

employment

Introduction

Employment law and rights and obligations given by the employment relationship are a potential minefield for employers and a maze for employees. The following is an overview of the main issues which can affect employers and employees.

Age Discrimination

The legislation makes it unlawful to treat people less favourably on the grounds of age, whether old or young, and has a wide ranging effect covering recruitment, terms of employment, promotions, transfers, dismissals and training. It also introduces a special retirement procedure which must be followed to retire an employee fairly.

Agency Workers

Engaging staff through an employment agency had traditionally been seen by employers as the way to avoid the worker becoming an employee of the business and thus claims for unfair dismissal and redundancy. However, as a result of case law agency workers may in theory be employed by the business to which they are assigned (the "end user") or the agency which assigns them. A close examination of the documentation and arrangements is therefore vital to understanding the status of the worker. When implemented in 2011, the Agency Workers Regulations will give additional protection to agency workers.

Bullying & Harassment

Bullying and harassment is usually associated with discrimination claims based on a worker's race, sex, disability, religion, belief, sexual orientation or age. However, it is now recognised as a workplace problem in itself and freestanding claims can be brought at common law and under the Protection of Harassment Act even if there is no specific discrimination claim. Bullying and harassment claims can be made against an employer on the basis of actions of a co-worker and the employer can be liable in some cases even if it did not instruct, authorise, approve or even know about it.

Confidentiality

Employers need protection if employees have access to sensitive trade secrets or other confidential information which could be extremely damaging in the hands of a competitor. Employees need protection from employers who try to use over onerous clauses in employment contracts to prevent them moving to another job or setting up their own business.

Commissions & Bonuses

Whether an accrued bonus or commission is payable on the termination of an employment contract can be a major part of any settlement negotiations. Arguments can arise about whether a bonus is entirely discretionary or whether an employee has forgone his right to a commission payment as a result of an alleged serious breach of contract.

Compensation

If an employee makes a successful claim for unfair dismissals he can claim compensation consisting of two elements; the basic award and the compensatory award. The basic award is calculated broadly in the same way as a redundancy payment and is a mathematical calculation dependent on the employee's age, years of continuous service and weekly pay. The compensatory award is designed to compensate the employee for financial loss suffered as a result of being dismissed but not for the manner of the dismissal or injury to feelings. It is, with some exceptions, subject to a statutory maximum.

By contrast there is no upper limit on the compensatory award for discrimination claims and awards are designed to compensate for all losses caused by the discrimination including injury to feelings and aggravated damages for the manner of the discrimination.

Compromise Agreements

A Compromise Agreement can be used to effect a settlement between an employer and employee where their relationship has or is about to come to an end and both parties want a "clean break". It is a special document which will prevent an employee bringing a claim against the employer in the future except in very rare circumstances. It is a statutory requirement that the employee receives professional advice before signing it. The employer needs certainty that it is properly drawn to prevent subsequent claims and the employee wants to ensure that it covers everything to which she is entitled as there will be no second chance.

Contract Workers, Casuals & Temps

Workers are increasingly being employed under labels which have no legal meaning and whether or not contract workers, casuals and temps can claim unfair dismissal depends on a number of criteria which will have to be assessed in each case.

Contracts

The employment contract is essential to define the working relationship and obligations between the employer and the employee. Certain particulars must be provided, being the bare essentials required by the Employment Rights Act. However, the contract also provides the opportunity to cover other matters of importance to the parties, for example, bonus schemes/commissions, confidentiality, garden leave, expenses, cars, training fees, restrictive covenants.

Data Protection

Employers must process personal data in accordance with the data protection principles contained in the Data Protection Act. Issues can arise relating to the improper use or disclosure of data and also over the extent of the employee's right to access that data.

Disability Discrimination

The Disability Discrimination Act protects, among others, job applicants, apprentices, people on work placements, contract workers and employees from discrimination by reason of disability. The definition of "disability" can cover workers who would not be perceived as disabled e.g. those with back injuries, depression and other temporary problems. The Act covers not only the actions of the employer but also discriminatory acts of their employees or agents usually whether or not the employer knew or approved of those actions.

Disciplinary & Grievance Procedures

The proper handling of disciplinary and grievance situations in the workplace is essential not only because many issues can be resolved quickly and informally but also to prevent expensive claims and an unhappy workforce. Failure by the employer or employee to follow the ACAS Code of Practice can result in awards of compensation being increased or decreased by the Employment Tribunal by up to 25%.

Discrimination

The law presently provides for claims to be brought for discrimination on the following grounds:

- Sex or marital or civil partner status
- Colour, race, nationality or ethnic origin
- Disability
- Sexual orientation
- Religious or philosophical belief
- Age

There is no minimum length of service required and no upper limit on the amount of compensation that can be awarded.

Dismissal

Dismissal happens when the employer sacks someone or fails to renew a fixed term contract on the same terms or there is a "constructive dismissal" where the employee leaves and treats herself as dismissed on the basis of a fundamental breach of contract by the employer.

Except for special cases called "automatically unfair" dismissals an employer can avoid a successful claim by showing that it acted reasonably in dismissing for one of the following grounds:

- Conduct
- Capability
- Redundancy
- Illegality
- 'Some other substantial reason'
- Retirement

Save for some limited exceptions employees cannot bring a claim for unfair dismissal unless they have at least one year's continuous service

Employment Tribunal and Employment Appeal Tribunal

The Employment Tribunal hears statutory claims relating to such matters as unfair dismissal, redundancy, sex and other forms of discrimination, unpaid wages and holiday pay. It also has limited jurisdiction to hear breach of contract claims. The Employment Appeal Tribunal hears appeals from decisions of the Employment Tribunal. The County Court and High Court has more extensive jurisdictions to hear contract and tort claims and to grant injunctions.

Flexible Working

The legislation gives qualifying employees a right to make a request to work flexibly and to have it properly considered by the employer. The request may relate to hours of work, time off work or home working. Failure to consider the request properly or to refuse a request on other than specified grounds is unlawful and the employee can seek redress in the Employment Tribunal.

Garden Leave

"Garden leave" refers to the situation where an employee is required to serve out his period of notice at home (or "in the garden"). Employers often adopt this approach where they want to prevent an employee of some status, who is leaving to join a competitor firm, having access during his last months to confidential information or customers. However, the enforcement of such clauses can be problematic.

Holidays

The Working Time Regulations set minimum holiday entitlements for most workers but issues can arise about the rate at which a worker should be paid for holidays, whether holiday can be carried over from one leave year to the next, and what happens when a worker is off sick or pregnant.

Part Time Workers

The Part Time Workers Regulations implement the EC directive on part time work. They make it unlawful for employees to treat part time workers less favourably than comparable full timers unless different treatment is justified on objective grounds. They are designed to ensure that part timers should, for

example, receive the same rates of pay, have access to the same training, and have the same holiday entitlement and maternity/parental leave on a pro rata basis.

Pregnancy and Family Life

A host of rights has grown up to protect work and family life. These include maternity leave and pay, adoption leave and pay, paternity leave and pay, parental leave and dependant leave. There are also enhanced protections in relation to unfair dismissal, redundancy, part time and flexible working while discrimination due to pregnancy or related reasons will usually amount to unlawful sex discrimination.

Race Discrimination

It is unlawful to discriminate directly or indirectly against employees on the grounds of colour, race, nationality, ethnic or national origins. However, understanding the meaning of "national origins" and "ethnic groups" can be very difficult in practice and has excluded certain people who were thought to be covered.

Religion or Belief Discrimination

It is unlawful to discriminate directly or indirectly against an employee on the grounds of religion or belief. There is an overlap with race discrimination in that certain religious minorities may be seen as being connected with race. Issues have also arisen from the interaction with the Sexual Orientation Regulations because conflicts may arise when one person discriminates against another on the grounds of their sexual orientation because it offends the discriminator's religious beliefs.

References

In most cases an employer is not obliged to give a reference but if it does then issues can arise about the right of an employee to gain access to a copy of the reference and the extent of any liability of the employer if the reference is discriminatory, misleading, or inaccurate.

Sex Discrimination

The Sex Discrimination Act prohibits discrimination based on sex (i.e. gender) marital status (i.e. being married) or civil partnership. It also forbids discrimination against workers undergoing gender reassignment. Sex discrimination claims can arise from all aspects of the employment relationship.

Redundancy & the Alternatives

Handling a redundancy process properly is essential to avoid large compensation claims. Potential traps for employers are:

- Using selection criteria which are vague and cannot be objectively measured or which may indirectly discriminate;
- Failing to comply with the key procedural stages of the process;
- Trying to disguise as a redundancy a dismissal for another reason;
- Not genuinely considering employees for alternative vacancies.

Further, employers often forget to consider alternatives to redundancy such as flexible working or retraining and redeployment which may save both redundancy and recruitment costs.

Restrictive Covenants

Restrictive covenants in the employment contract are designed to protect an employer's business from the actions of employees after they have left the company. Normally they seek to prevent:

- Competing or working for a competitor for a particular period and in a certain area following termination
- Entering into working relationships with former customers or suppliers
- Recruiting former colleagues
- Using confidential information

Sexual Orientation

The Employment Equality (Sexual Orientation) Regulations implemented the Equal Treatment Framework Directive and make it unlawful to discriminate against an employee on the grounds of sexual orientation which means orientation towards persons of the same sex or persons of the opposite sex or both. This includes discrimination based on a false perception that someone is gay or because they have gay friends or because they refuse an employer's request to discriminate against gay men or lesbians. Like all discrimination claims it covers discrimination in recruitment, during employment, dismissal and after the employment has ended so long as the discrimination arises from the former employment relationship.

Sickness & Sick Pay

Employees have a right to statutory sick pay which the employer may choose to supplement by some form of contractual sick pay scheme. Where an employee is on long term sick leave issues may arise about whether the employer is justified in dismissing him.

Tax

The "golden handshake" provisions, which give exemption from tax in respect of certain payments to employees on loss of their employment, are well known. However, there are other strategies which may be used to mitigate tax and maximise payments to employees on termination.

Training Fees

Employers often invest significant resources training staff including fees for external courses and qualifications. This investment can be protected by using a training fee agreement which enables all or part of the fees paid to be recovered from the employee in the event that he doesn't complete the course or leaves employment within a certain period after training ends.

Transfers of Business (TUPE)

The Transfer of Undertakings Regulations protect employees' rights on transfer of the business in which they are employed. However, this simple statement belies the complexity of the

issues which may arise. Often, it is unclear if a transfer has taken place at all and if it has which employees are transferred to the new employer. It is vital for buyers and sellers of businesses to ensure that the sale agreement contains provisions dealing with the effects of TUPE as failing to do so could leave them exposed to expensive claims.

Whistleblowing

The Public Interest Disclosure Act, the so called "whistleblowers charter", was introduced to protect individuals at work raising genuine concerns about crimes, civil offences, miscarriages of justice, dangers to health and safety or the environment and the cover up of any of these. It gives protection to workers against victimisation, including dismissal, for making "protected disclosures" under the Act, even if the information disclosed is confidential. The provisions are complex but there have been a considerable number of cases brought resulting in some very sizeable awards of compensation.

Working Time Regulations

The Working Time Regulations implement EC directives on the organisation of working time and protection of young workers. They cover such matters as the 48 hour week, night workers, shift workers, rest periods and breaks, maximum working hours for young workers and holiday entitlements.

How can Powells help?

It is essential that businesses comply with current legislation if they are to avoid expensive claims. Powells can ensure that your documentation is up to date and meets your specific needs. This includes drafting sale and purchase agreements so that your business is protected from potential claims under TUPE.

We can also advise employees and employers on key issues as they arise during an employment relationship and, where appropriate, arrange representation in the Employment Tribunal or Civil Courts.

For any advice relating to employment matters contact:

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