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# Compensation in Discrimination Claims

## Module cpdemp0109

### Contents

|   |    |
|---|----|
| Introduction – course aims and intended learning outcomes .....                     | 2  |
| General principles of compensation .....  | 3  |
| When will compensation be ordered? .....  | 3  |
| The basis of compensation .....   | 3  |
| Who may be ordered to pay compensation? .....                                       | 3  |
| Injury to Feelings Awards .....   | 4  |
| Aggravated Damages .....  | 7  |
| Physical and Psychiatric Injury .....   | 8  |
| Expenses .....  | 9  |
| Loss of Chance .....  | 9  |
| Risk of Future Dismissal .....  | 9  |
| Compensation for Indirect Discrimination .....                                      | 10 |
| Mitigation of Loss .....  | 10 |
| Refusing Offers of Re-Employment .....  | 10 |
| Seeking Alternative Employment .....  | 11 |
| Becoming Self-Employed .....  | 12 |
| Seeking Re-Training .....   | 12 |
| Interest on Awards .....  | 12 |
| Interest on Claimant's losses .....   | 13 |
| Interest in Injury to Feelings Award .....  | 13 |
| Interest on other losses .....  | 13 |
| Rates of Interest .....   | 14 |
| Interest on Unpaid Tribunal Awards .....  | 14 |
| Interest following appeals or reviews .....   | 14 |
| Failure to Comply with the ACAS Code on Disciplinary and Grievance Procedures ..... | 15 |
| How to Handle Discriminatory Dismissals .....                                       | 15 |
| Investigations .....  | 15 |
| Notification .....  | 16 |
| Further Practicalities Including Right to be Accompanied .....                      | 16 |
| Legal Representation .....  | 17 |
| Reasonable Requests .....   | 17 |
| Role of the companion .....   | 18 |
| The ACAS Grievance Code .....   | 18 |
| Manner in which grievances should be handled .....                                  | 19 |
| The meeting and investigation .....   | 19 |
| Right of appeal .....   | 20 |
| When does the new Regime apply? .....   | 20 |
| How Does the New Code Differ From the Last Regime? .....                            | 20 |
| <br>  |    |
| Multiple Choice Questions .....   | 22 |

# Compensation in Discrimination Claims

## Module [cpdemp0109](#)

### AIMS

This course should provide a basic grounding in the general principles of compensation applicable in discrimination cases including an in depth look at the new ACAS Disciplinary and Grievance codes. The Course is aimed at the employment solicitor with moderate knowledge of employment law and should take approximately 2 hours to complete. Subsequently the course offers 2 CPD points.

### INTENDED LEARNING OUTCOMES

On completion of this course, you will have:

- Awareness of the general principles of compensation and when it will be ordered;
- An appreciation of the basis of compensation and who might be ordered to make its payment;
- An understanding of the range of heads of compensation;
- Increased understanding of the principles of mitigation of loss;
- Up to date knowledge of interest calculations;
- Awareness of the practicalities of handling discriminatory dismissals;
- An overview of the new ACAS Grievance Code.

## **General principles of compensation**

The principles of compensation in discrimination cases share a number of features in common with other employment tribunal cases (such as unfair dismissal claims), as well as some civil claims such as personal injury, compensation in discrimination cases however, has a wider scope.

## **When will compensation be ordered?**

Where a tribunal finds that there has been unlawful discrimination, it must make whichever of the following orders it considers "just and equitable".

- a declaration of the rights of the parties;
- an award of compensation; and/or
- a recommendation that the respondent takes particular action to obviate or reduce the effect of the discrimination on the claimant.

The Claimant will add to his Originating Application contained in the ET1 form which remedy he seeks. In most, if not all cases, the claimant will be seeking compensation.

## **The basis of compensation**

Although the power to award compensation only applies where the tribunal considers such an award would be "just and equitable", the calculation of the award itself is not based on what is just and equitable, but seeks to place the Claimant in a position, which he would have been in but for the acts(s) of discrimination. Also, unlike in most unfair dismissal cases, there is no upper limit on compensation. The main difference between compensation awarded in discrimination cases is that a sum can be given on top of past and future losses for 'injury to feelings'. This was once also obtainable for unfair dismissal cases.

## **Who may be ordered to pay compensation?**

Compensation payable in discrimination cases may be payable by the employer and or any individual the Claimant believes discriminated against him. This person may be a third party or a fellow employee. If the Claimant is successful against more than one of these parties the tribunal must apportion liability. Looking at the harm suffered it is up to the tribunal to assess the degree to which the Respondent is responsible

for the harm suffered (*Armitage, Marsden and HM Prison Service v Johnson* [1997] IRLR 162 (EAT)).

When apportioning the amount of compensation joint and several liability awards against individual respondents can be made *Way and anor v Crouch* [2005] IRLR 603 (EAT).

### **Injury to Feelings Awards**

With the exception of the Equal Pay Act 1970, anti-discrimination legislation provides for payment of compensation for injury to feelings suffered by claimants as a result of the discrimination.

An award of injury to feelings is not a punitive award, but is intended to be compensatory. This means that tribunals should not take into account adverse feelings they may have towards the respondent as a result of their conduct so as to inflate the award.

An award for injury to feelings is separate from an award of compensation for financial loss. A claimant can therefore recover for injury to feelings even when they have suffered no financial loss.

The burden is on the claimant to show that their feelings have been injured, and to what extent, and it would be sensible for a claimant always to seek some form of injury to feelings award in the claim form. It would, however, be extremely rare for a tribunal to make a finding of discrimination, but not make an award for injury to feelings. A claimant does not need to show medical evidence of injury to feelings, as it is not a question of injury in a medical sense. It is more of a subjective analysis of the claimant's feelings as a result of the discrimination and it is for the tribunal to translate this subjective analysis into a cash equivalent.

There are a number of factors to consider in each case. These include the vulnerability of the claimant, the degree of hurt, distress or upset caused, the position of the person who was found to be discriminating and the seriousness of the treatment. The size of the respondent's business is irrelevant, as the tribunal is only concerned with the effect on the claimant.

Some examples of the factors which tribunals have taken into account are:

Personal characteristics. If a claimant reacted to the discrimination more severely than others, then this should be accounted for regardless whether the discrimination could be viewed "objectively" as less serious.

Any medical condition from which the claimant is suffering.

Factors such as panic attacks, stress, loss of confidence and interference with personal relationships.

The nature of the claimant's job.

The manner in which the respondent dealt with any grievance brought by the claimant.

### **The value of injured feelings: the Vento guidelines**

The anti-discrimination legislation does not provide guidance as to how a tribunal should carry out this calculation. This has been left to the tribunals and Courts to provide guidance.

The principal case providing guidance for the assessment of compensation for injury to feelings awards is *Vento v Chief Constable of West Yorkshire Police (No 2)* [2002] EWCA Civ 1871, [2003] IRLR 102. This set clear guidelines for the amount of compensation to be given for injured feelings and set out three bands of potential awards.

Top band of £15,000 - £25,000 for cases in the most serious category, such as where there has been a lengthy campaign of harassment. Only in the most exceptional cases should an award of injury to feelings exceed £25,000.

Middle band of £5,000 - £15,000 for serious cases which do not merit an award within the highest band.

Lowest band of £500 - £5,000 for less serious cases, such as a one-off incident or an isolated event.

Awards should not be so high as to amount to a windfall, but neither should they be so low as to diminish respect for the law. They should bear some broad similarity to the range of awards in personal injury cases. Tribunals should also take account of the "value of the sum in everyday life", either in terms of what it can buy, or its value in relation to earnings (*Armitage & others v Johnson* [1997] IRLR 162 (EAT); approved in *Vento*). However, there is no minimum award (*Greig v Initial Security Ltd*, UKEATS/0036/05/LA).

It has been made clear in the recent case of, *Corus Hotels Plc v Woodward & Anor* [2006] UKEAT 0536/05/1703, 17 March 2006, that an injury to feelings award is not punitive. In *Vento*, Mummery LJ described the kind of matters which can be the subject matter of compensation for injury to feelings:

"Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression" (*paragraph 50*).

The tribunal in *Woodward* was influenced by the employer's discriminatory conduct and effectively adopted a punitive approach in assessing the amount of compensation for injury to feelings. The EAT confirmed that an injury to feelings award is not a punitive award *Corus Hotels Plc v Woodward & Anor* [2006] UKEAT 0536/05/1703, 17 March 2006.

An example of an award under the lowest band is that of *Thomas v Eight Members Club and Anthony Killip*, ET/2202603, 22 November 2007 in this case a Claimant who was told that she was 'too young for the job'. She was awarded £1,500 in compensation.

The guidelines for assessing compensation in discrimination cases laid down by the Court of Appeal in *Vento v West Yorkshire Police CA 2002* (above) apply also to assessment of compensation in whistle-blowing cases (see *Virgo Fidelis Junior School v Boyle EAT 2004* on 23rd January 2004).

However, The EAT in the conjoined appeals of *Allan and Others v Newcastle City Council* and *Others and Degnan and Others v Redcar and Cleveland Borough Council* held that compensation for non-economic loss, such as injury to feelings, is not available in equal pay claims brought under the Equal Pay Act 1970.

In the rare instance of there being two types of discrimination then the tribunal must consider the impact of both separately. Where different forms of discrimination arise from the same discriminatory acts, it is appropriate for the tribunal to assess the effect on injury to feelings on a composite basis. However, where different forms of discrimination arise out of different discriminatory acts (as in this case), the tribunal must assess the impact to injury to feelings separately with respect to those acts. Having made its initial assessment, the tribunal must then look at the total figure to ensure that it is proportionate overall and does not involve double counting. *Jumard v Clywd Leisure Ltd and others* UKEAT/0334/07

## **Aggravated damages**

Aggravated damages are available for discrimination claims *see Vento*. Whilst not specifically provided for in the legislation, the tribunals and Courts have followed the usual tortious principles in establishing this principle. They are a stand alone head of compensation and should not be rolled up into the award for injury to feelings award. They are therefore additional to any amount the tribunal may award under the Vento guidelines set out above (*Scott v Commissioners of Inland Revenue [2004] IRLR 713 (CA)*; *Crofton v Yeboah [2002] IRLR 634 (EAT)*).

Aggravated damages are awarded in the most serious cases where the respondent has acted in a "high-handed, malicious, insulting or oppressive manner in committing the act of discrimination" *Alexander v Home Office [1998] ICR 685 [1988] IRLR 190, CA*. Typically this is seen where there are clear examples of malice or bad intention on the part of the respondent, and indeed intention is the vital factor. The Claimant must show that he had knowledge or suspicion of the aggravating conduct or motive and that such knowledge caused his hurt feelings to be aggravated *Ministry of Defence v Meredith [1995] IRLR 539, EAT*.

Again, aggravated damages are designed to compensate the claimant where the injury has been aggravated and not to punish the respondent. There must also be a causal link between the aggravating act complained of and the injury or loss suffered by the claimant. Expert evidence may well be required to establish this. Of course permission must always be requested of the tribunal before this evidence is adduced.

Aggravated damages have been awarded in the past when:

Attempting to cover up or trivialise the wrong-doing.

The manner of conducting internal procedures, including failure to investigate complaints or take them seriously, (*Armitage, Marsden and HM Prison Service V Johnson [1997] IRLR 162, EAT £7,500 awarded*).

Promoting or otherwise rewarding the perpetrators of the discrimination.

Using the claimant as a scapegoat.

The manner of defending the proceedings, including intimidating the claimant during litigation, for example, through oppressive and unwarranted "costs warning letters", (*Zaiwalla & Co v Walia [2002] IRLR 697 EAT*: £7,500 awarded).

Continuing failure to correct a problem which has led to the discrimination.

The Respondent's unsatisfactory answers to a statutory discrimination questionnaire ( *City of Bradford Metropolitan Council v Arora [1989] IRLR 442, EAT*).

The tribunal is permitted to order aggravated damages even if the aggravating action is not in itself discriminatory.

### **Physical and Psychiatric Injury**

In *Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] ICR 1170, [1999] IRLR 481, CA* the Court of Appeal confirmed that Claimants can recover damages for personal injury caused by unlawful discrimination.

In principle, injury to feelings and psychiatric injury are stand alone heads of loss but in practice they often overlap which can precipitate double recovery.

General damages for pain and suffering and loss of amenities are usually assessed in accordance with the 'Judicial Studies Board Guidelines'.

### **Expenses**

Expenses incurred as a direct result of the discriminatory act can also be recovered. These may include any out-of-pocket expenses, such as:

Medical bills resulting from depression or other injury caused by the discrimination.

Cost associated with seeking new employment, such as travel, telephone and even accommodation expenses.

The cost of additional training, where the claimant is otherwise unable to obtain equivalently-paid employment within a reasonable time (see, for example, *ICTS (UK) Ltd v Tchoula [2000] IRLR 643 (EAT)*).

Expenses incurred in setting up in business, if the employee reasonably chooses to do this rather than seek employment elsewhere (see, for example, *United Freight Distribution Ltd v McDougall EAT 218/94*).

### **Child Care Costs**

Child care costs which would have prevented the Claimant mitigating her loss by working should be set off against the compensatory award regardless if a third party paid them *Ministry of Defence v Cannock* [1994] ICR 918, [1994] IRLR 509, EAT).

### **Loss of Chance**

The correct test the tribunal should adopt under this head is:

But for the discrimination, what was the chance that the Claimant would have remained in the original job for the period of the compensation claim? In *Ministry of Defence v Cannock* [1994] ICR 918, IRLR 509, EAT it was stated that the calculation of loss should be dealt with as an evaluation of the loss of chance.

### **Risk of Future Fair Dismissal**

Often the tribunal will be asked to consider whether the Claimant would have been dismissed anyway despite the discrimination. For example, the Respondent may bring evidence to show that the Claimant would have been made redundant in any event within a matter of weeks. The tribunal may reduce the award by 20 per cent if it thinks that that is a fair estimate of the chances of the Claimant being dismissed.

### **Compensation for Indirect Discrimination**

Since March 25 1996, tribunals have had the power to award compensation for unintentional indirect discrimination in cases of sex discrimination and equal pay (see SDA, s.65(1A) and 1B inserted by the Sex Discrimination and Equal Pay (Miscellaneous amendments) Regulations 1996 (SI 1996, No.438).

There are similar provisions in cases of unintentional indirect sexual orientation or religion or belief discrimination (SOR 2003, reg. 30(2) and RBR, reg.30(2)).

With race discrimination cases, the RRA 1976 s57(3) provides that compensation may not be awarded in cases of indirect discrimination unless it is shown that a discriminatory requirement or condition was applied with the intention of treating the Claimant less favourably on racial grounds. No provision is made where the complaint is brought under the RRA 1976, s 1 (1A) i.e where the complaint relates to a 'provision, criterion or practice'. However such an intention may be

inferred where it is established that the employer deliberately took steps or applied requirements knowing the discriminatory effect they would have (*JH Walker Ltd v Hussain* [1996] ICR 291, [1996] IRLR 11, EAT).

### **Mitigation of loss**

A claimant is expected to take reasonable steps to mitigate their loss, usually by looking for a new job if the discrimination has resulted in them being out of work, and by limiting their out-of-pocket expenses to those which are reasonably incurred. The issue of mitigation is a question of fact for the tribunal, and the respondent has the burden of proving that the claimant has not mitigated their loss. This would include providing evidence of any jobs which the respondent alleges the claimant could have applied for or undertaken. If a tribunal finds that a claimant has not taken reasonable steps to mitigate their loss, then financial compensation can be reduced by a figure which the tribunals considers appropriate, depending on the extent of their failure.

### **Refusing Offers of Re-Employment**

In *Wilding v British Telecommunications plc* [2002] IRLR 524 the Court of Appeal upheld that tribunal's finding that an employee had unreasonably refused the employer's offer of re-employment, and had therefore failed to mitigate his loss. In that case the claimant had stated he wanted to go back to work and BT had made an offer of part time work (after the tribunal decision on liability, but before a remedies hearing). The claimant, after initially seeking re-employment, then rejected the offer on the basis that he did not have trust and confidence in BT as an employer. The parties had exchanged schedules of loss between the offer of the job and the claimant's refusal, and BT's schedule was the "final straw".

The Tribunal considered all the circumstances, including the events before the offer was made. In particular they considered the claimant's desire to return to work and the unavailability of other work, and concluded that the decision to reject the offer was unreasonable. Can the claimant refuse work?

Refusing other employment, merely because it involves lower wages, can be a breach of the duty. In *Daley v A E Dorsett (Almar Dolls) Ltd* [1981] IRLR 385, the tribunal held that a decision not to take a job on a lower wage was reasonable.

Whilst the EAT upheld this, they did stress that it would only be in special circumstances that such a decision would be reasonable and each case must be considered on its own facts.

A dismissed employee is however, entitled to spend time looking for other employment of equivalent standing before applying for employment at a lower level, without been deemed to be acting unreasonably (*Yetton v Eastwoods Froy Ltd* [1966] 3 All ER 353). The question of how long they should continue before looking for lower paid work is a matter for the tribunal. In *Yetton* the claimant continued for six months looking for employment at the same level. Although the court suggested that he might perhaps have lowered his expectations earlier, it did not find that there had been any failure to mitigate.

### **Seeking Alternative Employment**

A Claimant has a duty to mitigate their loss and a tribunal should examine all relevant facts when determining whether this has been achieved successfully. Some Claimants may argue that where they live there are few jobs of the type they are trained to do in their area and therefore the compensation period should be extended to allow for them to find a suitable role. Respondents have been known to counter this argument by researching newspapers and job agencies in that area to find roles the Claimant could undertake. These advertised roles can then be sent to the Claimant's representative or brought to the tribunal at a compensation hearing.

### **Becoming self-employed**

Setting up a business and being self-employed can also be a reasonable step to have taken (see *Gardiner-Hill v Roland Berger Technics Limited* [1982] IRLR 498 (EAT) and *Dore v Aon Ltd* [2005] IRLR 891 (CA)). Again, this will depend on the circumstances and, if reasonable, the claimant will be entitled to compensation to reflect the costs and expenses incurred as a result, as well as the loss of earnings over the period in which the business is set up. Any earnings from the new business or other sums which have been earned during the mitigation period would be deducted from this combined sum.

In *Gardiner-Hill*, the claimant set up his own business after being dismissed, rather than looking for a new job. The tribunal held that he had not mitigated his

loss, and as he had spent 80% of his time setting up the new business, his loss should be reduced by 80%. The EAT disagreed, and said that given his circumstances as sole managing director of the respondent for 16 years it was open for him to consider setting up his own business to use that experience. The tribunal had not considered all the circumstances, and the respondent had not provided evidence to show that doing so was unreasonable.

### **Seeking Retraining**

Changing career has also been held to be a reasonable step. In *Orthet Ltd v Vince-Cain* [2004] IRLR 857, the EAT held that a claimant's decision to change career and undertake a four-year university course was reasonable. In the circumstances the employer was unable to prove that there was other available work which the claimant could, or should, have done. She took the decision to re-train as a consequence of the dismissal, and she continued to look for other work whilst undergoing the course.

On her evidence she would have stopped the course if she had found suitable employment. The EAT also held in *Tchoula v ICTS (UK) Ltd* [2000] ICR 1191 that a security guard who was dismissed was entitled to retrain in IT, as his dismissal by the respondent had deprived him of the clean employment record he needed to continue to work in security.

### **Interest on Awards**

#### **Interest on claimant's losses**

Interest in discrimination awards is set down in the *Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations SI 1996/2803*. These give the tribunal the power to award interest on the claimant's losses as part of the compensation for discrimination. The claimant does not have to specifically claim for the interest as the tribunal is bound to consider it in any event (*regulation 2(1)*).

There are two ways of approaching interest. The parties can either agree the amount to be awarded or the tribunal can calculate it in accordance with the process set out in the Regulations (*regulation 2(2)*).

### **Interest on Injury to Feelings Awards**

Under the Regulations, for injury to feeling awards, interest runs from the date of the discriminatory act to the date of calculation (*regulation 6(1)(a)*).

### **Interest on other losses**

For other awards, including past financial losses, the interest runs from the "mid-point" date to the date of calculation (*regulation 6(1)(b)*). The mid-point is calculated as the date halfway between the discriminatory act and ending on the calculation date (usually the judgment date). This means that interest cannot be given for future loss of earnings, as they are attributable to the period after the date of calculation.

### **Rate of interest**

The rate payable in England and Wales is that prescribed for the Special Investment Account under regulation 27(1) of the Court Funds Rules 1987 - currently 6%. In Scotland it is currently 8%, set by the regulation 3(2) of the Act of Sederunt (Interest on Sheriff Court Decrees or Extracts) 1975. Interest accrues from day to day, and is simple rather than compound.

The tribunal may refuse to award interest, or may apply a different calculation, if it believes that serious injustice would otherwise result (*regulation 6(3)*).

### **Interest on unpaid tribunal awards**

Interest is payable on unpaid awards under the Employment Tribunals (Interest) Order 1990. Interest accrues from the day after the decision day onwards unless the full amount of the award is paid within 14 days after the relevant decision day (*regulation 8, Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996*).

Interest will be calculated in accordance with the rate prescribed by section 17 of the Judgments Act 1838, which is currently 8% (*article 4, Employment Tribunals (Interest) Order 1990*).

### **Interest following appeals or reviews**

Where an award of compensation is varied on appeal, or following a review by the tribunal, interest still runs from the day after the original tribunal decision. However, where the original decision was to award **no** compensation, but compensation becomes payable following an appeal or review, interest runs from the day after the decision to order compensation (*articles 2, 5 and 8, Employment Tribunals (Interest) Order 1990*).

### **Failure to Comply with the ACAS Code on Disciplinary and Grievance Procedures**

If an employee brings a successful claim for unfair dismissal or a number of other common types of claim (including those related to discrimination, breach of contract, working time, detriment, and deduction of wages- the list of claims to which this regime applies is set out in the new Schedule A2 of TULRCA) arising out of dismissal or disciplinary action for misconduct or poor performance, there is an impact on the level of compensation awarded if either party failed to follow the Code. If the employee unreasonably failed to follow it, the tribunal may reduce their compensation by up to 25%.

If the employer unreasonably failed to follow it, the tribunal may increase the employee's compensation by up to 25%. The employment tribunal must decide what uplift or reduction would be 'just and equitable' (*Section 207A, TULRCA, as inserted by section 3, EA 2008*).

### **How to Handle Discriminatory Dismissals**

***The following procedure must be followed if an uplift of up to 25% is not to be applied to any award of compensation.***

### **Investigations**

It is a traditional feature of fair dismissals that there has been a reasonable investigation undertaken. Any failure to conduct such enquiries may lead to a finding of unfair dismissal or discrimination claims. This principle of following a fair investigatory procedure is enshrined in the Acas Code. This may involve investigatory meetings with the employee under investigation and the collation of other evidence including witness statements. Witness statements and evidence

should be shown to the Claimant prior to a disciplinary hearing so that he might be equipped to answer the case against him. Crucially, any investigatory meeting should not result in disciplinary action without a disciplinary hearing.

If paid suspension is necessary during the investigation, this should be as brief as necessary and the employer should make clear that this is not in itself a form of disciplinary action.

### **Notification**

If there is a case to answer, the employee should be notified in writing of the alleged misconduct or poor performance and its possible consequences, setting out detailed allegations including, the risk of dismissal if it exists. In essence, there must be sufficient detail to enable the employee to respond at a disciplinary hearing. Any written evidence, which may include witness statements, should be provided to the employee.

### **Further Practicalities Including Right to be Accompanied**

The notification should set out the time and place of the disciplinary hearing which should be held as promptly as possible, while ensuring the employee has reasonable time to prepare their case. It should also set out the employee's right to bring either a fellow worker or a trade union representative to the hearing.

*Section 13(4), EReIA.* States that Sections 10 to 15 of Employment Relations Act, give workers and employees a statutory right to be accompanied by a trade union representative or a fellow worker at a disciplinary hearing. Disciplinary hearings for the purposes of this right are hearings (including meetings under a DDP) that could result in:

A formal warning being issued to a worker;

The taking of some other disciplinary action, such as suspension without pay, demotion or dismissal; or

The confirmation of a warning or some other disciplinary action, (as would be the case with an appeal hearing).

Meetings merely to investigate allegations are therefore not 'disciplinary hearings' but this does not mean that they should transform into one. If it becomes plain during the course of such a meeting that disciplinary action against the worker may be appropriate, a separate formal hearing should be arranged where all the usual format of a disciplinary meeting should be followed.

The companion should be someone who is either:

Employed by a trade union of which they are an official;

An official of a trade union (not employed by the union) whom the union has certified in writing as having appropriate experience of, or as having received training in, acting as a worker's companion at such hearings; or

Another of the employer's workers.

*Section 10(3), EReIA.* states that the worker does not have to be a member of the trade union to which the official belongs and there is no requirement that the employer should recognise the trade union.

### **Legal Representation**

There is no general right under UK law for an employee to have a qualified legal representative at a disciplinary hearing but there are rare circumstances when this may be appropriate. In the case of, *Kulkarni v Milton Keynes Hospital NHS Trust [2008] IRLR 949 (QBD)* the High Court refused to grant a declaration that a doctor was entitled to be represented by a lawyer at a disciplinary hearing.

Employees may have a right to legal representation at the hearing in certain limited circumstances as a result of the Human Rights Act 1998 (HRA) and article 6 of the European Convention on Human Rights. In *R (on the application of G) v The Governors of X School & another [2009] EWHC 504* a teacher was held to be entitled to legal representation at a disciplinary hearing because of the gravity of the allegations which, if upheld, would have led to his employer reporting him to the Secretary of State as being unfit to work with children.

### **Reasonable Requests**

The right to be accompanied only applies where a worker 'reasonably requests' to be accompanied at the hearing. The legislation does not address the question

of when such a request would not be reasonable, but the Acas Code provides some assistance at paragraph 15: What is reasonable will depend on the circumstances of each individual case. However, it would not normally be reasonable for workers to insist on being accompanied by a companion whose presence would prejudice the hearing nor would it be reasonable for a worker to ask to be accompanied by a companion who lived miles away if someone suitable and willing was available on site.

### **Role of Companion**

The companion must not answer questions on behalf of the worker or do anything to prevent the employer putting forward their case (section 10(2B)-(2C), ERelA 1999). The companion may however, address the disciplinary hearing (including putting the worker's case, summing up, and responding on the worker's behalf to any view expressed at the hearing).

### **The ACAS Grievance Code**

The new Code is not without teeth; If an employee's claim is successful but either the employer or the employee failed to follow the new Code, the level of compensation awarded to the employee may be affected. If the employer unreasonably failed to follow the Code, the tribunal may increase the employee's compensation by up to 25%. If the employee unreasonably failed to follow it, the tribunal may reduce their compensation by up to 25%. The tribunal must decide what uplift or reduction is suitable based on what would be just and equitable. (*Section 207A, Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), as inserted by section 3, Employment Act 2008 (EA 2008)*).

This regime does not apply to all claims but does apply to the types of claim most commonly brought in the tribunals (including those related to discrimination, unfair dismissal, equal pay, breach of contract, working time, detriment, and deduction of wages). The full list is set out in the new Schedule A2 of TULRCA.

### **Manner in which grievances should be handled**

#### **Should the grievance be in writing?**

A grievance can be any problem or complaint that an employee raises with the employer. The employee should raise the grievance in writing with a manager or if it relates to their line manager, the grievance should be raised with another manager. A failure to raise the grievance in writing does not preclude an employee bringing a tribunal claim about the matter. However, the employee may recover less compensation if no grievance is raised.

### **The Meeting and Investigation**

A meeting should be held to allow the employee to explain their grievance and how they think it should be resolved. Managers, employees and their companions should make every effort to attend the meeting. If the matter needs further investigation, the employer should consider adjourning the meeting and resuming it after the investigation has taken place. When the meeting is concluded, the employer should communicate its decision in writing without delay, including any plan of action it intends to take to resolve the grievance. A failure to deal with a grievance could lead to an uplift on any award made and lead to complaints of constructive dismissal or discrimination.

It should be remembered that Under *section 10, Employment Relations Act 1999*, An employee or other worker has a statutory right to bring a companion, whether a fellow worker or a trade union representative to a grievance meeting, where the complaint is about a "duty owed by the employer to the worker" The employee must make a reasonable request to be accompanied. What is reasonable will depend on the circumstances, but the Code suggests that it will not normally be reasonable for the companion to be someone whose presence would prejudice the meeting, or someone from a remote workplace if a suitable alternative candidate is available at the same site.

### **Right of Appeal**

If the employee is not satisfied with the outcome, they should appeal in writing, specifying the grounds of their appeal. If they bring a tribunal claim without appealing, any compensation they are awarded may be reduced. The employer must inform the employee that they have a right of appeal when they give the decision of the grievance meeting. If not, the employer faces having to pay an increase of up to 25% on any award made.

The appeal should be dealt with impartially at a hearing, which should be conducted by a manager who has not been previously involved. The employee should be informed in good time of the time and place of the appeal hearing and may bring a companion. The employer should communicate the final decision in writing without unreasonable delay. The appeal officer should look into the appeal points raised in as much detail as possible

### **When Does the New Regime Apply?**

There are transitional provisions governing whether the old or new regime applies. In general, any grievance concerning facts which occurred wholly before 6 April 2009 will fall under the old regime and any grievance which concerns facts occurring wholly on or after that date fall under the new regime. For most grievances about a state of affairs spanning that date, the old regime will continue to apply if the grievance or claim is submitted on or before 4 July 2009, although in some cases involving equal pay, redundancy or industrial action the date is 4 October 2009 (*Employment Act 2008 (Commencement No. 1, Transitional Provisions and Savings) Order 2008*). See *Checklist, Employment Act 2008 transitional provisions: grievance procedures*.

### **How Does the New Code Differ From the Last Regime?**

Best practice advice to employers and employees in dealing with grievances in the workplace should not change greatly in the light of the reformed law. The rules on admissibility, time limits and compensation have changed:

The submission of a grievance under the old regime triggered a three-month extension of time to bring a tribunal claim. There is no automatic extension of time under the new.

An employee who has not submitted a grievance is no longer barred from bringing a claim.

Under The new Code, it applies to any grievance and an "unreasonable" failure to follow it can affect compensation. This replaces complex provisions under the

Dispute Resolution Regulations governing when the statutory procedures applied and when they were excluded. Any breach of an applicable statutory grievance procedure would enable a tribunal to adjust compensation.

Compensation under the old regime could be adjusted by 10-50%. The adjustment under the new regime is 0-25%.

## Multiple Choice Questions

### Question 1

Under the 'Vento' guidelines cases that fall into the lowest bracket for injury to feelings are:

- very serious in nature and involve a series of events
- Are only for cases where harassment is a feature
- Are for one off or isolated incidents of discrimination.

### Question 2

With an injury to feelings award the burden is on the:

- Claimant to show the hurt and injury they have been caused
- The Respondent to show that the Claimant has suffered no injury to feelings.
- There is no burden on the Claimant to show that they have suffered.

### Question 3

Aggravated Damages,

- Form part of an award of injury to feelings
- Are a stand alone head of compensation

### Question 4

The duty to mitigate exists when:

- In all discrimination claims
- A duty to mitigate your losses in discrimination claims exists only when dealing with DDA claims?
- The duty only exists when the claim is based on race.

### Question 5

Seeking Re-training is:

- A form of mitigation of loss
- Is not considered to be good mitigation.
- Expected in all cases

### Question 6

Refusing an offer of re-employment offering less pay is:

- Not considered a form of mitigation of loss.
- Will be considered by most tribunals as a possible form of mitigation of loss.
- Will mean the Respondent pays no compensation

### Question 7

You can only claim expenses:

- In discrimination claims
- Unfair dismissal claims
- You can only claim expenses in DDA claims

### Question 8

If the employer fails to adhere to the ACAS Guide on Discipline and grievances at work:

- Compensation can be increased by up to 25%
- Nothing the Guide is for assistance only.
- There will be an automatic unfair dismissal

### Question 9

The new ACAS code applies to:

- Disciplinary situations only
- Redundancy Situations only
- Both disciplinary and redundancy situations

### Question 10

A worker may bring a lawyer to a disciplinary hearing:

- In all types of disciplinary meetings
- Never
- In rare occasions when human rights issues apply

**Question 11**

A reasonable request for accompaniment at a disciplinary meeting includes:

- A work colleague or union representative who lives miles away
- A work colleague or union representative who may prejudice the hearing
- A work colleague or union representative but it depends on the circumstances of the case

**Question 12**

A companion at a disciplinary hearing may:

- Answer questions on behalf of the worker being accused
- Talk over the employer's representative
- Sum up on behalf of the Claimant

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# The ACAS Statutory Code of Practice on Discipline and Grievance

## Module cpdemp0210

### Contents

|  |    |
|--|----|
| The Disciplinary Procedures 2009 Changes.....  | 28 |
| Transitional Measures.....   | 28 |
| The New Disciplinary Rules.....  | 28 |
| Failure to Follow the Code.....  | 28 |
| Does The Failure to Write a Written Grievance Mean that a Tribunal has no<br>Jurisdiction to Hear a Claim? ..... | 28 |
| To Whom Does the Code Apply? .....   | 29 |
| Referral to the ACAS Code .....  | 29 |
| The Basic Elements: .....  | 29 |
| Key Differences Between the Old Dispute Procedures and Those Set out in the<br>ACAS Code:.....                   | 30 |
| The ACAS Grievance Code.....   | 30 |
| Manner in which grievances should be handled .....   | 30 |
| Should the grievance be in writing?.....   | 31 |
| The Meeting and Investigation .....  | 31 |
| Right of Appeal.....   | 31 |
| When Does the New Regime Apply? .....  | 32 |
| How Does the New Code Differ From the Last Regime?.....  | 32 |
| <br>   |    |
| Multiple Choice Questions .....  | 9  |

# **The ACAS Statutory Code of Practice on Discipline and Grievance**

## **Module cpdemp0210**

**Course level:** Intermediate

**Course duration:** typically 2 hours

### **Course Aims and Targets:**

To understand the contents of the ACAS Statutory Code of Practice on Discipline and Grievance.

To appreciate when and how the transitional measures apply

To understand when and how the sanctions apply

To understand to whom the course applies

Key Differences Between the Old Dispute Procedures and Those Set out in the ACAS Code

To understand the Manner in which grievances should be handled

To appreciate some key differences between the old statutory grievance procedures and those set out in the ACAS Code

## **The Disciplinary Procedures 2009 Changes**

The ACAS Statutory Code of Practice on Discipline and Grievance is issued under section 199 of the Trade Union and Labour Relations (Consolidation) Act 1992 and was laid before both Houses of Parliament on 9th December 2008. It comes into effect by order of the Secretary of State on 6 April 2009 and replaces the Code issued in 2004. The Draconian old compulsory statutory disciplinary procedures were abolished recently as their Byzantine complexity made money for employment lawyers but resulted in an onerous burden on Claimants and Respondents.

## **Transitional Measures**

The 2004 compulsory statutory disciplinary procedure rules still apply if the employer dismissed the employee before 6th April 2009 or if the employer started the disciplinary procedures required by the 2004 compulsory statutory rules before 6th April 2009.

See: The Employment Act 2008 (Commencement No. 1, Transitional Provisions and Savings) Order 2008. The same provision introduced into effect on 6th April 2009 (subject to transitional provisions) sections 1 to 7 of the Act which replace the 2004 compulsory dispute resolution procedures with a new semi-voluntary [ACAS Code of Practice CoP1 on Discipline and Grievance, March 2009](#).

## **The New Disciplinary Rules**

### **Failure to Follow the Code**

The new post-April 2009 ACAS Code of Practice is being described by commentators as "semi" voluntary but failure to comply (by an employer in a discipline case or by an employee in a grievance case) will still involve potential penalties. Unreasonable failure to comply with the Code will give an employment tribunal power to impose an uplift (where the employer has not complied) or reduction (where the employee has not complied) to any award it makes. The maximum uplift or reduction is 25% rather than the 50% which applied under the 2004 rules and the automatic 10% minimum is removed.

### **Does The Failure to Write a Written Grievance Mean that a Tribunal has no Jurisdiction to Hear a Claim?**

One of the main points of contention regarding the old law was that employees had to submit to their employer a grievance in writing as opposed to verbally if their grievance were to be heard at all. The abolition of the statutory procedures will also mean that employees will not have to write a written grievance before making a non-dismissal claim, although the guidance set out in the Code suggests that it will help their claim to do so. To the satisfaction, of those fed up of interpreting the old rules on time limits it will come as good news that, the 6 month time limit for non-dismissal claims will also be abolished. Instead, there will be a 3 month time limit for all Employment Tribunal claims, including those relating to constructive unfair dismissal. Non-dismissal claims includes claims for unpaid wages, notice pay, redundancy pay

and all discrimination claims.

### **To Whom Does the Code Apply?**

The Code does not apply to redundancy dismissals or to the non-renewal of fixed term contracts. Even though the Code does not apply to redundancy dismissals, this does not mean that employers no longer have to offer an employee an appeal against the decision. Case law is already quite comprehensive when it comes to guiding us on how to conduct a fair dismissal on the basis of redundancy and the old law made the situation unnecessarily complex. The essential features in the old and new law are reflected in case law, such as; invitation to a meeting, allowing the employee to put their arguments forward and a right to an appeal.

Like the statutory procedures, the Code does not apply to casual workers.

### **Referral to the ACAS Code**

Unlike the Code employment tribunals are not required to have regard to the ACAS guidance booklet.

The Code sets out basic principle of fairness which should be followed when ever a disciplinary or grievance procedure is in use:

- Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.
- Employers and employees should act consistently.
- Employers should carry out any necessary investigations, to establish the facts of the case.
- Employers should inform employees of the basis of the problem and them an opportunity to put their case in response before any decisions are made.
- Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
- Employers should allow an employee to appeal against any formal decision made.

### **The Basic Elements:**

#### 1) Enabling the Claimant to Answer the Charge

If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about alleged misconduct or poor performance and its possible consequences. Any witness statements or written evidence collected should be provided with the notification.

#### 2) The Meeting

The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case. The employee should be allowed to set out their case and answer any allegations that have been made. If the employer or employee wishes to call a witness advance notice to the other side should be given.

### 3) The Appeal

It is always good practice to employ someone independent and preferably more senior than the person who conducted the original disciplinary and grievance hearing.

#### **Key Differences Between the Old Dispute Procedures and Those Set out in the ACAS Code:**

Unlike the old Statutory Dispute Procedures, the ACAS Code only applies to misconduct and poor performance cases. It does not apply to dismissal on the grounds of redundancy or the non-renewal of a fixed-term contract. It is not yet clear if the non-renewal of a fixed-term contract for reasons of misconduct or poor performance is covered.

An employer will no longer be found to have been automatically unfair if they do not follow the procedure. Now the question is whether the employer acted outside the band of reasonable responses in treating misconduct or poor performance as the reason for dismissal. The Tribunal will take into account the ACAS Code in deciding on this issue.

There is now no automatic extension of time for the employee to issue a claim in the Employment Tribunal, even if an appeal is ongoing. Under the old regime there were provisions for an automatic three-month extension. Therefore, the time limits are now all three months minus one day. This is from the date of dismissal or the discriminatory act or omission.

The Employment Tribunal now has wider discretion to uplift or reduce compensation where either party has unreasonably failed to follow the code. The Employment Tribunal can now choose not to adjust compensation at all, or adjust it by up to 25 per cent where either party unreasonably fails to follow the code (the adjustment was previously 10 - 50 per cent and less only in exceptional circumstances).

#### **The ACAS Grievance Code**

The new Code is not without teeth; If an employee's claim is successful but either the employer or the employee failed to follow the new Code, the level of compensation awarded to the employee may be affected. If the employer unreasonably failed to follow the Code, the tribunal may increase the employee's compensation by up to 25%. If the employee unreasonably failed to follow it, the tribunal may reduce their compensation by up to 25%. The tribunal must decide what uplift or reduction is suitable based on what would be just and equitable. (*Section 207A, Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), as inserted by section 3, Employment Act 2008 (EA 2008)*).

This regime does not apply to all claims but does apply to the types of claim most commonly brought in the tribunals (including those related to discrimination, unfair dismissal, equal pay, breach of contract, working time, detriment, and deduction of wages). The full list is set out in the new Schedule A2 of TULRCA.

#### **Manner in which grievances should be handled**

### **Should the grievance be in writing?**

A grievance can be any problem or complaint that an employee raises with the employer. The employee should raise the grievance in writing with a manager or if it relates to their line manager, the grievance should be raised with another manager. A failure to raise the grievance in writing does not preclude an employee bringing a tribunal claim about the matter. However, the employee may recover less compensation if no grievance is raised. Although the impact of not submitting a grievance in writing has been diluted under the new law, the Government failed to remove the condition that the grievance can only invoke the Code if in writing.

Consequently, the Claimant who can prove that they told their manager about their grievance but did not write to them may well see their compensation reduced. Conversely, the employer who fails to spot that a resignation letter can constitute a grievance under the new law and thus fails to invoke the prescribed procedures will face a hike in compensation.

### **The Meeting and Investigation**

A meeting should be held to allow the employee to explain their grievance and how they think it should be resolved. Managers, employees and their companions should make every effort to attend the meeting. If the matter needs further investigation, the employer should consider adjourning the meeting and resuming it after the investigation has taken place. When the meeting is concluded, the employer should communicate its decision in writing without delay, including any plan of action it intends to take to resolve the grievance. A failure to deal with a grievance could lead to an uplift on any award made and lead to complaints of constructive dismissal or discrimination.

It should be remembered that Under *section 10, Employment Relations Act 1999*, An employee or other worker has a statutory right to bring a companion, whether a fellow worker or a trade union representative to a grievance meeting, where the complaint is about a "duty owed by the employer to the worker" The employee must make a reasonable request to be accompanied. What is reasonable will depend on the circumstances, but the Code suggests that it will not normally be reasonable for the companion to be someone whose presence would prejudice the meeting, or someone from a remote workplace if a suitable alternative candidate is available at the same site.

### **Right of Appeal**

If the employee is not satisfied with the outcome, they should appeal in writing, specifying the grounds of their appeal. If they bring a tribunal claim without appealing, any compensation they are awarded may be reduced. The employer must inform the employee that they have a right of appeal when they give the decision of the grievance meeting. If not, the employer faces having to pay an increase of up to 25% on any award made.

The appeal should be dealt with impartially at a hearing, which should be conducted by a manager who has not been previously involved. The employee should be informed in good time of the time and place of the appeal hearing and may bring a companion. The employer should communicate the final decision in writing without

unreasonable delay. The appeal officer should look into the appeal points raised in as much detail as possible. The appeal officer, who gives evidence that he had no first hand knowledge of the area of expertise or of the individuals involved in the complaint and therefore didn't really investigate faces the finding of fact from the tribunal that there was no meaningful appeal.

### **When Does the New Regime Apply?**

There are transitional provisions governing whether the old or new regime applies. In general, any grievance concerning facts which occurred wholly before 6 April 2009 will fall under the old regime and any grievance which concerns facts occurring wholly on or after that date fall under the new regime. For most grievances about a state of affairs spanning that date, the old regime will continue to apply if the grievance or claim is submitted on or before 4 July 2009, although in some cases involving equal pay, redundancy or industrial action the date is 4 October 2009 (*Employment Act 2008 (Commencement No. 1, Transitional Provisions and Savings) Order 2008*). See *Checklist, Employment Act 2008 transitional provisions: grievance procedures*.

### **How Does the New Code Differ From the Last Regime?**

There are some key differences between the old dispute procedures and those set out in the ACAS Code:

An employee who does not submit a grievance is no longer barred from bringing a claim in the Employment Tribunal.

Submitting a grievance no longer entitles an employee to an automatic three-month extension of time for issuing certain claims in the Employment Tribunal.

The Employment Tribunal has wider discretion to uplift or reduce compensation as it applies to any grievance where either party has unreasonably failed to follow the code.

The Employment Tribunal can now choose not to adjust compensation at all, or adjust it by up to 25 per cent where either party unreasonably fails to follow the code (previously 10 - 50 per cent and less only in exceptional circumstances).

The ACAS Code does not apply to collective grievances - a grievance brought by an appropriate representative for more than two employees.

Where an employee raises a grievance during disciplinary procedures the employer can decide whether to suspend the disciplinary proceedings or not.

Under The new Code, an "unreasonable" failure can affect compensation. This replaces complex provisions under the Dispute Resolution Regulations governing when the statutory procedures applied and when they were excluded. Any breach of an applicable statutory grievance procedure would enable a tribunal to adjust compensation.

## Multiple Choice Questions

### Question 1

The new post-April 2009 ACAS Code of Practice is only "semi" voluntary because failure to comply (by an employer in a discipline case or by an employee in a grievance case) will still:

- Involve potential penalties
- Mean that failure to comply will result in automatic unfair dismissal
- Mean that failure on the part of the employer will mean a penalty of 50 percent uplifts

### Question 2

The 2004 compulsory statutory disciplinary procedure rules still apply if the employer dismissed the employee before 6th April 2009 or if the employer started the disciplinary procedures required by the 2004 compulsory statutory rules before:

- 2010
- 6 April 2009
- 6 May 2009

### Question 3

The Code,

- Does apply to redundancy dismissals
- Does not apply to redundancy dismissals
- Applies to all employment disputes

### Question 4

The abolition of the statutory procedures will also mean that employees will:

- Not have to write a written grievance before making a non-dismissal claim
- Have to submit a written grievance before making any claim
- Never bother writing a grievance

### Question 5

Employers should inform employees of the basis of the problem and:

- Give them an opportunity to put their case in response before any decisions are made
- Make sure that they allow them to contact a lawyer.
- Do not talk about the issues to the employer

**Question 6**

The employer must inform the employee of:

- A right of appeal
- The decision in 3 weeks
- The right to submit a 2nd grievance

**Question 7**

The grievance must be:

- Made verbally
- Made verbally or in writing
- Made in writing

**Question 8**

The Code applies to:

- Casual workers
- Casual workers and employees
- Employees only

**Question 9**

At the conclusion of a grievance meeting the employer should communicate the decision:

- After 21 days
- Speedily and in writing
- Speedily and verbally

**Question 10**

The uplift or reduction prescribed by the Code is:

- Based on what would be just and equitable
- Up to the tribunal
- Always 25%

**Question 11**

Under The new Code, with grievances:

- An "unreasonable" failure to follow the Code can affect compensation
- A failure to tell a manager about the grievance can affect compensation
- A failure to submit a grievance leads to an uplift of 10% in compensation

**Question 12**

In the instance of a Code breach, the tribunal can:

- Choose not to make any award of compensation at all
- Make an award of at least 10% uplift
- Always award an uplift of 25%

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# The Public Interest Disclosure Act

## Module cpdemp0310

### Contents

|  |    |
|--|----|
| Background .....   | 40 |
| When Does Protection Arise? .....  | 40 |
| To Whom Must the Disclosure be Made? .....   | 40 |
| Then What Happens? .....   | 41 |
| Definition of 'Worker' Under the Act.....  | 41 |
| Burden of Proof.....   | 41 |
| The Mental Element.....  | 42 |
| Good Faith.....  | 42 |
| Does the Employee Have to be Correct in the Belief that the<br>Employer was Under a Legal Obligation?..... | 42 |
| The Whistleblower's Belief: .....  | 42 |
| Court of Appeal .....  | 43 |
| Compensation .....   | 43 |
| The Cut off Point for Injury to Feelings .....   | 44 |
| Court of Appeal .....  | 44 |
| How the Legislation Has Been Interpreted .....   | 45 |
| The EAT has chosen to adopt a liberal approach to interpreting PIDA<br>Legislation .....                   | 45 |
| Time Limits.....   | 45 |
| Series of Similar Acts.....  | 46 |
| The Future.....  | 47 |
| <br>   |    |
| Multiple Choice Questions .....  | 13 |

# **The Public Interest Disclosure Act**

## **Module cpdemp0310**

**Course level:** Intermediate

**Course duration:** typically 2 hours

### **Course Aims and Targets:**

On completion of the course, the candidate should have a sound appreciation of the following areas:

- When protection under the Public Interest Disclosure Act arises
- To whom a disclosure may be made
- Dismissals and detriments under the Act
- Who is covered under the Act
- The scope of the Act
- Burden of Proof
- What the worker must believe
- Compensation
- Time Limits

## **Background**

Last year, employment tribunals received around 1,700 claims involving PIDA (Public Interest Disclosure Act) allegations. The Public Interest Disclosure Act 1998 started as a Private Members Bill introduced in the House of Commons on 18th June 1997 by Richard Shepherd MP, sponsored by the "Public Concern at Work" action group.

The Public interest Disclosure Act 1998 (PIDA) inserted certain rights into the Employment Rights act 1996 to protect a worker who discloses information about certain types of wrongdoing at work in accordance with the relevant provisions of the ERA. PIDA introduced new provisions into the Employment Rights Act 1996 as ss. 43A to 43L

## **When Does Protection Arise?**

### *Section 43B(1), ERA*

In order to be afforded protection under PIDA the disclosure must relate to one of six categories of subject matter:

That a criminal offence has occurred or is likely to occur

A person has failed or is likely to fail to comply with a legal obligation;

A miscarriage of justice has occurred or is likely to occur;

The health and safety of an individual has been or is likely to be endangered;

Environmental Damage;

Or information tending to show one of the above has been or is likely to be deliberately concealed.

## **To Whom Must the Disclosure be Made?**

### *Sections 43C - 43H, ERA*

Disclosure must be to an employer or other responsible person;

A legal advisor;

Minister of the Crown;

Disclosure to a prescribed person or:

Disclosure in other cases; and, disclosure of exceptionally serious failure.

## **Then What Happens?**

### *Section 47B, ERA*

If the above criteria is satisfied then the worker can bring a claim based on the contention that he/she has been subject to a detriment and/or been unfairly dismissed for making a protected disclosure. (Section 103A, ERA). If the detriment is "dismissal" of an employee it does not count as a "detriment" for this purpose (see ERA 1996 s.47B(2)). Instead dismissal of an employee for making a protected disclosure is automatically unfair dismissal (ERA 1996 s.103A).

N.B A detriment since the case of *Woodward v Abbey National plc. Court of Appeal, 2006 EWCA Civ 822*. can be post termination. In this case, months after making a sex discrimination allegation against her employer the Claimant was dismissed and received a poor reference. The reference was deemed to still fall under s47B despite it occurring after dismissal.

## **Definition of 'Worker' Under the Act**

The definition of 'worker' under PIDA is wider than seen in the ERA. Section 47B(1) of the Employment Rights Act 1996 protects workers who have made a protected disclosure from suffering a detriment in the workplace. For the purposes of the ERA generally, 'worker' includes not only employees and apprentices, but also individuals who provide personal services under any contract, whether of employment or otherwise, provided that the party to whom the personal service is provided is not a client or customer - S.230(3) ERA. For the purposes of the protected disclosure provisions, the definition is wider. S.43K(1)(a) ERA extends the meaning of 'worker' to include any individual who is not covered by the S.230(3) definition, but who works or worked for a person 'in circumstances in which (i) he is or was introduced or supplied to do that work by a third person, and (ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them'. See *Croke v Hydro Aluminium Worcester Ltd. EAT 4.4.07 (0238/05)*.

## **Burden of Proof**

The CA in *Ryta Kuzel v Roche Products Limited (2008) [2008] IRLR 530*, CA held that section 103A had to be applied in the context of Part X of the ERA: The R had to show the reason for dismissal and that it was a potentially fair reason. It was not for C to disprove the reason(s) for dismissal put forward. It was for the ET to consider the evidence and to make findings of fact and then to determine the reason or principle reason for the dismissal. The ET could find that the reason for dismissal was not that put forward by either side.

## **The Mental Element**

### **Good Faith**

There is no requirement for a worker to complete any particular period of employment in order to qualify for protection (see ERA 1996 s.108(3)(ff)). However the worker must act in good faith and must have reasonable grounds for believing that the information disclosed indicates the existence of one of the above problems (see eg ERA 1996 s.43G(1)).

The EAT stated in *Lucas v Chichester Diocesan Housing Association Ltd.* EAT, 17.2.05 (0713/04) that, where it is argued that a disclosure was not made in good faith, the evidence supporting that argument must be cogent, since 'bad faith is a surprising and unusual feature of working relationships'. As in all cases where improper motivation is alleged, the allegation should be made explicit in advance and should be put squarely to the claimant. The chronology of events and the impression given by witnesses are very important in such cases.

### **Does the Employee Have to be Correct in the Belief that the Employer was Under a Legal Obligation?**

In *Kraus v Penna.* EAT 2004 IRLR 260. - a case concerning the issue of whether the employer was in breach of a legal obligation under S.43B(1)(b) - the EAT concluded that a worker could not claim the protection of the legislation if he or she is mistaken in believing that the employer was under such an obligation.

The Court of Appeal however, revisited this issue in the recent case of *Babula v Waltham Forest College.* Court of Appeal, 2007 EWCA Civ 174.

Students at a college, being taught business studies, told B a lecturer that his predecessor, J, had not taught them the prescribed course curriculum, but had instead used lesson time to teach religious studies. The students said that J had divided the class into Muslim and non-Muslim groups, and had indicated his support for the terrorist attacks that took place in New York on 11 September 2001, expressing a wish that a similar event take place in London.

One student told B that she had raised her concerns about this with her personal tutor and with the Head of School, L, but that no action had been taken. B also raised the matter with J's previous supervisor, who likewise took the view that no action was required.

### **The Whistleblower's Belief:**

B believed that J's actions amounted to incitement to racial hatred under S.18 of the Public Order Act 1986 and that he would incite racial hatred in a different educational establishment or even commit or conspire to commit an act of terrorism. Shortly afterwards B resigned and initiated proceedings in a tribunal, alleging that his disclosures had led directly to a series of actions by the College which left him with no alternative but to resign. Accordingly, he argued that he had been unfairly

constructively dismissed under S.103A ERA for having made qualifying disclosures under S.43B(1). These included the disclosures made on the basis of his reasonable belief that a criminal offence contrary to S.18 POA had been committed by J and that L, as the Head of School, was unlikely to report the offence to the authorities and would therefore fail to comply with a legal obligation to report such an offence. In support of the latter allegation, B referred to the College's Equal Opportunities Policy, which required the 'Principal' to take a lead on race equality issues and to ensure that action was taken against those who committed acts of discrimination and harassment.

At a pre-hearing review, the tribunal chairman considered whether B had made a qualifying disclosure under S.43B ERA and concluded that he had not. The chairman noted that he was bound by *Kraus v Penna*. Applying this decision to the instant case, he held, first, that J's alleged actions in telling a group of Muslim students that he wished that a September 11 incident would occur did not amount to a criminal offence contrary to S.18 POA because they were based on religion, not race, and at the relevant time the POA only prohibited behaviour that stirred up racial hatred. Thus, there had been no qualifying disclosure under S.43B(1)(a). Secondly, B had failed to show that the College's equal opportunities policy had placed the Head of School under a legal obligation to report the discrimination on the ground of religion, because the policy did not make any reference to religious discrimination. B had therefore not made a qualifying disclosure under S.43B(1)(b). The *Kraus* line was adhered to at EAT.

## **Court of Appeal**

Lord Justice Wall, giving the leading judgment, took the view that *Kraus* was correctly decided on its facts. He went on to hold, however, that the construction of S.43B(1) ERA set out in that judgment was not correct and should not be followed. In each of the instances identified in S.43B(1)(a)-(f), the whistleblower has to establish a reasonable belief that the information being disclosed 'tends to show' one or more of the situations in (a)-(f). However, nothing in that section requires a whistleblower to be right. Provided his or her belief is held by the tribunal *to be objectively reasonable*, neither the fact that the belief turns out to be wrong nor the fact that the information which the claimant believed to be true does not in law show, for example, that a criminal offence is likely to be committed or that a person is likely to be in breach of a legal obligation, is sufficient of itself to render the belief unreasonable and thus deprive the whistleblower of the protection afforded by the statute.

## **Compensation**

There is no cap on the compensatory award which can be awarded under the Act to an employee dismissed for "blowing the whistle". However, the distinction between the rights to claim detriment and unfair dismissal is important because it has a direct bearing on the compensation available. Detriment awards under Part V ERA often include a sum for injury to feelings. On the other hand, as clarified by the House of Lords in *Dunnachie v Kingston upon Hull City Council*, compensation for injury to feelings is not available under the Part X unfair dismissal regime.

## **The Cut off Point for Injury to Feelings**

In the case of *Melia v Magna Kansei Ltd. Court of Appeal, 2005 EWCA Civ 1547* an employment tribunal found in a Claimant's favour in respect of both his detriment and his unfair dismissal claims. With regard to the former, it awarded him £6,000 for injury to feelings relating to the detriment suffered up to the end of June 2001. The tribunal decided, however, that M should not receive an injury to feelings award in respect of MK Ltd's subsequent investigation of his grievance, since the employer's action in this regard was 'so serious that it amounted to a fundamental breach of contract'. As such, this treatment was intimately connected with M's constructive dismissal; was excluded from the whistleblowing detriment provisions by S.47B(2) ERA; and fell to be considered under the unfair dismissal compensation regime under which injury to feelings awards are not available.

M appealed to the EAT, maintaining that he should be compensated for injury to feelings sustained as a consequence of the employer's actions during the whole period from May to November 2001. The EAT, however, agreed with the employment tribunal. It pointed out that S.47B(2) ERA clearly excludes a detriment amounting to a constructive dismissal from the whistleblowing detriment provisions. This means, said the EAT, that the S.47B(2) exclusion covers an employer's behaviour which amounts to a repudiatory breach of contract and leads an employee to resign.

The EAT deemed it, therefore important to determine the point at which MK Ltd's conduct ceased to comprise of a detriment short of dismissal and started to relate to the repudiatory breach forming the basis of M's constructive dismissal claim. The EAT found that the tribunal had been entitled to distinguish between the mistreatment suffered by M up to the end of June 2001 (which did not amount to a repudiation of his contract), and that received in connection with the investigation and consideration of his grievance from June 2001 onwards (which did). On this basis, it upheld the June cut-off point applied by the tribunal.

## **Court of Appeal**

The Appellant made the point that the only type of detriment for which he could be compensated under the unfair dismissal provisions of Part X ERA was loss sustained in consequence of his dismissal, i.e. losses arising from the date of termination - 9 November 2001 - onwards. It followed, in his view, that any detriment suffered before that date should be compensated under the provisions of Part V of the Act, and not be excluded by S.47B(2). There was no reason, it was argued, why he should be denied compensation under Part V in respect of a detriment if his loss arising from that detriment could not be compensated under the unfair dismissal regime.

Lord Justice Chadwick, with whom the other members of the Court agreed, accepted M's submissions. In his view, the S.47B(2) exclusion of 'dismissal' from the Part V detriment provisions plainly has the unfair dismissal provision of S.103A in mind. Ss.47B and 103A are meant to be complementary. Reading the two together, S.47B(2) only excludes from Part V a detriment which can be compensated under the Part X unfair dismissal provisions. If a detriment cannot be so compensated, in

that it took place prior to the termination of employment, there is no reason why it should not be covered by the Part V detriment regime.

Chadwick LJ, continued to express the court's view that a dismissal as defined by the ERA occurs when employment is terminated, and not at some earlier date. In a constructive dismissal case, therefore, a detriment will only amount to a dismissal for the purposes of the S.47B(2) exclusion at the point at which the termination of employment takes place, i.e. when the employee accepts the employer's repudiatory breach of contract and resigns. It followed that the employment tribunal should have assessed M's injury to feelings compensation with reference to the detriment he suffered up to the date of his resignation.

## **How the Legislation Has Been Interpreted**

### **The EAT has chosen to adopt a liberal approach to interpreting PIDA Legislation**

In the case of *Hibbins V Hesters Way Neighbourhood Project (2008) [2009] IRLR 198*.

The Claimant had been employed as a teacher by the Respondent. The Claimant learnt that one of the students who had applied for one of the Respondent's courses was suspected of rape and reported the matter to the Police, providing them with the student's address and telephone number. The Respondents expressed anger that he had disclosed personal information about the student and the Claimant resigned.

The Claimant Claimed that she had been subjected to a detriment by the Respondent. The employment tribunal held that the provisions of the ERA did not apply to disclosures where the wrongdoing was by a body that was not the employer of the person who made the disclosure. The Claimant appealed and argued that a qualifying disclosure could relate to 'a person' pursuant to section 43B(1)(b) and therefore could relate to a wrongdoing by someone other than the employer.

The Employment Appeal Tribunal stated that the statutory provisions had to be construed in light of the legislature's desire to encourage responsible whistleblowing. The reference to 'a person' in section 43B(1)(b) included all legal persons and there was no limitation on the people or bodies whose wrongdoings could be the subject of a qualifying disclosure.

## **Time Limits**

Whistleblowing complaints must be brought within three months of 'the date of the act or failure to act to which the complaint relates' or, where that act or failure is part of a series of similar acts or failures, the last of them – S.48(3)(a). Where the act

extends over a period, the 'date of the act' means the last day of that period – S.48(4)(a). In the case of *Unilever UK plc v Hickinson and anor.* EAT, 24.6.09 (0192/09) the definition of 'acts' and 'failures' was considered.

The Claimant was employed by U plc from October 1992 as a security guard. Although his employment was subsequently transferred to S Ltd, he continued to work at U plc's site. On 4 July 2008, U plc became aware that the Claimant had been making secret recordings of workers' activities and sent an e-mail to S Ltd advising the company that it was no longer ready to have him working at that site. The Claimant was removed. S Ltd spent a few weeks considering redeployment, but when this came to nothing he was dismissed on 2 August 2008.

After an unsuccessful appeal against dismissal, the Claimant lodged a claim with the employment tribunal on 6 October under S.47B of the Employment Rights Act 1996, alleging that he was a 'worker' in relation to U plc and that he had been subjected to a detriment by an act done by U plc (his 'employer' for these purposes) on the ground that he had made a protected disclosure.

U plc contended that the Claimant's claim was out of time since the act complained of occurred on 4 July 2008, and accordingly his claim should have been brought on or before 3 October 2008. There was no good reason why it had not been. The Claimant countered that although he was banned from the site on 4 July, there was persistent pressure from U plc to enforce the ban and this amounted to a continuing act or series of acts culminating in his dismissal on 2 August 2008; consequently, time ran from that date.

At a pre-hearing review, the employment judge found that the Claimant's claim was in time. In so doing, he found that it was 'wholly unrealistic' to isolate the e-mail of 4 July from its consequences and held that there was an act extending over a period that ended with the Claimant's dismissal on 2 August. U plc appealed. According to the EAT's view, the employment judge had fallen into error by conflating the act done by the employer – namely, the sending of the e-mail – with its consequences, and treating them as a single continuing act culminating in dismissal. This was contrary to the EAT's guidance in *London Borough of Harrow v Knight* 2003 IRLR 140 to the effect that it was important to distinguish the employer's act from the detriment suffered by the worker. The employment judge should have held that the relevant act was U plc's e-mail of 4 July 2008. The Claimant's claim was therefore out of time.

### **Series of Similar Acts**

A worker wishing to bring a claim under this section before the employment tribunal must do so within three months of his or her employer's alleged act or failure to act, or, where the act or failure to act has been part of a series of similar acts or failures, within three months of the last act or failure to act S.48(3)(a). see *Arthur v London Eastern Railway Ltd t/a One Stansted Express. Court of Appeal, 2006 EWCA Civ 1538.*

## **The Future**

The Department for Business, Innovation and Skills has launched a consultation on the provision of information between employment tribunals and regulators in whistleblowing cases. The Consultation sought views on whether details of employment tribunal claims involving PIDA allegations should be forwarded to the "relevant regulator". The Government have now said that the scheme will now go ahead.

The idea is that allegations of the underlying issue, for example fraud or non-compliance with health & safety law or care home standards, could then be investigated quickly by the relevant regulator.

The Employment Lawyers Association has raised the concern that there exists a fear that empowering the employment tribunal service to forward details of claims involving PIDA allegations to the "relevant regulator" if the claimant consents, as proposed, would give whistleblowing claimants 'improper bargaining power'.

The ELA points out that 'this could be used by claimants as 'leverage to get a higher financial settlement than they would otherwise expect', in return for not pursuing a serious allegation. It could also mean that serious claims of corruption would never reach the regulator'.

## Multiple Choice Questions

### Question 1

Section 43B(1), ERA states that protection arises under PIDA when, 'information tending to show' what, 'has been or is likely to be deliberately concealed'?

- The employment handbook
- The disciplinary code
- Any of the 5 other 'failures' listed in S43B(1) ERA

### Question 2

Which statement is correct?

- The Claimant has to show the reason for dismissal and that it is a fair one
- The Respondent has to show the reason for dismissal and that it is a fair one
- The Claimant must show a 'prima facie' case before the Respondent rebuts it

### Question 3

A qualifying disclosure can be made to:

- A Minister of the Crown
- A local council worker
- A responsible line manager

### Question 4

The whistleblower has to establish:

- A reasonable belief that the information being disclosed 'tends to show' one or more of the situations in S.43B(1)(a)-(f)
- That the subject matter of the disclosure definitely happened
- That the subject matter of the disclosure on a balance of probabilities took place

### Question 5

When considering compensation:

- There is no cap on the compensation limit awarded under the Act to an employee dismissed for "blowing the whistle"
- There is a limit similar to that of unfair dismissal circa, £65,000
- You cannot claim compensation for being dismissed for blowing the whistle

### **Question 6**

Events occurring after the dismissal:

- Can constitute a detriment under the Act
- Are out of time
- Can constitute a detriment if part of a continuing act

### **Question 7**

A qualifying disclosure could relate to 'a person' pursuant to section 43B(1)(b) and therefore:

- Must relate to a wrongdoing perpetrated by the employer
- Could relate to a wrongdoing by someone other than the employer
- Could relate to a wrongdoing by someone only working for the Government

### **Question 8**

When relying on a protected disclosure:

- The worker must act in good faith
- Must have a 'fair idea' what he is claiming is true
- It does not matter what the worker thinks

### **Question 9**

For the purposes of the protected disclosure provisions, the definition is of, 'worker' is:

- Wider
- The same
- Diminished

**Question 10**

The Public Interest Disclosure Act 1998 started as a:

- Petition
- Private Members Bill
- An extension of the ERA

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# The right to request flexible working

## Module cpdemp0410

### Contents

|  |    |
|--|----|
| Introduction .....                       | 4  |
| What is the right? .....                 | 4  |
| Types of request made .....              | 4  |
| Who can make the request? .....          | 4  |
| Requests to look after adults .....      | 5  |
| Procedure .....                          | 6  |
| What the employer must do .....          | 6  |
| Timetable .....                          | 6  |
| When can the employer refuse .....       | 7  |
| Right to accompaniment .....             | 7  |
| Contractual statuses of variations ..... | 7  |
| Legal redress .....                      | 8  |
| Remedies .....                           | 8  |
| Criticisms .....                         | 9  |
| <br>                                     |    |
| Multiple Choice Questions .....          | 10 |

## **The right to request flexible working**

### **Module [cpdemp0410](#)**

#### **Course Aims:**

This course should give an invaluable grounding in the law establishing the Right to Request Flexible Working. The 2-hour course offers 2 CPD points is aimed at employment professionals with a moderate knowledge of employment law. There is a set of multiple choice questions, which must all be answered correctly if the points are to be awarded.

#### **Intended Learning Outcomes:**

On completion of this course, you will have an understanding of:

- The evolution of the policy and law behind Flexible Working Requests;
- The legal definition of the Request for Flexible Working;
- The types of request covered by the law and the procedure, which must be followed by the employee and employer respectively;
- When an employer can refuse a request;
- The Legal Redress available to an employee;
- Criticisms of the law on the area as it stands.

## **The Right to Request Flexible Working**

The employment Act 2002 was the pioneering legislation which gave a new right to employees to request a change in their terms and conditions of employment in order to allow them to work from home. All of the main political parties have promised to extend this right as more and more people are beginning to appreciate this new 'family friendly' way of working.

The right was initially introduced with a view to helping those with a young or disabled child. The right has twice since been expanded to encompass a child up to and including the age of 16 or who is disabled and those who have caring responsibilities for an adult relative within one of the prescribed categories of relationship. These recommendations were accepted by the Government in August 2008, and put into effect by the Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2009, SI 2009/595, which amend reg 3A of the Eligibility Regulations with effect from 6 April 2009

### **What is the Right?**

The right is to request to work flexibly, not necessarily to be granted the request. However, whilst the right applies equally to employees of either sex, it is inescapable in practice that whilst the burden of childcare, and hence the need to be able to work under more flexible working arrangements, falls in practice primarily on the mother. Details of the new right are set out in ERA 1996, Part 8A, which is largely enabling, and in regulations made thereunder (the Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 (SI 2002/3236: 'the Eligibility Regulations') and the Flexible Working (Procedural Requirements) Regulations 2002 (SI 2002/3207: 'the Procedure Regulations').

The Employee can only make a request every 12 months.

### **Types of Request Made**

The right is not only a right to request part-time working, albeit this is in practice the commonest feature of requests made. The Act provides for three types of change (ERA 1996 s 80F(1)(a);

- an employee may request a change to working hours or to the times when he or she is required to work,
- or to work from home (for some or all of the time),
- or any combination of these. Thus the request may be concerned with several different aspects of a working regime. Changes to shift patterns, job-sharing, flexitime, home working, term-time only working and annualised hours are all examples of what might be covered by a request.

### **Who Can Make the Request?**

Employees (of either sex) who have the required qualifying service (the right is available only to employees within the definition in the ERA 1996), and have parental responsibility of a child under 17 at the date of the request (or a disabled child under

18) or caring responsibilities for a relevant adult, may make a formal request for flexible working arrangements. The last date for making a request is the day before the child's 17th (or, as the case may be, 18th) birthday.

The rights apply to those in Crown employment (but not those in the armed forces) and to Parliamentary staff. The right also applies to those in police employment (they are not excluded by ERA 1996 s 200, but police officers are excluded from these provisions by virtue of their status as office holders rather than employees). Share fishermen and fisherwomen are excluded from the right by ERA 1996 s 199.

In order to make a request in relation to caring for a child an employee (male or female) must be qualified in terms of ERA 1996 s 80F(1) and the Eligibility Regulations, SI 2002/3236 regs 3 and 3A. These requirements are that the applicant must:

- 'be a parent (natural, adoptive or foster) or guardian of a child under six, or under 18 in the case of a disabled child, or be married to or the civil partner of a person who is such a parent or guardian;
- have worked with the employer continuously for 26 weeks at the date the application is made;
- make the application no later than the day before the child's seventeenth birthday (or 18th birthday in the case of a disabled child);
- have or expect to have responsibility for the child's upbringing;
- not have made another statutory application to work flexibly during the past 12 months;
- have, as his or her purpose for applying for the change, to enable him or her to care for someone who is, at the time of the application, a child in respect of whom he or she has childcare obligations'.

The details of the parental relationships entitling an employee to make a flexible working application are set out in reg 3 of the Eligibility Regulations, together with the definitions of terms used in reg 2(1).

### **Requests to Look After Adults**

In order to make a request in relation to caring for an adult, an employee must be qualified in terms of the ERA 1996 s 80F(1) and the Eligibility Regulations SI 2002/3236 reg 3B. That means that he or she must:

- be an employee;
- have worked for the employer continuously for 26 weeks at the date the application is made;
- be or expect to be caring for a person in need of care who is either: (i) married to or the partner or civil partner of the employee; (ii) a relative (as defined in reg 2) of the employee; or (iii) living at the same address as the employee;

- have, as his or her purpose for applying for the change, to enable him or her to care for someone within the categories specified above who is, at the date of application, aged 18 or over.

The term 'relative' is defined in SI 2002/3236 reg 2(1) to cover parents, adopters and guardians, children, siblings, uncles, aunts and grandparents (but not nephews, nieces or grandchildren), the equivalent step relationships, and relationships of half blood and in-law relationships, as well as adoptive relationships.

## **Procedure**

An employee who seeks a change in working conditions must do so in writing (including email and fax).

Only one request may be made within any one year;

In the case of a child, the application must be made no later than the day before the child reaches the age of 17, (or if disabled, 18: see the Eligibility Regulations, SI 2002/3236 reg 3A); there is no equivalent time limit for the making of applications to care for an adult relative.

The application must state if and when a previous application has been made, and it must be signed and dated (Eligibility Regulations, SI 2002/3236 reg 4).

## **What the Employer Must Do**

The employer has a wide range of reasons they can give to say no but they are obliged to consider the request, and to invite the employee to a meeting to discuss it. , and the employer must give the employee a decision on the request, with reasons if the request is not acceded to. The Procedure Regulations, SI 2002/3207 reg 5(b)(ii), state that the employer's decision letter must contain 'a sufficient explanation as to why [the grounds relied on] apply in relation to the application'; an equivalent requirement is applied at the appeal stage by SI 2002/3207 reg 10(b)(ii).

## **Timetable**

Following the submission of a flexible working request, the employer must arrange to meet with the employee within 28 days (Procedure Regulations, SI 2002/3207 reg 3(1); no meeting is required if the employer notifies the employee that the request is accepted: reg 3(2)). This meeting is intended to provide the employer and the employee with the opportunity to explore the desired work pattern in depth, and to discuss how best it might be accommodated. It is also intended to provide an opportunity to consider other alternative working patterns should there be problems in accommodating the desired work pattern outlined in the employee's application. The details of the rights of accompaniment, including rights to time off for the companion, and to postponement of a scheduled meeting to enable the companion to attend, are in the Procedure Regulations, SI 2002/3207 reg 14.

Within 14 days after the date of the meeting the employer must write to the employee, either agreeing to the requested new work pattern and giving a start date,

or giving reasons for refusing the request, and advising the employee of the right of appeal (Procedure Regulations, SI 2002/3207 regs 4, 5). The employee's right of appeal is exercisable by giving notice in writing (specifying the grounds of appeal, and dated) within 14 days of the notice of the decision (SI 2002/3207 regs 6, 7). The procedure on appeal is essentially a repeat of the initial procedure: there must be a meeting, within 14 days of the notice of appeal being submitted, and with the employee having the same right of accompaniment. A decision in writing, with reasons if unfavourable to the appellant, must be given within 14 days of the meeting (SI 2002/3207 regs 8–10).

Any time limits imposed by the Regulations may be extended by agreement of the parties, often seen where an employer needs time to investigate the practicability of proposed working arrangements. However, any extension must be recorded in writing, and sent to the employee, to be effective (Procedure Regulations, SI 2002/3207 reg 12).

There is an automatic extension where the person within the employer who would ordinarily consider an application is absent on annual or sick leave (SI 2002/3207 reg 13). The extension postpones the running of time against the employer until the person returns to work, but the postponement is limited to a maximum of 28 days. The Procedure Regulations also provide that the time and place of meetings must be convenient to employer and employee (SI 2002/3207 reg 11). In addition, the employer is entitled to treat a flexible working application as withdrawn not only if the employee so states (orally or in writing) but also if he or she fails, without reasonable cause, to attend a statutory meeting or to provide information needed by the employer to assess whether the proposed arrangements can be agreed (SI 2002/3207 reg 17). The scope of the last point has yet to receive any judicial consideration.

### **When Can the Employer Refuse?**

The request is just that; there is no entitlement to have it granted. But the employer may only refuse it if he considers that one or more of a number of specified grounds (specified in ERA 1996 s 80G(1)(a)) applies. :

- burden of additional costs;
- detrimental effect on ability to meet customer demand;
- inability to reorganise work among existing staff;
- inability to recruit additional staff;
- detrimental impact on quality;
- detrimental impact on performance;
- insufficiency of work during the periods the employee proposes to work;
- planned structural changes;
- such other grounds as may be specified in regulations (as at 1 January 2010, no further grounds have been specified).

### **Right to Accompaniment**

The employee is entitled to be accompanied at the meeting by a fellow employee (but not a trade union officer unless the person chosen is also a fellow employee). The employee also has the right of appeal if his or her request is not granted, and the same entitlement to a meeting and right of accompaniment applies at the appeal stage.

## **Contractual Status of Variations**

If the request is granted, the agreed working arrangements take effect as a variation to the employee's contract of employment.

It should be noted that this change is indefinite in its effect unless agreed with a time limit. Importantly, the employee does not revert to the former terms and conditions simply because the circumstances giving rise to the request have ceased to apply. Although commonly seen there is no provision for trial periods for new arrangements.

## **Legal Redress**

The employee is limited to the following forms of redress:

has the right of complaint to an employment tribunal if the employer fails to follow the procedure outlined above, or if he or she is dismissed or subjected to a detriment by reason of having made the request; a complaint may also be brought on the ground that the reasons given for refusing a request are factually incorrect.

## **Remedies**

The employee may complain to an employment tribunal under ERA 1996 s 80H either that the employer has failed to comply with the duties imposed by s 80G(1) or that he has based his rejection of the application on incorrect facts. The latter category of complaint can only be made:

- a) Once the employee's request has been rejected following an internal appeal;
- b) Within three months of either the date when the employee was notified of the appeal decision or the date on which the alleged breach of duty was committed, as the case may be.

The time limit may be extended by a reasonable period if the tribunal is satisfied that it was not reasonably practicable for the employee to claim in time (s 80H(5)(b)).

If it finds a complaint, either of breach of the procedures or of giving factually incorrect reasons for rejecting a request, well-founded, a tribunal must make a declaration to that effect, and may award compensation not exceeding a maximum of eight weeks' pay. The statutory cap on a week's pay does not apply for these purposes.

However, an employer who refuses to entertain a request on inadequate grounds may face a claim of indirect (or even direct) sex discrimination, or a claim of constructive dismissal based on unjustified undermining of trust and confidence; if for example an employer gives an indication that they will offer a trial for flexible working but indicates that they do not believe that it will work they could face a successful claim for anticipatory breach of contract relied upon in a constructive dismissal case.

It is not however possible to base a claim for failure to make reasonable adjustments under the DDA 1995 on a refusal to agree a request for flexible working made under the statutory provisions, even if the purpose of the flexibility requested is to care for a disabled relative or child; the concept of associative discrimination established by the

ECJ in *Attridge Law v Coleman* [2008] IRLR 722 does not extend to the making of reasonable adjustments, which can only be required where the employee himself or herself is disabled (see as to this the subsequent decision of the EAT in *EBR Attridge Law LLP v Coleman* [2010] IRLR).

These possible avenues of redress open to the Claimant make the duty to give full, clear reasons for a refusal particularly important.

### **Criticisms**

Some polemicists have suggested that the employer has too much power to refuse a request for flexible working and that all the employer must do is ostensibly jump through a few legal hoops before declining the request.

Further, women generally are more likely to take on the burden of childcare and therefore refusal to accept or entertain requests is likely to encourage accusations of indirect sex discrimination.

Trial periods are often requested by employers before granting a Flexible Working Request, where, for instance the employer has doubts about the viability of the proposed arrangements; however the statutory scheme has been denigrated for not making any provision for the employer to respond to a request by proposing a trial, or offering a time-limited change in hours etc.

The fact that only one request can be made per year is restrictive. There is no statutory right to make a further request following a (successful or unsuccessful) request until a year has passed since the request was made, even if the employee's circumstances have changed or the request is made for the purpose of caring for a person other than the person in respect of whom the previous request was made. This inflexibility allows no leverage for the carer who, for instance, has to look after their baby and then discovers that their partner has become incapacitated.

The tribunal has no power to order the employer to comply with the request for flexible working.

## Multiple Choice Questions

Please Select One Answer:

- 1) The right to request flexible working has twice since been expanded to encompass;
  - a) a child up to and including the age of 16 or who is disabled.
  - b) a child up to and including the age of 14 or who is disabled.
  - c) a child up to and including the age of 16 only.
  
- 2) The following can make the request;
  - a) employees (of either sex) who have the required qualifying service (the right is available only to employees within the definition in the ERA 1996).
  - b) any worker
  - c) any employee or worker.
  
- 3) The person making the request must:
  - a) have worked for the employer for a year;
  - b) have worked with the employer continuously for 26 weeks at the date the application is made;
  - b) have worked for any period for the employer.
  
- 4) An employment tribunal;
  - a) has no power to order the employer to comply with the request for flexible working;
  - b) can request that an employee comply with the request;
  - c) can only request that the employer must comply with the request under certain circumstances.
  
- 5) Requests may be made:
  - a) whenever it becomes pertinent;
  - b) twice a year;
  - c) once a year
  
- 6) Following the submission of a flexible working request, the employer must arrange to meet with the employee:
  - a) within 28 days;
  - b) within 30 days;
  - c) Whenever it is reasonable.
  
- 7) Any time limits imposed by the Regulations may be extended:
  - a) Only with permission of an employment tribunal;

- b) by agreement of the parties;
- c) never

8) The employee also has the right of appeal:

- a) if his or her request is not granted;
- b) on application to a tribunal;
- c) Never

9) An employee who seeks a change in working conditions must do so;

- a) quickly without delay;
- b) in writing (including email and fax).
- c) orally or in writing.

10) Any agreed change, as a response to a request is:

- a) indefinite in its effect unless agreed with a time limit;
- b) only in existence for 26 weeks
- c) exists for a year.

11) Reasonable adjustments claims under the DDA 1995;

- a) can be based on a refusal to agree a request for flexible working made under the statutory provisions.
- b) cannot be based on a refusal to agree a request for flexible working made under the statutory provisions.

12) The employer may only refuse a request under flexible working if:

- a) an employment tribunal orders it
- b) It falls under ERA 1996 s 80G(1)(a)
- c) He has given it reasonable consideration.

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# Redundancy

## Module cpdemp0510

### Contents

|  |    |
|--|----|
| Unfair Dismissal and the Definition of Redundancy .....      | 2  |
| Qualifying Periods .....                                     | 6  |
| Consultation .....   | 6  |
| If potential redundancies involve 20 employees or more ..... | 6  |
| Individual Consultation .....                                | 8  |
| Unfair Selection for Redundancy .....                        | 9  |
| Lay Offs .....   | 9  |
| Bumping .....  | 10 |
| Compensation .....   | 10 |
| Redundancy payments .....                                    | 10 |
| Unfair Dismissal Compensation .....                          | 11 |
| Protective award .....                                       | 11 |
| Employer's Checklist .....                                   | 11 |
| Misc Cases .....   | 12 |
| Multiple Choice Questions .....                              | 13 |

## **Redundancy**

### **Module cpdemp0510**

#### **Course Aims:**

This course aims to give the employment lawyer with a moderate knowledge of employment law useful account of the law surrounding redundancy. The average time that participants take to complete the reading and the questions is 2 hours and offers 2 CPD points. There is a set of multiple choice questions, which must all be answered correctly if the points are to be awarded.

#### **Intended Learning Outcomes:**

On completion of this course, you will have an understanding of:

- Unfair Dismissal and the Definition of Redundancy
- Qualifying Periods
- Consultation
  - If Potential Redundancies involve 20 employees or more
  - Individual Consultation
- Unfair Selection for Redundancy
- Lay Offs
- Bumping
- Compensation
  - Redundancy payments
  - Unfair Dismissal Compensation
  - protective award
- Employer's Checklist
- Misc Cases

This course was written by Charles Price an employment barrister of 10 years Call.

## Unfair Dismissal and the Definition of Redundancy

### Statutory Definition

The statutory definition is quite precise and needs some time to examine in detail:

#### S 139 Employment Rights Act - Redundancy

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

(3) For the purposes of subsection (1) the activities carried on by a local education authority with respect to the schools maintained by it, and the activities carried on by the [governing bodies] of those schools, shall be treated as one business (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

(4) Where—

(a) the contract under which a person is employed is treated by section 136(5) as terminated by his employer by reason of an act or event, and

(b) the employee's contract is not renewed and he is not re-engaged under a new contract of employment,

he shall be taken for the purposes of this Act to be dismissed by reason of redundancy if the circumstances in which his contract is not renewed, and he is not re-engaged, are wholly or mainly attributable to either of the facts stated in paragraphs (a) and (b) of subsection (1).

(5) In its application to a case within subsection (4), paragraph (a)(i) of subsection (1) has effect as if the reference in that subsection to the employer included a reference to any person to whom, in consequence of the act or event, power to dispose of the business has passed.

(6) In subsection (1) “cease” and “diminish” mean cease and diminish either permanently or temporarily and for whatever reason.

Note, that if the employer is seeking to rely on either redundancy or some other substantial reason he would be wise to make sure that both grounds are specifically raised and argued before the employment tribunal (*Murphy v Epsom College* [1983] IRLR 395, [1983] ICR 715). However, when selecting the reason for dismissal some ostensible redundancy dismissals should be pleaded under the category of 'Some Other Substantial Reason' (SOSR - another one of the prima facie fair reasons for

dismissal under the ERA). This reason reason for dismissal is often employed in instances when the employee refuses to sign up to new terms and conditions or agrees to his own dismissal, the employer may be able to establish that he was dismissed for 'Some Other Substantial Reason'.

The usual rules relating to unfair dismissal apply to redundancy or 'SOSR' dismissals - In determining whether or not a dismissal is fair, there are two stages. First, the employer must establish the principal reason for the dismissal and show that it falls within the category of reasons which the law specifies as being potentially valid reasons.

Redundancy is one of the potentially fair reasons for dismissal under the Employment Rights Act 1996, (ERA s 98(2)(c)). The list of potentially fair reasons is set out in the ERA s 98. The following reasons are specified:

- (1) A reason related to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;
- (2) A reason related to the conduct of the employee;
- (3) Retirement;
- (4) That the employee was redundant;
- (5) That the employee could not continue to work in the position which he held without contravention (either on his part or that of his employer) of a duty or restriction imposed by or under an enactment;
- (6) Some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

Redundancy in this context has the meaning assigned to it by ERtsA s 139. The test is an objective one: was there in fact a redundancy situation as defined in s 139?

Establishing a 'prima facie' fair reason for dismissal, ie one which is capable of rendering the dismissal fair, is only the first stage in defending an unfair dismissal claim. Whether the dismissal is fair or unfair will then turn on whether the Tribunal considers that the employer acted reasonably in treating the misconduct "as a sufficient reason for dismissing the employee". There is no onus of proof on employer or employee here and the matter has to be determined by the Tribunal "in accordance with equity and the substantial merits of the case" see ERA 1996 s.98(4)(b). The correct test to apply is to consider whether dismissal fell within the range of reasonable responses open to an employer in all the circumstances and a tribunal must not substitute its own view of what would have been reasonable (see *Midland Bank plc v Madden* CA 2000 ICR 1283). It is my opinion that when considering the evidence an employment tribunal will on a balance of probabilities believe that dismissing the Claimant for misconduct fell within the range of reasonable responses to the Respondent and will be reluctant to substitute its own view of what would be reasonable.

The tribunal must remind itself when construing s 98(4) is that it is not for the tribunal simply to substitute its own opinion for that of the employer as to whether certain conduct is reasonable or not. Rather its job is to determine whether the employer has acted in a manner which a reasonable employer might have acted, even although the tribunal, left to itself, would have acted differently.

In *Iceland Frozen Foods v Jones* [1982] IRLR 439 the test was set out:

'Since the present state of the law can only be found by going through a number of

different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the Industrial Tribunal to adopt in answering the question posed by [s 98(4) of the 1996 Act] is as follows.

- (1) the starting point should always be the words of [s 98(4)] themselves;
- (2) in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;
- (3) in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;
- (4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
- (5) the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair'.

### **Qualifying Periods**

The qualifying period of continuous employment for unfair dismissal claims, normally one year since June 1999 and sometimes zero, is less than the two year period required for redundancy pay claims.

There is no "qualifying period of service" to take into account for any of the purposes of TULRCA 1992, s.188 ( *see below* consultation in connection with proposed redundancies).

### **Failure to Consult**

#### **When Must an Employer Consult?**

##### **a) If Potential Redundancies Involve 20 or More:**

Since 1st March 1996 employers have been under a statutory duty to consult appropriate representatives of employees about impending redundancies if at least 20 employees are being dismissed at one establishment within a 90 day period (TULRCA 1992, s.188(1) as amended by Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995, SI 1995/2587). Consultation must begin in good time and in any event 30 days before the first of the dismissals takes effect or 90 days if 100 or more employees are to be dismissed.

From 1st November 1999 onwards if there is a recognised trade union the consultation must be with trade union representatives (Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999, SI 1999/1925). Previously, until 31st October 1999, the law and definition of appropriate representatives was such that an employer could choose whether to consult trade union representatives or other employee representatives.

An important change (brought into effect on 1st November 1999 by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999, SI 1999/1925 is to ensure that where there is a recognised trade union it must be consulted (see see reg 3(3) of SI 1999/1925. Only if there is no recognised trade union is it sufficient for the employer to consult with other employee representatives.

### **Who are Employee Representatives?**

"Employee representatives" are employees elected by their fellow employees either:

- (i) for the purpose of being consulted by their employer about proposed redundancies or proposed transfer of ownership of the employing business; or
- (ii) elected for general purposes which embrace one of the specific purposes mentioned at (i) above.

They have special protection under the ERA 1996, namely, rights:

- (i) to paid time off work to attend to their duties
- (ii) not to be victimised and
- (iii) protection against dismissal

The provisions creating the role of "employee representative" have applied with effect from 1st March 1996 (see Collective Redundancies and Transfer of Undertakings (Protection of Employment) Regulations 1995, SI 1995/2587, superseded by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999 SI 1999/1925 with practical effect from 1st November 1999).

The basic rules are now contained in TULRCA 1992, ss.188 and 196 (in respect of redundancies) and in TUPE regs 1981, reg 10 and TUPE regs 1981, reg 11 (in respect of transfers of ownership of employing undertakings).

These rules implement the EC Collective Redundancies Directive 98/59/EC in Britain.

Failure to consult as required can lead to a Tribunal making a protective award unless there were "special circumstances which render full compliance not reasonably practicable" - see TULRCA 1992, s.188(7). However, special circumstances have to be very special see *Clarks of Hove Ltd v Bakers' Union* CA 1978 ICR 1076, where insolvency was found not to be an excuse.

NB. The law of collective consultation has been criticised by polemicists, who argue that TULRCA 1992 has not interpreted the Collective Redundancies Directive accurately principally because TULR(C)A 1992 confines the duty to consult to cases where the employer contemplates dismissing so many employees as redundant. The definition of 'dismissal' is narrowly defined whereas the CRD extends to any termination of employment which is not desired by a redundant employee.

According to EU law as it applies to the UK, whenever, in any establishment, 20 or more employees are to be made redundant within a period of 90 days, the employer is expected to;

Draw up, in conjunction with the relevant trade union or other representatives of the employees, an agreed plan for dealing with the situation;

Seek to avoid compulsory redundancies where possible;

Seek to mitigate the consequences of any compulsory redundancies that prove inevitable. For example, look at redeploying or retraining the redundant employees;

On completion of the plan, the employer should warn BIS in advance of any compulsory redundancies there may be.

### **Individual Consultation**

Where there has been no collective consultation it is essential that employers consult with and give advance warning to an individual, who may be made redundant (see ACAS Handbook No 12 on "Redundancy Handling"). Failure to do so will make it likely that a Tribunal would decide that any resulting dismissal was unfair even though it was genuinely caused by redundancy. One of the main accusations made by Claimants facing redundancy is that my dismissal on the basis of redundancy was a 'fait accompli'. Meaningful consultation at an early stage i.e prior to dismissal will counter this. The employer should make sure that the employee has been equipped with all of the facts as to why he has been made redundant and has been given the chance to respond with ideas in order to avoid dismissal.

Consider bumping - think about removing someone in a junior role and placing the employee facing redundancy there.

Look for alternative suitable employment

If you find potential alternative employment provide all the details of the role including the salary.

Consider part time work for the employee.

Individual consultation is an implied term in employment contracts see the well known 'Polkey' case. At the individual level, failure to consult an employee and/or his

representative may make any dismissal of that employee an unfair dismissal.

Polkey v A.E. Dayton Services Ltd [1988] ICR 142, HL establishes:

that a dismissal can be unfair purely on procedural grounds

that an employee has an absolute right, save in exceptional circumstances, to be consulted before being dismissed notwithstanding that consultation would make no difference to the decision to dismiss him;

that where a dismissal is unfair purely on procedural grounds a tribunal can reduce the compensation to the claimant, or eliminate it completely, in proportion to the likelihood that the dismissal would have gone ahead even if the correct procedure had been followed.

### **Unfair Selection for Redundancy**

Firstly it is important to note that it is automatically unfair to select an employee for redundancy on union grounds (TULR(C)A 1992 s 153). Tribunals cannot substitute their own principles of selection for those of the employer. Case law has given some guidance on what constitutes fair selection procedure; one crucial principle established is that the tribunal can only interfere if the criteria adopted are such that no reasonable employer could have adopted them or applied them in the way in which the employer did (see eg Earl of Bradford v Jowett (No 2) [1978] IRLR 16, [1978] ICR 431; and NC Watling v Richardson [1978] IRLR 255, [1978] ICR 1049).

An employer must be entitled to take into account criteria in addition to length of service, eg efficiency and the need to retain a balanced workforce. Provided these are proper criteria the tribunal cannot seek to substitute its own selection method by giving greater prominence to long service (BL Cars Ltd v Lewis [1983] IRLR 58).

LIFO survived a challenge under the Employment Equality (Age) Regulations 2006 in Rolls Royce v UNITE [2009] EWCA Civ 387, [2009] IRLR 576 (see L [1721.02]), being held to be justified as a proportionate means of attaining legitimate aims such as rewarding loyalty and maintaining a stable workforce. However, it should be noticed that in that case LIFO was only one of several criteria and there are indications in the case that use of LIFO alone might now be hard to justify under the Regulations.

Apart from long service, other criteria which have been considered relevant in selection include:

- efficiency, though it may be unfair to select a marginally less competent person if his work is generally satisfactory and he has long service (*Farthing v Midland Household Stores Ltd*[1974] IRLR 354);
- greater experience in certain particular tasks or on certain machines (*Abbotts and Standley v Wesson-Glynwed Steels Ltd*[1982] IRLR 51); and
- the fact that certain employees remained loyal during industrial action (*Cruickshank v Hobbs*[1977] ICR 725).

## Lay Offs

The employer has no right unilaterally to impose a lay-off or short time unless the contract of employment so provides, expressly or impliedly. In any event, a lay-off or period of short-time **working will not necessarily avoid liability to make a redundancy payment (ERtsA s 147; see Part 11)**. Lay-offs or short-time working is an option for employers when business is slow. s 135(1)(b) and ss 147 to 154, which give the employee a right to claim a statutory redundancy payment if he is laid off or kept on short time to the extent specified. Under s147(2) short time is defined as; 'by reason of a diminution in the work provided for the employee by his employer (being work of a kind which under his contract the employee is employed to do) the employee's remuneration for the week is less than half a week's pay'.

This prevents an employer retaining an employee in an endless purgatory without a wage rather than pay a redundancy payment. The provisions of ss 147 to 154 are extremely complex. The stipulated conditions must however be fully satisfied (Vennard v Deal (1969) 4 ITR 315, IT). According to case law, in view of the complexity of the law, courts and tribunals should be prepared to take a generous view of the evidence in favour of an employee (Walmsley v C & R Ferguson Ltd [1989] IRLR 112, 1989 SLT 258, Ct of Sess).

## Bumping

The termination of an individual's employment is rarely easy for the employer or the employee involved. However, termination may become even more difficult where employee "A", whose job is no longer required, is placed by his employer into employee "B's" position, so that "B" is dismissed instead of "A". In this scenario "B" is said to have been "bumped".

A bumped employee will be considered to have been dismissed by reason of redundancy following Murray v Foyle Meats Limited [1999].

The practical position is thus that a prudent employer should at the very least consider whether such a course is appropriate before finally selecting an individual for redundancy see Dixon v The Automobile Association Ltd, EAT on 20th April 2004 and Lionel Leventhal Ltd v North EAT 2004 .

## Compensation

### Redundancy Payments

The length of service qualification for the right to statutory redundancy pay is completion of two years continuous employment ending with the relevant date (see ERA 1996 s.155). Unlike redundancy pay, unfair dismissal compensation is normally made up of two components, basic award and compensatory award. The basic award component is calculated according to a formula. This formula is the same as that used for calculating redundancy pay. The same formula is used for calculating both basic award on unfair dismissal and statutory redundancy pay. It is as follows:

½ week's pay for each year worked before 22nd birthday;

1 week's pay for each year worked between 22nd and 41st birthday;

1½ week's pay for each year worked after 41st birthday.

The most recent 20 years (only) are taken into account for the purposes of this calculation if a long service employee is being dismissed (ERA 1996 s.162(3)).

No more than 20 years can be taken into account. The maximum week's pay to be taken into account was increased from £350 to £380 with effect from with effect from 1st October 2009. See ERA 1996 s.227(1)(c) and Work and Families (Increase of Maximum Amount) Order 2009, SI 2009/1903 (see also Maximum and minimum tribunal awards/statutory limits ).

The increase from £350 to £380 in the statutory limit on a week's pay from 1st October 2009 increases the absolute (generally theoretical) maximum for statutory redundancy pay to £11,400 (from the £10,500 set from 1st February 2009).

There are many online calculators, which can help you calculate this award. One such calculator can be found on the comprehensive Emplaw website <http://www.emplaw.co.uk/emplaw/employer/research-employer.aspx>

The statutory redundancy payment should of course be distinguished from a contractual redundancy payment where the length of qualifying service and the sum awarded are found within the contract of employment.

### **Unfair Dismissal Compensation**

Unfair dismissal for the purported reason of redundancy is governed by the usual principles seen in unfair dismissal cases. unfair dismissal compensation has a normal absolute maximum of £67,100 while absolute maximum statutory redundancy pay is £8,400 (figures apply as from 1st February 2005, previously £65,200 and £8,400 respectively see Employment Rights (Increase of Limits) Order 2004, SI 2004/2989).

### **Protective Award**

Failure to consult as required where there are 20 or more can lead to a Tribunal making a protective award unless there were 'special circumstances which render full compliance not reasonably practicable' - see TULRCA 1992, s.188(7). In the case of *Clarks of Hove Ltd v Bakers' Union* CA 1978 ICR 1076, it showed that the excuse of insolvency alone is not a "special circumstance".

### **Automatic Dismissal**

Redundancy dismissal is automatically unfair dismissal if the selection for redundancy was:

(i) for any of the reasons specified in ERA 1996 s.105(2)-(7K) (see Unfair dismissal/automatically unfair dismissals ); (ii) related to trade union activity/membership (TULRCA 1992, s.153

## **Checklist For Employers Considering Making Employees Redundant**

### **1) Are there other options?**

Management should first consider whether there are any, and if so what, alternatives to dismissing employees for redundancy. Failure to do so may render any dismissal unfair. A lay-off or a period of short-time working may be a more appropriate way of dealing with a temporary recession.

Lay-offs or short-time working is an option for employers when business is slow. s 135(1)(b) and ss 147 to 154, which give the employee a right to claim a statutory redundancy payment if he is laid off or kept on short time to the extent specified. Under s147(2) short time is defined as; 'by reason of a diminution in the work provided for the employee by his employer (being work of a kind which under his contract the employee is employed to do) the employee's remuneration for the week is less than half a week's pay'.

This stops an employer retaining an employee in an endless purgatory without a wage rather than pay a redundancy payment.

### **2) Consultation is a must (See above)**

### **3) Be Aware of the Law of Unfair Dismissal**

Redundancy is prima facie a fair ground of dismissal, but can become unfair in the way it is handled (see above).

### **4) Impose a Fair Selection Procedure for Redundancy**

In general, to guard against a finding of unfair dismissal, there must be a fair method of selecting those to be made redundant (see above).

An employer should offer suitable alternative employment. If he offers his old job back or offers suitable alternative employment, then provided the new or renewed employment is to begin not later than four weeks after the end of the old job, the employee will lose his right to a redundancy payment if he unreasonably refuses the employer's offer (ERTsA ss 138, 141; see Part 9, para).

When an employer makes a redundancy payment to the employee, the employer must give him a written statement showing how the amount is calculated, unless the amount of the payment has already been fixed by the decision of a tribunal (ERTsA s

165(1)). If the employer fails to give a statement without reasonable excuse he commits a summary offence carrying a maximum fine at level 1 on the standard scale (s 165(2)).

If the employee is not given a statement, he may by notice in writing demand one by a specified date, giving the employer at least one week to comply (s 165(3)). If the employer fails to comply with the employee's demand without reasonable excuse he commits a further offence. That too is a summary offence, carrying a maximum fine at level 3 (s 165(4)).

## **Miscellaneous Cases**

### **Caps on Redundancy Payments not Age Discrimination**

Age discrimination considerations has pervaded all areas of employment law but this was an interesting recent case involving redundancy payments. *Kraft Foods v Hastie* BAILII case number: [2010] UKEAT 0024\_10\_060 Appeal No. UKEAT/0024/10 is authority for the proposition that a cap on a (generous) contractual redundancy compensation scheme (which prevented employees from receiving a redundancy payment in excess of their wages up until retirement), did not amount to unlawful indirect age discrimination. The cap had most impact on employees who were close to retirement - but for the cap, Mr Hastie's (The Claimant) redundancy payment would have been around £14,000 higher. However the cap was deemed justified as it was a proportionate means of achieving a legitimate end. It was important to consider the fairness of the scheme as a whole, and the scheme was supposed to protect employees' incomes after redundancy. Drawing on the observations of Elias P. in *Loxley v BAE Systems Land Systems (Munitions & Ordnance) Ltd* [2008] ICR 1348, the EAT decided it was not improper to have a rule which saved the company the expense of giving a windfall to a redundant employee.

## Multiple Choice Questions

Please select one answer for each question

**1) Which law prevents an employer escaping liability for making a redundancy payment by 'indefinitely laying someone off without pay?**

- a) Employment Rights Act 1996 s 135(1)(b) and ss 147 to 154
- b) There is no law against this - an employer is entitled to do it
- c) The law on this subject matter is contained principally in case law

**2) The qualifying period of continuous employment for unfair dismissal claims connected with redundancy is:**

- a) Normally one year since June 1999 and sometimes zero
- b) Two years
- c) Six months

**3) If the employer expects 20 or more redundancies (according to the wider, EU definition) at the same establishment within a period of 90 days then he should, in good time,**

- a) Formally consult the employees' representatives about his proposals
- b) Consult individually only
- c) Continue to notify employees of a threat of redundancy

**4) Why has TULRCA 1992 been criticised? - Is it because:**

- a) The TULRCA provisions employ too much legalese
- b) The definition of 'dismissal' is more narrowly defined than the Collective Redundancies Directive
- c) The definition of 'dismissal' is more widely defined than the Collective Redundancies Directive.

**5) If suitable alternative employment is identified for the employee in danger of redundancy;**

- a) You should provide the job role details but not the financial details.
- b) You should provide the job role details and the financial details.
- c) Providing details other than the job title is unnecessary.

**6) If an employee is offered suitable alternative employment before he is made redundant and the employee accepts the offer, or if he unreasonably refuses it, there is payable;**

- a) No redundancy payment.

- b) A smaller redundancy payment.
- c) The usual redundancy payment.

**7) When it comes to 'bumping' and employer should;**

- a) Always employ the practice.
- b) Never employ the practice.
- c) Always consider it

**8) Failure to consult as required where there are 20 or more potential redundancies can lead to a Tribunal;**

- a) Making a protective award unless there were 'special circumstances which render full compliance not reasonably practicable'.
- b) Making a protective award 'in all circumstances'.
- c) Awarding 2 weeks pay

**9) The employer has no right unilaterally to impose a lay-off or short time unless;**

- a) There is a redundancy situation;
- b) The employee requests it;
- c) The contract of employment so provides, expressly or impliedly

**10) The qualifying period for claiming a statutory redundancy payment is;**

- a) 3 years
- b) 1 year
- c) 2 years