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GREGORY ROWCLIFFE MILNERS
SOLICITORS

1 Bedford Row, London WC1R 4BZ

Tel: +44 (0)20 7242 0631

Fax: +44 (0)20 7242 6652

Email: law@grm.co.uk



Jane Laidler
Joint Managing Partner

“As 2011 draws to a close there is no time to lose in thinking ahead to next year’s events, most significantly the London Olympics and how it will affect your business. Our first article in this issue therefore deals with the HR policies you will need to have in place to deal with staff annual leave and flexible working arrangements throughout the duration of the Games.

More immediately the Government has now announced its proposals to tackle employment law in the New Year. Measures include a consultation on “protected conversations” and the overhaul of Employment Tribunal procedures possibly with the introduction of fees for bringing employment tribunal claims and financial penalties also for employers who breach employment rights. The unfair dismissal qualifying period will be increased from one year to two years with effect from April 2012.

We shall be holding a seminar to review the impact of these policy changes and other recent employment and immigration law developments at 5.30pm on 18th January 2012 at 1 Bedford Row. To register (spaces will be limited) please email: law@grm.co.uk

In the meantime, I hope you find these articles of interest. Do feel free to let me have your feedback by contacting me at:

j.laidler@grm.co.uk or telephone +44 (0) 20 7242 0631 ”

www.grm.co.uk

COUNTDOWN TO THE OLYMPICS – HR POLICIES NEEDED

With less than a year to go until the 2012 Olympics, employers are advised to take action now in respect of devising and communicating plans and policies for staff annual leave and flexible working arrangements throughout the duration of the Games.

As in the past with key sporting events there will be those employees who will want time off to attend (having acquired tickets) and many more who will request workplace facilities and/or flexible working practices in order that they can watch televised events either at their place of work or at home.



Employers must ensure that not only are such requests dealt with as fairly and reasonably as possible, but that policies are clear from the outset. This will involve achieving a careful balance between recognising the significance of the Olympics as a “once in a lifetime” event and meeting the ongoing needs of the business.

Policies should also cover how the employer will respond to those taking unauthorised leave, for example sick leave, during this period.

As ever, consultation with staff and other significant parties such as union representatives is recommended as an initial first step. In locations likely to be directly affected by the events, issues such as transport difficulties and flexible working contingencies should also be discussed.

Employers must also take into account that not everyone will be interested in the Games taking care that those who are willing to work as usual are not unfairly penalised as a result.



DISABILITY DISCRIMINATION: REASONABLE ADJUSTMENTS

Under the Equality and Human Rights Commission's Employment Statutory Code of Practice (which came into force in April 2011) businesses are advised to make changes to redundancy selection criteria to help comply with the duty to make reasonable adjustments for those with a disability.

However, a recent Employment Appeal Tribunal decision has emphasised that an employer only has a duty to make reasonable adjustments that will actually assist an employee in overcoming a substantial disadvantage at work. It does not have a duty to make an adjustment that would in fact make no difference.

In this case, an adjustment giving a disabled claimant a "chance" to avoid being selected for redundancy was not reasonable because it would have made no difference to the outcome.

Nevertheless, businesses should be aware that there will be occasions where they should make reasonable adjustments. Although each situation will be different, there are a number of factors which may be taken into consideration when deciding if the steps a business took were "reasonable" including:

- Whether the adjustment would actually solve the disadvantage identified.
- The practicality of the adjustment.
- The impact of the adjustment on the business as a whole.
- The financial and other costs of making the adjustment.
- The size of the business.

It is good practice for a business to ask the disabled person about possible adjustments they may need. It is also advisable to agree any proposed adjustments with that person before they are made.



For more information, please contact:
Jane Laidler + 44 (0)20 7242 0631
j.laidler@grm.co.uk

NEW PENSIONS OBLIGATIONS FOR EMPLOYERS

Getting ready to meet the requirements of the The Pensions Act 2008

One of the biggest challenges currently facing employers, individuals and the government is that people are living longer but are failing to save enough to support a potentially longer period of retirement.

Responding to this situation and recognising human nature encourages us to spend today rather than save for tomorrow, the Government has introduced new legislation.

From 2012, under the requirements of the Pensions Act 2008, employers will have a legal duty to enrol most employees into a pension scheme and to contribute towards their retirement. The new legislation is aimed at getting an estimated seven million extra workers saving for retirement through automatic enrolment into a comparatively straightforward scheme of portable personal pension accounts.

For employers, the requirements of the act will be phased in over three stages depending on company size (calculated on PAYE payroll data). Larger employers (over 30,000 employees) will be required to comply first from October 1st 2012, followed by small and medium-sized organisations (estimated date 2014-2016).

Key requirements:

- Under the Pensions Act 2008 all employers must offer a qualifying workplace pension scheme and automatically enrol eligible employees.
- Employers with an existing pension scheme will be able to certify that their existing scheme meets the requirements detailed in the act.
- Any employer who does not have an existing pension scheme must enrol staff into the national system of low-cost personal pensions accounts: NEST – the National Employment Savings Trust.
- A minimum of 8% of an employee's qualifying earnings must be paid into a pension, to be made up of 3% employer contributions, 4% employee contributions, and 1% tax relief.
- Staff will be allowed to opt out of schemes, in which case, employers will no longer be required to make a contribution.



~~Problems~~
Solutions

Planning for performance

Although for many smaller employers the new requirements may seem some way off, advance planning will help ensure that systems and structures are in place for a trouble-free transition. Issues that you, as an employer, should consider, include:

Reviewing your existing pension scheme/s to establish if it/they will meet the requirements set out in the act.

Deciding what specifically you will need to do to support the introduction of NEST personal accounts if you do not have an existing scheme. This will include communicating with staff and being fully aware of all the implications.

- Deciding what specifically you will need to do to support the introduction of NEST personal accounts if you do not have an existing scheme. This will include communicating with staff and being fully aware of all the implications.
- Ensuring your HR and payroll and systems are able to cope with the extra administration.
- Budgeting well in advance for the cost of the compulsory 3% employer contribution.

One of the aspects that employers should be aware of is that employees can choose to opt-out of the scheme. However, the implications of this, as many individuals are now finding, is that as they approach the time when they hoped to retire they have insufficient funds to do so.

As a good employer you should therefore consider the value of providing financial education as an employee benefit to help staff fully understand the implications of pensions contributions as part of life-long money management.

At GRM we would be pleased to advise you further on meeting the requirements of the new legislation. We also have many contacts with financial services professionals to whom we can refer you if necessary.



For more information, please contact:
Helena Ross +44 (0)20 7242 0631
h.ross@grm.co.uk

SOCIAL MEDIA MISCONDUCT: WHEN IS IT REASONABLE TO DISMISS?

Alleged misconduct involving an employee's use of social media is a growing problem but can be difficult for employers to handle correctly.

First, employers may struggle to identify the specific type of misconduct, for example, whether the misdemeanour consisted of damaging the employer's reputation or breaching a duty of confidentiality. Second, the employee may counter the accusation by arguing that their conduct took place outside work and had no bearing on the employment relationship, possibly asserting that their right to privacy has been infringed.

Recently, an employment tribunal held that the dismissal of an employee for making derogatory comments about her workplace on Facebook was not reasonable in the circumstances and was therefore unfair*. The tribunal decided that the comments were "relatively minor" and there was nothing to suggest that the employer's relationship with a key client had been harmed or jeopardised as a result. The employer also had failed to take into account the employee's exemplary employment record and mitigating circumstances.

The implications of this decision are that employers must investigate matters involving social media thoroughly and not respond with a "knee-jerk reaction" to comments that have a derogatory element. The case mentioned above indicates that employers will not be able to rely, as a matter of course, on the assertion that their reputation may be damaged by such remarks; rather they should make some attempt to assess the risk of harm.

Arguably, in most cases, the risk of harm to an employer's reputation will be evident from the content as will the nature of the misconduct, i.e. whether or not it also amounts to a "breach of confidence".



However, this case also highlights the inherent risks for employees of having Facebook friends who are colleagues given that in this case it was the employee's colleagues who informed her employer of the comments.

**Whitham v Club 24 Ltd t/a Ventura ET/1810462/10*

PROVIDING A REFERENCE

Although they often may be asked for one, in general, employers are under no duty to furnish their former employees with a reference. However, if they do provide one they owe a duty of care to the individual when preparing it, and may be sued for damages for negligence if they breach that duty.

A recent Court of Appeal decision* has held that a former employer had not been in breach of its duty of care when it provided a reference which referred to allegations against a former employee but made it clear that they had not been investigated. The employer was not negligent as the reference was true, accurate and fair.

As the provision of a reference will generally involve the disclosure of personal data it will be subject to the Data Protection Act 1998 (DPA 1988) and the Information Commissioner's Employment Practices Code. Part two of the Code makes a number of recommendations for employers providing references including that employers should draw up and publicise a clear policy regarding which employees can provide corporate references and under what circumstances and that they should not provide confidential references about a worker unless they are sure that the worker consents to this.

Employers will be liable under the DPA 1998 for the contents of a corporate reference but not for one given by an individual in their personal capacity.

Employers must take particular care when providing information in a reference about an employee's sick record or reasons for periods of absence, because information about health is sensitive personal data under the DPA 1998. Employers can only disclose such information if they have obtained the employee's explicit consent.

Key issues a an employer needs to consider when providing a reference for a current or former employee:

- Is the reference true in all aspects?
- Is it accurate in respect of all facts and details?
- Is it fair? In this context, "fairness" means that it should not be misleading overall.

**Jackson v Liverpool City Council* [2011] EWCA Civ 1068



For more information, please contact:
 Tim Moloney + 44 (0)20 7242 0631
 t.moloney@grm.co.uk

LIABILITY OF COMPANY DIRECTORS FOR DISCRIMINATION

A recent case* has highlighted the potentially wide liability of directors in relation to employee discrimination claims, and the potential for claimants to pursue an alternative route to recovery in cases where the actual employer might not have the financial means to meet an award for damages.

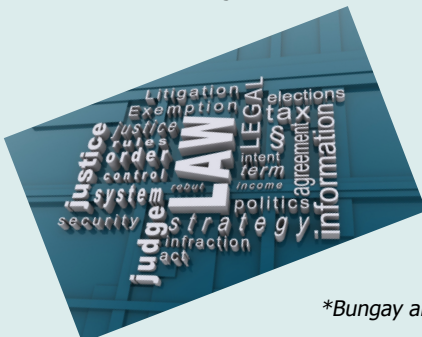
The case involved allegations of race discrimination. Although the tribunal held that the employee's dismissal had been discriminatory, by the time of the hearing the company had gone into liquidation. The tribunal then ordered an award of damages including aggravated damages in favour of the employee against the two directors named in the case on a joint and several basis.

The directors appealed against the decision but the Employment Appeal Tribunal dismissed the appeal. The directors appealed on the grounds that they were not agents of the company and could not be personally liable, that it was wrong to award damages jointly and severally, and that aggravated damages could not relate to any acts occurring after the termination of the employment relationship.

The case therefore clarifies some significant points concerning when directors are acting as agents i.e. exercising authority conferred by the principal rather than carrying out discriminatory acts that the principal had authorised them to do.

The case is also important for clarifying details about making awards on a joint and several basis, as well as providing helpful guidance concerning the circumstances in which aggravated damages may be awarded.

If in doubt, directors should seek guidance about their liabilities in relation to any dispute at an early stage.



**Bungay and Paul v Chandel and others (UKEAT/0331/10)*