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This month A-Z focus - "U" - Unfair dismissal

Following the "Resolving Workplace Disputes" consultation, the qualifying period for claiming unfair dismissal will be increased from one year to two years on 6 April 2012. It has been confirmed that it will only apply to employees starting on or after 6 April 2012.

The law allowing the right to claim unfair dismissal was first introduced in 1971, with a qualifying period of two years, as part of the Industrial Relations Act 1971. The qualifying period has since been reduced and raised several times. It was six months in 1975. In 1985, qualifying period was standardised from one year to two years for all employees; and was then eventually reduced to one year in 1999.

The two-year qualifying period for unfair dismissal was challenged in the House of Lords in the landmark case of *R v Secretary of State for Employment Ex Parte Seymour-Smith & Perez (No.2) 2000 IRLR 263 HL*. It was recognised that the two-year period was indirectly discriminatory against women because statistics showed considerably fewer women worked long enough to be protected by the unfair dismissal law. This case was over ten years ago and things may have changed with time. However, who can guarantee the two-year period will not indirectly discriminate certain groups of employees? Perhaps, we will see another landmark case.

While we are on the subject of discrimination, many of us are aware that length of service is not required to bring a discrimination claim. It could reasonably be assumed that employees who believe that they have been unfairly dismissed but have not acquired the necessary length of service to bring an unfair dismissal claim, will probably try to demonstrate their dismissal was because of their protected characteristics, i.e. age, sex, race, disability etc. (Cynical? Well, maybe!)

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Discrimination claims are often complicated and can be expensive. Unfair dismissal awards are capped while there is no cap on discrimination awards. In *Michalak v Mid Yorks NHS*, Dr Michalak was awarded £4.5 million for sex and race discrimination; and in *Browne v Central Manchester University Hospitals NHS Trust*, Mr Browne was awarded close to £1 million for race discrimination.

Dismissing an employee does not necessarily mean facing a claim at an Employment Tribunal. The reason why employers can all too often find themselves at an Employment Tribunal is because of not following correct procedures.

Employers are expected to comply with the principles of the Acas Code of Practice on Disciplinary and Grievance Procedures. A tribunal is required to consider this code in deciding whether an employer has dealt with the issue fairly and reasonably. The Code does not only cover disciplinary and grievance but also includes handling poor performance.

When it comes to under-performance, it is important to bear in mind that a capability procedure is not primarily designed to dismiss employees. The focus should be supporting staff and managers in dealing with problems regarding

performance to enable employees to reach their employer's expectation. Managing performance should be an ongoing process and should not be limited to an annual appraisal. Rather than waiting until a problem arises, employees should be managed even when they are performing well. It is obviously a definite no-no to allows problems to reach an irredeemable stage and simply resort to a dismissal. If there is a performance issue, it is almost certainly a fairer process for the employee, as well as in the eyes of law, if s/he is made aware all along.

The Government believes that by increasing the unfair dismissal qualifying period to two years and other proposed changes, the number of unfair dismissal claims should drop by around 2000 a year. That said, there were over 100,000 unfair dismissal claims at Employment Tribunal and Employment Appeal Tribunal in 2010-11, which means the estimated drop is only a mere 2%!

Dr John Philpott, Chief Economic Adviser at the Chartered Institute of Personnel and Development (CIPD), comments that "there is no evidence that UK employment suffered significantly in the 1970s as a result of the introduction in 1975 of a six month qualifying period for rights against unfair dismissal or that there was any substantial benefit when the qualifying period was subsequently raised to two years in the 1980s before being lowered to one year in 1999. "

So, in a nutshell,

- Make sure your policies and procedures comply with the Acas Code of Practice
- Follow your policies and procedures
- Performance manage employees effectively to improve and enhance their performance
- Be fair and reasonable

Mediation in 2012

The statutory discipline and grievance procedures were repealed on 6 April 2009 after a review, commissioned by the Secretary of State in 2006, by Michael Gibbons. One of the many recommendations Gibbons made was to increase the use of mediation in the resolution of workplace disputes.

Mediation is essentially a facilitated conversation between the two parties concerned. It must be entered into voluntarily by both parties. It is a good way to 'nip it in the bud' before the issue escalates and gets out of hand. It should not be disregarded when formal procedures have been instigated because it can still be used as long as the procedures are set aside; or as a way to rebuild relationships at the end of formal procedures. When mediation is used properly, hopefully it will keep you out of an Employment Tribunal. In comparison to tribunal proceedings, mediation is a cheaper and quicker alternative.

Confidentiality is a key part of the mediation process.

It does not matter who the mediators are as long as they are independent and have had no involvement in the case. They can be trained in-house staff or external providers. However, external mediators could be a

preferred choice in order to give the perception of independence. Some local authorities have developed a relationship with their neighbouring councils to provide officers who are trained in mediation to each other when the need arises without resorting to an external provider.

Acas commissioned a research paper, *Evaluation of the Acas Code of Practice on Disciplinary and Grievance Procedures*, in June 2011 to explore how the Code was understood and used by employers, employees and their representation; as well as the impact of it. It is evident in the paper that mediation is an effective tool to resolve workplace disputes.

Linked to the move to encourage the use of mediation in solving workplace disputes, one of the proposals in the Government's "radical" plan to reform employment relations announced last November was that all Employment Tribunal claimants will be obliged to submit their complaint to Acas so that parties are given the opportunity to resolve their dispute through conciliation before it can be taken to a tribunal. Conciliation through Acas is simply a form of mediation that takes place if an employee has already made a claim to an Employment Tribunal or if they believe they may be entitled to make such a claim.

With both mediation and conciliation important elements in the Government's proposals, it looks as though workplace mediation is on track to be the next big thing!

Further information:

- SEE Mediation Service
- Certificate in Internal Workplace Mediation (OCR accredited)
- Introduction to Workplace Mediation (non-accredited) – 17, 18, 19 April 2012
- Acas – Mediation – An employer's guide

Case Law

Readman v Devon Primary Care Trust
Who should judge what is a reasonable alternative to redundancy?

In this case, the claimant was made redundant after refusing three offers of suitable alternative employment. Hence she was not paid her redundancy pay. The ET agreed with the employer but the EAT did not! Read more

Michalak v Mid Yorkshire Hospitals NHS Trust
£4.5 million awarded for sex and race discrimination claims

This is thought to be the largest award in a UK discrimination case. Read more

Browne v Central Manchester University Hospital NHS Trust
Former NHS worker awarded almost £1m for race discrimination

Another discrimination case, another eye-watering amount is awarded. Read more

Other Information

Increase in parental leave will be postponed

It really is not an exaggeration describing employment as ever-changing. You may have read about the increase in parental leave in our January issue. However, sine then the Department for Business, Innovation and Skills (BIS) has confirmed that the increase in parental leave will NOT be implemented by March 2012 but likely to be March 2013.

Olympic Games

Acas has produced guidance to help employers. Read more

Pension auto-enrolment timetable

The Department for Work and Pensions has published a new timetable clarifying auto-enrolment starting dates. Read more