disprove.

The questionnaire process is a useful tool for an individual who is considering bringing a claim. It puts an employer (and any individual, such as a manager or fellow employee, who has been involved in the alleged discriminatory conduct) under pressure to respond comprehensively and promptly.



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A questionnaire commits a potential respondent to a written answer at an early stage and can involve the disclosure of a large quantity of information before any obligation to disclose documents in the course of tribunal proceedings. Indeed, the questionnaire process goes further than disclosure of documents in tribunal proceedings because an individual can request statistical information, for example, an analysis of the gender breakdown of the organisation's structure, to demonstrate the lack of promotion opportunities to management for women.

Employers should act cautiously in relation to such questionnaires. Responses should be considered carefully following a thorough and prompt investigation. An investigation may reveal substance to the allegations, in which case the matter can be resolved by discussion with the employee and by taking appropriate disciplinary action against any individual whom it is alleged was guilty of discriminatory conduct, rather than employment tribunal proceedings.

Disciplinary Proceedings

Q We are currently running disciplinary proceedings involving possible misconduct of an employee. The individual who alerted us to the misconduct and who has provided the only evidence is unwilling to provide a written statement, even anonymously. Can we use their evidence in any decision to take disciplinary action?

The evidence of witnesses is generally a fundamental part of an investigation. Best practice is to interview any witnesses, make a note of the statement or the information they provide and have the witness sign the statement or notes to confirm that the information is correct.

However, reluctant witnesses are a common problem for employers. These situations involve a balancing act between the need for a fair hearing and the witness's perceived need for anonymity.

Essential requirements of a fair dismissal or disciplinary action on the grounds of conduct (other than the principles set out in the statutory disciplinary procedures) are that the employee:

1. knows the allegations which he has to answer;
2. has an opportunity to prepare himself to answer the allegations; and
3. is given a reasonable opportunity to explain his actions.

It is not necessary, as a matter of course, for the employee to know the identity of any witness but the employee must know the case he/she has to answer. An employer can ensure that nothing is disclosed which could identify the informant whilst ensuring that the employee knows the full allegations against them. Case law indicates that if a witness wishes to remain anonymous, employers should take extra care to ensure that the evidence is truthful and the witness has no ulterior motive for seeking anonymity, such as a dispute with the employee under investigation.

In practice, the situation should be discussed with the witness to find out why he/she is reluctant to provide a statement. The editing of a witness statement to conceal identity should be a first consideration before agreeing to exclude a witness statement altogether.

In unfair dismissal proceedings, the tribunal will consider whether the employer's investigation was reasonable, whether it was reasonable to rely on the witness's evidence and whether the employee knew the case he/she had to answer in the absence of any witness evidence.

As mentioned above, best practice is to provide written statements, particularly if such evidence is to be relied upon heavily in any decision to take disciplinary action. Employers are encouraged to err on the safe side and provide access to all documents relevant to the issues being investigated.

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Employment Contracts

Q Our employment contracts provide that employees “may receive a bonus at the discretion of the Company”. We have paid out bonuses for the previous 2 years. Are we obliged to pay out bonuses this year?

There is a fine distinction between contractual and discretionary entitlements and care should be taken in drafting documents which may form part of an employee’s contract. The bonus scheme in this scenario appears to be entirely discretionary, i.e. there is discretion as to whether or not to award a bonus and the amount of any award.

Even though the scheme is discretionary, there is still an implied obligation on the employer to exercise its discretion, in relation to the payment of a bonus, in good faith and not irrationally or perversely.

As bonuses have been paid in the previous 2 years, it may be harder to justify the complete withdrawal of a bonus scheme. Case law indicates that an employer should give notice to withdraw a discretionary scheme, and should notify the employee prior to the start of the year to avoid any expectation that a bonus would be payable in that year.

Some discretionary schemes contain guidance as to the factors which may be taken into account when assessing the level of bonus. In the scenario mentioned above, this is left to the employer’s absolute discretion. The previous bonuses may indicate a consistent practice of paying a minimum amount and a nil award in similar circumstances may be considered irrational or perverse.

The recent Court of Appeal case of *Commerzbank AG v James Keen (2006)* has limited the scope for such claims by employees, as well as claims in relation to custom and practice. The Court emphasised that it is a high hurdle for an employee to overcome to demonstrate that the discretion of its employer has been exercised irrationally or perversely.

However, the facts of the particular case will be important, as will the degree of judgment required by the employer as well as market and labour conditions.

Employers can manage expectations in relation to discretionary bonuses by giving some indication as to factors that may be taken into account when considering if bonuses are to be paid or not, record reasons for each bonus decision to demonstrate that they have exercised their discretion in a rational manner, and explain the reasoning to the employee.

In terms of drafting, it is advisable to state clearly that the level of bonus in one year is not an indication of the amount that may be awarded in future years and that a nil award is possible.

Recruitment and Selection

Q We received a reference for a prospective employee and as a result we have withdrawn our previous offer of employment, which had been made “subject to satisfactory references”. The individual has requested a copy of the reference but the giver of the reference has marked it confidential. What are our obligations to disclose the reference?

Under the provisions of the Data Protection Act 1998, a reference is “personal data” and is therefore disclosable to the individual by the receiver of a reference if a subject access request is made. However, as the reference in this scenario is marked “confidential” then the recipient will need to decide whether the information is truly confidential before providing a copy to the individual.

Information already known to the individual, such as factual information concerning the employment, must always be disclosed. If there is further information that is potentially confidential, such as an opinion, the correct procedure is to contact the person who provided the reference and ask whether they object to the reference being disclosed.

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If that person does object then a decision has to be made as to whether it is “reasonable in all the circumstances” to comply with a subject access request. This will involve weighing the interests of the person who gave the reference in confidence against the individual’s interests in seeing what has been said about them.

The Information Commissioner lists a number of relevant factors to consider, including:

- Any express assurance of confidentiality given to the referee.
- Any relevant reasons the referee gives for withholding consent.
- The potential or actual effect of the reference on the individual.
- The fact that a reference must be truthful and accurate and that without access to it the individual is not in a position to challenge its accuracy.
- Good employment practice suggests that an employee should already have been advised of any weakness.
- Any risk to the referee.

Consideration should also be given to whether it is possible to keep the identity of the referee secret.

To summarise, simply because a reference is given in confidence, and consent for disclosure is refused, does not of

itself justify withholding the information, especially if it is likely to have a significant impact on the individual. When balancing the interests of the parties, the retraction of an offer of employment is likely to be a major factor.

If you have any questions you would like addressed in a future issue of this bulletin, or would like specific advice on any of these matters or other employment law issues, please contact Clare Gilroy-Scott on t: 020 7404 0606 or e: cgilroy-scott@gdlaw.co.uk

This bulletin has been designed to give general guidance on issues which can arise in the course of an employment relationship. Each situation varies and, accordingly, this bulletin is not intended to be relied upon as giving specific advice.

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