

# Spearing | Waite

Employment Law

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**Amanda Badley**

## Newsletter

### News update for HR Specialists



**Kim Abbott**

#### Redundancies

Owing to the current climate, we have received a significant number of phone calls on the subject of redundancies, and how to dismiss fairly by reason of redundancy. The following queries have been raised on several occasions.

Some practical tips

1. Do not forget to include employees on long term sick leave or maternity leave in the consultation process.

This can be done by either allowing them to join group meetings by telephone or by telephoning them after group meetings to let them know what was said and by holding individual consultation meetings with them either at their home address, a mutually convenient venue or by telephone. This is to reduce the risks of sex discrimination, disability discrimination or unfair dismissal.

It is also important to remember that any employees on maternity leave have an automatic right to be offered suitable alternative work, where available. This means that if suitable alternative employment is available, it must be offered to that employee in preference to any other employee who is similarly affected by the redundancy situation, but is not absent on maternity leave. A failure to do so will make her dismissal automatically unfair.

To a large extent, this puts an employee away on maternity leave in a far more advantageous position than if she were at work, since it may be that, had she been at work, she would not

have been offered one of the available alternative jobs in preference to other more highly qualified candidates.

If the redundancy is inevitable, and the employee qualifies for statutory maternity pay, ("SMP") by having 26 weeks' service by the qualifying week, SMP must be paid even if she is made redundant before or during maternity leave. SMP may have to be topped up to the equivalent of full pay during the notice period.

2. Temps and redundancy volunteers count for collective consultation purposes.

The statutory requirements to consult for a set period of time with elected representatives if 20 or more employees are to be dismissed within 90 days make no distinction between contractual status or length of service of the employees.

3. Leaving at an earlier date than the redundancy dismissal date does not necessarily mean that no payment is due.

Employees who are given notice of redundancy may sometimes want to leave early to go to a new job. This does not mean that they automatically lose the right to a redundancy payment. The employer can reach an agreement with the employee to vary the date of dismissal or the employee can write a "counter notice" during the "obligatory period," which is the employee's contractual or statutory notice, whichever is greater. The statutory procedure is complex. Should this be an issue which you are currently facing or about which you require further advice, our contact details are at the foot of the newsletter.

4. "Last in first out" ("LIFO") may constitute age discrimination.

Historically, LIFO was a very common selection criterion. However, since age discrimination came into force on 1st October 2006, any redundancy selection criteria based on length of service or experience may constitute age discrimination unless they can be objectively justified. LIFO may also amount to indirect sex discrimination as a disproportionate number of women may have short service. Additionally, LIFO may serve to retain the most expensive employees and eliminate those with the best skills.

Employers should consider carefully the issue of "bumping," where a long serving, redundant employee is retained by bumping out an employee with fewer years' service, experience etc. This could be indirect age discrimination against younger employees, which now must be objectively justified.

Enhanced redundancy schemes which mirror statutory redundancy payments ("SRP") but are more generous in that the weekly pay cap is not used, the multiple is more than one or multiplying the total amount by more than one are permitted variations. Any other deviation, no matter how generous is not permitted, and must be objectively justified. Time will tell what kind of approach Tribunals take.

The upper age limit and reduction in the SRP to employees over the age of 64 has been removed by the age discrimination regulations.

5. The Statutory Dismissal Procedures are a minimum requirement when dealing with redundancies.

A breach of the statutory procedures leads to an automatic unfair dismissal if the employee has over one year's service.

Compliance with Step 1 is the written invitation to the meeting, setting out the proposed reason for the dismissal. This is usually known as the "at risk" letter. The Step 2 meeting should not take place until the employer has informed the employee of the basis for the proposed dismissal and why she or he has been provisionally selected. This means providing the selection criteria and the employee's assessment scores so that he or she can give a considered response. Prudent employers should not conduct a Step 2 meeting until there has already been a consultation meeting to discuss the selection criteria and the employee's view on

the process. Step 3 is the employee's appeal against dismissal.

6. The employee is entitled to a written statement of the redundancy payment

Unless the exact amount of the redundancy payment has been determined by a Tribunal, the employer must provide the employee with a written statement of how the amount has been calculated. An employer who fails to provide the statement without reasonable excuse is guilty of a criminal offence, and liable on summary conviction to a fine not exceeding level 1 on the standard scale, (currently £200.)

## Stop press

23rd September 2008

The Advocate-General has handed down his opinion in The Heyday Appeal. He recommends that the ECJ dismiss Age Concern's challenges to the lawfulness of regulation 30 of the Employment Equality (Age Discrimination) Regulations 2006.

The Court recommends that regulation 30 (which permits employers to dismiss employees aged 65 or over if the reason for dismissal is retirement) is not incompatible with the Equal Treatment Framework Directive, provided the regulation is objectively justified within the context of national law.

So the question of whether a lawful retirement age of 65 is lawful is still very much a live issue for determination by the national courts.

***This newsletter does not contain legal advice. Whilst every effort is made to ensure its accuracy, Spearing Waite and the authors of this newsletter do not assume for, and cannot be held liable in respect of, the correctness of its contents, or for any reliance placed upon them.***

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