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Employment Newsletter
Recession Special





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The pace at which employment laws change shows no signs of slowing with a steady stream of new UK laws and EU Directives. Dyne Solicitors Limited helps businesses cope with these changes whilst better managing their employees and avoiding claims. Unlike most firms, our lawyers come from a management background so we understand the practical issues that businesses must face.

In this edition we look at how the recession is affecting our Clients' businesses, and how employers can best deal with the uncertain economic conditions ahead...

Redundancy - Employers face up to the new economic reality

The current state of the economy has forced many companies to consider the unenviable task of making cutbacks and enforcing redundancies.

Whilst the redundancy process might initially appear complex it can be simplified by breaking it down into four constituent elements or the "Four C's"...

1. Circumstances

The employer must ensure that a genuine redundancy situation exists. Such a situation will arise where the employer:

- Has ceased or intends to cease carrying on its business;
- Has ceased or intends to cease carrying on its business at the location where the employee works; or
- Has a reduced requirement to carry out work of a particular kind, or to carry out particular work at a particular location.

2. Criteria

Once a genuine redundancy situation exists, the employer will need to establish objective criteria for use when selecting employees for redundancy. Before establishing the criteria themselves, the 'Pool' from which an employee should be selected for redundancy must first be established.

The Pool should be objectively identified and agreed with employees or their representatives. Establishing a pool may not always be necessary however, for instance where all employees are being made redundant, or where a unique role no longer exists.

If the employer already has a redundancy policy in place, then these existing selection criteria should be followed. If not, then the employer will have to draw up new criteria ensuring that these are objective and verifiable.

3. Consultation

Employers must consult with affected employees or their representatives.

- If less than 20 employees may be made redundant within a 90 day period, then the employer must consult with the affected staff in "good time";
- If 20 to 99 employees may be made redundant within 90 days, then the employer must consult with affected employees at least 30 days before the redundancy is to take place;
- If 100 or more employees may be made redundant within a 90-day period, then consultation must commence at least 90 days before the redundancy is due to take effect.

Employers should meet with staff and inform them of the selection criteria. Thereafter the selection should be made, and the following three steps should be adhered to:

Step 1: Write to the employee

The employer should write to any employee selected for redundancy, informing them of the reasons upon which their dismissal is being contemplated and inviting them to a meeting at which they have the right to be accompanied by a work colleague or trade union representative;

Step 2: Meet with the employee and provide a written decision

At the meeting the employer should inform the employee of the reason for their selection for redundancy. The employer should consider suitable alternative employment and any representations made by the employee. After the meeting the employer should write to the employee with the outcome of the meeting and advise them of their right to appeal.

Step 3: Hold an Appeal Meeting – where appropriate

The Appeal should be heard by a more senior member of the management staff if possible. Again the employee has the right to be accompanied and should be provided with written reasons for any decision.

4. Calculation

Any employee possessing at least two years continuous service who is selected for redundancy should be made a redundancy payment calculated against their age, length of service and weekly pay (subject to statutory limits).

The Tribunal takes a dim view of any business that mishandles a redundancy situation and failure to accord with procedures may lead to claims for unfair dismissal being brought against the employer.

Dyne Solicitors Limited is able to provide practical legal advice to any employer contemplating the dismissal of employees by reason of redundancy.
Please contact James Mannouch, our Head of Employment, on 01829 773 107 for further guidance.

Lay-off – a short term solution to economic uncertainty

Many employers and employees confuse the terms 'redundancy' and 'lay-off'. Employees will sometimes talk of having been 'laid off' when they have in fact been made redundant. Here we look at the differences between the two and consider when it is appropriate to utilise 'lay-off'.

When an employee is made redundant they are dismissed from the business usually because of some permanent diminution in work. A lay-off is different. This is where the employee is not provided with work by their employer and the situation is expected to be temporary. The employee is not dismissed but instead temporarily suspended.

The fact that employees do not possess a general right to be provided with work does not provide employers with a general right to lay them off! Lay-off can only be safely exercised when there is an express contractual right agreed between the employer and the employee, or a collective or national agreement amounting to the same (although such agreements only have contractual force if they are incorporated into the employee's contract of employment). Employers may additionally claim an implied right to lay-off if they can show by clear evidence that this right has been established over a long period by custom or practice.

The agreement the employer seeks to rely upon to justify the lay-off will normally also determine the issue of pay. Employees may only be laid-off without pay (or on reduced pay) if this has been agreed in the manner described above. If an employer purports to lay-off an employee without pay when they have no right to do so then the suspension may amount to a fundamental breach of contract entitling the employee to resign and claim for constructive dismissal which may in turn entitle them to a redundancy payment or else to make a claim for unfair dismissal.

Where a right to lay-off without pay does exist then the employee may be entitled to a statutory guarantee payment from the employer. As from 1st February 2009 the rate is £21.50 per day but this is limited to a maximum of five days in any period of three months. On days when no guarantee payment is payable then the employee should seek to claim Jobseeker's Allowance. Subject to anything specifically provided by contract, there is an implied assumption that a lay-off will not last longer than is reasonable in all the circumstances (for an example, in the case of Dakari & Co v Tiffen this meant a maximum of 4 weeks). If the lay-off lasts longer than is reasonable or the maximum laid down by statute (see short-time working, below) the employee may be able to claim that it amounts to constructive dismissal and the employee can give the employer written notice that he or she intends to claim a redundancy payment.

An employer's contractual right to lay-off one of their employees without pay may appear to provide an unfair balance of power in the contractual relationship. However, it should be remembered that lay-off can serve in the employee's interest too. For instance, where it is known that work will return after a short period (for example on the commencement of a new works contract) it can enable the employer to avoid unnecessary redundancy thus preserving the employee's continuity of service for years to come.

Short-time working – a further alternative to redundancy

A final alternative to redundancy or lay-off is short time working. Again, this is an option to provide the employer and the employee with flexibility through any lean times.

Short-time working occurs when employees are laid off for a number of contractual days each week, or for a number of hours during a working day.

As in the case of a lay-off, the employer must have an express or implied power in order to lawfully reduce the amount of pay. Normal practice would be for the workforce or their union to agree to short-time working as an alternative to redundancies.

If an employee is laid-off without wages or put on short-time working and receives less than half a week's pay for four consecutive weeks - or for six weeks in a period of 13 weeks - because of a shortage of work, then the employee can give the employer written notice that he or she intends to claim a redundancy payment under authority found within the Employment Rights Act 1996.

However, and as was the case with lay-off (above), in cases where the employer does not possess a contractual right to impose short-time working but does so anyway, employees may claim that the employer's action amounts to a dismissal and make a claim to an employment tribunal for unfair dismissal. They may also be entitled to bring a contractual claim for loss of wages or a statutory claim for unlawful deduction of wages.

Comment

It is clear that any employer that does retain 'lay-off' and 'short-time working' clauses in their employees' contracts of employment or, worse, does not use written contracts of employment at all, reduces its options should work temporarily dry up. The company might be forced to continue to pay employees whilst they are not at work or else have to make redundancy payments only to have to re-employ workers later. To unilaterally choose to suspend employees without pay or cut their hours will almost inevitably lead to claims being made against the company in the Courts or the Tribunal.

Dyne Solicitors Limited is able to advise any business considering a reduction in its workers' hours. Please call James Mannouch, our Head of Employment, on 01829 773 107 for an informal, no obligation chat.

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