

Employment Law Breakfast Briefing

22 September 2009

East of England Showground, Peterborough



Anne Corder Recruitment

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Cambridge Suite, East of England Showground, Peterborough

7.30 - 8.00 am - Registration & breakfast

8.00 am - Anne Corder, Anne Corder Recruitment
Introduction

8.05 am - Martin Bloom, Partner, Hegarty LLP Solicitors
Redundancy and fair selection

8.25 am - Tim Thompson, Partner, Hegarty LLP Solicitors
Amending terms and conditions of employment

8.45am - Martin Bloom, Partner, Hegarty LLP Solicitors
Employment update

9.05 am
Responding to questions submitted in advance and from the floor

9.20 am
Briefing finishes

Feedback Forms – please leave completed form on your table or hand in at the registration table.



Anne Corder Recruitment

Employment Law at Hegarty LLP

Hegarty LLP Solicitors has a prominent reputation for providing practical first-class employment law advice to its clients in this fast moving area of law. The Employment lawyers understand the challenges facing human resources professionals, and are proactive in developing close working relationships with clients. The team is well known throughout Peterborough and Stamford, but the calibre of our lawyers has meant we have been highly successful at attracting national clients.

Speaker Profiles

Martin Bloom – Head of Employment, Partner



Martin advises a very wide range of businesses and individuals on all matters relating to employment law. His clients range from individuals to large multinational organisations and 'high street' names employing thousands of people in the UK and beyond.

The work he undertakes varies from drafting employment contracts and consultancy agreements to representation at Employment Tribunals across the country.

He is an accomplished presenter and undertakes a large number of seminars and courses each year, including national conferences, in-house training and breakfast updates. For a number of days a year, Martin sits as a Part Time Employment Tribunal Judge in the London North West Region. He is a member of the Industrial Law Society and the Employment Lawyers Association.

Contact details: Tel: 01733 295632 Email: martin.bloom@hegarty.co.uk

Tim Thompson – Partner



Tim has been a Partner at Hegarty Solicitors since 1979 and over the years has built up a wealth of legal experience spanning a range of disciplines. Specialising in employment law, Tim advises on a wide range of matters for businesses and individuals and represents clients at employment tribunals. He is also an experienced speaker and presents employment law updates for clients' in-house training sessions as well as firm hosted events.

Contact details: Tel: 01733 295606 Email: tim.thompson@hegarty.co.uk

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Anne Corder Recruitment

Networking the 21st century way

Personal contact is key to being a success in our industry. But more and more we're discovering – and embracing – the benefits of e-networking.

Professional etiquette has changed to the extent that, where once it was deemed vital to meet regularly and talk on the phone often, it is now acceptable to fire off an email, keep in touch through LinkedIn and follow contacts on Twitter.

At Anne Corder Recruitment we like to be at the cutting edge, staying a step ahead to ensure we are delivering the best service to our clients and candidates at all times. Over the last year – more than ever before – that has meant us having to dive deeper and deeper into social networking.

We now regularly 'tweet' – using Twitter.com to post new job openings. This has proved an invaluable method of sourcing potential candidates who have found us through our 'tweets', registered and been booked in for interview within hours.



Our blog helps position us as experts within our field, giving us the opportunity to comment on the industry, wider employment issues and share our news. The bi-monthly e-newsletters – one geared towards clients and prospective clients, the other at candidates – supply regular hints, spread the word about what's happening within our business and share useful information. Using the same delivery method we can send invitations, reminders and stop press bulletins at the touch of a button.

Being able to provide the very best portfolio of information and services in this way sits perfectly with our bid to become paperless. Since the introduction of e-invoicing last month we're just a few sheets of A4 short of achieving that goal. We receive our magazines electronically, we've managed to slash the amount of junk mail and local good causes are now using our old paper files and plastic wallets.

That doesn't make it any less important to continue with the personal involvement which has helped position us at the forefront of recruitment in Peterborough. We are still involved with student sponsorship, local colleges and schools, industry-related forums, business awards and, of course, our regular law briefings which have become an important date on the calendar of HR personnel across the region.

We continue to work with an increasing number and range of companies in different sectors across the region providing permanent, contract, interim and temporary staff for a wide cross-section of roles.

You will find a number of ACR staff present today so please feel free to stop and chat. And when you get back to the office look us up on Google!

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Anne Corder Recruitment
4 Park Road, Peterborough, PE1 2TD, Tel: (01733) 319888, Fax: (01733) 319800
Website: www.annecorder.co.uk Email: mail@annecorder.co.uk

Redundancy & Fair Selection

Martin Bloom
Partner, Hegarty LLP Solicitors



Introduction



Definitions



ACAS Code of Practice



Core Elements

- Consultation
- Alternative positions
- Other available steps



“Polkey”



Redundancy Selection



Selection Pools



Bumping



Selection Criteria



Conclusions



Redundancy and fair selection

Background

1. If the reason or principal reason for a dismissal is redundancy, this is a potentially fair reason – Section 98(2)(c) Employment Rights Act 1996.
2. The definition of redundancy is set out in Section 139 Employment Rights Act 1996. Essentially an employee is redundant if work of their particular kind has ceased or diminished or is expected to cease or diminish.
3. Remember it is the job that is redundant – not the person undertaking that role. It is important not to confuse other issues such as poor performance or various other capability issues such as absenteeism.
4. Even if a genuine redundancy situation exists a dismissal will still be unfair if the process, including the selection procedure itself or the way that it has been handled, fails to comply with the test set out in Section 98(4) Employment Rights Act 1996.

“The question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) -

4.1 depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and

4.2 shall be determined in accordance with equity and the substantial merits of the case”

5. It is fortunate for many that the complex and onerous Dispute Resolute Regulations 2004 have now been repealed (with effect from 6 April 2009). These Regulations have been replaced by the ACAS Code of Practice on

Discipline and Grievance. However the new Code does not apply to redundancy dismissals.

6. Procedural failures in a redundancy situation can no longer lead to a finding of automatic unfair dismissal.

7. Compliance with old pre 2004 Law is essential and continued adherence to “basic principles of fairness” will still be essential.

8. Core elements of any well organised redundancy exercise are still required:-

8.1 Consultation including compliance with the provisions of Section 188(1) Trade Union and Labour Relations (Consolidation) Act 1992.

8.2 Consideration of suitable alternative positions.

8.3 Taking reasonable steps to alleviate redundancies.

9. The House of Lords Judgment in Polkey –v- A E Dayton Services Limited (1988) ICR142 will still apply to awards for compensation where a redundancy dismissal is deemed to be unfair. If the Employment Tribunal concludes that a differently applied fair procedure as opposed to the unfair procedure adopted by the employer would have resulted in the same result i.e. the employee’s dismissal in any event, the Tribunal may well decide to reduce the compensatory award or decide not to make any award at all in the employee’s favour.

10. Redundancy Selection

10.1 Defining the pool for selection

10.1.1 Is there an existing procedure for such an issue e.g. in the Company’s Redundancy Policy or a Collective Agreement?
Has such a procedure become established by custom and

practice? If so, do you want to change it? Consider the need to consult and then change that existing contractual term.

10.1.2 Wide discretion available to the employer to consider the pool from which the employer will select redundant employees. Could be limited to a narrow area of the business or may encompass a wider area. The wider the pool the greater the flexibility available to the employer.

10.1.3 In identifying the pool it is normally sufficient for the employer to show that they acted with genuine motives in mind – Thomas and Betts Manufacturing Limited –v- Harding (1980) IRLR 255.

10.2 Bumping

10.2.1 Permissible but requires a clear advanced thought process including the desire to retain the most “valuable” skilled and experienced members of the work force.

10.2.2 Employees may consider a demotion or a lower paid job as an alternative to redundancy and this may result in consideration to “Bump” other junior or lower paid employees out of their jobs.

10.3 Selection Criteria

10.3.1 Address the challenges facing the present and future needs of the business but nevertheless remain objective at all times.

10.3.2 The choice of purely subjective criteria will almost always render a redundancy dismissal unfair.

10.3.3 If old established criteria no longer meet the needs of the business then introduce new ones (following consultation with employees, unions or elected bodies of employees).

- 10.3.4 Ensure that the criteria are well publicised before or at the very least at the beginning of the consultation exercise.
- 10.3.5 Ensure that all aspects of selection are well documented – the individual scores and the basis for them.
- 10.3.6 Ensure if possible more than one member of management is involved in the process. If possible, calibrate and check the scores.
- 10.3.7 Can you justify and support the scores, e.g. by reference to appraisal documents as well as other records such as attendance and disciplinary records.
- 10.3.8 Consider giving some criteria e.g. performance or competency levels greater weighting than, for example, absence records or length of service.
- 10.3.9 Maintain the same level of objectivity and fairness in situations of redundant employees applying for or being considered for alternative positions e.g. where the employer's decision will be made following a competitive interview process. Have, in addition, all the redundant employees been given the same opportunity to apply for the vacant position? (Note – special considerations apply to pregnant women and women on maternity leave – regulation 10 Maternity and Parental Leave Regulations 2008).
- 10.3.10 Stay clear of discriminatory criteria:-
- Obviously sex (including pregnant women and women on maternity leave) and race discrimination but less obviously:-
- 10.3.11 Disability discrimination where selection criteria may include consideration of attendance records. Note – the House of

Lords Judgement in London Borough of Lewisham –v- Malcolm (2008) IRLR 700.

10.3.12 The duty on the employer to make reasonable adjustments in cases of disabled employees to perhaps modify or adjust any selection criteria. Each case will usually require a detailed consideration of its own particular facts and merits.

10.3.13 Age discrimination – “Last in First Out” (LIFO) – indirectly age discriminatory but could be objectively justified – see the Court of Appeal Judgement in Rolls Royce Plc –v- UNITE The Union (2009) IRLR 576. LIFO is always useful as a ‘tie breaker’.

11. Conclusions

To avoid a finding of unfair dismissal and / or discrimination an employer must ensure:-

- 11.1 It has given careful and detailed thought to its existing procedures as well as the need to reconsider and perhaps amend those in the light of a changing and deteriorating economic position.
- 11.2 To ensure that if at all possible selection criteria are as objective as possible.
- 11.3 It follows a proper meaningful period of consultation.
- 11.4 Gives detailed thought to any suitable alternative roles and notifying those affected employees of any vacancies.
- 11.5 If paying some form of enhanced redundancy package consider the use of Compromise Agreements.

Changing Terms and Conditions

Tim Thompson
Partner, Hegarty LLP Solicitors



Balance

1. What are you hoping to achieve?
2. What will the impact be?



What are contractual terms?

- Contracts of employment need not be in writing
- Four types of terms
 - Express
 - Implied
 - Incorporated
 - Statutory
- Workplace rules and policies e.g. staff handbook
- Collective Agreements



Non-contractual measures to make savings

- Better absence management
- Reduce/remove overtime
- Stop using temps



Lay off or laid off?

- They are not the same



Methods of varying contracts

- By express agreement
- Renegotiation of collective agreement
- Variation permitted by the contract
- Unilateral imposition of new terms
- Dismissal and re-engagement on new terms



Express agreement

- Verbal or written
- Need all consents



Collective agreements

- Easier as negotiating with a smaller group of representatives
- Not binding normally on dissenters



Contract flexibility

- Do you have it?
- What does it cover?
- Duty of reasonableness



Unilateral imposition of changes

- Can be risky - but successful!
- Stand and sue
- Resign and claim constructive dismissal
- Refuse to work to the new terms



Dismissal and re-engagement

- Statutory procedures now relaxed since April 2009
- Fairness will still apply
- Fair reason. The employer acted reasonably in treating that reason for dismissal. Overall procedurally fair in the circumstances



If all goes wrong

- Tribunal proceedings for unfair dismissal – but you've succeeded!
- Breach of Contract claim – High Court or if resigned in Employment Tribunal
- So balance what it may cost with what you will save overall



Amending terms and conditions of employment

Employers may think a redundancy is the first option in these hard economic times but there are steps which can be taken to avoid dismissals which may keep the work force intact but also save the company money. It may be the business genuinely needs to reduce its overheads in an attempt to survive or an employer may simply see this as an opportune time with reduced income to restructure salary levels at a time when employees may be reluctant to challenge the position for fear of not finding suitable alternative employment.

1. Aims

The first consideration must clearly be to decide what you want to achieve before embarking on any process and balance up the impact that will have on your business not only in relation to loss of good will but a general decline in the morale of the staff and the cost of compensation should you act unfairly and end up in an Employment Tribunal. Be realistic, and appreciate that no-one likes a reduction in the income or benefits they receive but if the process is managed sensibly there may only be limited fall out so the overall picture would be a substantial saving to the salary bill. It is unlikely that salaries will have been considered by you in isolation and the fact that if challenged you can show the other measures the Company has taken to reduce its expenses as part of a global approach may well assist you in justifying the action you have taken.

2. Contractual Terms

Contracts of Employment don't have to be in writing and many are verbal. To comply fully with the law, employees who have been employed for one month or more are entitled to written statement of particulars of their employment and to an updated statement when changes are made. Such statements will not necessarily include all the terms governing the employment relationship and contractual terms can arise from a variety of sources.

There are four types of term in an employment contract.

- **Express terms** – terms that have been specifically agreed by the parties either orally or in writing
- **Implied terms** – terms that are not spelt out in so many words but are deemed to have been agreed because they are too obvious to need recording or because they are part of custom and practice of the business or industry or they may be logically deduced from the conduct of the parties
- **Incorporated terms** – these are terms that are incorporated into individual contracts from other sources such as Collective Agreements or Works Rules
- **Statutory Terms** – terms that are derived from statutes affecting the employment relationship such as the Equality clause inserted into every individual's contract by Section 1 of the Equal Pay Act 1970 or the minimum notice requirements on termination if greater than the contractual terms as provided for in the Employment Rights Act 1996.

Workplace rules and policies, such as those contained in staff handbooks or similar documents can acquire contractual effect. This often happens where the contract itself refers to the staff handbook or policy to flesh out the details. For example in *Keeley –v- Fosroc International Ltd 2006 IRLR 961* the Court of Appeal held that a clause in a staff handbook providing that employees with two or more years continuous service were entitled to an enhanced redundancy payment constituted an enforceable contractual term. The handbook had been incorporated by reference into the Contract of Employment and the language of entitlement of the enhanced redundancy payment provisions along with its inclusion in the “employee benefits and rights” part of the handbook were strong pointers that it was intended to have contractual effect.

That is not always the case, however, as some items in staff handbooks are considered “workplace rules” that the employer can modify without the employees consent, see the case of *Dryden –v- Greater Glasgow Health Board 1992 IRLR469* which related to the imposition of a smoking ban in the workplace where there had

previously been an unwritten policy of allowing smoking in designated areas was held not to be a breach of the contract.

Policies and procedures contained in collective agreements could also become part of employees individual contracts via express reference. But only if the terms are “apt” for incorporation see *Kaur –v- MG Rover Group Ltd 205 ICR 625*. The Court of Appeal held that a statement in a collective agreement to the effect that there would be no compulsory redundancies was merely aspirational and so was not apt to be incorporated into individual contracts of employment.

3. Other Savings

Of course there are many non-contractual measures which can be introduced to make savings. These would be better control of absence, reduce or remove completely non-contractual overtime and perhaps considering having a ban on employing temporary staff in periods of absence so the existing staff are fully utilised. It must be remembered however, that the “financial package” that an employee receives is part of the bargain for which he or she exchanges his or her services and that is apt for incorporation into the employment contract. As a result the unilateral redrafting of an employee handbook so that substantial financial provisions such as enhanced redundancy, permanent health cover or taking away or reducing car benefits is a risky move which could find an employer facing an action for breach of contract.

The areas of variation that you could consider are unlimited. You could to try and make them more palatable introduce the changes as a temporary measure rather than propose them as a permanent measure although if the intention is that you want them to apply permanently you may create a bigger dispute with the staff long term. You can consider a salary reduction with the normal working week, a salary reduction with a reduced working week, compulsory unpaid leave, removal of contractual overtime, the reduction or removal of benefits such as the provision of cars or car allowance, the contributions that you will pay towards travelling and overnight expenses or removing benefits such as staff discounts, death-in-benefits service or private health care, to suggest just a few.

4. Lay off or laid-off

The phrase “laid off” is commonly used to describe having been dismissed. The legal meaning of “lay off” is quite different. In respect of the rights under the Employment Rights Act a lay off occurs when an employee whose contractual remuneration depends on his or her being provided with work of the kind that he or she is employed to do, is not provided with such work, with the result that he or she is not entitled to any remuneration for that week. The related concept of short time working occurs where there is a diminution in the work provided by the employer and as a result the remuneration for any week is less than half a week’s pay.

While temporary laying off staff or putting them on short term working may be an attractive option to an employer facing a reduced cash flow, there are a number of legal considerations. The first fundamental one being an employer must have the contractual authority to withhold remuneration in the event that there is no such work or a reduced demand for work. In the absence of such authority laying off an employee or putting them on to short time work is likely to amount to a fundamental breach of contract.

If you do have the statutory right to lay off there is a statutory scheme where the employee can claim a redundancy payment. The details of the scheme are outside the scope of this article but it is worth noting that to claim a redundancy payment an employee must have been laid off or kept on short time either for four or more consecutive weeks or for a total of six weeks (no more than three of which can be consecutive) in a period of 13 weeks and the employee must give the employer notice of his or her intention to claim a redundancy payment. – Section 148(2) and 148(3) of the Employment Rights Act 1996.

5. Agreeing the changes

By Express Agreement

The only satisfactory method to make changes to the employees contractual terms is by mutual agreement. That minimises dispute or acrimony and there is no lingering threat of a tribunal claim. Like the contract that variation can be oral or in writing but

clearly preferable recorded in writing to ensure there will be no subsequent dispute as to what the variation was and how it was to be applied. The difficulty in practice is the larger the company the more difficult it will be to get 100% agreement and only those who agree the variation will be bound by it. The employer would then have to take more drastic and aggressive action to those who were not prepared to agree the terms.

Human nature is that employees may be reluctant to agree the variation if their fellow workers don't also agree and therefore this can be a tense and protracted procedure. If you don't impose the variations on those who don't agree you're going to have a bigger problem potentially as there would be resentment then from those who have agreed the variation that they have been "hoodwinked". Most employers would have to take an aggressive stand against those who haven't agreed - which I deal with later.

By Collective Agreement

Where there is a recognised trade union in the workplace, changes in terms and conditions are commonly resolved through collective bargaining. This can be easier as the union will probably appreciate the financial difficulty the company is in and the negotiations will be with a limited number of representatives who may deep down realise the need for the variation to be imposed. They may well be able to recommend to the workforce that agreement is made but importantly you should note that the agreement will not be binding on the entire workforce only those which on the union's recommendation agree the change.

There are two circumstances in which agreement of the trade union is relevant as to whether it affects the individual employees' contracts. The first is if you can argue the union may be acting as agent for the employee and secondly where there is an express or implied term in the employee's contract incorporating agreements made between the employer and the unions. The latter is more common and will obviously apply to larger businesses than small ones. I would mention that the contractual term in the contract can be in all employees' contracts not just those members of the union who are taking part in the negotiations.

Flexibility Clauses

Certain contracts have flexibility clauses which would purport to entitle the employer to alter the terms of the employment. This often relates to mobility clauses and may apply to job functions if the contractual provision defining the employee's role has been drafted sufficiently wide to include new duties. Even if there is the express contractual authority it does not automatically make the employer's actions lawful. Flexibility clauses are subject to substantial restrictions and implied terms may operate to restrict the extent of what first appears covered by the flexibility clause. Court and Tribunals impose a duty of "reasonableness" on the employer's enforcement of such a clause and they are interpreted restrictively by the Courts and Tribunals. When looking at the enforceability of a flexibility clause it should be borne in mind the implied term of mutual trust and confidence.

The case of *United Bank Limited –v- Akhtar 1989 IRLR 507* deals with the interpretation of the mobility clause. The employee had been given very little notice and no help with relocation expenses and the EAT found the employer had acted in such a way as to undermine the mutual trust and confidence of the employment relationship. In that case there had been a breach of two further implied terms that the employer would give reasonable notice of any transfer and would not exercise discretion to provide re-location expenses in such a way to make the performance by the employee of his obligation to move impossible.

Often there are flexibility clauses relating to employees' shift patterns. Case law has demonstrated that Courts and Tribunals are reluctant to allow such a clause to be used to allow to reduce or increase the amount of hours an employee works if this does not expressly permit this. See *National Semiconductor (UK) Ltd –v- Church and others EAT 252/97* and *Smithkline Beecham plc –v- Johnston and others EAT 559/96* it is a well established rule of construction in contract law that any ambiguity will be resolved against the party who seeks to rely on it to avoid obligations under the contract. So even where you appear to have a well drafted contractual term you must give general thought and consideration to fairness which will still hold true even during a financial crisis.

Imposing Changes Unilaterally

This may be necessary to impose the changes required if you are reluctant to seek the agreement of your staff for the proposed variation or having sought their agreement, haven't received a 100% acceptance. The risk is quite clear that you will be in breach of contract which would entitle the employee to consider they have been constructively unfairly dismissed and resign. The last thing you would want is for all your staff to leave but in this economic climate however annoyed or frustrated the employee is, are they likely to give up a job and risk being unemployed for a long period of time in the hope that they can eventually extract a large sum of compensation from you at the Tribunal? I am sure there are not many employees who would happily say "do your worst" but if you want to impose the change and you can't get an agreement you're going to have to accept that challenge if you wish to push on with your plans.

If the employee remains in employment albeit unhappily there is the possibility that he or she will be taken by his or her conduct to have impliedly agreed to the variation. On the other hand the employee in question has a number of options; the first is to continue to work under the new terms but make it clear that he or she does not accept them and is working under protest and reserves the right to sue for breach of contract in the High Court or County Court. This I refer to as "stand and sue".

Alternatively if the breach is sufficiently fundamental and the employee resigns in response to it he or she may be able to claim unfair constructive dismissal "resign and claim constructive dismissal". The third is to "refuse to work to the new terms". Depending on the nature of the changes it may be possible for the employee simply to refuse to work to the new terms.

Implied Agreement

As you know it is not possible to unilaterally vary a term in a contract as this is outside the varying parties contractual authority. Any such action is a breach of contract. However, if by his or her conduct the employee instead "affirms" the contract the contract continues and the new varied terms apply. In the case of GAP

Personnel Franchises Ltd –v- Robinson EAT 0342/07 Robinson was employed on a contract which stated travelling expenses would be paid at 25p a mile. Shortly after he began working GAP Ltd unilaterally varied the contract by reducing the mileage to 15p a mile. Robinson subsequently submitted expense forms claiming 15p per mile until he left GAP's employment after which he brought a claim for breach of contract and unlawful deduction of wages. The Tribunal found that GAP had breached Robinson's contract but the EAT disagreed. It held that by submitting the expense forms at the varied rate for five months Robinson had in fact affirmed the contract and could be said to have given his implied consent to the variation.

Stand and Sue

If this is the course the employee wishes to take they need to make it clear the change is not being accepted otherwise there is a danger to have implied they agree to the change and waive the right to sue for damages. The leading case in this area is Rigby –v- Ferodo Ltd 1988 ICR 29 in the HL. The employer with serious financial problems reduced wages and a number of staff continued to work but expressly refused to accept the change to rate of pay and commenced legal proceedings. The House of Lords stressed that the employer's action amounted to a repudiatory breach of contract but did not amount to a notice of termination of employment. As the employees worked under protest they had not accepted the purported change in terms and conditions and were entitled to sue for the difference between the amount of wages they should have received and the amount they did receive. It is important that there needed to be a continuing contract and that neither party terminates it. In those circumstances the employer will remain liable for the shortfall in contractual wages. As an employer if this happens to limit liability, you must terminate the existing contract by giving contractual notice and offer the employee a new contract on revised term. This will not amount to a breach of contract as he is serving contractual notice but will still risk the claim for unfair dismissal which I deal with below.

In the recent case of Robinson –v- Tescom Corporation 2008 IRLR 408 EAT Robinson refused to accept the doubling of his size of his sales territory. He indicated that he worked to the new terms under protest but reserved the right to sue for breach of contract. He however did not work under the existing terms which led

to disciplinary action and dismissal for gross insubordination. Both the initial Tribunal and EAT held that Robinson had agreed to work under the new terms under protest and he could not then avoid the consequences of his insubordination by relying on his employer's breach of contract.

An employee who wishes to stand and sue can't seek redress from the Employment Tribunal which involves no Court costs being paid and in reality little chance of a costs liability. This is because the tribunal's jurisdiction is limited to obligations arising or outstanding on termination of the employment relationship. There is also the limited amount of compensation of £25,000.00 within the Tribunal for breach of contract claims. The employee needs to issue High Court or County Court proceedings which involves a fee and a risk if unsuccessful of paying the employer's costs.

The downside for employers is that the limitation period for these proceedings is six years rather than three months at the Employment Tribunal so if the employee has made it perfectly clear they are working under sufferance, resolution need not necessarily take place quickly although the employer is still going to be able to argue that if the employee doesn't take Court action reasonably swiftly that they may have acquiesced in the variation.

Resign and claim constructive unfair dismissal

Not all imposed changes on terms and conditions will be sufficiently fundamental to warrant an employee resigning and claiming constructive unfair dismissal. Realistically those relating to financial terms of the contract or the working week are likely to be considered fundamental. The breach must be repudiatory i.e. it entitles the employee to regard the contract as being at an end and the employee needs to establish that they have resigned as a result of the breach and not because of anything else. Quite often employees are reluctant to resign until they have another job and the employer can then argue the real reason for the resignation is the alternative employment, not their original action of e.g. proposing a reduction in the salary. It will be a very confident or perhaps foolish employee that rushes into constructive unfair dismissal claims at a time of rising unemployment as they may find it very difficult to find new employment let alone at the same grade or salary.

From the employer's point of view however, bear in mind that if the contract is breached by the employer any post termination restrictions within the contract of employment are unlikely to be upheld. This could mean that your best salesman immediately joins a competitor which could have a larger impact on your business than the savings you would have made by reducing his salary!

Dismissal and re-engagement

The employer may wish to do this to any of the employees who have not agreed the variation that others in the workforce have agreed. Alternatively the employer may wish to go down this route rather than attempting to seek the employees' agreement initially, however to do so would perhaps be seen as an aggressive act by the employer. In any of these situations the impact on morale must be considered and the way the proposal / action is put forward will affect the response which is received.

Where there is no consensus and no contractual flexibility the employer is left with this option which is really the "nuclear option" by dismissing the employees on contractual notice and offering re-engagement on new terms. The reality is that your employees may all have differing contractual notice periods depending on their length of service so to implement this you may decide that you give all staff the maximum contractual notice i.e. 12 weeks under the Employment Rights Act so that their employment would end in three months time and that the new terms on which they will be employed will commence so far as this presentation is concerned, on 1 February 2010. That would give you three months to explain, discuss, conciliate so you may get agreement from some of the staff and you know at the end of that period the numbers of staff who may be unemployed and then wish to pursue a claim against you.

It would also give the employees three months in which to seriously consider their position so that if they are optimistic that they would secure new employment they are likely to leave the company but if they realise the job market is particularly depressed, may well in that 12 week period come to the reality that the company's proposals are not that unpalatable in all the circumstances and albeit reluctantly agree the variation.

If by choice or events you consider the nuclear option, again to mitigate the consideration of the matter by the Tribunal, you may be wise to consider offering an ex-gratia redundancy payment for those employees who don't accept the new terms and whose employment ends. This of course only equates to the basic award which they would get if they pursued the matter to an Employment Tribunal. The maximum currently is £10,500.00 for an employee who has had 30 years of service and which may well be a worthwhile "sweetener" if there are funds to actually pay it. I would recommend you seriously consider it being conditional on a compromise agreement being entered into which then will restrict further litigation from any employee who is subsequently disgruntled.

Fortunately the statutory disciplinary and dismissal procedures are no longer with us so there is no longer the risk of an automatic unfair dismissal as that no longer applies. Bear in mind however if the ACAS Code of Practice is not adhered to, compensation can be increased by 25% unless there is justification for non-compliance.

6. Fairness for Dismissal

If there is a dismissal the obligations under the Employment Rights Act requires the employer to show a potentially fair reason for dismissal and he acted reasonably in treating that reason as sufficient reason for dismissal and the dismissal was overall and procedurally fair in all the circumstances. In relation to dismissal and re-engagement for business reasons, showing potentially fair reason for dismissal is generally considered to be the easiest of these three hurdles to clear. If an employer can show that a company had sound business reasons for dismissing an employee who refused to accept a change in terms and conditions, this is sufficient to establish "some other substantial reason" for dismissing him or her. The change need not have been essential for the survival of the business in fact some cases suggest that the test for what is a "substantial" reason actually sets the bar quite low, see for example *Kerry Foods Ltd –v- Lynch 2005 IRLR 680.*

As to the reasonableness in dismissing the employee for that reason case law indicates that this will depend on a number of factors including

- That the employer considered the impact on the employee of the changes
- Whether those disadvantages outweigh the advantages to the employer in implementing the changes
- The level and genuineness of any consultation
- Whether the employer responded reasonably to the employee's objections
- The percentage of employees who accepted the proposed changes and whether they were supported by the trade union recommendations and whether alternative jobs (if any) were considered by the parties

Whilst the Tribunals have seen a substantial increase in the applications being submitted which unrealistically will continue in the foreseeable future many companies are re-appraising their trading position both in relation to the numbers of staff employed and the terms and conditions on which they are employed. Many companies have had detailed job evaluations revealing that their existing staff are substantially over paid in relation to the market rate. In the light of that notwithstanding the inherent risks of upset, reduced morale and possible litigation, all employers should seriously consider their own structures and if appropriate start implementing change which could have a long lasting impact on the profitability of the business which will far outweigh the temporary difficulties of implementing the procedures.

Employment Update

Martin Bloom
Partner, Hegarty LLP Solicitors



The Equality Bill



Redundancy Pay / Basic Awards



Holiday Pay – Sick Leave



Legal representation in internal hearings



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