

LEGAL UPDATE

March 2009: Issue 12

The Advice Team will be holding advice surgery every Wednesday afternoon to see community groups.

If you would like to attend one of the slots, please get in touch with us.

We would be happy to deliver training to your group on an aspect of HR and Legal issue. Employment Law is constantly changing and it is crucial to keep up to date with the latest developments. For example, in April 2009, the current Statutory Disciplinary Procedure will be replaced by ACAS Code of Conduct. Groups will need to ensure that their Disciplinary and Grievance procedure is amended to accommodate the changes, and on a practical level, managers and team leaders are aware of how to carry out disciplinary and grievance procedure in their organisation.

In the current economic climate many groups are faced with the decision of making staff redundant. Even the simplest redundancy exercise can soon become expensive, with one recent report finding the average cost of making someone redundant was £10,575. again, it is very important that the process is managed fairly and in accordance with the law, to avoid any claim for unfair dismissal.

In a claim for unfair dismissal, whilst an Employment Tribunal will not be concerned with the economic reason of making an employee redundant, it will however, want to know that an employer adopted a fair procedure when reaching its decision.

Before, reaching any decision or taking practical steps that may lead to redundancies, groups are advised to seek support to ensure that the correct procedure is applied from the outset. Once an organisation embarks on an incorrect or defective redundancy procedure, it will be almost impossible to objectively rectify the procedure retrospectively. We appreciate that there are many organisations in our region, who may not even have a redundancy policy but are faced with making redundancies and are therefore more vulnerable to not meeting the minimum requirement. We would urge such groups to come and speak to us so that we can help them to manage the process in the best possible way.



**VOLUNTARY ACTION
BARNSELEY**

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INVESTORS IN PEOPLE



Changes to Disciplinary and Grievance

The current statutory Discipline and Grievance Procedures are due to come to an end in April 2009 and will be replaced by the ACAS Code of Practice on Disciplinary and Grievance Procedures. This provides basic practical guidelines to employers and employees and sets out principles for handling disciplinary and grievance situations to the workplace. It sets out the requirement for fairness and standards of reasonable behaviour that should be applied in most instances. They include:

- ◆ Employers and employees should raise and deal with issues promptly, without unreasonable delay;
- ◆ Employers and employees should act consistently;
- ◆ Necessary investigations should be carried out to establish the facts of the case;
- ◆ Employers should notify employees of any problems and give them an opportunity to respond before decisions are made;
- ◆ Employers should allow employees to be accompanied to any disciplinary or grievance meetings;
- ◆ Employers should allow employees an appeal against any formal decision made.

If you would like further advice or support with amending your existing Disciplinary and Grievance procedure, please get in touch with us.

Changes to the Equal Pay Rules

Two significant changes will be made by the Equal Pay and Flexible Working Act 2008.

- Employers may presently rely on the 'genuine material factor' defence where men and women are not being paid the same for doing the same job or work of equal value. Employers must show that the difference is not related to sex. The Act proposes that the material factor must now, also be 'objectively justified' as reasonable.
- Where employers are found to have discriminated against employees in relation to Equal Pay, they will be required to complete an 'equal pay audit' and the results of that audit will be published. This could result in more equal pay claims being lodged against employers if the audit finds that there is inequality in pay.

The Act comes into force from April 2009.



Sick pay for agency workers - Fixed-term Employees (Prevention of Less Favourable Treatment) (Amendment) Regulations 2008.

From 27 October 2008 agency workers who are working under a fixed-term contract are entitled to statutory sick pay from their employer.

Sex Discrimination Act 1975 (Amendment) Regulations 2008.


The Regulations give women whose expected week of childbirth begins on or after 5 October 2008 the right to the same terms and conditions during additional maternity leave as those given during ordinary maternity leave. This means that employers are under an obligation to provide their employees with the same terms and conditions over the entire 52 week maternity leave period as those given for the duration of ordinary maternity leave (the first 26 weeks). As a result of these changes amendments have also been made to the Maternity and Parental Leave etc and the Paternity and Adoption Leave (Amendment) Regulations 2008 to extend the period employees are entitled to benefits to additional maternity or adoption leave.

Changes in employers' liability compulsory insurance certificates rules

Since 1st October 2008 there is no legal requirement for employers to keep copies of out-of-date employers' liability compulsory insurance (ELCI) certificates for 40 years.

However, as an employer, you are strongly advised to keep a detailed record of your ELCI policies. This is because certain diseases can appear many years after a person was exposed to their cause and former or current employees may decide to make a claim against you for the period they were exposed to the cause of their illness.

If you choose to use electronic rather than paper display, you need to make sure that all your employees know how and where to find the certificate.



THE NEED TO GET IT RIGHT FROM THE VERY BEGINNING.

This case illustrates exactly this very point.

The Employment Appeal Tribunal has held, in [Zimmer v Brezan](#), that a step 1 dismissal letter must state that the employer is contemplating dismissal. If it does not, then any resulting dismissal will be automatically unfair.

Rolls-Royce v Unite 2009

A Company alleged that the redundancy selection matrix they had agreed with the trade union could not proceed as it amounted to age discrimination. The redundancy selection process used a points system based on five criteria in addition to each employee could receive one extra point for each year of continuous service. Those with the least points were selected for redundancy. The Court agreed with the union that the continuous service points were objectively justified. Given the use of these points with the other criteria within the matrix, the length of service points were capable of being justified as they did achieve a legitimate aim. The scheme agreed with the union had the legitimate aim of peaceful redundancy selection, and the aim of respecting the loyalty and experience of the older employees and protecting older employees who find it harder to get jobs from becoming unemployed. In addition the age award fell squarely within the length of service exception.

Employers should have in place a carefully planned redundancy procedure which can be used if the need to make redundancies arises. Selection criteria used in any redundancy procedure must be objective and verifiable against, for example, attendance and personnel records and must be applied fairly and not be discriminatory. If employers do use length of service criteria as part of a redundancy selection process, they may be able to defend their use of this criterion if they can show it fulfils a business need or achieves a legitimate aim of the business or, as part of a matrix, be a valid and fair indicator of loyalty and experience



CASE NOTES

Dickins v O2

An employee who was given promotion to management and promised support and training was not given and found the new role to be overly demanding. She informed her manager that she was very stressed and was told to use the company's confidential counselling service. As she was already receiving counselling, she did not do this. She repeated her concerns and was referred to the occupational health department, but this was not actioned. She then signed off work with anxiety and depression. She brought a claim against her ex-employer for personal injury and sought damages for injuries that she had suffered due to psychiatric injury from stress at work. The Court held that the employer was largely responsible for the employee's psychiatric injury. Although the employee had not suffered a previous breakdown, the injury was foreseeable as the employee had advised the company over a period of time of her problems. The referral to a counselling service suggested by her manager was an inadequate response.

Advice for Employers.

Employers should be proactive in dealing with stress issues in the workplace and be aware of and follow the Health and Safety Executives management standards for work-related stress. One way to deal with this is to implement a 'dealing with stress at work' policy to help introduce measures to reduce and prevent stress, or provide Managers with training in how to deal with employees who complain that they are over-worked and suffering from stress. Employers should take action to investigate a stress situation, listen to the employee, take steps to alleviate the situation. A mere referral to a counselling service alone is not enough to guarantee an escape from a finding of breach of duty.



Retirement and Age Discrimination

The Employment Equality (Age) Regulations 2006 (“the Regulations”) have been in force to prevent age discrimination in the workforce. This piece of legislation involves major changes in employment law.

One of the changes made by the Regulations is that there is now no upper limit for claiming unfair dismissal. Previously, if an employee was retired at the normal retirement age for the Company or had their employment terminated at 65 or above, then there was no right to claim unfair dismissal. This has changed with the introduction of the Regulations, enabling employees of any age to bring unfair dismissal claims.


Retirement as a reason for dismissal

Under the Employment Rights Act 1996 there were five potentially fair reasons for an employee’s dismissal and the Regulations now introduce a sixth – retirement. This provision, coupled with the introduction of a default retirement age of 65, enables employers to retire employees at their normal retirement age where the reason for dismissal is a genuine retirement. If a company has a retirement age below the default age of 65 they are still able to retire people at this earlier age, but have to show that such treatment, which on the face of it amounts to less favourable treatment on the grounds of age, can be objectively justified.

Many companies have been reviewing their normal retirement age where it is below 65. Unless they can objectively justify having a lower retirement age, then dismissals are likely to be unfair and discriminatory. Also, the danger of having a lower age is that an employer will often be inclined to keep some employees after the employer retirement age but not others, usually due to their performance or contribution levels, and if the employer does not treat all employees in the same way it will not be able to rely on its own retirement age.

Dismissal by reason of retirement

As mentioned above, retirement is now a potentially fair reason for dismissal. There are two types of retirement. An employer may want to retire employees at 65 or at the “normal retirement age” for that business if this is lower than 65. Alternatively an employer may look to retire employees who have worked beyond their retirement age. In either case the Regulations impose a complex retirement procedure which the employer must comply with in order to avoid a claim of automatically unfair dismissal.



New retirement procedures under the Regulations

The retirement procedure must be followed or the resulting dismissal will be deemed to be automatically unfair. It is similar to the flexible working request procedure, but also has similarities with the statutory disciplinary and dismissal procedure. In very broad terms the procedure includes the following:

- 1. The employer must inform the employee in writing between six and twelve months before the retirement date that they intend to retire the employee. The employee must be notified that they have a right to request to work beyond the retirement age.*
- 2. The employee can make a request (which must also be in writing) not to retire, and this request must be made between six and three months before the intended retirement date. The employee must specify whether they wish to continue to work indefinitely, for a stated period or until a certain date.*
- 3. The employer can agree to such a request, in which case the contract is varied. If the employer does not instantly agree, the employer must hold a meeting to discuss the request, following which they must notify the employee of their decision in writing. The employer does not have to give a reason for rejecting the request and no guidance is given as to the grounds which the employer can use to refuse. However it is likely that the employee may bring an unfair dismissal claim if they believe that the real reason for their dismissal was something other than genuine retirement. It is therefore difficult to see how an employer can realistically avoid giving details of the reasons for refusal if they want to support their assertion that retirement was the real reason for dismissal. The employee has a right to be accompanied at the meeting by fellow employee.*
- 4. If the employer refuses the request, the employee has the right to appeal. If the employee appeals then a further meeting is held, at which the employee again has the right to be accompanied by a fellow employee. The employer must again notify the employee of the outcome of that meeting in writing.*

The Draft Aces Code of Practice on handling Discipline and Grievance (which will come into force from 6th April 09) can be downloaded at:

www.acas.org.uk/CHttpHandler.ashx?id=961&p=0

The Advice Team



Nigel Middlehurst **External Services Manager**

Nigel is responsible for all VAB external services and manages the Advice Team.



Ann Moffatt **Senior Organisation Advisor**

Is responsible for supporting voluntary and community groups in developing/drafting governing documents, policies and procedures. Ann also supports groups with training and induction for trustees and advising new groups on charitable status.



Shokat Hayat **Business Advisor HR & Legal**

Provides advice and support for voluntary and community groups on all aspects of HR policies and procedures. This can range from assisting and advising groups with Disciplinary and grievance policies and procedures to support groups with redundancy and redeployment of staff.

Shokat also support community groups with other legal issues such as company Incorporation, charity registration, CiC registration and premises lease.



Lorna Lewis **Quality Officer**

Lorna advise and assists groups with all aspects of organisational quality issues. This may range from assisting a group to accomplish a particular quality mark to supporting a group with reaccreditation for a particular quality kite mark. Lorna is also Team Leader of the Advice Team.