

New Way to Settle Workplace Disputes



The Employment Act 2008 will change the law regarding the settlement of workplace disputes. It will repeal the existing statutory dispute resolution procedures and related provisions dealing with procedural unfairness in dismissal cases. In their place will be a revised Advisory Conciliation and Arbitration Service (ACAS) Code of Practice supported by non-statutory guidance aimed at encouraging employers and

employees to resolve issues both earlier and informally. It will not apply to dismissals due to redundancy or the non-renewal of fixed-term contracts on their expiry.

In addition, the Act will:

- confer on Employment Tribunals (ETs) discretionary powers to increase or decrease awards by up to 25 per cent if parties have failed reasonably to comply with a relevant statutory code;
- amend ETs' powers by which they may reach a determination without a hearing;
- allow ETs to award compensation for financial loss

in certain types of monetary claim; and

- make changes to the law relating to conciliation by ACAS, removing the fixed periods for conciliation.

The changes are due to come into force in April 2009.

Employers are reminded that until the law is changed, they must follow the existing statutory dispute resolution procedures when dismissing staff and handling grievances.

The ACAS Code of Practice can be found at <http://www.acas.org.uk/CHttpHandler.ashx?id=961&p=0>.

Our Employment Team just got Bigger and Better

We are delighted to welcome Jenny Gibson, who joined the team as a solicitor at the beginning of this year. Jenny was previously with niche employment specialists PJH Law and says she is delighted with the warm welcome she has received from everyone at Lanyon Bowdler.

John Merry and his team – which also comprises solicitor Kate Attwood and partner and fee paid Employment Judge David Battsby – provide expert advice for employers, and also employees.



The employment team now benefits from partner Jo Griffiths' NEBOSH qualification

which means she is able to offer clients a full Health & Safety consultancy service. With her helpful, yet professional, approach, Jo is able to provide practical advice and assistance to clients with a view to preventing court proceedings and accidents. Jo also has a wealth of experience as a solicitor advocate in defending companies and individuals against health & safety, environmental and other regulatory prosecutions. Now is a good time to take advantage of complimentary health & safety audits: you can contact Jo on 01952 211020.

Stress – An Employer’s Duties

Dealing with stress in the workplace is a difficult issue for employers. As well as specific duties under health and safety legislation, employers owe their employees a common law duty to take reasonable care to safeguard their health and safety and this includes a duty to control stress levels in the workplace. Employers are only in breach of their duty if they have failed to take reasonable steps in the circumstances to prevent the stress. It is foreseeable injury arising from an employer’s breach of duty that gives rise to a liability and foreseeability depends on what the employer knows (or ought reasonably to know) about an individual employee.

In 2002, the Court of Appeal (in *Sutherland v Hatton*) provided 16 points as guidance on the legal position as regards stress claims in negligence. In 2004, the House of Lords endorsed this general statement of the law (in *Barber v Somerset County Council*) but stressed that it was only guidance and that each case would hinge on the particular facts under consideration.

For example, point 11 of the Court of Appeal’s guidance stated that an employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty.

In the recent case of *Dickins v O2 plc*, the Court of Appeal upheld the decision of the County Court that O2 was liable to Ms Dickins for psychiatric injury negligently caused by excessive stress at work. In the Court of Appeal’s view Ms Dickins’ psychiatric illness was reasonably foreseeable. The judge in the County Court had found that she was ‘palpably under extreme stress’ and was ‘about to crack up’. She had raised the matter several times with her managers and her situation should have been plain to them but they did nothing of substance.



O2 tried to argue that because it provided a confidential counselling service it should not be held in breach of duty. This argument was dismissed by the Court of Appeal. *Hatton* made clear that the advantage of a confidential service was that an employee could seek advice without fear of harming their reputation or making a potentially damaging disclosure directly to their employer. On the facts of this case, it was clear that Ms Dickins had no

qualms about telling her manager that she was ‘at the end of her tether’. Her employer should have sent her home and referred her to the occupational health service much earlier.

The Court of Appeal found that O2’s breach of duty had made a material contribution to Ms Dickins’ severe illness. The evidence was quite strong enough to conclude that O2 had received a clear indication of impending illness. In the Court’s view, Ms Dickins ‘tipped over the edge from suffering from stress into complete breakdown. The obvious inference is that she tipped over the edge because nothing significant had been done to recognise and address her need for a rest and for a change to her work requirements’.

The message to employers is clear: stress cannot be ignored and it is important to have a formal stress management policy in place. Be alert to the signs of stress and once you are aware that a problem exists, investigate and take appropriate action at once. Active intervention is required. Monitor the situation to see if remedial action is working and continue to do so until the situation is resolved.

Contact us if you would like individual advice on stress in the workplace.

Annual Increase in Tribunal Awards

The Employment Rights (Increase of Limits) Order 2008, which details the annual inflation-linked increase in limits on the amounts which can be awarded by employment tribunals, was made on 24 November 2008 and applies where the appropriate date falls on or after 1 February 2009.

The main increases in compensation limits are:

- the maximum compensatory award for unfair dismissal has increased from £63,000 to £66,200; and
- the maximum amount for a week’s pay (for calculating various tribunal awards including the basic award or redundancy payment) has increased from £330 to £350.

There is no statutory cap on the amount a tribunal can award in discrimination cases.

The full list of the increases can be found in the Schedule to the Order at http://www.opsi.gov.uk/si/si2008/ukSI_20083055_en_1.

Collective Redundancy Consultation – A Reminder

Employers are reminded of the potentially serious financial consequences of failing to consult when making collective redundancies.



If an employer is proposing to make redundant 20 or more employees at one establishment within a period of 90 days or less, the collective consultation provisions of Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 come into play. Where the employer is proposing to dismiss 100 or more employees, the consultation period must be at least 90 days; otherwise it must be at least 30 days. Failure to consult with the appropriate representatives of affected employees can lead to a protective award requiring the employer to pay each affected employee 90 days' pay. Even if the obligation to consult is for a minimum 30 day period, a serious breach of the requirement can result in

employees being granted a 90 day protective award.

Genuine efforts to consult must be made – merely keeping employees informed does not fulfil this duty. Consultation of the required duration must take place before any employees are given redundancy notices. Consultation must be meaningful, with a view to reaching an agreement. If the decision to dismiss employees has already been taken, it effectively compromises the consultation process.

In addition, in a collective redundancy situation, the employer has a statutory duty to notify the Secretary of State for the Department for Business, Enterprise and Regulatory Reform before giving notice to terminate an employee's contract. If an employer fails to give the required notification to the Department, the Secretary of State may institute legal proceedings that could lead, on summary conviction, to a fine of up to £5,000.

The obligation to consult over avoiding proposed redundancies extends to consultations over the

reasons for the closure of a business. Where it is recognised that dismissals will inevitably, or almost inevitably, result from closure, dismissals are proposed at the point when the closure of the business is proposed. Where closure and dismissals are inextricably linked, the duty to consult over the reasons for the closure arises.

Collective consultation does not replace the need to consult with individuals who may be made redundant in order for any subsequent dismissal to be fair.

It is important that employers are aware of this requirement to consult at an early stage in the decision-making process. Making employees redundant always requires care and advice should be sought as soon as redundancies are contemplated. Restructuring a business, even where staff may not actually leave your employment, also carries with it potential risks. Care must always be taken where fundamental changes are made to employees' jobs. We can help ensure that a proposed redundancy programme or the restructuring of your business is carried out with the minimum risk of unanticipated financial consequences.

Tougher Penalties for Minimum Wage Cheats

The Employment Act 2008 contains measures to toughen up penalties for those who break National Minimum Wage (NMW) laws. The maximum penalty for underpayment of the NMW will be increased from a £5,000 fine to an unlimited fine with the most serious cases of non-compliance tried in the Crown Court. The Act will also:

- introduce a fairer method for dealing with the way NMW arrears are calculated, so that workers do not lose out as a result of being underpaid. The formula for this calculation is set out in the Act and the provision ensures that the

calculation of arrears takes into account the length of time that arrears have been outstanding. The new method of calculating arrears will apply to any arrears of the NMW that are outstanding on or after the date the Act comes into force, so will include arrears resulting from underpayments of the NMW made before that date;

- allow those enforcing the NMW and Employment Agency Standards to share information; and

- give further powers to HM Revenue and Customs officers to obtain NMW information from employers, allowing them to take information away from the

employer's premises in order to copy it.

In addition, the maximum penalty for Employment Agency Offences will be increased and the investigative powers of the Employment Agency Standards Inspectorate will be strengthened, allowing them greater scope to access financial information in order to check whether a worker's complaint is an isolated instance or an example of widespread abuse.

The Government intends the NMW provisions to come into force on 6 April 2009.

HSE – Never Out to Lunch

A recent case shows that inspectors of the Health and Safety Executive (HSE) are never really 'out to lunch'. It involved HSE inspectors who, whilst on their lunch break, witnessed unsafe scaffolding and leapt into action.

The inspectors had seen workers employed by a roofing firm in Newcastle-under-Lyme passing tiles down by hand from the roof of a terraced building and stacking them on a pallet. The roofers had removed two scaffolding boards from the scaffolding in order to make a makeshift platform. The men were not trained scaffolders and their action made the scaffolding unsafe, creating a clear danger that a worker could fall through the gap in the scaffolding boards. There was also an absence of edge protection and toe boards. Furthermore, the men had not been given training in the safe removal of tiles.

The HSE inspectors ordered the men to cease work immediately and to arrange a system for

passing the tiles down safely. Their employer was prosecuted.

In mitigation, the roofing firm claimed that the employees were experienced and should have known how safely to remove the tiles. However, the firm was fined £2,000 and ordered to pay £1,160 in costs.



One of the HSE inspectors commented that "falls remain one of the biggest killers of employees. Incidents like these could be avoided if companies ensured that they had assessed the risks from working at height, thought through a safe way of tackling a job, provided all the

necessary equipment and ensured workers were fully trained and properly supervised. Employers must also ensure that protective measures remain in place for the whole duration of a contract. Proper planning for such work and taking necessary precautions to prevent falls are often simple and there is ample free guidance readily available to help companies take the right action."

The Health and Safety (Offences) Act 2008 makes changes to the penalty framework set out in Section 33 of the Health and Safety at Work etc. Act 1974. The maximum penalty that can be imposed in the lower courts for breaching health and safety regulations has been increased from £5,000 to £20,000 and the range of offences for which an individual can be imprisoned has also been broadened.

The message for business owners and managers is that the HSE will act at any time if it becomes aware of blatantly unsafe working practices.



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A list of partners is available for inspection at the above addresses.**

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