

Employment Legislation – 10 Ways to Minimize your Risk Exposure

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Last year 266,542* employment tribunal claims were made against employers costing £2.6 billion, so; help yourself by reducing your exposure to tribunal claims and costs. (*Employment Tribunal & EAT Statistics April 08 to March 09).

This paper has been written as a brief guide to business owners and managers who seek to reduce the risks to their organisation resulting from employment legislation in the UK. It primarily addresses the issue of avoiding conflict and managing it wherever possible in order to minimise disputes that may ultimately be settled at an employment tribunal.

1. Contracts of Employment

Under the Employment Rights Act 1996, there is a legal requirement to provide employees with at least one month's service with a written statement of their terms of service within the first 2 months' of their employment. This is a basic statement of an employee's conditions of service. These requirements are generally insufficient for most employers' needs and in order to reduce your risk, we recommend that you:

- a) Establish contracts of employment that not only specify employee entitlements but also refer to employee obligations and responsibilities as well as the employer's rights. This practice is essential as it lays the foundation for an employer's expectations of its employees, standards of conduct and the employer's policies and procedures.
- b) Contracts of employment should be written to address issues that impact on your business such as confidentiality, post termination restraint, data protection, health and safety, bullying and harassment, equal opportunities, medical examinations, searches, dress codes, conflicts of interest, inventions and copyright. The inclusion of these issues can help you to protect your business as they define obligations and responsibilities.
- c) Issue contracts of employment before employees start work. This practice provides prospective employees with a clear understanding of their rights, entitlements and expectations before they join and minimises the risk of misunderstanding and possible conflict. Where there are misunderstandings, they can be resolved before the prospective employee starts or alternatively he / she can decline the offer. It is better that a prospective employee rejects an offer than joins an employer and enters into conflict.

2. Employee Checks

Some prospective employees exaggerate their qualifications or provide incorrect information relating to their employment history. To reduce the risks to your business, we recommend that you:

- a) Take up employment references from previous employers to confirm an employee's work history and ask questions about dates of employment, his/her performance and the reason for termination of employment. Take note where an employer does not answer a question; contact the employer by telephone; you might obtain information that a referee is not prepared to put in writing. Taking references from personal referees serves little practical purpose; no-one is going to provide details of a referee who will offer a bad testimonial.
- b) Ask to see original copies of employees' educational and professional qualifications; particularly where they are necessary for the job they are required to perform.
- c) Always establish an employee's right to work in the UK; ask for appropriate evidence. You risk a fine up to £10,000 for employing an individual who has no right to work in the UK or even up to 2 years in prison for knowingly employing an illegal worker.
- d) Consider undertaking pre-employment health checks to determine whether prospective employees are fit to undertake the work you require them to perform or have underlying health problems that may make them unsuitable for employment. Employees rarely reveal their health histories unless they are asked to and checks are undertaken.
- e) Consider using the services of vetting agencies, particularly for employees in senior positions or where their failings can put your business at risk. Agencies can be used to identify disqualified directors, professional and educational qualifications, insolvent /bankrupt persons, criminal records, individuals with County Court judgements against them etc.

3. Setting Rules & Standards

Reduce the risks resulting from conflict in the workplace; we recommend that you:

- a) Establish a basic set of rules in the workplace to give clarity to employees about their obligations and your expectations in terms of conduct and performance. These can be expressed in the format of written policies, procedures or an employee handbook. The advantage of doing so is that employees will obtain a clear understanding of their obligations and responsibilities and will be able to offer fewer excuses in circumstances where you need to address issues relating to their conduct or (poor) performance. These policies and procedures must be kept up to date with changing legislation and business requirements.
- b) Look carefully at the issue of IT in the workplace and ensure you have clearly defined rules in place governing use of IT, e-mail, blog sites and the Internet. This is a growing area of concern to employers whose IT systems are exposed to the threat of external attack but also to internal abuse.

4. Managing Performance

There is no excuse for accepting poor performance in the workplace yet, that's what we often find. Tacit acceptance of an under performing employee is bad for productivity and

morale and importantly, such problems are more difficult to manage when you are eventually forced to 'deal' with a problem.

Reduce your risk from employment tribunal claims when you address performance issues; we recommend that you:

- a) Deal with poor performance early, don't let it go unchecked.
- b) Use counselling in the first instance to deal with minor performance issues such as timekeeping, errors and omissions, breach of a rule or obligation.
- c) Set up review meetings to discuss the performance of new employees after an appropriate length of trial period; this will allow you to restate your requirements and provide a formal opportunity for employees to clarify issues and any misunderstandings.
- d) Don't inadvertently turn a discussion about performance into a disciplinary hearing.
- e) Utilise the disciplinary procedure to address more serious cases of poor performance.

5. Disciplinary & Dismissal Issues

Reduce your exposure to tribunal claims and a maximum compensation award of £65,300 from February 2010 (plus a maximum £11,400 basic award) for unfair dismissal:

- a) Follow the requirements of the ACAS Code of Practice and better still, ensure that you have a written disciplinary procedure in place compliant with the ACAS Code with clearly defined rules relating to conduct. Always inform an employee of the reasons for a disciplinary hearing in advance of a meeting as well as the evidence, allow representation by a work colleague or trade union representation and provide the right of appeal against any disciplinary action you take.
- b) Any failing to follow the ACAS Code in cases of dismissal may result in successful claims for unfair dismissal. If an employment tribunal finds that you have unfairly dismissed an employee (and you have failed to follow the Code without good reason), it may increase any compensation award payable by up to 25%.

6. Redundancy

This is a major area of conflict for employers and is governed by legislation and case law; failure to consult and follow a fair process in the selection of employees will result in successful claims for unfair dismissal at an employment tribunal.

- a) Ensure that there is a genuine need for redundancies has arisen and establish how many employees you propose to make redundant.
- b) Where at least 20 or more employees are to be made redundant you must consult with representatives within prescribed timescales as well as notify the Secretary of State; where representatives do not exist, they must be elected from within the group of affected employees. Legislation is silent on the issue of consultation and timescales where less than 20 employees are to be made redundant, case law is not; you must consult individually with all employees 'at risk' of redundancy.
- c) Ensure that the employees are given as much warning as possible redundancies and they are given the opportunity of making suggestions and representations to avoid the redundancy situation. Also ensure that consultation is conducted on the basis of proposed redundancies, making it clear that a firm decision will not be made until after the consultation exercise has been completed.

- d) Where redundancies need to be made amongst employees undertaking the same or similar roles you will need to establish a process to determine who from the 'pool' of employees should be selected. Identify objective and reasonable selection criteria wherever possible and apply them consistently and fairly. Consultation should also enable employees and representatives the opportunity to make suggestions and representations about the selection criteria and the method of applying them.
- e) Consider whether any alternative jobs are available within the company for those who have been selected.

In the current recession more employers are looking at pay and benefit cuts as an alternative to redundancy; employment tribunals will expect employers to look at reasonable alternatives to redundancy.

Redundancy is a difficult and highly contentious area and it is recommended you obtain the support of an HR professional to assist you in establishing the consultation and selection process.

7. Grievances

Reduce your exposure to conflict in the workplace and the risk of compensation claims:

- a) Follow the requirements of the ACAS Code of Practice when dealing with grievances in the workplace even when they are not put in writing. Follow the Code, allow representation and the right of appeal against any decision you take where the individual is still in employment.
- b) Look for signs of grievances in letters of resignation and offer a meeting to discuss their departure; such grievances might be considered reasonable grounds for constructive dismissal claim at an employment tribunal. Always make such offers to meet and discuss grievances in writing.

8. Discrimination

Discrimination on the grounds of age, disability, race, sex, sexual orientation, gender reassignment, marital status, part time employee status, religion or belief is illegal in the UK and this is a real risk area as the compensation available for successful discrimination claims is totally £ unlimited.

Reduce your exposure:

- a) Be aware that you can be held liable for the actions of your employees (vicarious liability) where discrimination occurs in the course of employment, irrespective of whether or not you know or approve of it.
- b) Address the issue of discrimination in employment policies and procedures and ensure they are understood and followed by employees.
- c) Ensure that you don't inadvertently discriminate against women returning to work following a period of maternity leave; any failure to follow Maternity Regulations can result in discrimination claims.
- d) Ensure that you don't discriminate against employees reaching their retirement age; follow the requirements of the Employment Equality (Age) Regulations 2006 and avoid discrimination claims.

- e) Remember discrimination claims can also be made by job applicants; make sure the reasons for not offering a job or even an interview are objectively based decisions as your decisions are open to challenge. This is going to be more important with age based discrimination claims which can be brought against employers.

Discrimination claims are highly contentious and it is recommended you obtain the support of an HR professional to assist you where such claims arise to assist in the investigation and management process.

9. Maintain Employee Records

Regulations specify what records an employer must retain and how long they have to be retained; good record keeping reduces your risk:

- a) Maintain employee records / files and observe the requirements of the Data Protection Act.
- b) Keep copies of correspondence relating to employees terms and conditions of employment including offer letters, contracts of employment and changes to terms and conditions that you have agreed.
- c) Where an employee agrees to a change to his / her terms of service ensure it is put in writing and obtain confirmation of acceptance from the employee.

Reduce your risk from disputes and employment tribunal claims:

- a) Keep notes on issues about employee performance that concern you. One issue on its own may not require informal or formal action on your part but with time you may detect a pattern of events or employee performance that does require your intervention; you will be able to draw upon your record of observations to support your position.
- b) Write and retain notes on informal meetings relating to counselling sessions or performance issues; you may need them if you are forced to undertake formal disciplinary action – record details on the date, time, issue, outcome and who was present.
- c) Write and retain notes on all formal meetings relating to disciplinary events and grievance hearings; you may need them as part of your defence in any subsequent employment tribunal claim. Contemporaneous written notes are of more value in tribunal hearing than memory of such meetings.

10. Get Help Before Acting

Managing employees is a difficult business particularly with legislation which covers virtually every aspect of employment from recruitment to termination not to mention the changes resulting from tribunal cases and constant revision to existing Regulations. Minimise your risk by following the Regulations and seek assistance if necessary before acting:

- a) Beware of articles on the Internet, many are inaccurate and out of date; they often tell you 'what you have to do' but not 'how to do it'.
- b) Seek assistance from an experienced HR professional who can review an issue, give advice on options where they exist and support you in resolving problems or offering

solutions before you act. Acting after the event exposes you to compensation claims and solicitor's costs which will be more expensive than an HR Consultant's.

Today there are 70+ different types of claim that an individual can take to an employment tribunal; pursuing claims is free and claims can be submitted on-line and note, that there is an army of solicitors prepared to pursue genuine and frivolous claims against employers on a 'no win, no fee' basis. Typically individuals pursue multiple claims and whilst one or two might have reasonable grounds, the others often lack credibility and are thrown in for the sake of completeness to try to build a case.

Unsurprisingly the majority of cases settle before an employment tribunal hearing and the decision to make an out of court settlement is often commercially based to avoid legal fees, management costs and the prospect of bad publicity. Winning at an employment tribunal is often a hollow victory because of the time and expense spent on a case; however, employers that always 'settle out of court' can be seen as a 'soft touch'.

Smaller employers lose more often in employment tribunals than their larger counterparts because larger employers tend to have 'in-house' personnel systems and resources. Observing these 10 points won't stop employees making claims but if you develop good employment systems and get help before acting, you can minimise your risk to claims for compensation and legal costs; you will also have gone some way to developing good employment practices that support and help to grow your business. Tribunals are won in the workplace not the courtroom and as such employers need effective employment policies and procedures