

2004 – Not a good year for the small employer

2004 was not a good year for the small employer. Problems from increased family leave may have made the headlines, but there were two other technical changes which will add to small business costs.

First, before 1 October 2004, the statement of initial employment particulars did not have to include or refer to grievance or disciplinary rules and procedures where there were fewer than 20 employees. If problems arose, then there was still a need to follow a fair procedure, but at least when taking someone on, this was part of the paperwork which could be left out.

Now even if you employ just one person, you need to include or cross-refer to both disciplinary rules and procedures.

To add to the threat, there is now a compulsory sanction for getting the paperwork wrong, but only if a claim (of any description) is made in the Employment Tribunal and upheld. The employee may be awarded a minimum of two weeks' pay, capped at £280 per week, i.e. for most London full-time workers a payment of £560, but with the Tribunal having the power to increase the award up to 4 weeks' pay (i.e. £1,120).

We have always recommended that small employers consider grievance and disciplinary rules and procedures, even if they were not "compulsory". The effect of the change is to make full documentation for the smaller employer even more desirable. One can try to simplify the rules and procedures, on the basis that exceptional cases are less likely to occur in a given small business. Even so, the cost per head of preparing documentation will be higher in the small business.

The second change affecting small employers relates to disability discrimination. The Disability Discrimination Act 1995 exempted businesses with less than 15 staff. This exemption was withdrawn on 1 October 2004.

The result is that small employers are now under a duty to make adjustments where current accommodation or working practices put a disabled person at a substantial disadvantage compared to a non disabled employee. This could extend to making adjustments to premises and re-allocating duties.

While adjustments are to be "reasonable" and one may have regard to financial and other resources, there is the risk that what a tribunal and what the Disability Rights Commission think reasonable and what you think is reasonable could be a long way apart.

robert.o'donovan@rlb-law.com

Tribunal Limits

The annual review of limits in connection with tribunal awards has now taken place, and is effective on 1 February 2005.

The maximum week's pay for statutory redundancy calculation purposes goes up from £270 per week to £280, an increase of 3.7%.

The maximum redundancy payment or basic award for unfair dismissal rises as a consequence to £8,400. The limit on the compensatory award goes up from £55,000 to £56,800. The maximum award for Unfair Dismissal is therefore now £65,200.

Coming down to earth, however, the average award for unfair dismissal in 2003/2004 reported by the Employment Tribunal Service was £7,275.

New pitfalls for employers in the Redundancy Process

The Employment Act 2002 (Dispute Resolution) Regulations 2004 (“the Regulations”) are now in force, and introduced statutory dismissal and disciplinary procedures (DDPs), with which employers and employees must comply. Many employers are still unaware that they apply to redundancies. Sejal Raja explains why this is.

... apply to all types of dismissal

The DDPs apply to *all* types of dismissal. That includes dismissals on the grounds of redundancy, failure to renew a fixed term contract and on ill health grounds. There is also an argument that they apply on retirement.

How will the DDPs affect dismissals on the grounds of redundancy generally?

The DDPs increase the risk that an employee could claim that what should have been a straightforward redundancy was in fact an unfair dismissal, and demand additional compensation. Redundancy is potentially a fair reason for dismissal, but this does not prevent the redundant employee raising an allegation of unfair dismissal provided he or she has the necessary one year’s service.

In order to defeat such a claim, the employer needs to show not only that the reason for dismissal was redundancy but also that, in the circumstances, it was reasonable to dismiss that particular employee for redundancy and that a fair procedure was followed. Such a procedure will now need to take into account the DDPs.

Initial Warning and Consultation

So how does the traditional recommended redundancy procedure change with DDPs?

There is some academic argument as to whether the initial stages of redundancy do, in fact, fall under the DDPs. One could argue that the

announcement of possible redundancies and potential selection for redundancy should be regarded as the same as contemplating dismissal and so the DDPs would apply. On the other hand, the employer may, after discussion, decide that there is no longer a need to undertake or continue with the redundancy process and consequently, the procedures would not apply.

The Regulations are not clear. A prudent approach would be to carry out one-to-one consultation even at this stage.

Although the DDPs apply when an employer is proposing to dismiss an employee on the grounds of redundancy, the Regulations provide that, where an employer will be making more than 20 employees redundant, it will not be required to comply with the DDPs. This is because of the need to carry out collective consultations which will apply even if the number of employees to be made redundant falls below 20.

Consultation and Meeting

As was the case under the old law, there should be one to one consultation regarding the possibility of dismissal by reason of redundancy before a final decision is made, so as to allow the employee to put forward reasons or arguments for retaining his or her services in the same or in alternative employment.

The invitation to the meeting now ought to be in writing (previously it could have been oral), setting out the circumstances which might lead the employer to contemplate dismissing the employee on the grounds of redundancy.

New pitfalls for employers in the Redundancy Process (continued)

Once the written invitation has been sent to the employee, the meeting should be held. This is not a new stage in the procedure as most consultations would take place in the form of a meeting.

Employers should bear in mind the following:

- The meeting must take place at the appropriate stage of the procedure.
- The timing of the meeting must be reasonable. For example, it would not be reasonable to ask an employee to attend a meeting at 7pm when working hours are 8am to 4pm. Furthermore, employers should bear in mind that meetings should be of sufficient duration to allow both parties to explain their case.
- Each step and action under the procedure must be taken without unreasonable delay. It is not clear what is meant by unreasonable delay. No doubt case law will provide guidance in due course.
- The employee is required to take all reasonable steps to attend the meeting.
- The location of the meeting must be reasonable. Therefore if you have offices in various parts of the country and there are redundancies at the Gloucester branch, it would be unreasonable to have the meeting in London.
- The meeting must be conducted in a manner that enables both employer and employee to explain their cases. If the employer makes a decision at the end of the meeting, particularly in a redundancy situation, it helps if he has left the meeting for a time to consider arguments put forward by the employee. If he did not do that, the employee could argue that the employer did not listen to his/her case which would be a breach of the DDPs.
- The employee should be offered the right to be accompanied by a Trade Union Representative or a fellow employee.

Alternative employment

This element of the procedure remains unchanged. The employer should make enquiries in the case of any employee who is likely to be made redundant as to the possibility of some other job being available elsewhere in the employer's organisation.

Appeal

Whereas under the old procedure, a dismissal would not have been unfair simply because of a lack of appeal, it will now be automatically unfair.

The employer should notify the employee of the right to appeal. No time limits have been set out in the Regulations and therefore an employer should stipulate a time limit of say 5-7 days for the employee to appeal. However, if the employee submits an appeal within say 14 days, the safer course would be to hear the appeal until guidance is received from the Employment Tribunal as to what amounts to a reasonable time limit.

Conclusion

The bad news is that the new procedures have created a minefield. The Regulations have not provided any clarity as to how these procedures dovetail with pre-existing practice and therefore we will probably see in the next 2 years, a number of cases doing just that. In the short term, many apparently routine redundancies may expose the employer to a claim by an employee that the dismissal is automatically unfair and result in an increase in compensation of between 10-50%.

If you have any questions please contact Sejal Raja on 0207 227 7410 or at sejal.raja@rlb-law.com.

Workshop/Seminar News

Dates to put in your diary now:-

10 February 2005 – The Atypical Worker
(fully booked but there may be cancellations)

23 June 2005 – Stress/Health and Safety

8 September 2005 – Whistle-Blowing

17 November 2005 – Annual Seminar



Ask REG

For those who have not been introduced to REG

Who is REG? REG (otherwise known as RadcliffesLeBrasseur Employment Group) is a friendly, approachable and yet knowledgeable character and appears as a (fairly) regular feature in our Update to answer those employment law questions you were too afraid to ask.

REG invites you to email your questions to reg@rlb-law.com. You can also telephone or email any of us and we will pass your questions on. Look out for REG's answers to your questions in forthcoming issues of the Employment Update.

Dear REG

A former employee left our employment in December. Prior to leaving, the employee raised a grievance alleging that she was sexually and racially discriminated against. I have now received a request for a reference from a potential new employer. Should I give a reference and what should I say about the grievance?

Answer:-

When providing a reference, whether it be a verbal reference or a written reference, care will need to be taken. The reason is that an employer not only owes a duty of care to its ex-employees but also to the recipient of the reference.

An employer owes a duty of care to an employee about whom it provides a reference. An employer's duty is to take reasonable care in the preparation of the reference and it will be liable to the employee in negligence if it fails to do so and the employee suffers damage. The obligation on the employer is to provide a true, accurate and fair reference. A reference must not give any misleading impression. However, as long as the reference is accurate and does not tend to mislead, there is no obligation on the employee to provide great detail or to be comprehensive.

The employer also owes a duty of care to the recipient of a reference. The recipient of a negligent reference may also sue the person

giving the reference for any loss suffered. A claim will arise as follows. It is reasonably foreseeable that the recipient of the reference will act on its content and if it relies on a reference which is inaccurate because it is carelessly drawn up, and thereby suffers a loss, the employer providing the reference may be held liable to pay the recipient damages on account of a negligent reference.

An employer is not obliged to provide a reference unless it is contractually obliged to do so. If an employer decides not to provide a reference to a former employee, then it should treat all employees the same. Furthermore, employers should take extreme care if they refuse to provide a reference to an ex-employee on the grounds that the employee has brought legal proceedings on the grounds of discrimination or has alleged discriminatory conduct. If the employer refuses, the employee could argue that he/she has been victimised. Therefore an employer who fails to provide a reference, or provides an inaccurate reference, by reason that the employee raised issues of discrimination, may find itself liable to a claim of victimisation.

As to a grievance, until the grievance has been investigated, you cannot say anything about it without risking being unfair. By mentioning it, you may give the impression that the employee is difficult or a trouble-maker. Yet if the grievance were justified, this would have been misleading.

If you require any further assistance with regards to the provision of references then please do not hesitate to contact Sejal Raja on 0207 227 7410 or sejal.raja@rlb-law.com.

If you require any further information regarding the issues mentioned in this bulletin please contact Robert O'Donovan or Sejal Raja.

**robert.o'donovan@rlb-law.com
sejal.raja@rlb-law.com**

Readers should take professional advice before taking any action based on this bulletin.

5 Great College Street
Westminster
London SW1P 3SJ
Tel +44 (0)20 7222 7040
Fax+44 (0)20 7222 6208
LDE 113

6-7 Park Place
Leeds LS1 2RU
Tel +44 (0)113 234 1220
Fax+44 (0)113 234 1573
DX 14086 Leeds Park Square

25 Park Place
Cardiff CF10 3BA
Tel +44 (0)29 2034 3035
Fax+44 (0)29 2034 3045
DX 33063 Cardiff 1

info@rlb-law.com
www.rlb-law.com

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