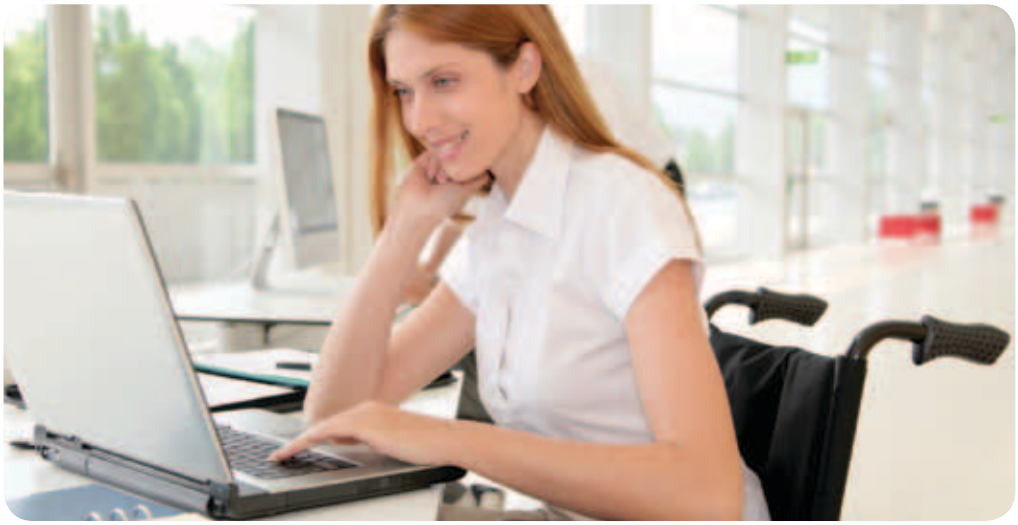
Employment*Brief*

October 2013



Disability Discrimination: What is reasonable?

The duty to make reasonable adjustments for disabled employees can arise in three circumstances:

Where a provision, criterion or practice puts a disabled person at a substantial disadvantage in comparison with individuals who are not disabled. This is wide ranging and includes such things as recruitment, contractual provisions, employment policies or even informal practices.

Where a physical feature puts a disabled person at a substantial disadvantage in comparison with individuals who are not disabled. Examples here would be toilet facilities, building accessibility or furniture.

Where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in comparison with individuals who are not disabled. An auxiliary aid is something which provides support or assistance to a disabled person (for example, a specialist piece of equipment, such as an adapted keyboard or text to speech software).

What is a substantial disadvantage?

Discrimination legislation describes "substantial" as "more than minor or trivial". It is a relatively low threshold and, therefore, an employment tribunal is likely to find it easy to conclude that a claimant suffered a substantial disadvantage. Whether an employee is placed at a substantial disadvantage depends on the individual facts of the situation.

Taking steps to identify disability

A business is not expected to make reasonable adjustments if it does not know, or could not reasonably be expected to know, that the disabled person has a disability and is likely to be placed at a substantial disadvantage. Reasonable steps should be taken to put a system in place to help the business identify whether individuals are disabled and at a substantial disadvantage. If a business should have known about a disability, for example if it would have been discovered from an occupational health assessment, then the duty to make reasonable adjustments will arise.

What is a "reasonable" adjustment?

Although each situation will be different, there are a number of factors which may be taken into consideration when deciding if the steps a business has taken were "reasonable", including:

- Whether the adjustment would actually solve the disadvantage identified.
- The practicality of the adjustment.
- The impact of the adjustment on the business as a whole.
- The financial and other costs of making the adjustment.
- The size of the business.
- It is good practice for the business to ask the disabled person about possible adjustments. It is also advisable to agree any proposed adjustments with that person before they are made.

NEWS IN BRIEF

Gross misconduct does not always justify dismissal

The Employment Appeal Tribunal (EAT) has held that a tribunal erred when it stated that dismissal would always fall within the range of reasonable responses in cases of gross misconduct. Moving straight from a finding of gross misconduct to the proposition that dismissal must fall within the range of reasonable responses gave no room for considering whether mitigating factors might mean that dismissal was not reasonable.

When assessing an employer's conduct and the question of fairness, a tribunal should not only take into account the nature of the misconduct but also, insofar as they are separate from it, the employee's long service, the consequences of dismissal and any previously unblemished record.

Minimum wage

Rates rise from October (the new ones are set out in our Quick Reference section). In addition The Government propose to publicly name and shame employers who fail to pay the National Minimum Wage and have to be chased through the courts for compliance. Previously name and shame only applied to cases meeting certain criteria. This sanction will be on top of the civil and criminal penalties already in existence.

Breakfast seminar

We are presenting at Barham Court on the 16th October for 360EE. Topics include Maternity and Paternity Issues, Social Media and the employment issues surrounding the office Christmas party. There are still some places available. Please contact sarah@360employment-evolution.com

WHAT IS CONSTRUCTIVE DISMISSAL?

In short, one of the most often used but least understood terms of employment law!

Constructive dismissal is the term used where an employee resigns in response to their employer's conduct in breach of an important term of their employment contract. This can be a breach of an express or an implied term. The employer's conduct is often referred to as a repudiatory breach.

For a constructive dismissal claim to succeed, the employee must show the following:

- The employer was in repudiatory breach of the employment contract.
- The employee resigned in response to that breach.
- The employee did not delay too long in resigning in response to their employer's breach.
- If the employee continues working for any length of time without leaving, he is likely to lose his right to treat the contract as breached and will be regarded as having chosen to affirm the contract.

Repudiatory conduct may not only be just one incident; sometimes it is a series of incidents or a pattern of behaviour which, taken as a whole, amounts to repudiatory conduct. In these circumstances, an employment tribunal may consider that any previous breaches of contract that may have been waived by the employee should be treated as part of a continuing course of conduct.

If an employee can establish that he has been constructively dismissed, an employment tribunal will assess the loss that he has suffered. The employee may receive compensation for breach of contract and/or unfair dismissal.

Collective redundancy consultations

The Trade Union and Labour Relations (Consolidation) Act 1992 provides that where 20 or more employees are being consulted about redundancy "at one establishment" they are entitled to be collectively consulted and we have set out the collective redundancy procedure below.

In a significant recent case which looked at the collective redundancy of Woolworths' employees, the Employment Appeal Tribunal (EAT) has overturned an employment tribunal's decision that the employees, who worked in stores where fewer than 20 employees were employed, were not entitled to be consulted collectively.

In fact, the EAT found that the provision that the employees be "at one establishment" should be disregarded for the purposes of any collective redundancy involving 20 or more employees. The effect of this is that businesses will now have to collectively consult with employee representatives once they reach the 20 employee threshold, regardless of the location of the proposed dismissals.

When does the duty to consult collectively arise?

- The duty to consult arises where a business is proposing to dismiss as redundant 20 or more employees within a period of 90 days or less, even if the employees are based at different locations within the business.

- The obligation to consult operates, in effect, as a moratorium on the proposed dismissals, whereby the dismissals cannot take effect for a minimum period of time once consultation has started.

Who to inform and consult

- The business has a duty to inform and consult with appropriate representatives of the affected employees. It must also notify the Department for Business, Innovation and Skills and failure to do so is a criminal offence.

- Where any of the affected employees is a member of a recognised trade union, the trade union must be consulted. In other cases, the business may consult with representatives directly elected by the affected employees or with an appropriate standing body of representatives elected or appointed for some other purpose.

- Where elected representatives are required, specific statutory rules exist governing the election and adequacy of representation produced by that election.

The consultation process

- The consultation must begin in good time. Certain minimum time periods apply depending on the scale of the redundancies proposed. For fewer than 100 redundancies the consultation period is 30 days. For more than 100 it is 45 days.

- Consultation begins with the provision of information on the proposals to representatives. As a minimum, consultation must be undertaken with a view to reaching agreement on:
  - ways and means of avoiding the dismissals;
  - reducing the numbers of dismissals; and
  - mitigating the consequences of any dismissals.

Penalties for breaching the duty to consult

- A failure to comply with any of the rules on information or consultation, or on the election of representatives, can lead to a protective award being made by an employment tribunal. The maximum protective award is up to 90 days' gross pay for each affected employee. The award is not based on loss of earnings, but on the seriousness of the employer's default.

Changing terms of employment: business briefing

An employee's terms will usually alter during their employment for example, their pay may increase. Most changes will be uncontroversial, but sometimes a business will want to do something that the employee is less willing to accept. In these cases, the business must understand how to make the change legally binding while minimising any possible disruption.

A contract can only be amended in accordance with its terms or with the agreement of the parties. However, not all changes during the employment relationship will require the contract itself to be amended. Some will be changes in practice, rather than in the terms of the contract, and in other cases the contract will allow for the proposed variation. In most cases, it will be good practice to carry out a consultation process before changing any terms of employment.

The business should first decide if its plans involve amending the contract itself. This involves identifying the existing terms of the contract, which may be:

Express: terms explicitly agreed between the parties (either orally or in writing).

Implied: terms may be implied for a number of reasons, for example through custom and practice.

Incorporated: terms may be incorporated into the contract by law.

Some terms will not be part of the contract. For example, benefits that are stated to be non-contractual or "Policies" which merely provide guidance on how the contract will be carried out.

If the proposed change will affect existing terms of the contract, the business will not need to amend the contract if:

- The existing terms are sufficiently broad to accommodate the business's proposals.
- There is a specific right for the business to vary the contract in this way.
- The contract gives the business a general power to vary its terms.
- If a business's proposals involve altering the existing contract and there is no contractual right to make such a change, the business can consider the following options.
- The employee may agree to the business proposals orally or in writing (although an oral agreement is clearly more vulnerable to challenge at a later date).
- For the contractual amendment to be binding, the employee must receive some form of benefit in return. In many cases, the employee's continued employment will be sufficient, but there may be problems when the change does not have an immediate effect (for example, when the employee's rights on termination are altered).
- Unilaterally imposing the change and relying on the employee's implied agreement. This strategy is more likely to be effective if there is an immediate practical effect on the employee (for example, a pay cut) and they continue to work without objecting. However, a business should not assume that silence is sufficient to indicate implied agreement, especially if there is no immediate impact on the employee. If the business imposes the change it will be a breach of contract. The employee can;
  - Comply with the new terms but work "under protest" and claim for breach of contract or (if their wages have been reduced) unlawful deductions from wages. Where the change imposed is substantial, the business may be deemed to have dismissed the employee, and therefore the employee may also bring a claim for unfair dismissal.
  - Resign and bring a claim for constructive dismissal, if the change is sufficiently fundamental.
  - Refuse to work under the new terms (for example, where there is a change in duties or hours).
- Dismissing and offering re-engagement on new terms. This approach avoids the risks involved in unilaterally imposing the change on the employee. However, as a result, the employee may be able to claim either:
  - Wrongful dismissal, unless the business gives the appropriate period of notice (or makes a payment in lieu of notice).
  - Unfair dismissal, unless the business can establish a potentially fair reason for dismissal and show that it acted reasonably in deciding to dismiss the employee for failure to agree to the change.

A refusal to agree to a change in contracts will usually amount to some other substantial reason for dismissal, provided there is a sound business reason for the change.

QUICK REFERENCE SECTION

Statutory minimum notice periods
An employer must give at least:

- One week's notice to an employee who has been employed for one month or more but less than 2 years.
- One week's notice for each complete year of service for those employed for more than 2 years.
- Once an employee has more than 12 years service the notice period does not extend beyond 12 weeks.

National Minimum Wage
From October 2013

16 – 17	£3.72
18 – 20	£5.03
21+	£6.31
Apprentices	£2.68

Statutory Sick Pay
from April 2013
£86.70 per week

Statutory Maternity/Paternity/ Adoption Pay
Basic rate from April 2013
£136.78

Statutory Holiday
5.6 weeks for a full time employee.
This can include bank and public holidays.

Redundancy Calculation

- 0.5 week's pay for each full year of service when age is less than 22.
- 1 week's pay for each full year of service where age during year is 22 or above, but less than 41.
- 1.5 week's pay for each full year of service where age during year is 41 and over.

Calculation is capped at 20 years. Maximum week's pay is capped under the Statutory Scheme at £450.00.

Settlement agreements

On 29 July 2013, two important employment law changes came into force.

~ Compromise agreements have been renamed Settlement Agreements. The Settlement Agreement is the same in all but name, that is to say, a contract whereby an employee or worker agrees not to pursue employment claims against their employer usually in exchange for payment. The rationale was to improve dispute resolution rates. The government believed that the term would help to avoid a party refusing to enter an agreement on the grounds that they did not want to be seen as 'compromising' and because 'settlement agreement' was said to be a more widely understood term.

~ Pre-termination negotiations and an Acas Code on Settlement. Pre-termination negotiations will not be admissible as evidence in ordinary unfair dismissal claims unless there has been "improper behaviour" by a party.

This requires some explaining.

Employers and in some cases employees, sometimes wish to explore ending the employment relationship on mutually-agreed terms before there is a legal dispute. This can be as a result of say a personality clash or performance issues. Rather than go through formal procedures, it can be beneficial to start confidential exit negotiations with a view to reaching a financial settlement under a Settlement Agreement to avoid the risk of litigation or adverse publicity.

The old position was that in these circumstances, the employer had to rely on the 'without prejudice rule'.

The without prejudice rule generally prevents statements that are made in a genuine attempt to settle a dispute from being put before the court or tribunal as evidence. The key point is that there needs to be a dispute in place to rely on the rule, so for example a disciplinary or a capability procedure. Whereas, sometimes employers may wish to initiate the conversation about a potential exit, before a dispute has arisen, but by initiating the conversation before formal procedures have started the employer is running the risk that the employee may treat the approach as a breach of contract.

It was as a result of this conundrum that the new rules about Settlement negotiations were introduced in July, seeking to give greater protection to employers in these circumstances, but whether they will make negotiations easier in practice remains to be seen.

Following the change in the law, offers made or settlement discussions held with a view to terminating employment on agreed terms cannot be used in evidence in an ordinary unfair dismissal case unless there has been "improper behaviour." This basically makes it possible for an employer to begin a settlement discussion before a dispute is in motion. That is to say it removes the need to commence a formal procedure such as a capability or disciplinary procedure prior to having the discussion about options and possible settlement.

However there are two important limitations to the new regime. Firstly, it only applies to so-called 'ordinary' unfair dismissal claims. It will not apply where the employee is alleging that the dismissal was for an automatically unfair reason (for example related to health and safety), breach of contract, or significantly, in discrimination cases. Secondly, employers will not be able to rely on the rule if an employment tribunal takes the view that the employer did or said anything which was improper. Acas' statutory Code of Practice on Settlement Agreements contains examples of improper behaviour but the employer will not know until its too late whether (a) the employee is going to allege improper behaviour or (b) the employee is going to raise a claim for say discrimination.

Following the change introduced earlier this year whereby employees are only now able to bring 'ordinary' unfair dismissal claims after two years of employment rather than one year, we may well see an increase in discrimination and automatically unfair dismissal claims as these claims do not require any minimum period of employment. In our view the safest way of proceeding will still be to rely on the old without prejudice rule by initiating a formal procedure. It remains to be seen how the new rule will be used in practice.

EMPLOYEE SHAREHOLDER

On 1 September 2013, the government introduced a new type of employment status, the employee-shareholder.

Employees with this status will give up certain employment rights in exchange for shares in the employer.

There are various conditions that must be met for an employee to become an employee-shareholder, including that both the employer and employee must both agree that the employee will be an employee-shareholder and the employer must pay for the employee to seek advice on the agreement. The shares must be worth at least £2,000 and the employee must not pay for the shares.

Specifically the employee-shareholder:

- Loses the right to claim unfair dismissal,
- Will not be entitled to statutory redundancy pay,
- Loses the right to request time off for study or training,
- Loses the right to request flexible working except where this is a request within 14 days of returning to work after a period of parental leave.
- Will have to give 16 weeks' notice if they intend to return early from maternity, additional paternity or adoption leave.

It should be noted that, although shareholder-employees are barred from bringing a normal unfair dismissal claim, the right to claim unfair dismissal survives if the dismissal was on discriminatory grounds, related to health and safety or for an automatically unfair reason.

Existing employees have the right not to be subjected to a detriment on the ground that they have refused to accept an offer to be an employee shareholder. It will also be unfair to dismiss an employee for refusing to accept an offer to become an employee shareholder.

There has been much criticism of the new status and early indications as reported in the press were that take-up the new scheme would be low, but it remains to be seen what impact this new status will have on businesses.

CONTACT

If you would like any additional information on any of the subjects discussed in this newsletter please do not hesitate to contact us.

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