



Bindmans

Employment law newsletter

Winter 2010 issue

Cuts, Redundancies and Consultations

In this brief guide to consultation we set out some of the key issues that employers need to be aware of to avoid falling foul of their legal obligations. Nothing here is intended or should be understood as a substitute for taking legal advice.

Introduction

On 20 October 2010 the Chancellor, George Osborne, announced the government's four-year Spending Review, revealing some of the deepest cuts in public spending in decades.

At first glance, it appears that the public sector is taking the hardest hit (with approximately 490,000 jobs set to disappear). However, the cuts will almost certainly have an impact on organisations in all sectors. Organisations such as NGOs and charities which rely on government funding may find their income stream drying up. Similarly, companies which service government contracts will feel the pinch.

In the midst of this cost-cutting climate, organisations will inevitably look for ways to increase efficiency and, in some cases, simply survive. This may result in redundancies and/or employers seeking to restructure their organisations and introduce changes to working practices. This may entail changes to an employee's contract of employment.

As a general rule, changes to a contract of employment must be mutually agreed between employer and employee. Therefore an employer should engage in a process of consultation and obtain express permission from the employees concerned before introducing any changes. In practice, however, in order to effect a restructure or introduce changes to working practices employers often find it necessary to dismiss employees and then offer re-engagement on new terms. This strategy is inherently risky and we would strongly suggest that an employer seeks expert legal advice before taking any such action.

What follows is an overview of the steps that an employer proposing to make 20 or more staff redundant, or wishing to dismiss and re-engage 20 or more existing employees on different contractual terms will need to take.

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“The consultation should cover ways of avoiding or reducing the numbers of dismissals and mitigating their consequences.”

The duty to consult

Under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (‘TULR(C)A’) an employer proposing to make 20 or more employees at one establishment redundant within a period of 90 days or less, should consult with the appropriate representatives of the employees who may be affected by the proposed dismissals, unless there are special circumstances which mean that it is not reasonably practicable.

The definition of ‘redundancy’ in this instance is wider than that which many employers are accustomed to, and also includes a reorganisation where an employer gives notice to end existing terms and offers new terms of employment. The Employment Appeal Tribunal (‘EAT’) has confirmed that the duty to consult applies even when the employer intends to offer alternative employment to the majority of employees, thereby bringing the number actively dismissed below 20.

“The potential liability for a failure to consult collectively is one of the most expensive liabilities that an employer may face in employment law.”

Consultation must begin in good time. If 100 or more employees are to be dismissed at one establishment within a 90-day period, the employer must consult at least 90 days before the first dismissal is to take effect. Where the employer is proposing to dismiss at least 20 but fewer than 100 employees the employer must consult 30 days before the first dismissal takes effect. The consultation should cover ways of avoiding or reducing the numbers of dismissals and mitigating their consequences.

Employers who recognise a trade union must consult with representatives of that particular union and cannot choose to consult with elected employee representatives.

If there is no recognised trade union, the employer must arrange for employee representatives to be elected and consult with them. The EAT has recently confirmed that consultation should include consultation over the business reason(s) for proposed action. Similarly, during the consultation, the employer must disclose the reasons for the proposed changes and provide details as to the numbers and descriptions of the affected employees and the method of selection.

The employer should also notify the Department for Business Innovation and Skills. Failure to do so is a criminal offence.

Protective award

If the employer fails to consult in accordance with TULR(C)A, trade unions, elected

employee representatives or affected employees may complain to the employment tribunal. If such a complaint is well-founded, the tribunal must make a declaration to that effect and may make a ‘protective award’ of wages for such ‘protected period’ as it considers just and equitable.

The maximum ‘protected period’ is 90 days and, as the purpose of the ‘protective award’ is to punish the employer, the Court of Appeal has ruled that this should only be reduced where there are mitigating circumstances.

Information and Consultation Regulations 2004

In addition to the TULR(C)A obligations outlined above, employers with 50 or more employees will also need to be alert to their obligations under the Information and Consultation of Employees Regulations 2004. They provide employees with a right to be informed about the undertaking’s economic situation, informed and consulted about employment prospects, and informed and consulted with a view to reaching agreements regarding decisions likely to lead to substantial changes in work organisation or contractual relations.

The Regulations oblige employers to establish information and consultation arrangements in order to ensure that employees are properly consulted on a broad range of matters. These obligations are, however, only triggered by a valid request from no less than 10% of the employer’s workforce.

Moreover, the obligations cease to apply once an employer informs the relevant representatives in writing that they will comply with their duty to consult under TULR (C)A.

The EAT is able to award penalties of up to £75,000 for breaches of the Regulations. The first such penalty was awarded against MacMillan Publishers when it was fined £55,000 for failing to comply with the Regulations. The EAT concluded that this penalty was appropriate as it would serve to deter other employers from adopting a similarly ‘cavalier’ attitude.

Conclusion

The potential liability for a failure to consult collectively is one of the most expensive liabilities that an employer may face in employment law. It is, therefore, vital that employers are alert to their legal obligations in this regard and remember that the provisions outlined above apply not only to ‘normal’ redundancy situations but also situations in which an employer gives notice to end existing terms and offers new terms and, in the case of the Information and Consultation of Employees Regulations, situations where there are likely to be substantial changes in work organisation.



Key contacts

If you would like to make an enquiry, please contact one of our employment experts:



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Case law update

This update highlights a few important developments in employment law over the last quarter or so.

The case summaries below are not intended as legal advice but rather as a means of flagging up volatile issues. Should you have any situations which raise similar questions or problems, please contact us for further, more detailed advice.

Giving references

S A Bullimore v (1) Potheary Witham Weld (2) P J M Hawthorne
UKEAT/0189/10/JOJ

This case looked at employers' liability arising from providing a poor reference. The employee in this case brought proceedings in the employment tribunal for unfair dismissal and sex discrimination. The parties agreed to settle the claim and the dismissed employee went on to apply for alternative jobs. She was offered a post with another firm subject to satisfactory references.

Her former employer provided a reference which referred to her poor relationship with them and the fact that she had brought proceedings against them. It then followed that the new employer attached conditions to the job offer including a probationary period of six months and one month's notice of dismissal during that period.

The employee brought proceedings against both employers for victimisation. She was successful in her claim and went on to appeal against the level of compensation she was awarded. The employment tribunal had found that the action taken by the new employer had broken the chain of causation so that the former employer would not be liable for the appellant's future loss of earnings.

The EAT disagreed, finding that the provider of a poor reference, which had been found to constitute an act of victimisation, would be liable to the victim of that victimisation for future loss of earnings. The EAT observed that this was a common form of victimisation and claimants were entitled to a remedy. It also found that damages would be

apportioned between the former employer and the new employer according to their culpability for the loss of earnings.

Comment: Employers need to be cautious when providing references for outgoing employees in circumstances where there is a history of dispute. Employment law gives rise to liability to employers even outside of an existing employment contract; including, during recruitment and in the provision of references.

Disciplinary and maternity rights

Hague v Chief Constable of Hampshire Constabulary

In this case, the police professional standards department brought disciplinary proceedings against the Claimant and her husband for misconduct. Although Mrs Hague was on maternity leave at the time when the disciplinary was started, it was decided that those proceedings should go ahead. She was asked to attend a preliminary hearing on 17 July, some four months after going on maternity leave. Despite her complaints about inadequate facilities and her objections to the disciplinary proceeding during her maternity leave, the police professional standards department proceeded to a full hearing. Mrs Hague was subsequently found guilty of gross misconduct but nevertheless went on to succeed in her claim for sex discrimination in the tribunal.

Comment: Employers need to be extremely careful to respect maternity rights if conducting disciplinary proceedings during an employee's maternity leave. The tribunal found that it was not unlawful to proceed with the disciplinary during Mrs Hague's maternity leave but that her employers had directly discriminated against her in the manner in which they had proceeded.

The tribunal found that employers had "to have careful and considerate regard to any representations made by or on her behalf as to the manner and timing of the disciplinary proceedings", and stated that employers should carry out risk assessments, provide proper facilities and keep interference with the protected period of maternity to a minimum.

Focus on Emma Webster Solicitor

Emma studied History at Nottingham University before obtaining a distinction in her legal training at the College of Law. She qualified as a solicitor in 2004. Emma trained at Bindmans LLP, left to expand her post-qualification experience and then returned to Bindmans LLP in 2008.

She advises both employers and employees on a full range of contentious and non-contentious employment law matters. Her clients include individuals working in education such as teachers, bursars and university professors; civil servants at all levels, lawyers and city executives.



Emma also advises employers with regard to their employment policies, management of employees, redundancies and dismissal procedures. She has advised organisations such as trade unions, charities and local authorities. Emma has successfully defended a union against a complex equal pay claim. She also undertakes cases which involve the overlap between employment and regulatory work, including assisting with the successful defence of an individual referred to the Nursing and Midwifery Council.

Emma enjoys her work and is committed to ensuring that clients, whatever their needs and background, receive pragmatic legal advice that deals with problems as efficiently as possible.

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New employment law micro-site launched

We have recently created a new employment micro-site to offer support for professionals and executives, and provide a resource for clients.

The new micro-site is accessible via the main Bindmans' website, under the 'Employment law for executives and professionals' section.

Our solicitors have specialised in championing the rights of employees for years. We have significant experience in this complex area of law, so we understand how stressful employment related issues are. Our solicitors recognise the importance of acting quickly and assertively when dealing with your case.

Whether your concerns are about highlighting wrongdoing, seeking financial compensation, or minimising losses to your future career prospects, we have the skills necessary to fight for you and maximise your prospects of achieving a positive result.

Our services:

- Negotiating and advising on Directors Agreements and Contracts of Employment
- Discrimination on the grounds of your Sex, Race, Age, Sexual Orientation
- Restrictive Covenants, confidentiality agreements and restraints of trade
- Public Interest Disclosure issues and Whistle blowing
- Negotiating severance packages and compromise agreements
- Unfair Dismissal
- Breach of Contract and Wrongful Dismissal claims
- Grievances
- Support and representation during disciplinary and investigatory proceedings
- Representation at the Employment Tribunal, Employment Appeal Tribunal and High Court

Please visit our new microsite: www.employmentlawexecutive.com

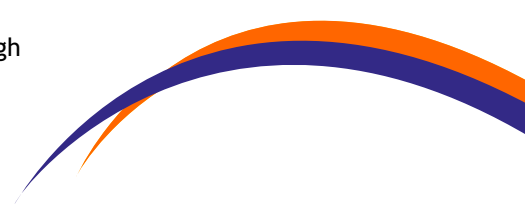
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Seminars and lectures

In order to meet the needs of organisations and companies that endeavour to keep abreast of their duties and obligations as employers the employment department at Bindmans offers a range of seminars and lectures.



These events can be tailored to the specific needs of your organisation and provide an excellent way to improve your knowledge of employment law rights and obligations. Please contact Shah Qureshi if you have any particular training requirements.



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