

## **Legally conned?**

Most employers know their key legal obligations – from duty of care to staff to dismissal procedures. But it's easy to get caught out. Richard Kenyon and Louise Fernandes list 10 hazards to steer well clear of.

### **1. Providing particulars**

Every employer knows that it is obliged to provide written employment contracts. More accurately, each employee is entitled to a written statement of particulars of employment containing specified terms (such as hours of work and remuneration) no later than two months after employment begins. Far more employers struggle with this basic requirement than one might expect.

At one time, a failure to comply carried no financial penalty. Now, if an employee brings a specified claim – for example, discrimination or unfair dismissal - and is successful at tribunal, further compensation may be payable where the employer has failed to provide a written statement of particulars.

The additional compensation will usually be two or four weeks' pay, so limit liability, make sure you issue written particulars and notify staff of any changes to their terms and conditions.

### **2. Vicarious liability**

Employers are increasingly aware of their liabilities under discrimination legislation, but few realise they will be liable for their employees' discriminatory acts, even if they do not know about them.

Under all strands of discrimination legislation, anything done by a person in the course of employment shall also be treated as done by his employer, whether or not it was done with the employer's knowledge or approval.

However, there is a defence if an employer can prove that it took such steps as were reasonably practicable to prevent the discrimination taking place. A comprehensive equal opportunities policy will assist with this defence, alongside regular training for the workforce.

### **3. Protection from Harassment Act 1997**

Who would have imagined that legislation introduced to combat stalking could be used in the workplace? In *Majrowski v Guys' and St Thomas' NHS Trust*, the House

of Lords confirmed that employers can be vicariously liable under the Protection from Harassment Act 1997 if employees are subjected to a course of conduct (that is, behaviour or speech on at least two occasions) which amounts to harassment.

The harassment need not be based on unlawful discrimination and the limitation period for bringing claims is six years rather than the usual 3 months, plus extensions in the employment tribunal. Making people aware of this liability – and the lengthy timeframe within which staff can claim – could prevent your organisation falling foul of the law.

#### **4. Third party harassment**

It's not just employees harassing other employees you need to watch out for. In *Macdonald v Advocate General for Scotland*, the House of Lords confirmed that employers are liable for discrimination by third parties if the failure to protect employees from such discrimination is unlawfully motivated.

However, from 6 April 2008, if a third party (for example, a customer in a shop) harasses an employee in the course of employment on the grounds of gender, the employer will be liable if it failed to take such steps as would have been reasonably practicable to prevent the third party from doing so. This would also apply if the employer knows that the employee has been harassed in the course of employment on at least two other occasions by a (i.e. the same or a different) third party.

Employers should review their anti-harassment policies, publicise them to third parties and take appropriate action if complaints of third party harassment are made.

#### **5. Redundancy and maternity leave**

Employees on maternity leave are often 'out of sight, out of mind', particularly during business reorganisations. Women who are made redundant during maternity leave have a priority right to any suitable available vacancy – so much so that it is mandatory to discriminate positively in favour of the woman. If an employer fails to offer such a vacancy, the dismissal will be automatically unfair and could also constitute sex discrimination. A woman dismissed while on maternity leave also has an automatic right to written reasons for dismissal without having to ask, and regardless of length of service.

#### **6. Responding to requests for information**

Graduates of the guerrilla school of employment relations will know of umpteen ways of extracting information from employers through discrimination questionnaires, data subject access and freedom of information requests.

One of the more obscure requests is the right to written statements of reasons for less favourable treatment under the Part-time Worker & Fixed-term Employee Regulations and National Minimum Wage “production notices”. If the employer fails to comply with a production notice within 14 days, they can be ordered to pay the worker 80 times the relevant minimum wage. Staff who have been consistently underpaid can potentially serve numerous production notices for each pay reference period. Keep records and respond promptly to requests to avoid costly litigation.

## **7. Redundancy calculations**

Although familiar with the redundancy process, many employers often forget that they are required, on making any redundancy payment, to provide a written statement indicating how it has been calculated. Employers that fail to comply with this requirement, without a reasonable excuse, are guilty of an offence and liable to a fine (currently £200).

If an employer fails to provide this information, it may be required by the employee to provide the written statement within a specified period. Those that fail to comply will also be liable to a fine (currently £1,000) so set out the calculation or risk a criminal record.

## **8. Time off during redundancy**

Not every employer knows that staff who have two years’ continuous employment and are given notice of dismissal due to redundancy are entitled to reasonable time off to look for new employment or make arrangements for training for future employment. Employees should be paid for the absence at the appropriate hourly rate.

If an employer unreasonably refuses any time off, or fails to pay the employee, it may be ordered to pay the employee the amount due to them (subject to the limit of 40% of a week’s pay for the employee). A policy setting out the scope of such time off is therefore helpful and will avoid litigation, particularly where large numbers of employee are affected.

## **9. Changing contractual terms**

There is nothing harder to explain to the uninitiated than the service provision change in TUPE. The client sacks its service provider because the staff are useless, only for those staff to transfer to the new service provider. It’s the case of same security guard, different uniform.

Similarly peculiar, under TUPE, detrimental changes to terms and conditions are void, but beneficial changes are not. The Court of Appeal in *Power v Regent Security*

*Services Ltd*, confirmed that transferring employees can “cherry pick” from their TUPE protected old terms and the best of what the transferee employer has agreed to provide. Transferees should ensure that any new terms are granted in such a way as to minimise the risk of employees later picking the most favourable – either that, or take the extreme approach of sacking everyone and rehiring them on new terms. Then you are risking unfair dismissal claims.

## 10. Dismissals

Unlike on TV show *The Apprentice*, it’s not clear in every situation whether someone has actually been fired or not.

Whether a dismissal has taken place is sometimes key to tribunal claims and an employer’s liability can depend on the words and conduct used. The tribunal would consider the surrounding circumstances alongside how the words would be understood by a reasonable listener.

In *Futty v D and D Brekkes Ltd*, a foreman told an employee, a fish filleter, “If you don’t like the job, f\*\*k off”. As the words were interpreted against the background of the fish dock, the employee was held not to have been dismissed. Employers should approach such matters carefully, and avoid ambiguity.

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