

Moon & Co

Solicitors

Employment Newsletter

Highlights October 2008

Soggy Thoughts

After a very soggy summer it's back to work for most people. However the economic weather seems just as bad and many businesses face reduced profits and need to cut their wage bill. This is going to mean more redundancies.

But more dismissals may not mean more employment tribunal claims. Some employers want to avoid the risk of claims so offer terms to employees under a compromise agreement which settles everything. Also redundancy is a fair ground for dismissal if it is genuine and a fair procedure is followed. Then an employee shouldn't have grounds for a claim if he gets his notice entitlement and statutory redundancy pay. If redundancy becomes more common it may be easier for employers to convince a tribunal this is the real reason for a dismissal. Then if work is harder though more employees may want to claim they may fear it will make it harder to get a new job.

So with redundancies looming it is a good time to remind everyone of some basic points.

1. Don't leave things to the last moment or be rushed into decisions or accepting volunteers.
2. Work out the costs
3. Consider which groups of employee may be affected
4. Consult employees before you decide there is a need for redundancies
5. If some of a group of workers may be made redundant consult about objective criteria for making the selection.
6. Hear what employees have to say about options
7. Consider alternative jobs or methods of working.
8. Don't assume an employee will reject an alternative job
9. Document meetings and discussions in writing.
10. Abide by the statutory dismissal procedure even if the employee hasn't been employed for a year.

IF IN DOUBT TAKE ADVICE. That's what I am here for!

The statutory disciplinary process; still making new law on its way out.

A case was brought by a former employee that she had been unfairly dismissed. She also complained that the procedure followed by the employer failed to meet the statutory disciplinary rules. The breach of the rules she claimed related to a 4 month delay between the dismissal and the hearing of her appeal. The statutory disciplinary procedures require that for there to be an automatic unfair dismissal the tribunal must find (a) that a statutory Dismissal and Disciplinary Procedure "DDP" applies; (b) that the DDP was not completed; and (c) that the non-completion was wholly or mainly attributable to the employer's failure to comply with the DDP's requirements. Another part of the regulations says that the procedure should be dealt with in a reasonable time. The Employment Appeal Tribunal ("EAT") decided that if there was an unreasonable delay this amounted to not completing the procedure. However the Court of Appeal has decided the opposite. They have now concluded that the two matters are separate. This is a good reminder to employers that they should ensure they complete any disciplinary procedure including the appeal even if matters have dragged on and there seems no point to it. Whilst a delay might still lead to criticism not completing the procedure at all is worse.

As you know the old statutory dismissal and disciplinary and grievance rules will change from April 2009. It doesn't seem five minutes since we were calling them the new rules. In anticipation of this ACAS has launched its proposed revised Code of Practice on Discipline and Grievance. Following the new code isn't compulsory but a tribunal can adjust awards in relevant cases by up to 25 per cent if there is an unreasonable failure to comply with the Code. If you would like to look at the code here is the link <http://www.acas.org.uk/CHttpHandler.ashx?id=880&p=0>

Are enhanced redundancy payments fair?

Despite pressures on employers many are reluctant to make good, hardworking and long term employees redundant. Therefore when the crunch comes many will try to give the employee a cushion against the hard times ahead. When age discrimination law was brought in it still allowed for the statutory redundancy payment to take some account of age and length of service in calculating the level of payment. The government also accepted that it would be ironic if it allowed an employer who merely paid the statutory minimum to reward length of service and age to avoid claims for ageism and penalised for discrimination an employer who was prepared to do more. Therefore the rules allow that if any employee would be entitled to a redundancy payment anyway the employer can increase the multiplier or raise the maximum weekly payment which is taken into account. It is therefore quite common for example to see an employer base the redundancy payment to take account of an employee's actual weekly earnings and not limit it to the maximum £330 which currently applies under the statutory scheme.

However in less common cases the employer is more generous still and goes beyond the increases allowed for under the regulations. Where age is a direct or indirect factor which affects how much the employee gets the employer must then be able to objectively justify the scheme. In a recent case the EAT heard a case brought by Ms MacCulloch against Imperial Chemical Industries plc. The case illustrated some guidelines on how a tribunal should review whether a scheme was justifiably discriminatory.

Ms MacCulloch was 36 and had been employed for 7 years when she was made redundant. Her redundancy payment came to 55 per cent of gross annual salary. However an employee with 10 years' service and aged 50 would receive 175 per cent of gross annual salary. Ms MacCulloch said this was directly discriminatory. The tribunal accepted that the scheme directly and indirectly discriminated against her on the grounds of age. However the EAT decided that the tribunal had not properly considered whether the discriminatory scheme was justifiable. The EAT agreed that the tribunal could consider whether the scheme encouraged and rewarded loyalty which was a legitimate aim and it protected older employees who were more vulnerable to long term unemployment. Also a tribunal can accept that a scheme can have a legitimate aim if the objective is encouraging turnover and preventing blockages in the employment system. However a tribunal must consider the issue of proportionality; it had to weigh up whether the effect of the scheme on Ms MacCulloch was justifiable and whether the difference in the treatment was reasonably necessary to achieve the objectives. While the EAT refused to rule out the possibility that such a scheme might be justified, the analysis needed to reach that conclusion was lacking from the tribunal's decision. The case has been sent to the same tribunal for them to look at this issue of proportionality.

Suitable alternative job.

Part of the redundancy process all employers should follow is to consider whether they have any suitable alternative job they can offer employees. One of the major problems I come across is employers failing to offer jobs because they assume the employee is not suitable or would not want the job. This can lead to a huge amount of work if the case come before an employment tribunal. Then it can be necessary to produce details of all the jobs the employer had vacant or filled over say a 6 month period with details of the qualifications necessary for the job and details of those who filled them. If the employer has associated employers (e.g. holding, sister, or subsidiary companies) the work in getting this data is further increased. The galling thing is that the employer and employee both know that the employee was never suitable for the jobs or would have rejected them anyway. Therefore employers should very seriously consider offering jobs or at least allowing a redundant employee to apply for any vacancy.

However if the employer does offer an alternative job does the employee have to take it? There are perhaps two points worth making on this point just now. First remember that if an employee takes an alternative job where the terms are different from their previous job and that is usually the case, there is a statutory 4 week trial period. After the trial period if the employee stays in the job they are deemed to have accepted it and can't claim it is unsuitable.

In a new case of the Commission for Healthcare Audit Inspection –v- Ward the EAT considered the overlap between the suitability of alternative employment, and the reasonableness or unreasonableness of a refusal to accept the job. It decided that a tribunal can look at how suitable the job is. Then the more suitable it is the more difficult it may be for the employee to show he has good reasons for refusing it.

Snippets

- The tribunals have held that an employee's grievance is a grievance even when it says it isn't. This is a salutary reminder to employers to take advice about any written complaint from an employee as failing to deal with it correctly can lead to a tribunal claim.

- A good reminder from the European Court of Justice that what you say in a job advert can amount to discrimination and an employer would have to prove that their actual recruitment procedures aren't discriminatory.
- You may not realise but using a solicitor where there is an employment dispute has a technical advantage. The EAT has confirmed that legal advice given by a consultant rather than a solicitor does not attract legal privilege. Therefore information exchanged with the employer has to be disclosed in tribunal proceedings.
- The number of Employment Tribunal cases has in the last year risen from just over 100,000 to over 150,000. This is slightly misleading due to the increased number of equal pay complaints particularly by women against local authorities. Unfair dismissal claims remained much the same around 44,000 a year.

Welcome to our e-newsletter which looks at new cases and employment related matters, which are likely to be of interest to many. However specialist advice should be obtained before taking or refraining from taking action based on comments in this newsletter, which is only intended as a brief note. For more information or if you have specific concerns phone me on **01233 714055** or e-mail.

E-mail me kirsten@moon-and-co.co.uk to cancel at any time.

www.moon-and-co.co.uk

Partners: Kirsten B. F. Moon, Kevin G Moon. Regulated by the Solicitors Regulation Authority

29 MOON & CO Applewood House, The Hill, Charing, Kent TN27 0LU

Telephone: +44(0)1233 714055 The Partners: Kirsten B F Moon; Kevin G Moon

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