Another Legal Guide from Bonallack & Bishop Solicitors

26 Things EVERY BUSINESS OWNER Should Know To Keep Them Out of an EMPLOYMENT TRIBUNAL

THE SECRETS REVEALED!

BONALLACK & BISHOP
SOLICITORS

From the time you decide to employ someone, you embark on a route that has numerous employment law hurdles that must be negotiated with care if you are to avoid the Employment Tribunal (ET), and litigation to resolve employment disputes can be costly.

Employment law impacts on all stages of the employer/employee relationship. For example, anti-discrimination laws are intended to eliminate discrimination from all workplace situations, so your recruitment procedures (including advertisements for new employees) must not discriminate on the grounds of sex, sexual orientation, colour, race, nationality, ethnic origin, religion or belief, disability or age.

Other legislation deals with specific employment situations. For example, when you appoint a new member of staff, the law requires that you must provide them with a written statement of their employment terms and conditions containing specific information.

Some circumstances require knowledge of more than one piece of legislation. For example, employers have a clear legal duty to treat pregnant women fairly. Dismissal of a female employee for a reason connected with her pregnancy is likely to be both sex discrimination contrary to the Sex Discrimination Act 1975 as well as automatically unfair dismissal under the Employment Rights Act 1996 and the Maternity and Parental Leave etc. Regulations 1999. It is not unusual for an employee in these circumstances to bring a claim at the ET for both sex discrimination and unfair dismissal. In addition, under the Management of Health and Safety at Work Regulations 1999, employers have a duty to carry out risk assessments and alter working conditions in order to avoid risks to new or expectant mothers. Therefore, if you employ women of childbearing age, risk assessments must include risks specific to new and expectant mothers.

In an environment where employees are becoming increasingly aware of their employment law rights, we offer some tips to help you identify potential hazards and avoid the problems.

BONALLACK & BISHOP
SOLICITORS

Rougemont House, Rougemont Close, Manor Road,
Salisbury, SP1 1LY Tel: 01722 422300
Email: adele.dethick@bishopslaw.com
www.bishopslaw.co.uk

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Every decision you make and every action you take with regard to your employees must not discriminate directly or indirectly on the grounds below. These laws also protect employees from bullying or harassment by other employees. They apply equally to vocational training.

1

Age

The Employment Equality (Age) Regulations, which came into force on 1 October 2006, aim to achieve equal treatment in employment and vocational training to eradicate discrimination on the grounds of age.

It is unlawful to make employment decisions based on a person's age. Retirement ages below 65 are unlawful unless they can be objectively justified. The legislation also removes the upper age limits for unfair dismissal rights and statutory redundancy payments. It is not age discrimination to have in place a compulsory retirement age of 65 or older but, if you do, new statutory procedures must be followed. These include giving employees at least six months' notice of their intended date of retirement and notifying them that they have the right to request to continue working beyond either the default retirement age or the normal retirement age set by the employer. Employers have a duty to consider such a request. It is therefore important to be aware of forthcoming retirements and to have the necessary systems in place for notifying employees and dealing with requests to continue working.

Create an age profile of existing staff so that you can plan for retirements. This can also be used to aid your recruitment policy, rectifying any obvious age imbalance in the workforce, and to ensure that equal access is given to training and other opportunities.

2

Disability

Under the Disability Discrimination Act 1995 (DDA), it is unlawful for employers to treat a disabled person less favourably than they would a non-disabled person or someone without that particular disability, unless it can be demonstrated that the treatment in question is justified. The DDA also requires employers to make reasonable adjustments to the working conditions and physical working environment to cater for the special needs of disabled employees so that they are not placed at a substantial disadvantage. The definition of 'disability' is a bit wider than you would think.

3

Sex

The Sex Discrimination Act 1975 outlaws discriminatory practices on grounds of sex in connection with recruitment, promotion, dismissal and access to benefits, services or facilities. In addition, there is a specific prohibition against harassment, sexual harassment and conduct of a sexual nature.

The Equal Pay Act 1970 gives protection against discriminatory terms and conditions of employment, particularly pay and eligibility for pension scheme membership, where the difference is on the grounds of sex.

4

Race

The Race Relations Act 1976 makes it unlawful to discriminate against an employee because of their colour, race, nationality, ethnic or national origins. Where a prima facie case is established that the employer's conduct is discriminatory, it is then up to them to demonstrate that it is not.

Sometimes, what may appear to be a non-discriminatory requirement or condition, which applies equally to everyone, can be indirectly discriminatory. For example, this could be because it can only be met by a considerably smaller proportion of people from a particular racial group.

5

Sexual Orientation

Discrimination on grounds of sexual orientation in an employment or vocational context is unlawful under The Employment Equality (Sexual Orientation) Regulations 2003.

The status of a civil partner under the Regulations is comparable with that of a spouse. A civil partner who is treated less favourably than a married person in similar circumstances can bring a claim for sexual orientation discrimination.

It is also unlawful to discriminate against transsexuals under the Sex Discrimination (Gender Reassignment) Regulations 1999.

6

Religion or Belief

Discrimination on grounds of religion or belief in an employment or vocational context is unlawful under The Employment Equality (Religion or Belief) Regulations 2003.

It is important for employers to be aware of the requirements of an employee's religion in order to ensure that employment policies and practices, even though they apply to all employees, do not put an individual member of staff at a particular disadvantage. In particular, failing to allow employees time off to observe religious holidays and festivals can result in indirect discrimination.

There is no upper limit to the amount that can be awarded to claimants in discrimination cases.

In addition, recent cases have seen employers found vicariously liable, under the Protection from Harassment Act 1997, for bullying and harassment of one employee by another in the workplace where there is a sufficiently clear link between the work and the harassment.

It is important to have in place a strict equal treatment policy, but merely having a policy is not enough to comply with the law. Positive action must be taken to enforce it and to eliminate employee behaviour of a kind that could cause distress and anxiety to others. Any incidence of such behaviour must be dealt with at once to the satisfaction of the alleged victim.

PRACTICAL PROBLEMS

7

Recruitment – The First Hurdle

When advertising for a new member of staff, specify only skills and knowledge which are a genuine requirement of the post on offer, avoiding requirements which disadvantage a particular group of people and which could constitute unlawful discrimination. Preparing a job description or specification can help in the process of analysing the exact needs of the job.

The selection process must be seen to be objective and open at all stages. Selection criteria should be established at the outset and consistently applied to all candidates. These should relate directly to the requirements of the job and must be clear, precise and objective. Avoid making stereotypical assumptions. Make sure arrangements are in place to enable any disabled applicants to attend for interview. Where possible, ensure that more than one person carries out the interview and that all candidates are asked the same questions. Deciding on the wording of the questions in advance is a good way of ensuring equal treatment and of avoiding careless use of language.

The successful candidate should be offered the job subject to any conditions, such as satisfactory references etc. A copy of your terms of employment, receipted by the successful candidate, will reduce the likelihood of later disputes as to what was agreed.

Providing feedback after the interview process, to explain to unsuccessful candidates why they were not chosen, could reduce the likelihood of a discrimination claim.

8 Written Statement of Employment Particulars

All employees must be given a written statement setting out the main particulars of their employment, provided their employment lasts for one month or more. This must normally be given within two months of the start of the employment and may be contained in the contract of employment. If the employee is to work abroad for more than one month within two months of commencing employment, it must be provided before the employee goes abroad.

All employers must operate minimum statutory dismissal, disciplinary and grievance procedures and provide details of these in the written statement of particulars or refer the employee to an accessible document specifying these.

9 Contracts and the Staff Handbook

Contracts with employees should be tailored to suit your business. Subsequent variations to the contract must be approved by the employee. In addition to contractual arrangements, you should have a staff handbook detailing practices and procedures which are to be followed, for example with regards to health and safety, details of the dismissal, disciplinary and grievance procedures and other standard operating procedures. It is advisable to consult with trade unions or staff representatives when developing or making changes to the company rules.

10

Dismissal, Disciplinary and Grievance Procedures

The Employment Act 2002 (Dispute Resolution) Regulations 2004 require all employers, regardless of size, to operate minimum statutory dismissal, disciplinary and grievance procedures.

Employees are entitled (save in cases of gross misconduct or where an employee has worked for the employer for less than a year) to the benefit of a minimum standard formal disciplinary procedure before they are dismissed. It is automatically unfair dismissal if an employer dismisses an employee without following the appropriate statutory procedure. Employees who do not first attempt to settle a grievance using the internal workplace procedures are disqualified from bringing most claims to an ET.

The first cases concerning the procedures to reach the ET suggest that the courts are taking a broad view as to what constitutes a grievance letter. Always keep a full record of what action has been taken to prove compliance with the law. Employers should be aware of the wide scope of the procedures with regard to dismissals. They normally have to be followed not just where the termination is on the grounds of capability or conduct but also when the employer is contemplating dismissing an employee on the grounds of redundancy and non-renewal of a fixed term contract. Where it is not possible to settle a grievance internally, consider alternative methods of dispute resolution such as mediation, conciliation or arbitration as a viable alternative to legal action.

11

Deductions from Wages

Under the Employment Rights Act 1996 it is generally unlawful for an employer to make any deduction from the wages of a worker unless the worker has agreed to this in writing or it is required by law (e.g. deductions for PAYE and National Insurance).

12

Working Time

The Working Time Regulations 1998 afford basic rights and protections with regard to the number of hours worked. It is unlawful for an employer to require workers who are not governed by sector-specific provisions to work more than an average of 48 hours a week, unless an individual employee has given prior agreement to waive this right.

Being ‘on call’ is normally regarded as working time under the law. There are special provisions which apply to shift work, night work, rest breaks, minimum holiday entitlement, sector-specific workers and the hours that can be worked by young workers aged 16 or 17.

13

Pay and Benefits

Promotion procedures and all employee benefits should be kept under review to ensure compliance with the law. As regards length of service-based pay increases, a pay system whereby employees with long service and more experience receive higher pay than those with short service and less experience does not automatically infringe the Equal Pay Act 1970, even though it is likely that the majority of those with longer service are male, but take care!

Under the age discrimination legislation, benefits can be awarded on the basis of length of service where the length of service requirement is 5 years or less. However, if a worker who has six years' or more service claims that they are being discriminated against because they are being paid less than someone with more service, the employer must show that the difference in pay fulfils a genuine business need.

Employers are required to recalculate the level of a woman's maternity pay if a pay rise takes effect at any time between the start of the reference pay period and the end of the maternity leave. Minimum wage rates change annually on 1 October. Failure to pay the minimum wage can lead to substantial fines.

14

Information and Consultation

The Information and Consultation of Employees Regulations 2004 give employees of organisations with more than a specified number of employees the legal right to be provided with information about and be consulted on major business decisions which affect them at work.

The legislation allows employers flexibility to agree consultation arrangements with employees which suit the individual circumstances of the business. Pre-existing arrangements that are supported by both employees and the employer are allowed to continue.

Where there aren't any existing arrangements, the onus is on employees to ask for information and consultation agreements to be put in place. Employers will be obliged to comply with the request if it is supported by 10 per cent of the workforce.

All employers are required to consult on Health and Safety matters, with any elected safety representatives or with employees themselves, and in certain business transfer and redundancy situations (see 'TUPE' and 'Collective Redundancies' below).

http://www.opsi.gov.uk/SI/si2004/20043426.htm

15

Collective Redundancies

If at least 20 employees are to be made redundant at one establishment within a 90 day period, under the Trade Union and Labour Relations (Consolidation) Act 1992 the employer must consult with appropriate representatives of the employees. Failure to do so can lead to a protective award requiring the employer to pay each affected employee up to 90 days' pay. Employers contemplating making between 20 and 99 employees redundant must begin the consultation process at least 30 days before any decision to terminate contracts of employment is made. This period rises to 90 days if 100 or more redundancies are proposed. Genuine efforts to consult must be made – merely keeping employees informed does not fulfil this duty.

In addition, in these circumstances notification must be made to the Secretary of State of the proposed redundancies at least 30 days or 90 days before giving notice to terminate an employee's contract. Restructuring a business, even where staff may not actually leave your employment, carries with it potential risks. Care must always be taken where fundamental changes aremade to employees' jobs. If you propose to retain an employee on what is in reality a different contract of employment, this is a proposal to terminate the existing one.

16

Employees on Fixed-term Contracts

The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 guarantee employees on fixed-term contracts the right not to be treated less favourably than comparable permanent employees, especially with regards to contract terms, unless there is a good reason for the difference in treatment.

In addition, the Regulations seek to prevent the use of successive fixed-term contracts when in reality a worker is a permanent member of the workforce. To discourage this practice, a fixed-term contract is normally automatically converted into a contract of indefinite duration once an employee has completed four years' continuous employment under two or more fixed-term contracts. Service before 10 July 2002 does not count towards the period of four years' continuous employment so the first date on which fixed-term contracts could be converted to indefinite contracts was 10 July 2006. If an employee is dismissed for trying to enforce their rights under the legislation it will automatically be unfair dismissal.

17

Part-time Workers

The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 established a minimum standard of fairness for part-timers so that they cannot be treated less favourably than comparable full-time co-workers, unless the treatment is justified on objective grounds.

A comparable full-time worker must work in the same establishment as the part-timer, be engaged in broadly similar work and work under the same type of contract.

18

Agency Workers

The employment status of agency workers has been the cause of many disputes over the years. Tribunals have to reach a decision based on the facts in each case. On many occasions, implied contracts of employment have been found to exist between employment agency workers and the end users of their services.

The determinant factor is how the employment relationship operates on a day-to-day basis. In particular, companies hiring staff for an extended period may well be acquiring responsibilities as employers of which they are unaware.

19

TUPE

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) apply to any size of business and protect the employment rights of employees when their employer changes as a result of the 'relevant transfer' of a business or a part of one. When a business is sold and the TUPE Regulations apply, both the transferor and the transferee have a duty to inform and consult with the appropriate representatives of any affected employees with a view to seeking their agreement to the proposed measures. When a business or business unit is being transferred, with its employees, it is essential to take advice at the planning stage.

20

Whistleblowing

The Public Interest Disclosure Act 1998 (PIDA) – often referred to as the 'Whistleblowing' Act – gives workers legal protection when disclosing information relating to crimes, breaches of a legal obligation, miscarriages of justice, dangers to health and safety or the environment and to the concealing of evidence relating to any of these. It is automatically unfair dismissal to dismiss an employee for making a 'protected disclosure', in good faith, to someone to whom they are entitled to make it, or to penalise them for doing so. The protection afforded continues to apply after the termination of the whistleblower's employment.

21

Health and Safety

There is a raft of legislation dealing with specific health and safety requirements and workplace hazards. For information, see the Health and Safety Executive website at http://www.hse.gov.uk.

In general, all employers have a statutory duty to ensure, so far as is reasonably practicable, the health and safety of their employees and to take reasonable care to protect the health and safety of anyone else who may be affected by the business and its activities, such as customers.

Carrying out risk assessments is an important step in protecting your workers and your business, as well as complying with the law. It helps you focus on the risks that really matter in your workplace – the ones with the potential to cause real harm. Health and safety arrangements must be monitored continually, so it is vital that you start from a carefully thought out policy. This will help you review and manage preventative and protective measures.

All employers are obliged to provide the information, instruction, training and supervision necessary to ensure, as far as is reasonably practicable, the health and safety at work or their employees. In order to do this you need to identify the skills needed to carry out all jobs safely and provide the necessary training. This should include training in emergency procedures.

It is good practice for internal health and safety inspections to be carried out by more than one person in order to get more than one viewpoint. Try to be objective and look for problems that might be outside the scope of your current safety check list.

22

Stress

Dealing with stress in the workplace is a difficult issue and employers cannot afford to be ignorant on this subject. An employer should be knowledgeable as to the best ways to prevent the onset of stress and be able to recognise the signs and know how best to respond.

Failing to deal with cases of stress and to appreciate the psychological damage that can result can be costly for employers. You should have a formal policy for dealing with stress-related complaints. Treat any complaints seriously and investigate them thoroughly. Employers who offer a confidential advice service, with referral to appropriate counselling or treatment services, are unlikely to be found in breach of their duty.

23

Performance Appraisals

Equal treatment must be given to all staff when setting targets and performance standards. Appraisal reports should avoid phrases which use discriminatory language, such as 'shows maturity for their age'. It is important that the person carrying out the appraisal is trained to do so.

24

Flexible Working – Family Friendly Policies

There is specific legislation dealing with employees' statutory rights to maternity, adoption, parental and paternity leave and pay and to time off work to look after dependents.

In addition, parents of children aged under 6 (or under 18 if the child is disabled), who have worked for their employer for 6 months or more, have the legally enforceable right to ensure that a request for flexible working arrangements is not rejected without good cause. From April 2007, this right is to be extended to those with caring responsibilities for adult relatives.

25

Email and Internet Policy

Make sure employees understand that what they put in an email message should not be regarded any less seriously than written or spoken communications. Inappropriate Internet use can also lead to claims of harassment and discrimination. Employers should have and enforce a clear email and Internet use policy.

26

Staff Parties

The annual staff party can be a nightmare and many employers choose not to hold them. If you do, it is important to carry out an assessment of possible risks and take reasonable steps to reduce them, as you would for any work activity. Employees should be made aware that normal disciplinary procedures apply. Employers can be held responsible for employees' actions after consuming alcohol provided by the employer, so beware!

"Packed full of useful tips and information, this booklet is a must for every business owner".

Stephen Sellers
Grant Sellers, Chartered Accountants

"A real eye-opener to the implications of the current employment legislation".

Sharon Southon
Marketing Et Al Limited

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