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Briefing Note: Top 10 Tips for Avoiding Employment Compensation Claims

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Summary:
10 things every employer should do to eliminate or reduce the risk of having to pay compensation to an employee

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An Introduction to the Guide

This guide should be read by anyone who is, or who may be considering, buying or selling a business or part of a business, that employs any staff. It is a 'laymans' guide and is not intended to be a substitute for professional legal advice. Rather it should complement that advice and perhaps explain why it is essential not just to receive the advice but also to follow it. This guide should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

1. Implement a Retirement Procedure

The Employment Equality (Age) Regulations 2006 came into force on 1 October 2006. These introduced new concepts into employment law such as the duty to notify, the right to request, the duty to consider and the retirement dismissal.

An employer who intends to retire an employee has a duty to notify the employee in writing of the date he intends the employee to retire. This must occur not more than a year and not less than 6 months before the intended retirement date.

The employee has a right to request to continue working beyond the intended retirement date and the employer is under a statutory duty to consider that request in good faith.

Previously, there was an upper age limit for bringing unfair dismissal claims. That has been removed and instead there is now the concept of a retirement dismissal. Essentially, for a dismissal to be potentially fair on retirement grounds the employee will have to have reached their normal retirement age. If there is not one then they must be 65. If the normal retirement age is below 65 then the employer must be able to justify it - this will be rare. However, even if the dismissal is potentially fair on retirement grounds a Tribunal may still find it unfair due to the employer's failure to follow the notification procedures.

Additionally, the employee will be entitled to a statutory award of 8 weeks pay. We recommend that a retirement age for all employees is fixed and that procedures are put in place to trigger notification requirements.

2. Put a pay structure in place

The increase in Employment Tribunal claims in recent years is partly explained by the dramatic explosion of equal pay claims. The Equal Pay Act has been on the statute books since 1970 yet it is only in the last few years that employees and trade unions have woken up to its existence.

Employees can bring a claim for equal pay within six months of the last act of inequality - usually this means within six months of employment ending. The amount awarded to a successful claimant is the difference in pay between the claimant and the equivalent employee. Until 2003, compensation could only be backdated for the last two years but, as a result of the Equal Pay (Amendment) Regulations 2003, a successful claimant can be compensated for pay inequality for the last six years of employment.

The Act is not restricted to just wages. It includes any contractual benefit - such as pension, healthcare, sick pay arrangements.

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The Act makes it unlawful for employers to discriminate between men and women where they are doing like work; work rated as equivalent or work of equal value. If an employee can establish she is doing like work etc and is paid less than an employee of a different gender, it is for the employer to justify the difference - which must be genuinely due to a material factor unrelated to sex.

The recent case of *Cadman-v-Health and Safety Executive* considered whether a pay scheme which rewarded seniority could amount to a genuine material factor. The European Courts' answer was that it could but only where additional service will lead to improved performance. This will not be the case in many work places.

We recommend employers review their pay structure. Are there staff on different levels of pay? Can this difference be genuinely objectively justified? This review should extend not just to pay but also to other benefits.

3. Have clear bonus/commission arrangements

Bonus and commission schemes are a common source of employment litigation. It is surprising how often the need for a properly drafted scheme is neglected by employers - perhaps in the mistaken belief that the employer has absolute discretion over how they are operated.

A decision of the Court of Appeal handed down on 17 November 2006 has confirmed the following principles:

- The employee is entitled to a bona fide and rational exercise by the employer of their discretion as to whether or not to pay him a bonus and in what sum.
- The implied duty of trust and confidence between employer and employee will generally require an employer to give his reasons for the exercise of his discretion.
- Other questions to ask when setting up a bonus/commission scheme are:
- What happens when the employee leaves/gives notice?
- Does commission accrue on securing a sale or receipt of the monies?

In 2005 the Court of Appeal decided that such provisions will be construed restrictively against employers, in the absence of clear words making it plain that any accrued entitlement to commission was dependent on the employee also being in employment at the date the commission would be payable..

4. Do not tolerate bullying and harassment

In the recent case of *Helen Green-v-Deutsche Bank,* Ms Green complained that she had suffered two nervous breakdowns as a result of bullying from four female co-workers. The High Court found a campaign of spiteful behaviour had occurred and that additionally a male colleague had showed disrespectful behaviour. The Court found Ms Green's line managers knew or should have known what was going on and intervened. Ms Green was awarded £828,000.

Green brought her claim under the Protection from Harassment Act 1997 - legislation introduced to combat stalking. Under the Act a person is guilty of harassment if he pursues a course of conduct which amounts to harassment of another if he knows or ought to know that the other person will perceive this conduct as harassment.

Importantly, the House of Lords earlier this year confirmed that an employer could be vicariously liable under this Act - in other words automatically liable for the acts of its employees - even if they do not know what their employees are up to.

Employers must therefore be proactive. Where a complaint of bullying is received, it must be dealt with swiftly

and effectively. Put into place policies which make it clear bullying will not be tolerated. Ensure that all employees know about the policy and consider training line managers to spot bullying behaviour. Support the employee who complains and take disciplinary action against any person found to be responsible - but above all - know what is going on in your workplace.

5. Consultation, Consultation, Consultation!

Consultation has been recently defined as meaningful consultation with a view to reaching agreement with the workers concerned. Consultation, therefore, should take place before and not after a decision has been taken!

The need for consultation is becoming more and more widespread. When do you need to consult?

If you are making any staff redundant you must consult with them first. If 20 or more are to be made redundant, there is a minimum period of statutory consultation.

If you are buying or selling part of a business the new Transfer of Undertakings Regulations 2006 may apply. All staff must be informed in good time of the transfer. Any staff which will be affected in any way must be consulted. Failure to do so will give them the right to compensation - the starting point is 13 weeks pay per employee.

If you are changing employment terms - even if the contract allows you to do so - you must still consult the affected employee or risk breaching the implied duty of trust and confidence and potentially a claim for constructive dismissal.

The Information and Consultation of Employees Regulations 2004 came into force on 06.04.05 for businesses with at least 150 employees. On 06.04.07 they will apply to businesses with at least 100 employees and on 06.04.08 that goes down to 50 staff. They oblige employers to provide information to and consult representatives on the recent and probable development of the businesses' activities and economic situation; the situation, structure and probable development of employment in the business in particular where there is a threat to employment and decisions likely to lead to substantial changes in work organisation or contractual relations.

The employer must hold a ballot of its employees to elect information and consultation representatives. As well as any employment related compensation that may arise - the employer can also be fined up to £75,000 for failure to comply.

6. Employment Status Review

It appears to be the unstated aim of the government to ensure that as many workers as possible enjoy the benefits of employment status - those being protection from unfair dismissal after 12 months service, the right to written particulars of employment, redundancy, holiday and sick pay and statutory minimum notice.

Nowhere is this more prevalent than in the cases of agency workers and self-employed subcontractors in the construction industry.

It is estimated that 15% of the UK labour market comprises workers supplied through an employment agency. This is particularly the case with secretaries, computer contractors, local authorities, supermarkets and some of the heavier industries. Historically, agency workers were not deemed to be employees of either the agency or the end user because of the absence of mutual obligations. However, that all changed with the decision of the Court of Appeal in *Dacas-v-Brook Street Bureau [2004].*

Briefing Note: Top 10 Tips for Avoiding Employment Compensation Claims

Mrs Dacas had been a cleaner for Wandsworth Council for four years but had been supplied by an agency. She was deemed to be an employee of the Council and the Court indicated that any agency worker who had worked for the same employee for a period of 12 months is likely to have attained the status of employee of the end user. Employers who use consultants, agency workers or bank workers are therefore recommended to review the status of their workers on a regular basis.

Those in the construction industry should already be aware that on 06.04.07 the existing CIS scheme will be scrapped and replaced with a new stricter regime. The returns will include a declaration that the employment status of each subcontractor has been considered and is accurate. It is essential that contracts for services are professionally prepared for any subcontractors post April 2007 as their status is likely to be scrutinized by HMRC like never before.

7. Introduce Sickness Absence Management

This is one of the most difficult employment issues that employers have to grapple with. There are many common misconceptions but, yet again, the key is pro-active management.

It is recommended that employers introduce an absence policy which will have a number of benefits. It will ensure employees know where they stand, will produce consistency, will reduce sickness absence and protect the employer from claims based upon a failure to follow a fair procedure.
A good policy should introduce absence reporting mechanisms covering the timing, method and regularity of reporting and providing medical certificates. It should provide for meetings during periods of sick leave and allow for the obtaining of an Occupational Health Consultant's report. Failure to co-operate with reasonable requests such as these has been held to amount to gross misconduct.

In the case of short term persistent absence - there is a danger of complacency among employees if absence is not addressed - to the extent that some employees see sick leave as an adjunct to their holiday entitlement. If you introduce return to work interviews for all staff absence, requiring them to explain the reasons for their absence, staff will have to become increasingly inventive about their reasons for absence. The wider the range of reasons the less likely it will be that an employer has to obtain a medical report before terminating employment. Ensure that detailed records are maintained and if absence levels become unacceptable ensure that warnings are given and recorded.

It is often wise to set absence levels which trigger warnings within the policy.

Long term absence requires the employer to undertake a full investigation and obtain medical reports. In the case of a disabled employee reasonable adjustments to working conditions should be considered. If there is an unacceptable impact upon the business as a result of the absence - then after consultation the employment may be terminated.

Finally, be clear what your sick pay policy is and apply it consistently.

8. Implement an Equal Opportunities Policy

Equal opportunities policies are the cornerstone of any employer's defence to a discrimination claim. Once a document has established facts from which conclusions could be drawn that the employer has treated an individual less favourably on discriminatory grounds, the employer then has the onus of proving that the treatment was in no sense whatsoever on those grounds. Guidelines point to the need for cogent evidence and compliance with the EOC Code of Practice. In reality, the first thing a Tribunal will expect to see is an Equal Opportunities Policy. Case law has made it clear - that it will be a rare case where an employer who does not have a policy will be able to discharge the burden of proof.

Discrimination claims are particularly prevalent in cases where employment never actually begins - that is in

the area of recruitment. There is a steady stream of discrimination claims emanating from unsuccessful job interview candidates. In such situations, it is important that notes are kept of interviews that non-discriminatory questions are asked and that interviewers are capable of objectively rationalising their decisions. If however merely having a policy is not enough, steps have to be taken to implement the policy. This is demonstrated in the recent case of *Martin-v-Parkham Foods.*

Mr Martin was a gay employee who complained about homophobic and pornographic graffiti in the male toilet - which had his name beside a particularly graphic drawing. The company removed his name (but not the drawing) and placed notices in the toilets banning graffiti. The notices did not mention the action that would be taken if breached. The Equal Opportunities Policy made no reference to sexual orientation discrimination. The company indicated there was not much else they could do.

Mr Martin's name was then added back to the drawing. He raised a further grievance and was suspended because of the stress he was suffering. He resigned in protest. Unsurprisingly, his discrimination claim succeeded because the employer was unable to demonstrate to the employee that they had taken adequate steps to protect his dignity at work. It was incumbent upon the employer to create a culture where discrimination would not be tolerated - if need be by education of the workforce. They had done the least they could get away with doing.

9. Introduce written contracts of employment

It is a statutory requirement that a written statement of particulars of employment must be given to an employee not later than two months after they commence employment. There are 13 particulars which must be included.

Since October 2004 an employee has the right to compensation if the employer fails to provide a written statement in this time. Perhaps more significantly, it will be left for an Employment Tribunal to decide what the terms of employment actually are.

We however recommend that employers go further and provide their staff with written contracts of employment. The purpose of a well drafted contract is to protect the interests of the employer by clarifying the extent of the rights and obligations of both employer and employee.

Typically, we would suggest clauses for flexibility enabling the employer to change the place of work, hours and days of work, job title and duties and even some pay and benefits. We would also suggest clauses allowing for deductions to be made from wages during and at the end of employment; for making a payment in lieu of notice and for placing an employee on garden leave. Disciplinary rules should specify what matters will be treated as gross misconduct. In sales, management or technical position consideration should be given to the introduction of confidential information clauses and clauses restricting competition and poaching of staff and customers.

10. Comply with the Statutory Dismissal, Disciplinary and Grievance Procedures

These procedures were introduced under the Employment Act (Dispute Resolution) Regulations 2004 and sit alongside existing case law. There are two procedures - the dismissal/disciplinary procedure and the grievance procedure.

The first must be followed whenever an employer is contemplating dismissal or relevant disciplinary action. It does not therefore just apply in misconduct cases but also redundancy, ill-health and compulsory retirement cases. A 3 step procedure must be followed which requires:

- the circumstances which may lead to the dismissal/disciplinary action being put into writing and sent to the employee;

Briefing Note: Top 10 Tips for Avoiding Employment Compensation Claims

- The employee to be given the chance to state his case at a hearing; the employee being given the opportunity to appeal the first decision.

Failure to comply with any one of these steps will render any dismissal automatically unfair. The employee will receive a minimum of 4 weeks pay - on top of any other compensation and any award will be increased by between 10 and 50%.

The second procedure applies where an employee has a grievance about some action that an employer has taken or will take in relation to him. This will apply to discrimination and constructive dismissal cases. Once the employee has set out his grievance in writing he must be invited to a meeting and be given the right to appeal against the earlier decision. Failure to comply will once again mean any award the employee receives will be increased by between 10 and 50%.

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