

LEONARD GRAY LLP

Employment Law Department

Employment Law Update

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These notes are intended to be a general overview of the law in relation to the subject detailed above.

Legal advice on the issues and the application to a particular case should still be obtained.

This constitutes our understanding of the law as at April 2009.



THIS SECTION

- Age discrimination –
recap

- Recent case law
developments

- Guidance for future

Age discrimination – staff recruitment

Age discrimination – a reminder

Since 1 October 2006, it has been unlawful for employers to discriminate against employees (or potential employees) on the grounds of their age. For those with the necessary degree of enthusiasm (a cold flannel across the forehead and strong cup of coffee is likely to be of help), the relevant law can be found within the Employment Equality (Age) Regulations 2006.

Readers of this update less willing to delve into the 2006 Regulations in detail may simply wish to note that the law in this area prohibits:

- *Direct* discrimination; and
- *Indirect* discrimination

Direct discrimination occurs where Employee A is treated less favourably than Employee B simply on the ground of Employee A's age. So, if an employer awards a promotion to B in preference to A solely because B is younger than A and is, for example, assumed to be more energetic/motivated, the employer will have directly discriminated against A.

Indirect discrimination arises where the employer imposes a 'provision' or 'practice' on all its employees but the effect of this is that employees within a certain age bracket are treated less favourably than others. An example might be where an employer introduces a benefit (e.g a bonus scheme) which is only open to those who have completed a certain number of years' service. Such a benefit might discriminate against employees of a younger age who, it may be fair to assume, cannot qualify for the new benefit because they have not yet had the time to attain enough years in employment.

Both direct and indirect discrimination is capable of being justified in certain circumstances. This has led to a number of key court/Tribunal decisions

being made in relation to how this complex area of law should apply in the future.

Case law developments – recruitment

In a recent case, the Employment Tribunals rejected a claim of both direct and indirect discrimination brought by an unsuccessful job applicant. The employer in that case posted job advertisements inviting applications from “*newly qualified*” and “*nearly qualified to two years’ qualified*” candidates. These adverts were plainly discriminatory on the basis that senior applicants were automatically not likely to be favoured.

The employer contended that the discriminatory wording/criteria contained in its adverts had been included by mistake. The Tribunal accepted this argument. The Tribunal also ruled that, at a practical level, the job applicant in question had been refused a job on grounds which did not relate to her age/level of seniority, so she had not been discriminated against as such.

As stated above, age discrimination is capable of being justified. However, in the above case, although the employer won, the Tribunal issued a careful reminder to employers that, if adverts of the type referred to above are to avoid being deemed unlawful, they must have at their heart a desire to achieve a “*legitimate aim*”. Advertising for younger candidates simply to save on costs is not enough; the employer must take other factors into account.

Guidance

There are plenty of traps for the unwary employer to fall into when seeking to recruit new staff. Potential job candidates are entitled to be given ‘a fair crack of the whip’ and employers who choose to recruit on the basis of age alone are unlikely to avoid being caught out for very long. In the case referred to above, one of the few things which prevented the job candidate succeeding was that her application was itself a sham; she knew that the adverts in question were discriminatory and simply applied for the job in the hope of succeeding with a Tribunal claim. Whilst it is clear that such cunning attempts to claim compensation are unlikely to succeed, employers must nevertheless be careful to ensure that they recruit fairly and impartially.

Section
2

THIS SECTION

- The repeal of the 2004 law
 - The new regime
 - Practical points to note
-

The statutory disciplinary/grievance procedures

The old law repealed

For some this monumental event may simply have passed them by, but across the land on 6 April 2009 hundreds of lawyers and judges (and employers) rejoiced and cracked open the champagne to celebrate the repeal of the unpopular statutory disciplinary and grievance procedures, imposed on virtually all employers on 1 October 2004.

The statutory procedures required employers to follow a set (and in many respects inflexible) process when enforcing disciplinary sanctions against employees (i.e warnings or dismissals) or dealing with staff grievances. They essentially involved a three-step system in each case, involving (1) writing to the employee concerned; (2) holding a meeting with the employee; and (3) making an appeal process available to the employee.

For smaller organisations in particular, the procedures created a cumbersome, costly and bureaucratic nightmare. The procedures also frequently proved confusing and unhelpful to employees, who were often left unable to discuss grievances openly and honestly with their employers, some of whom became obsessed with policy and processes, in the hope that this would stave off Tribunal claims.

The new regime

The statutory procedures are now replaced with an ACAS code. The code has no statutory force but Employment Tribunals will still be entitled (and probably feel obliged) to have regard to its contents when determining whether an employer has dealt properly with a disciplinary matter or staff grievance.

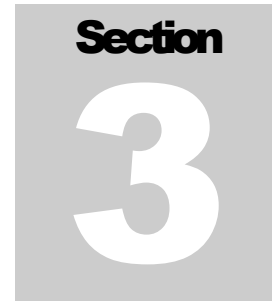
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The old 2004 law imposed harsh penalties on employers who failed to comply with the statutory procedures; those that did fail to comply risked automatic claims for unfair dismissal being brought by their employees and the awards for such claims being enhanced by up to 50%. The penalties under the new regime are considerably less onerous.

The new code has, however, been met with criticism by some. In certain respects, elements of the code may lead to uncertainty and confusion. For example, the code stipulates that all grievances should be dealt with informally at first, but what happens if an employee insists on having their grievance looked at on a formal basis straightaway? Will the employee or employer still be able to resolve their dispute via Tribunal proceedings without being penalised? There will almost certainly be Tribunal cases arising in the future dealing with these points amongst others.

Recommendations

The old procedures under the 2004 law will still apply to disputes/grievances which arose prior to 6 April 2009, so both employees and employers should seek specialist legal advice in relation to what their obligations might be. Employees may still have to raise formal written grievances before being allowed to commence a Tribunal claim (a requirement in certain cases under the 2004 legislation), so it is vital that guidance from an Employment Law practitioner is obtained.



THIS SECTION

- ❑ Employee entitlements in an insolvency

- ❑ Transferring employees

Insolvent employers

The National Insurance Fund

If a company gets into such severe financial difficulty that it can no longer operate viably, an inevitable consequence will often be for that company to either be placed into administration or be liquidated. Administration is a process by which a struggling company is effectively intervened by a third party (an administrator) who attempts to help the company avoid going completely bust. During an administration all current court claims against the company are frozen, no new claims can be made against it and the company is therefore given a breathing space to rescue itself from collapse.

Liquidation occurs when a company is brought to an end because it can no longer afford to continue operating. It is what is commonly meant by the phrase “going bust”, and can sometimes follow an administration which has proven unsuccessful.

It is worth noting, particularly in the current economic climate, that employees have certain rights if the company which employs them either goes into administration or is liquidated. Staff can in such situations claim limited sums from the National Insurance Fund (NIF) to cover payments such as wages or holiday or notice pay. However, there is a statutory cap on these payments which can often render them far from satisfactory.

Most Tribunal claims for compensation do not benefit from the NIF and therefore any employees succeeding with such claims will effectively become unsecured creditors and may find it almost impossible to actually recover any sums awarded to them.

Employees at risk of losing their jobs as a result of a liquidation/administration would be well-advised to acquaint themselves fully with how the NIF works and the implications it may have for them. Detailed guidance from an Employment Law specialist should be sought for further information and reassurance.

What happens if an insolvent business is rescued?

In ordinary circumstances, if a business is bought by one party from another, the buying party has to accept responsibility for all future obligations owed to staff/employees. If, however, the business in question is on the brink of collapse, the buying party may not necessarily have to automatically take on the employees of that business and all the liabilities/obligations that go with them. This potential exception to the rule is aimed at encouraging the rescue of companies and general business activity/enterprise. Employees/buyers of such businesses should therefore speak with an Employment lawyer for the purposes of establishing what their rights/liabilities in these situations are likely to be.

Section
4

THIS SECTION

- Difference between independent contractor/employee
-

Self-employment

Switching to independent contractor status

In the current economic climate it is not uncommon for employers to explore all possible cost-cutting measures to enable their businesses to survive the recession. We all know and accept that one of the biggest costs (and most prized assets) of a business is its employees. In an attempt to retain workers but at the same time reduce staff expenditure, some employers are choosing to dismiss employees but, with their agreement, take them back on as self-employed workers. This can help the employer cut costs, since National Insurance contributions (which have increased considerably over the past decade) are not payable on fees/invoices rendered by independent contractors, but are payable for employees 'on the payroll'.

The above approach can often be laden with potential pitfalls and therefore needs to be implemented very carefully, and documented in a clear and unambiguous manner. Such arrangements can often be overturned by the courts (as well as the tax authorities) and it is therefore vital, whether you are a worker or employer, to ensure that legal advice is sought on the appropriate procedure.