

COOLEHADDOCK

+employment law bulletin

Welcome

Just as we have to let go of Christmas for another year, so too do we have to say goodbye to ridiculous festive employment law stories. The pick this season is the reporting of the Australian Navy's decision to give its sailors 8 weeks off for Christmas. It naturally invited ridicule, most notably from Australians. Employee retention was the rationale behind the decision but one Australian MP wasn't entirely convinced, saying, "I've never seen a defence force charged with the protection of Australia saying we're going to have six to eight weeks off over Christmas because we think it's a good thing for the mums and dads". We anticipate more outrage when a working from home policy is introduced.

And so to 2009 and, in this New Year edition, we start with a look at the changes in employment law coming up in February. We then focus upon recent guidance on redundancy, given the current planning which many businesses are undertaking over the next few months in anticipation of increasingly bleak trading conditions.

Increase in Compensation Limits

From February 1st 2009, the maximum compensatory award in the Employment Tribunal increases from £63,000 to £66,000. The Maximum redundancy payment increases from £9,900 to £10,500. Importantly, the cap on a week's pay for redundancy calculation purposes is increased from £330 to £350.

The maximum compensatory award has increased by 452% over the last 10 years. The Daily Telegraph has described the latest increase as part of a 'triple whammy'. The recession will inevitably result in more staff being made redundant. It will also mean that redundant employees will find it more difficult to find work. Compensation in the Tribunal is calculated according to the loss incurred by the claimant and, if work is hard to come

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by, the loss will be significantly higher. Last year there was a 6% increase in the number of employment tribunal claims. A much larger increase is anticipated this year due to the economic situation. The only saving grace is the increasing acceptance by tribunals of the need businesses have to make redundancies.

Redundancy and Age Discrimination 1 – ‘last in, first out’

A redundancy policy of "last in - first out" used to be fairly common in some industries, until the advent of age discrimination legislation. In the case of *Rolls Royce plc v Unite*, Rolls Royce argued that it did not have to comply with the part of collective agreements with the union which were designed to protect employees with longer service, because those aspects were discriminatory against younger employees. The High Court ruled that using length of service as one of the criteria for redundancy did indeed discriminate against younger workers, because in general younger workers were more likely to be selected for redundancy, where all other criteria were equal. The Court said that had the redundancy selection criteria just been "last in - first out", then that might be unlawful. However, in this case it was just one element of a wider redundancy selection criteria. The Court said that, as such, the criterion of length of service did not make the whole selection criteria unlawful, as it served a justifiable aim of the employer, namely rewarding the loyalty and experience of longer serving employees and protecting older employees from being put onto the labour market at a time when they are particularly vulnerable, because of the difficulty that older workers find in securing alternative employment.

Redundancy and Age Discrimination 2 – enhanced redundancy benefits

The case of *MacCulloch v Imperial Chemical Industries* considered similar issues, but in the context of age-related enhanced redundancy payments. ICI operated a redundancy scheme whereby employees were entitled to a severance payment (over and above the statutory requirement) based on age and length of service. The formula used gave rise to wide variations in the severance payments. Miss MacCulloch claimed that the scheme resulted in (a) direct discrimination, because it was directly related to age; and (b) indirect discrimination, because it was calculated by length of service, which meant that indirectly age was used as a factor. The Employment Tribunal dismissed both claims and Miss MacCulloch appealed to the Employment Appeal Tribunal (EAT).

The EAT found (similar to the above case) that the scheme had legitimate aims - encouraging and rewarding loyalty; operating a scheme that increased opportunities for junior employees; and making larger payments to workers who were likely to be more vulnerable in the job market. However, the EAT found that the Employment Tribunal did not consider whether there was a fair balance between the reasonable business needs of the Company and the scheme's discriminatory effects:- Miss MacCulloch (aged 36 with 7 years' service) was entitled to 55 percent of her gross salary under the scheme. A colleague with 10 years' service, aged 51, was entitled to 175 percent of gross salary. The EAT said that the Employment Tribunal had failed to consider whether the degree of difference in the benefits available according to length of service was

reasonably necessary to achieve the scheme's objectives. The case was referred back to the Tribunal to consider this point.

Redundancy 3: Selection

In the recent case of *E-Zec Medical Transport Services Ltd v Gregory*, the Employment Appeal Tribunal (EAT) confirmed that, although a redundancy situation did exist, the use of a completely subjective selection system made a redundancy unfair. In particular, there was a complete lack of consultation as to the method of selection for redundancy, the criteria to be adopted and the marking process. There was particular criticism because the selection criteria marking was carried out by "... one individual who was not able to support his marking by reference to any company documents such as performance appraisals, who had not spoken to any other manager concerning those marks and who had made no notes or given any indication as to how he had made this individual choice...".

The key to carrying out a fair redundancy process is to pool those employees who carry out similar work, consult with the pool over the criteria to be used and to use objective criteria wherever possible (i.e. that can be referenced to documents such as appraisals, disciplinary records, attendance records etc). Where subjectivity is necessary then several senior staff should carry out the marking and the marks should be consulted upon.

Stress at Work

Following the Court of Appeal decision in the case of *Dickens v O2 plc*, it now seems to be a bit easier

than previously thought for employees to argue that the employer should have foreseen that, in allowing an employee to continue working in a manner that was causing them to suffer ill health, it was likely to lead to a serious illness.

In considering the issue of foreseeability, the Court said that it was sufficient that the employee had previously complained about the stress of her job, had been coming into work late on a regular basis, and had told her line manager that she did not know how long she could keep going before she would become ill.

The Court said that in these circumstances the employer should have sent its employee home, pending an urgent investigation by occupational health, even in circumstances where she had not been signed off sick by her GP.

The Court held that the mere suggestion of confidential counselling for the employee was not an adequate response to a situation where an employee was complaining of severe stress. The Court inferred a sufficient causal connection between the employer's breach of its duty to the employee and the illness, finding that the series of failings by the employer to address her problems had materially contributed to her illness.

Name of ET Respondents to be Published

The identity of all Respondents (which means all employers) in employment tribunal cases will be routinely published again – a practice that stopped in 2001, because parties were being targeted by organisations offering to represent them. The Information Commissioner's Office (aka the Data Protection Office) has ruled that the Department for Business, Enterprise and Regulatory Reform (BERR) must publish this information where there is a Freedom of Information Act request. However, Claimants are not affected by this decision and

there will be no right to obtain their names.

And finally

Checking bank statements after the Christmas break can often be a traumatic affair for any of us but spare a thought for part-time care worker Donald Moffat of Irvine in Scotland. He checked his bank account and found that two withdrawals had been made of £50 billion each. Having discovered a £100 billion overdraft, Mr Moffat could be forgiven for thinking that he had been tasked with the responsibility of single-handedly bailing out the banking sector. He had checked his bank account before going out and all was in good order but must have thought he had lost a few hours because "...when I came back I was overdrawn by that amount". He says he spent a long time on the phone trying to resolve the issue and being passed between various advisors. Barclays say there was a technical glitch and have offered him £10 in compensation.....

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This newsletter is a guideline only to recent changes in employment law. You are advised to seek Legal Advice from our Employment Group on any specific queries you may have.