



Business NEWSLETTER

SPRING 2009

ISSUE 55

Redundancy

It is a hard world out there and many businesses are faced with the painful task of making redundancies. Few employees will be able to challenge successfully the need for redundancies because the law will not interfere with management decisions taken in good faith. Employers must, however, be careful in deciding whom to make redundant because claims for unfair selection are heard regularly by Employment Tribunals. They are allowed a reasonable discretion, but must be prepared to explain their decision. Once upon a time it was reasonably straight forward, 'last in first out' (LIFO) was the normal rule. Nowadays, skills, qualifications, performance, aptitude and the needs of the business are generally more important factors.

The extent to which length of service can still be taken into account at all was recently tested. Rolls Royce sought to overturn an agreement negotiated with the union Unite under which length of service was one factor in the selection process. They argued that this unlawfully discriminated against younger employees on the grounds of age. Their argument failed. Although LIFO itself might now be unlawful, a scheme which took some account of length of service was not. It met a number of legitimate business needs such as respecting loyalty and experience, and protecting older workers from being thrown onto a labour market where they were unlikely to find other jobs. Accordingly, even if there was discrimination, it was justified.

The statutory procedure imposed by the Government on businesses seeking to dismiss staff on the grounds of redundancy, as well as for misconduct or poor performance, is abandoned in April as a bad job. There is a new ACAS Code on disciplinary and grievance procedures, but this does not apply to redundancies. Nevertheless, employers will still have to consult with employees before making them redundant, or face claims for unfair dismissal. Furthermore, when 20 or more employees are to go from one workplace within 90 days there are additional requirements to consult with workers' representatives and inform BERR (formerly the DTI).

Pensions

The Government has been trying, without much success, to persuade us all to save for our old age. Now new pensions legislation will, from 2012, place the burden squarely on employers to foot much of the bill. The main proposals are:

- A new Personal Accounts Scheme, set up by the Government, will serve as a 'money purchase' occupational pension scheme for those jobholders whose employers have not already made adequate alternative arrangements.
- If businesses have adequate alternative schemes then they must enroll all jobholders into those schemes, unless they positively opt out.
- Jobholders can still opt out of a pension, but businesses must not encourage them to do so.
- Unless jobholders opt out, employers must contribute not less than 4% of their pay and jobholders must contribute not less than 3% of their pay to a pension, with the Government adding a further 1% by way of tax relief, up to a maximum annual total of £3,600 (based on 2005 earning levels).
- The term 'jobholder' includes not only employees, but temporary and agency workers.

This Newsletter is intended for the use of Clients of Gross & Co. It provides a summary of recent developments in business law but not specific advice on individual cases. We would, of course, be pleased to provide more detailed advice on these or any other business related matters.

Stress at Work

We all live stressful lives and the pressures of work can sometimes be too much. Employers will rarely be held liable for psychiatric illness caused by stress, but they must respond positively to cries for help. If an employee genuinely says that they are at the end of their tether, and the risk of injury to their health is obvious, it is not enough for the employer simply to refer them for confidential counselling. There are times when an employer must insist on their taking leave to recuperate.

Having a Pop

It is always tempting to have a pop at a competitor, after all their goods and services are not as good as yours. Writing to their customers can, however, backfire. Following press reports that the telecommunications company Tiscali might be taken over, BT wrote to Tiscali's broadband customers, hinting, without justification, that a take over might jeopardise their service, and inviting them to switch to BT. Not surprisingly, Tiscali sued. A complaint of libel was struck out, but one of interference with Tiscali's business by unlawful means was allowed to proceed. Even if BT had not been dishonest to Tiscali's customers, they might well have been guilty of infringing new consumer protection regulations which required a much higher level of 'honest market practice' and 'good faith'.

Air Conditioning

Property owners will just be getting used to the need for energy performance certificates. Now those whose buildings are air conditioned will need to call back the accredited energy assessor to look at their air conditioning systems. If the output is more than 250 kilowatts then the final date for an inspection was 4 January 2009, and if it is more than 12 kilowatts then the deadline is 4 January 2011. The inspection report must include an assessment of efficiency, a review of sizing and advice on improvements or replacements and alternative solutions. The penalty for not arranging an inspection is a £300 fine.

PlayStation 2

Warehousing and distribution businesses should take note of a recent award of damages to Sony arising out of the loss of memory cards for their PlayStation 2. Sony sold these cards on an ongoing basis to Game Stores Group at a massive profit. They received a large order which they entrusted to their distributor Cinram. Sadly, the cards were stolen en route from Cinram's warehouse to Game Stores Group. Cinram admitted responsibility,

but argued that their liability should be limited to the cost price of the cards to Sony, not their much higher sale price. It was, however, for Cinram to prove that Sony had recouped their profit through a substituted sale, and there was no evidence of this. Accordingly, Sony were entitled to recover the sale price which included their loss of profit.

Lego Bricks

In English law a sign cannot be registered as a trade mark if it consists exclusively of the shape of goods which is necessary to obtain a technical result. A similar prohibition on the registration of functional shapes applies in EC law. Lego sought to fend off an application by a competitor to cancel their European trademark, which consisted of a three dimensional shape of a standard 4x2 red brick. The competitor, Mega Brands, manufacturer of Mega Bloks, argued that the shape was necessary to make Lego bricks stick together. In vain, Lego pleaded that the shape was not exclusively functional, but had specific features, such as the knobs, which made it distinctive and aesthetically pleasing. Mega Brands' application succeeded.

Dangerous Activities

Biffa needed a new waste disposal depot in Leicester. The building work was carried out by a number of sub-contractors, among whom were welders who negligently caused a serious fire. Biffa claimed compensation from the main contractor on the basis that it should be held responsible for the sub-contractor's failings, but the claim was unsuccessful. The main contractor would only have been liable if the sub-contractor had been engaged in activities that were exceptionally dangerous, whatever precautions might have been taken. Welding was not, however, such an activity because it could be done perfectly safely if the right precautions were taken. Accordingly, Biffa could only seek compensation from the welders.

Rest Breaks

Sometimes the law provides light relief from the most unlikely sources – the Working Time Regulations and National Minimum Wage Regulations. Mrs Hughes was employed by Mrs Jones as a care worker in Graylins Nursing Home. She was expected to be on call to residents 11 hours a night, 7 days a week, but not to be awake the whole time. In fact, she was only ever called out about twice a month. Although Mrs Hughes was only entitled to pay for those hours when she was awake for the purpose of working, she was entitled to a 20 minute paid rest break after being on call for 6 hours. Therefore, she had a right to be woken up in order to enjoy her rest break!

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