
Employment Write News

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Employment Law Update

Given the current economic climate, **employee stress** and **redundancy** are serious issues for many employers. In recent weeks, there have been key decisions in these two areas.

Stress claims now easier for employees to bring

The Court of Appeal (CA) has decided the important case of *Dickins v O2 PLC*. In this case, Ms Dickins argued that she had told her employer, O2, that her health was suffering as a result of her work. O2 argued that they had taken steps to support Ms Dickins and had offered her the use of their counselling service. Despite this, the CA ordered O2 to pay £109,754 for psychiatric injury caused negligently by excessive stress at work.

The CA considered guidance issued by the House of Lords in 2002 in the case of *Hatton v Sutherland* which imposes a number of hurdles on employees before a stress at work claim can be successful. However, the CA decided that it was acceptable to take a 'less strict' approach when determining if the employer should be liable. This case is therefore likely to make it much easier for employees to succeed in claims for psychiatric injury against their employers in the future.

The way in which stress claims are considered is as follows:

In addition to statutory duties under health and safety legislation, employers have a common law duty to take reasonable care of the health and safety of their employees in the workplace. This duty arises under the law of negligence, on which personal injury claims are based. In order to succeed in a claim, an employee must show (1) that their employer breached the duty of care owed to them by their employer, (2) that it was reasonably foreseeable that an injury would result from that breach and (3) that a loss, in the form of personal injury, has actually occurred.

In relation to **breach of duty**, even though Ms Dickins had **not** been signed off work by her doctor, it was held that O2 should have sent her home because she was asking for time off to recover from exhaustion. They should also have referred her to occupational health for proper professional consideration by a medical specialist. The fact that O2 had suggested that she go for confidential counselling was not sufficient to discharge their duty of care and therefore not an adequate response when the employee was expressly complaining of severe stress.

On whether the injury was **reasonably foreseeable**, the fact that Ms Dickins had complained about being stressed about her job, had regularly arrived at work late and told her employer she felt she was 'coming to the end of her tether' was sufficient to persuade the court that her illness of depression and anxiety was reasonably foreseeable.

Finally, on the issue of whether O2's failure **caused** her illness, the court found that there had been a number of failings over a sustained period of time that had 'materially contributed' to her illness.

This decision acts as a reminder to employers that it is vital to act quickly when faced with complaints from employees of work related stress (and the importance of training managers in dealing with such complaints). Employers should consider, in consultation with the employee, whether medical advice is needed, and agree practical steps for trying to reduce or remove the work related factors that are causing the employee to be stressed.

Enhanced redundancy payments - Can age-related differences be justified?

Statutory redundancy payments are calculated by reference to an employee's age, length of service and weekly pay, currently capped at £330 (increasing to £350 from February 2009).

This formula is inherently age discriminatory. However, the Employment Equality (Age) Regulations 2006 (Age Regulations) allow both direct and indirect age discrimination to be justified, provided it can be shown to be a '**proportionate means of achieving a legitimate aim**'. The Government retained the age-based redundancy formula when age discrimination became unlawful on the basis that older workers may be disadvantaged in finding alternative work. Therefore, it is argued that providing higher compensation to older workers is a proportionate means of achieving the legitimate aim of recognising the additional time it may take older workers to secure new employment.

Exemption

The Age Regulations also include a specific exemption which allows employers to pay staff enhanced redundancy payments provided the payment is calculated using the same multipliers as the statutory formula. Where the enhanced redundancy scheme does not follow the statutory formula, and calculates a redundancy payment by reference to age, the age-related differences in the scheme will be discriminatory unless they are justified.

Tribunal decision

In *Galt and others v National Starch and Chemical Limited*, the employment tribunal decided that NSCL failed to justify paying enhanced redundancy payments calculated by reference to age and length of service, but which did not follow the statutory formula.

NSCL decided to close its Warrington site and entered into consultation with its recognised trade union. Historically, employees who were redundant and below age 40 had received 3 weeks' gross pay for each year of service and 4 weeks' gross pay for each year above 40. There were no concerns raised during the consultation process about the enhanced scheme, and redundant staff received

redundancy payments according to this formula. However, employees below the age of 40 subsequently brought claims that they had been treated less favourably than the older employees who had received higher payments.

NSCL agreed that employees below age 40 had been treated less favourably but argued they were concerned about industrial unrest which would impact on the orderly closure of the site and the enhanced payment was to avoid this. The tribunal held that this was a legitimate aim but did not accept that it was proportionate; it could not be said that the purpose of treating the employees less favourably was to ensure orderly closure of the site. NSCL also sought to rely on the argument that older workers should be favoured because they would find it harder to secure new employment. However, the tribunal did not accept this argument because there was no evidence that NSCL had offered the enhanced scheme for this reason.

What does this mean for employers?

This case is a warning to employers who have enhanced redundancy payments that they should:

- check whether their redundancy scheme falls within the exemption in the Age Regulations;
- if it does not, explain to employees and employee representatives during the redundancy consultation process the aim of giving enhanced redundancy payments calculated by reference to employees' ages;
- ensure the less favourable treatment is genuinely to achieve that aim;
- consider whether there is a less discriminatory way of achieving the aim; and
- support all these considerations with documentary evidence.

Redundancy selection - Can employers use LIFO?

Since the introduction of the Age Regulations in 2006, there has been considerable debate about whether 'last in, first out' or 'LIFO' can be used to select for redundancy. The problem with LIFO is that it is indirectly discriminatory because, in order to have longer service, employees tend to have to be older. However, the case of *Rolls Royce plc v Unite the Union* has decided that having a redundancy selection policy which gives credit for length of service can be exempt from age discrimination.

The facts

Rolls Royce had two collective agreements with Unite relating to redundancy, one for staff and the other for works employees. Both agreements had substantially similar terms and provided that redundancy selection would involve a points scoring system. Under this system, employees at risk of redundancy would be assessed in various categories, such as expertise and versatility. In addition, each employee would receive one point per year of continuous service.

A dispute arose over whether this length of service criterion complied with the Age Regulations and the matter went to the High Court to be settled.

The decision

The High Court held that, while the criterion was age discriminatory, it was justified. The collective agreements were a compromise between the parties designed to enable them to carry out any redundancies in a fair way and this was considered to be a means of achieving a legitimate aim. Further, the length of service criterion respected loyalty and experience and protected the older workforce from being made redundant at a time when finding alternative employment is harder.

In addition, the High Court went on to hold that the collective agreements provided a benefit and would therefore fall within the exception in the Age Regulations for the provision of certain benefits based on length of service. It should be noted however, that this exception still requires employers to demonstrate that awarding a length of service benefit to employees with over five years' service reasonably fulfils a business need. It is likely this test would be met where the redundancy scheme is agreed with a trade union, and length of service is only used as one criterion together with other measures of performance, as was the case here.

What does this mean for employers?

The advantage of LIFO as a redundancy selection criterion is that it is purely objective. Employers can also be pressurised by unions to use LIFO. The Rolls Royce decision is some comfort that the use of LIFO will not necessarily put an employer in breach of the Age Regulations. However, it is important to note that the Court in the Rolls Royce case stated that its conclusion might well have been different had they used LIFO alone, and not the various other performance based criteria as well.



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Increase in compensation limits

The annual increase in compensation limits has just been published and will apply to dismissals occurring from 1 February 2009 onwards. The main changes are:

- maximum 'week's pay' for redundancy and basic awards: £330 to £350
- maximum statutory redundancy payment: £9,900 to £10,500
- maximum unfair dismissal compensatory award: £63,000 to £66,200

Temporary Agency Worker Directive gets the go ahead

Following on from our September Employment Write, the proposed European Directive giving basic employment rights to temporary agency workers has been approved by the European Parliament without amendment. This will give agency workers substantial additional protection. The Directive now needs to be implemented into UK law and will take effect three years after that.

Agency workers entitled to sick pay

In the meantime, traditionally, agency workers have been the only group of employees who were not entitled to statutory sick pay (SSP) if their contract was for three months or less. This exemption has now been removed from the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. This means that, provided agency workers comply with the other SSP

eligibility requirements, they will be able to claim SSP from their agency from the first day of their contract with the agency.

UK's default retirement age - still hanging in the balance?

Currently, employers in the UK can retire employees at the age of 65 or over without being in breach of the Age Regulations. This 'default retirement age' has been challenged by Age Concern as being fundamentally discriminatory and we are waiting for the view of the European Court of Justice (ECJ). Employment Tribunal claims brought by employees because they have been dismissed for being aged 65 or over have been stayed pending the ECJ decision.

The questions referred to the ECJ have now been considered by the Advocate General (AG). The AG's opinion, although not legally binding, is followed by the ECJ in the majority of cases.

The AG has confirmed that the UK's rules on mandatory retirement do fall within the scope of European discrimination legislation and will be unlawful unless they can be objectively justified. This means that, if the ECJ agrees with the AG, the issue of whether the UK's default retirement age can be justified will still be very much a live one and will be referred back to the High Court where the UK Government will have to show that the default retirement age is objectively justified.

The Government has argued so far that the default retirement age is justified because it meets the aim of national work force planning and aims to prevent an adverse impact on the provision of occupational pensions and other work-related benefits. However, the Government will need to present evidence to support these reasons. The ECJ's decision is expected in early 2009.

In any event, the Government has said that if there is evidence that shows that the UK does not need a default retirement age then it will be removed in 2011. Therefore, employers need to think about the possibility of managing their workforce without reliance on mandatory retirement.

Minimum wages for apprentices

From August 2009, the minimum weekly wages for all apprentices in England is to be increased from £80 to £95. Currently, the national minimum wage (NMW) does not apply to the

wages of apprentices who are aged 16 to 18 and those who are aged 19 and over in their first year of apprenticeship. However, the Low Pay Commission is reviewing this exemption and is due to report in early 2009.

Plan to extend right to request flexible working may be delayed

The right to request flexible working is currently limited to any working parent with a child under 6 (or a disabled child under 18) and to any employee who is a carer for their spouse, partner, civil partner or a person who lives with them.

The Government had proposed to extend the right to request to work flexibly to parents of children up to the age of 16 with effect from April 2009. However, recent reports suggest that this is being reconsidered in the light of the current downturn in the economic climate, although no final decision has yet been announced.

The Employment Department - Key Contacts



Joanne Evans
Partner and Head of Department

Jo is a nationally recognised employment law specialist. She is a graduate of Cambridge University and was a partner at one of the country's leading law firms before joining Neil Myerson Solicitors in 2007 to head up the firm's team of employment specialists.

joanne.evans@neil-myerson.co.uk



Melloney Anderson
Solicitor

Melloney is a solicitor in the employment department. After working in business for a number of years, Melloney read law at the University of Sheffield. She then trained and qualified at DLA Piper UK LLP and joined Neil Myerson in 2007 at 3 years qualified.

melloney.anderson@neil-myerson.co.uk



John Morris
Solicitor

John is a solicitor in the employment department. He read law at Cardiff University before working at national law firms DLA Piper UK LLP and Beachcroft LLP. He then joined Neil Myerson in June 2008.

john.morris@neil-myerson.co.uk



Charlotte Gilbert
Solicitor

Charlotte trained with Neil Myerson Solicitors, having studied law previously at Durham University. We are delighted that she has joined our busy employment department following her qualification as a solicitor in September 2008.

charlotte.gilbert@neil-myerson.co.uk

NEIL
Myerson
SOLICITORS

Neil Myerson Solicitors
The Cottages Regent Road
Altrincham Cheshire WA14 1RX

T (0161) 941 4000
F (0161) 941 4411
E lawyers@neil-myerson.co.uk
W www.neil-myerson.co.uk