BBi Alternative Solutions
Health & Safety : Human Resources : Training : Risk Management

Human Resources - April 2009

INCREASES MADE TO STATUTORY REDUNDANCY PAY (SRP) FROM 1ST FEBRUARY 2009

The limit for SRP has changed from £330.00 per week to £350.00 per week. The limit changes every February in line with the Retail Price Index.

Any Employee made redundant up to and including 31st January 2008 will only be entitled to the previous limit of £330.00 per week.

CHANGING TERMS AND CONDITIONS OF EMPLOYMENT

Whilst recent events have led to many Companies looking for ways to reduce costs, not all employers may want to consider redundancy due to;

- Potential high costs of redundancy payments to long serving employees.
- Loss of key employees and talent which would be a necessity once business recovery begins.

Employers are instead considering restructures and reorganisations to improve business efficiency. Employers have also considered making changes to the employee's terms and conditions of employment as an additional measure to reduce costs.

To avoid any potential claims of breach of contract and unfair dismissal, employers must take caution when considering changes to the employee's;

- Hours of work
- Pay
- Commission
- Bonus
- Benefits
- Other such changes which may be regarded as 'significant' changes

HUMAN RESOURCES - SUPPORTING YOUR BUSINESS

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CHANGING TERMS AND CONDITIONS OF EMPLOYMENT..cont

WHERE TO START?

Initially employers should check the contract of employment, as well as any related Company Handbooks, Policies and documentation which may form part of the contract. From checking these documents an employer can determine what flexibility is incorporated within the contract of employment, essentially finding out if there is or is not a contractual right to vary the terms of the contract.

CONTRACTUAL RIGHT TO VARY THE TERMS OF THE CONTRACT

If there is right within the contract to vary the terms of the contract, The employer must act reasonably and justifiably to avoid potential constructive unfair dismissal and breach of contract claims.

The following is recommended;

- The employer must inform employees of the contractual right.
- The employer must act reasonably when implementing the changes.
- The employer must ensure they can justify the change.
- The employer must ensure they can justify the process followed for implementing the change.

The above would need to demonstrate to any potential tribunal that the employer acted reasonably in the given circumstances.

If there is an 'express right' to vary the terms of the contract, care must be taken not to make fundamental changes which could be classed a breach of contract, for example reducing an employee's salary by 50%.

NO CONTRACTUAL RIGHT TO VARY THE TERMS OF THE CONTRACT

Where there is no right within the contract to vary the terms, alternatives such as variation of contract through 'express agreement' or 'unilateral imposition' could be considered.

EXPRESS AGREEMENT

Express agreement involves gaining voluntary agreement in writing from the employee of the changes to be implemented. The employee must not be placed under duress or pressured into agreeing to any changes. This the most preferred method of implementing changes to terms of the contract.

To compensate and gain consent from the employees, a form of payment could be considered for the employee. This could include; a salary increase, a bonus or some other form of payment.

UNILATERAL IMPOSITION

If the employee does not consent to such changes the employer could unilaterally impose the changes on the employee, with the hope of the employee accepting the changes and continuing to work. By continuing to work the employee would have potentially accepted the changes. However this form of action poses the risk of the employee;

- Working under protest, also known as 'standing and suing'.
- Resigning and claiming constructive unfair dismissal.
- Refusing to work under the new terms and conditions.

Unilateral imposition may not guarantee the variation to the terms of the contract required.

TERMINATION AND RE-ENGAGEMENT

As a final option the employer could provide notice and terminate the employee's current employment and offer re-engagement on the terms of the new contract, with the new terms commencing immediately after termination of the of the current contract. However if the employee refuses to sign and agree to the re-engagement on the terms of the new contract, they could claim for constructive unfair dismissal.

Employers should note that using termination of the current contract would also require the new dismissal procedure to be followed.

The employer would also have to show a sound business justification for the change requiring termination of the current contract within the context of their circumstances, and why this action was required to achieve the changes required. For example if the employer has previously suffered financial loss due to employees not having restrictive covenants, introducing restrictive covenants could be justified.

ALWAYS CONSULT WITH EMPLOYEES

Consulting with employees is vital in aiming to maintain positive relationships with employees after changes to the terms of the contract have been implemented.

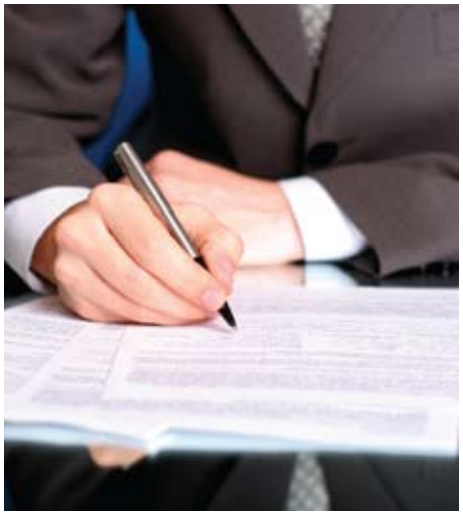
If the employer is proposing to make changes to more than 20 employees within a 90 day period, they must abide by Collective Consultation obligations, as required by the Trade Union and Labour Relations (Consolidations) Act 1992. This may involve consulting with elected representatives.

Should the correct Collective Consultation obligations not be fulfilled, the employer would be liable to pay employees a protective award of up to 90 days pay.

IN SUMMARY

When considering changes to terms of the contract and implementing these changes, the employer should aim to implement a process that will not have a detrimental impact on their relationship with the employee and ideally look to gain agreement from the employees of the proposed changes.

Consideration should also be given to planning, communicating, consulting and following a process which will demonstrate that the employer has acted reasonably and with sound business justification, in relation to it's circumstances.



PAY AND BENEFITS STATUTORY RATES AND BENEFITS

There has been an increase in the standard rate of statutory maternity, paternity and adoption pay from £117.18 to £123.06. In addition, Statutory sick pay has been increased from £75.40 to £79.15.

RIGHT TO REQUEST FOR FLEXIBLE WORKING IS EXTENDED

From April the right to request flexible working will be extended to parents of children aged up to the age of 16 years.

EXTENSION OF RIGHT FOR TIME OFF FOR PUBLIC DUTIES

The right to time off for employees serving in a wider range of civic roles is extended. It is proposed that the right to time off for public duties under s.50 of the Employment Rights Act 1996 should be extended to cover roles such as members of probation boards; members of court boards; and youth offender panel members. It is also proposed that roles in the housing sector, such as board members of registered social landlords and tenant management organisations, should be covered by time off entitlements.

HOLIDAY ENTITLEMENT DURING SICKNESS ABSENCE

On 20th January 2009, the European Court of Justice (ECJ) handed down a decision, which is sure to cause concern amongst businesses. It seems likely that long-term sick employees will accrue holiday year on year, entitling them to take it all in one lump on their return.

The ECJ has undermined the Working Time Directive (stopping people from being able to carry over holidays from one year to the next) in the case of Stringer v HMRC (previously Ainsworth v HMRC). Basically it stated that where an employee has been unable to take holiday due to sickness, then the holiday must be carried over to the next year.

This could be disastrous to companies who have PHI schemes in place! Companies who, as such have employees who may be absent from the business for many years.

This case will now go back to the House of Lords to be interpreted. If employees on long term sick start to demand back payments, you are currently still able to resist this, well at least until there is a final decision from the House of Lords.

STATUTORY MINIMUM HOLIDAY ENTITLEMENT INCREASES

With effect from April 1st 2009 statutory minimum holiday entitlement will increase from 4.8 weeks to 5.6 weeks.

It's worth remembering that no payment in lieu of the additional leave is permitted from this date. A 'relevant agreement' may provide for the additional leave to be carried forward into the leave year following the one in which it falls due.

NEW DISCIPLINARY PROCEDURES

From April 2009 new disciplinary and grievance procedures will come into force, ACAS has produced a draft Code Of Practice, which should be adhered to. The new procedures encourage informal dispute resolution, following this 3rd party mediation should happen and the absolute last resort being application to the employment tribunal.

SO, WHAT IS THE ACAS CODE OF PRACTICE?

It states that disciplinary issues should be resolved by fact finding, informing the employee of the problem, holding a meeting, offering the right of accompaniment, reaching a decision and offering the right of appeal.

Within the new grievance process the most obvious change is that employees will no longer be required to raise the grievance in writing. This may cause problems when it comes to companies identifying the grievance however, it is important because tribunals will be able to adjust an award by up to 25% for an unreasonable failure to comply with the new code. So if you think it is a moan by text message and nothing to worry about….. think again!

The revised code is not legally binding however, it will remain the primary guide for process fairness and the extent to which the revised code has been adhered to in any dismissal or grievance, and will be taken into consideration by an Employment Tribunal in determining whether it is fair or not. If it is not followed you must be prepared to answer the question of why.

The new code will not apply to dismissals by reason of redundancy and it won't apply to dismissals due to the non-renewal of fixed term contracts.

The code provides that employers should make a decision on the evidence available where an employee is persistently unable or unwilling to attend the meeting. Employees should be provided with greater info before the meeting.

The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should be given the opportunity to raise points about any information provided by witnesses. Where
any employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.

SIMPLER APPROACH TO PROBATIONARY PERIODS

Following the abolition of the Statutory dismissal and disciplinary procedures in April, you will no longer need to follow such a strict process to end employment after an unsatisfactory probationary period.

The new ACAS Code does not apply during the first year, so disciplinary policies will need to change to take this into account. Do not make hard work for yourself in making these processes apply to probationary periods. Also note that if your policy says it does apply to them, you must abide by it. Be mindful throughout these processes of any potential discrimination claims.

Over the last couple of years the number of cases reaching Tribunal has hugely increased, it is thought to be by more than 50%. Many of you may have experienced this for yourselves, the increases being driven by disputes about equal pay, unfair dismissal, age, sex, race and disability discrimination.

With this being high on the agenda, we are able to offer our clients with not only hands on consultancy but also, an insured/legal expenses cover of up to £75,000 per claim.

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