


New guidance on redundancies

 The Department of Work and Pensions (DWP) has published new guidance for employers who are having to make redundancies as a result of COVID-19.

www.gov.uk/government/publications/redundancy-support-for-employers/redundancy-factsheet-for-employers

The DWP has set up a Rapid Response Service (RRS), which is a redundancy service designed to give both employers and employees support and advice about things like:

- helping people facing redundancy to construct curriculum vitae (CVs) and find jobs
- helping people identify their transferable skills and training needs
- providing training to help people develop vocational skills
- providing general information about benefits
- helping with costs like travel to work expenses

It asks for employers to get in touch as soon as there is a risk of redundancy and claims that it can provide a tailored package of free support through its network of partners. It also signposts links to other organisations who may be able to help. It will be interesting to see if a tribunal views this as something that has to be done as part of a fair redundancy process. We wonder whether there will be sufficient resources to cope with the demand but think that it is sensible to make contact with the RRS as soon as possible.

Mental wellbeing

Employers have a duty to look after the health and safety of their staff and comply with the Equality Act for disabled staff which in the context of mental health is typically staff who have depression or anxiety.

10 September 2020 is World Suicide Prevention Day, and it is fair to say that as a result of the pandemic the level of workplace and general anxiety has increased enormously for some people.

Employers should consider the following:

- a) Conduct detailed risk assessments on jobs and employees' mental health. It is undeniable that some jobs by their nature have greater mental demands and pressures.
- b) Consider the ACAS guidance on coronavirus and mental health – acas.org.uk
- c) Allow considerable flexibility on working arrangements.
- d) Discuss matters regularly with staff both collectively and on a 1-2-1 basis in an environment where employees feel able to voice their views.
- e) Management needs to act on any concerns raised.

Managing disciplinary and grievance hearings remotely

Given that many offices are locked down and staff are working from home, it will be important to consider how any hearing can be handled fairly if it has to be done remotely via Teams or Zoom. Factors to consider:

1) If parties are happy to attend face to face, that is preferable provided it can be done safely.

2) Video conferencing is preferable to just being on a telephone. That said, parties need to be realistic about the quality of their broadband, the risk of losing connection and the ability to cope with multiple users. I have conducted a number of employment tribunal hearings that are telephone only and at the moment there have been very few trials via video link. Privacy is also highly relevant. It is totally unacceptable for participants' partners/children to accidentally 'wander in' and it is also likely to amount to a breach of GDPR.

3) Ideally, a document screen share needs to be available. If not, consideration needs to be given as to how to share the evidence/bundles so that all parties have it in front of them. It is also necessary to think about how parties conduct cross-examination and have the opportunity to speak without interruption.

4) Unacceptable delay can mean that a hearing is unfair or potentially an employee may have a good claim for constructive dismissal or disability claim (reasonable adjustments etc.)

5) Rules need to be in place to remind parties that covert recording of hearings is not acceptable and is a misconduct offence. That said, parties may be able to use it in employment tribunal so all hearings need to be conducted in a professional manner.

6) Obviously reasonable adjustments need to be factored in for disabled staff who need them. The level of support will vary considerably from case to case.

Unfair dismissal procedural fairness



A recent EAT case highlighted the need for an employer to comply with basic procedural fairness. The lessons to be learned were that an employer is likely to lose an unfair dismissal case if it doesn't allow sufficient time for a party to review documents. Furthermore, on the facts of this case a headteacher had always been accompanied by his sister to interviews. She was unable to attend the disciplinary hearing due to holiday commitments but the school nonetheless proceeded with the hearing without waiting for her return. This too was a breach but obviously not every delay will be acceptable – everything turns on the facts as to what is reasonable.

Access to Work scheme extended

Under the Government's Access to Work scheme, disabled employees can get funding to cover a variety of costs to help them working. Typically this is for travel or equipment costs but it also includes mental health support .

The Government has expanded the scheme to assist those who have health conditions which have prevented them from working or attending the workplace during the pandemic. This includes the following:

- Grant funding to pay for special equipment needed to support homeworking during the pandemic such as a screen reader, video remote interpreting or support worker services
- Financial support for things such as taxi fares where travelling to work is not a safe option during the pandemic due to an employee's health condition;
- A tailored mental health support package for up to nine months where an employee is anxious about returning to work.

Anonymous witness evidence



It has always been a tricky situation where a witness needs or requests anonymity in disciplinary proceedings because it requires a fine balancing act between fairness to the accused employee and respecting the witness' wish to remain anonymous. This issue was recently looked at in the EAT where it held, overturning the view of the Employment Tribunal, that it doesn't automatically follow that the use of an anonymous statement means that the procedure was unfair.

The ACAS guidance observes that the accused may be placed at a disadvantage and anonymous statements should only be used if there is a genuine fear of reprisals. This particular case is going to be reheard by a new tribunal and one of the weaknesses of the employer's case is that although a statement was provided by the complainant, he/she was never interviewed by the employer. It will be interesting to see what the employment tribunal makes of that omission balanced against the fact that it must not substitute its view for that of the employer.

Furlough fraud



HMRC is to be given more powers to deal with employers/employees who have made fraudulent claims under the furlough scheme. HMRC has received nearly 4,000 telephone allegations of fraud. This does not come as a surprise and if an employer has claimed financial support even though the guidance suggests it is not entitled, they are likely to be in trouble.

Personality clash / no procedure



Gallacher v Abellio ScotRail is a very interesting case as on the facts it was fair to dismiss an employee without any procedure on the basis that the relationship had irretrievably broken down. It is always best to have some process but in this case, it was highly significant that both the employee and the employer agreed that the relationship had broken down. What was surprising was that it was still a fair dismissal even though there was no process or even appeal. The EAT confirmed that the necessary trust and confidence had clearly gone and noted that the employee was not interested in rescuing the relationship.

Public sector exit payments



It seems that the Government is finally going to implement legislation that limits public sector exit payments to £95,000. Legislation had been passed in 2015 but it has only been recently that a full consultation was undertaken with a view to bringing this in.

The Restriction of Public Sector Exit Payments Regulations have now been laid before Parliament and it is expected that these will become law within the next couple of months. It seems that further guidance will be forthcoming as it is anticipated that in several areas such as TUPE, discrimination and whistleblowing the rules may not apply.

Contact details

If you have any queries relating to this newsletter or wish to seek employment law advice or discuss training needs, please contact: andrew.brett@norfolk.gov.uk, (01603) 223101



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