

## Flexible working

Work Life balance is firmly on the political agenda and the Government has announced further measures which it says are designed to help working parents achieve a better work life balance. Already, there is a legal right to request flexible working. For some time, working parents with children aged under six or those with disabled children have had the right to request flexible working, and their employers are under a legal duty to consider such a request. This right was recently extended to those who care for adults. The Government are now investigating whether the right should be further extended to parents of children up to the age of 16. This would bring an extra 4.5 million parents into the equation.

But how can businesses, particularly smaller businesses accommodate such requests? Although the Government's proposals have enjoyed some support, there has been a backlash from business leaders. John Wright, chairman of the Federation of Small Businesses said: "The Government needs to recognise that the reality in a business is that the employees need to be at work to enable the firm to make money, pay their wages and grow to employ others."

Aside from the proposals to extend flexible working, employers need advice on how to deal with requests from their existing workforce. There are a series of steps an employer must take when faced with a request, and employers ignore those steps at their peril.

We can advise on the process which your business can adopt when facing these requests.

## Beware - Other rights for Carers

Whilst on the subject of flexible working and carers, employers should well take note of a recent case which has now suggested that those caring for the disabled are protected against discrimination. If a person qualifies as a disabled person under the legislation, the law already outlaws discrimination against that person on the grounds of their disability, eg turning someone down for a job on the grounds of their disability. However, the law may now be extended to cover discrimination against an employee on the grounds not of their own disability but on the grounds that they are caring for a disabled person. The case surrounded a legal secretary who has a disabled child and who alleges that she was treated badly by her employer in various ways (eg unsympathetic behaviour). She alleges that this was on the grounds of her caring responsibilities. If the case succeeds then it will have a real impact on employers.

The legal group director of the Equality and Human Rights Commission (who are supporting the case), John Wadham, said: "This is truly a landmark case and I hope it will have a real impact on the lives of millions of carers, sixty per cent of whom are women. People will no longer have to live in fear of losing their

jobs whilst looking after their loved ones, and employers will have to become more flexible. I hope that employers will recognise the importance of this case which should inform best practice."

## Is it safe to sack my PR Company?

Employers should exercise caution when engaging the services of, or terminating the services of a "service provider". As a result of amendments made to the Transfer of Undertakings (Protection of Employment) Regulations ("TUPE") service provision changes are now caught. This means that where there is a service provision change within the meaning of TUPE then employees are automatically transferred. A recent case illustrates the position.

Ms Hunt ("H") worked for Storm Communications Ltd ("Storm"), a PR agency, as an account manager. She spent the majority of her time during the five year period of her employment working on the Brown Brothers Wines ("BBW") account. BBW then terminated their contract with Storm and engaged another PR agency. Storm took the view that Ms Hunt's contract of employment automatically transferred to the new agency. Storm therefore refused to continue to employ Ms Hunt. The new agency denied that it had to take on Ms Hunt as an employee. They had their own staff who could service the BBW account.

The Employment Tribunal found that Ms Hunt spent around 70 percent of her time servicing the BBW account, that she was "essentially dedicated" to that account. On this basis, TUPE did apply and therefore the new agency should have taken her on. Ms Hunt's unfair dismissal claim therefore succeeded at the Tribunal.

This has major implications for Employers who are considering changing a service provider, and is not limited to PR companies, but any professional service provider, such as business advisors, and can include accountants and lawyers, where the individual advisor is "essentially dedicated" to that account. Clearly, individuals will not transfer in all cases but Employers should take advice when they are planning a change of service provider. TUPE still, of course, applies in the traditional areas where there has been a "relevant transfer" such as the outsourcing of business. This whole area remains somewhat of a minefield.

## Redundancy risks – beware "20 or more"

With the recent credit crunch, and rumblings that the economy may not be in such good shape, redundancies are again firmly on the agenda. However, Employers need to exercise caution when planning to lay people off. Aside from ensuring that employees are not handed an unfair dismissal claim "on a plate", a more potent liability potentially arises.

Where the redundancies affect 20 or more staff, Employers should proceed carefully. Where 20 or more are affected there is a legal duty to inform and consult with "appropriate representatives" BEFORE reaching a decision to terminate employment. This applies to all Employers, not just those where trade unions are

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involved. We can advise on the steps which should be taken. Where there has been a failure, then there is a claim for what is known as a "protective award" which can be made to an Employment Tribunal by the employees or their representatives. The award is up to 90 days pay per affected employee and therefore this liability can be huge.

A recent case has increased the importance of all this. Many Employers only pay lip service to this legislation, and in fact make all the decisions irrespective of any consultation with employees. The recent case (UK Coal, involving a decision to close down a coal mine) highlights that this is very dangerous. Employers must consult genuinely on not just the redundancies themselves but in most cases on the business case itself which has led to those redundancies. Employers should not therefore start the consultation process off on the basis that there is a closure. Consultation should be offered on the widest terms.

We recognise that there is not much enthusiasm for consultation, and working with you we can come up with the best strategy for your business.

## Cost of Tribunal claims

According to latest figures UK Employers were spending £210m a year in 2006 on defending Employment Tribunal claims. The Government think tank, Committed2Equality predicts that this will rise by 70 percent to £360m in 2007, due to increased claims in the areas of age discrimination and equal pay.

115,039 claims were brought in the Employment Tribunals during the year 2005/2006, a substantial increase on the previous year (86,181 claims).

Although many of the claims were eventually settled out of Court, the research shows that claims cost companies an average of £7000 per claim.

The most popular claim remains unfair dismissal, which is now, under the Government's dispute resolution regime, very process driven. A failure by an Employer in the dismissal process can lead to a finding of automatically unfair dismissal, irrespective of the merits of the case.

We can advise on the necessary steps to take when considering termination of employment to minimise the risks of a claim.

## Job adverts

Over a year after age discrimination was outlawed in the workplace, one in five job advertisements still fails to comply with the rules, according to a recent survey.

A survey of 200 advertisements found that 21 per cent were potentially 'ageist', while 27 per cent could be viewed as containing some form of discrimination, whether on grounds of age, sex or disability.

One of the biggest problems was that 12 per cent of all adverts specified a minimum level of experience, which could rule out younger people who might be equally capable of carrying out the role.

An additional problem, particular in the leisure and retail sectors, is that some employers ask for candidates who are 'lively', 'energetic', 'enthusiastic' or 'dynamic'. Such terms can all be viewed as discriminating against older people or those with disabilities.

Sloppy wording within advertisements is leaving employers open to tribunal claims. Job candidates can bring a claim on the basis of an advert even though they are not employed by the company. We are currently dealing with a case where an unsuccessful job applicant has written in to the company stating that he believes that ageism has been a factor. The candidate is aged 60 and has asked for full details of the ages of each of the job applicants and the successful candidate. We can guide employers through the recruitment process to ensure that the risks of Tribunal claims are minimised.

## The "lifblood of the Company" .....

If they thought about it, most employers may well describe customer databases and other confidential information as the "lifblood of the Company". However, what steps have been taken to ensure that the Company is best placed, in the event that the unthinkable happens?

We have dealt with a case where a senior employee left the business suddenly and suspicions were aroused that she was going to join a competing business. When her company pc was examined, it became clear that she had downloaded the company database of customers and contacts onto a memory stick and it later transpired that she had transferred the information onto the system of the competing company she was about to join. An application for an injunction to prevent the unlawful conduct was made.

The best preparations may not be able to prevent an employee doing such things but we can advise as to the steps which can be taken now to ensure that the company is best placed to minimise damage and disruption. This includes confidentiality clauses in employment contracts together with non compete clauses. It is widely thought that such clauses are "not worth the paper they are written on" but recent cases show that the Courts are changing their stance on these and may well be prepared to uphold such clauses, provided that they are appropriately worded. We can ensure that contracts are worded in such a way as to best protect the interests of the company.

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