

# 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.

## LEGAL UPDATE

### Increase in statutory holiday entitlement

Currently workers are entitled to a statutory minimum of 4 weeks' annual leave, which can include UK bank and public holidays if the employer so chooses. This is to increase to give workers paid public holidays in addition to 4 weeks' paid leave, and this increase will be implemented in 2 stages. From 1 October 2007 workers will be entitled to 4.8 weeks' paid annual leave (i.e. 24 days for workers who normally work a 5 day week). From 1 April 2009, workers will be entitled to 5.6 weeks' paid annual leave (i.e. 28 days for workers who normally work a 5 day week). This will only affect employers who do not currently give their workers paid leave on public holidays in addition to the 4 week entitlement.

### National Minimum Wage

New regulations have amended the National Minimum Wage Act 1998 so that employers are not required to pay the National Minimum Wage to students who undertake work experience as part of their further education.

The National Minimum Wage increases with effect from 1 October 2007. The adult rate (22 and over) increases to £5.52, the development rate (18-21) increases to £4.60 and the young workers rate (16-17) increases to £3.40 per hour.

### Smoking at Work

With effect from 1 July 2007 smoking is banned in enclosed or substantially enclosed workplaces and other public places, including company vehicles. Employers face criminal sanctions if they fail to stop employees smoking or fail to display the correct "no smoking" signs.

## FAQs

### Discrimination in Employment

**Q We are aware that we must make reasonable adjustments to accommodate employees with disabilities. We currently have an employee with a disability who has now been off sick for 3 months. The Company pays full pay for 3 months' sickness absence only. Are we at risk of a claim if we don't pay full pay for any further absence?**

You are correct that employers are under a duty to make reasonable adjustments where any provision, criterion or practice applied on behalf of the employer places a disabled employee at a substantial disadvantage in comparison with a non-disabled employee (s.4A(1) Disability Discrimination Act 1995). Failure to comply with this duty amounts to discrimination (s.3A(2) DDA). Furthermore, discrimination also occurs if, for a reason related to a disabled person's disability, an employer treats a person less favourably than he treats or would treat others to whom that reason does not apply, and that treatment is



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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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## HR FAQs - August 2007

not justified (s.3A(1) DDA).

On the face of it, it may appear that this employee is substantially disadvantaged by the sick pay rules and that you should make reasonable adjustments to alleviate that disadvantage. However, the aim behind the duty to make reasonable adjustments is to facilitate the employee's return to work. It will be a rare case where it will be a required adjustment to pay a higher level of sick pay to a disabled employee, as this will not help the employee to return to work. Furthermore, it is reasonable for an employer to decide to pay those who attend work and not to pay those who don't. This was recently confirmed by the Court of Appeal in **O'Hanlon v Commissioners for HM Revenue and Customs, Court of Appeal, 2007 EWCA Civ 283**.

Note, however, that if the absence is caused by the employer's failure to make reasonable adjustments, for example, if the employer failed to adjust hours, the role or supply suitable equipment, meaning that the employee was unable to return, it might be a reasonable adjustment to extend full sick pay. This area of law is extremely dependent on the individual circumstances and it is recommended that specific advice is sought should such an issue arise.

### Disciplinary Proceedings

**Q When considering the appropriate disciplinary sanction for misconduct, what weight, if any, can we give to a previous warning on an employee's file?**

When warnings are given for misconduct or poor performance, it is common for employers to state that a copy of the warning will remain on the employee's personnel file but will be disregarded for disciplinary purposes after a particular period of time, generally 6 or 12 months from the date of the warning.

Subject always to the wording of the company's disciplinary procedure, it is safe to take into account previous warnings where a further act of misconduct or poor performance occurs within the unexpired period of the previous warning.

A recent decision of the EAT has clarified that expired warnings must be ignored in later disciplinary proceedings. The case in question concerned a

number of employees who were disciplined for misconduct. The employer considered the misconduct to be a dismissal level offence but reduced this sanction to a final written warning for the majority of the employees after considering the lack of previous warnings to be mitigating circumstances. One employee had an expired warning which remained on his file. The EAT held that the employer had been wrong to take this expired warning into account when deciding whether to reduce the dismissal sanction as for the others (**Airbus UK v Webb EAT 2007**).

You might wonder why expired warnings are kept on file at all. It is generally recommended that employers keep full disciplinary records for the purposes of giving future references, consideration of promotion prospects, and as evidence of consistency in dealing with complaints.

### Grievances

**Q During a recent meeting, an employee raised a number of concerns, including allegations of race discrimination. However, the employee did not state that he wished to raise a formal grievance and has not put anything in writing to us. Do we need to do anything?**

Firstly, any allegation of discriminatory conduct should be investigated, regardless of whether the employee making the allegations wishes to raise a grievance on the matter. Employers have a duty of care to their employees and this includes ensuring that they are not subjected to harassment, bullying or other discriminatory conduct. An employer may be held to be vicariously liable for the discriminatory conduct of an employee if they fail to act when allegations are raised, albeit informally. It will not be a defence to say that the complainant did not expressly state that they wished to raise a formal grievance.

Secondly, you will need to consider whether a grievance has, in fact, been raised under the statutory procedure. Step 1 of the statutory grievance procedure states that "the employee must set out the grievance in writing and send the statement or a copy of it to the employer".

It has been held that a note made by an employee's manager during a meeting with an employee

## HR FAQs - August 2007

amounted to a written statement of grievance under Step 1 of the statutory grievance procedure (**Kennedy Scott Limited v Francis, EAT 2007**). This means that if notes were taken at the meeting, even if by HR or his/her manager, these are likely to amount to a Step 1 of the statutory grievance procedure. If the employer does not pursue this in accordance with the statutory procedure, there is a risk of a claim by the employee and, if successful, a potential uplift in compensation for the failure to complete Steps 2 and 3. The safest course is therefore to invite the employee to a further meeting at which they can be accompanied, and allow a right of appeal. During this process the employer should be able to obtain confirmation that the employee does not wish to pursue the grievance further.

### **Employment Protection & Rights**

**Q We have a number of individuals who work for us as “freelancers”. They do not have contracts of employment. What employment protection do these workers have?**

It is commonly assumed that freelancers who work on a self-employed basis are not employees and therefore do not have any employment rights. The legal position is not so clear cut and each case really depends on the particular circumstances. To establish whether an individual is an employee or not, there are 3 main elements which must be considered:

1. whether the worker is obliged to render services personally;
2. whether the worker is controlled in a manner consistent with an employer and employee relationship; and
3. whether “mutuality of obligation” exists between a worker and employer, i.e. an obligation to provide work and payment for work and an obligation to perform work that is offered.

Even if a freelancer does not qualify as an employee, they may fall within the legal definition of a “worker” which covers individuals who perform their services personally and do not provide their services as part of a business. The test for worker status is therefore less stringent than that for employee status.

Workers have legal protection and rights including the

following:

- the national minimum wage;
- paid annual leave, rest breaks and a maximum working week under the Working Time Regulations 1998;
- rights under whistle-blowing and data protection legislation;
- the right to equal pay for work of equal value;
- the right not to be discriminated against on grounds of age, gender or marital status, race, disability, religion or belief, sexual orientation, or part-time status; and
- the right not to be victimised for alleging discrimination or providing information in relation to a discrimination claim.

The definition of worker also applies to agency workers including individuals who supply services via their own limited company, then through an employment business to an end-user. Such an individual is likely to be considered a “worker” of the end-user (**Croke v Hydro Aluminium Worcester Ltd EAT 4.4.2007 0238/05**).

### **Termination of Employment**

**Q During the course of disciplinary proceedings for poor performance, where it has been clear that the employee is at risk of dismissal, the employee in question has opted to resign and we have agreed some favourable terms. We are very relieved but should we have any concerns?**

In order to claim unfair dismissal, an employee must first show that there was a “dismissal”. Where an employee has been told that he/she has no future with the employer and is invited to resign, there is a deemed dismissal (**East Sussex County Council v Walker (1972) ITR 280**). If, however, an employee is told that dismissal is not a foregone conclusion but that it might be in the best interests of the employee to resign rather than be subject to disciplinary proceedings, a subsequent resignation will normally be genuine (**Staffordshire County Council v Donovan [1981] IRLR 108**).

Where a settlement package is negotiated, the situation can be a bit more complicated and the question of causation must be considered.

## HR FAQs - August 2007

Provided the employee chooses to leave as a result of negotiating a satisfactory financial settlement, and not because of the threat of dismissal, this will be a genuine resignation and not a dismissal (**Sheffield v Oxford Controls Co. Ltd EAT 1979 ICR 396**).

However, in a recent case the Court of Appeal held that an employee who had opted to resign with a financial package had been dismissed (**Sandhu v Jan de Rijk Transport Ltd Court of Appeal, 2007 EWCA Civ 430**). In that case the court held that causation was the key. The employee had had no warning of the purpose of the meeting, had no time to reflect on what he had been told in the meeting, and had agreed all the terms of a deal in that meeting without independent advice. He had not negotiated freely in the circumstances. Furthermore, the court did not think the terms were particularly favourable to the employee.

The crucial question in this scenario is whether the employee had freely negotiated his/her departure or whether the discussion about financial terms was merely the employee trying to make the best of a situation whereby dismissal was certain, i.e. was it a “take it or leave it” deal?

Ultimately, the safest course of action in such situations is to keep the prospect of dismissal uncertain, i.e. make it clear that the company proposes to conduct a full disciplinary and performance review process with the hope that dismissal will not be necessary. If the employee raises the possibility of a negotiated departure, the following is advised:

1. make it clear that no decision to dismiss has been taken and will not be taken until the end of the procedure;
2. ensure that these discussions take place over at least a few days and are not primarily concluded in any meeting which had been called in relation to the poor performance/misconduct;
3. obtain a resignation letter clearly recording the reason for the resignation and that it was not because the employer had been addressing performance concerns and the possibility of dismissal; and
4. consider entering into a Compromise Agreement whereby the employee waives possible employment claims, including unfair dismissal.

Employers should also be wary of “heat of the moment” resignations. It is generally accepted that such action is not a genuine resignation and that employers should not be too hasty in accepting a resignation and should suggest the grievance procedure as an avenue to resolve the situation.

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

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