

Review

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Is “Last in First Out” Dead?

Redundancy and Age Discrimination

Making the most recent recruits redundant before employees with longer service (“last in first out”) has been generally accepted as fair. It avoids arguments about favouritism and rewards longer serving employees. It is the safest method to ensure that the dismissal is not an unfair dismissal contrary to the Employment Rights Act 1996. But there may be a problem depending on the make up of the workforce at risk of redundancy. If those with long service tend to be men (because, at least in the past, women more often had broken service) it could arguably be sex discrimination. If those with long service tend to be older there may be indirect age discrimination contrary to the Employment Equality (Age) Regulations (Age Regulations) which came in in 2006. Many employers

have always preferred to choose who they wanted to keep and who they wanted to lose. Since the Age Regulations they have been arguing that they now have to drop “last in first out” altogether. Some employers understand the advantages of “last in first out” but have genuine fears that if they use it, younger employees, with shorter service who they make redundant might claim age discrimination. Under the Age Regulations even if a scheme on the face of it favours older employees (with longer service), it is not caught by the Regulations if either there are good reasons to justify using it and/or the scheme is exempt altogether because using length of service to decide who goes is a benefit that “fulfils a business need” of the employer.



Is “First in Last Out” Dead?...continued

The High Court was recently asked in a joint application by the Employer and the Union for guidance on this problem (in *Rolls Royce plc v Unite the Union* 2008 EWHHC 2420 (QB)). The High Court said that there were good reasons justifying using length of service as a criterion for selection for redundancy; the scheme itself said its purpose was to allow the restructuring to be “peaceable” and to have a “fair” selection process. The Court found these to be good reasons which justified using length of service. The Court said that length of service recognised the loyalty and/or experience of older employees and protected them from being put on the labour market when they are particularly likely to find it hard to get another job.

The Court also said that not to lose your job was a “benefit” and that length of service as a selection criterion encouraged loyalty and rewarded service which “fulfilled the business need” of the employer so the scheme was exempt under the Age Regulations.

In reaching both these conclusions the Court thought it was important that the selection criteria had been agreed with the Union and that length of service was one of several selection criteria. (It is not clear why, if length of service is justified and/or falls in the exemption for the reasons given, there have to be other criteria as well.)

According to this decision (which is being appealed) the Age Regulations don’t mean you can’t use length of service to decide who is to be made redundant even if, in the group of employees at risk, those who have longer service tend to be older. Employers can defend any age discrimination claims that result, especially if the criteria are agreed with the Union and, possibly, with the addition of some other criteria.

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What about Redundancy Payments and Age Discrimination?

On the face of it, the usual method for calculating both statutory and most enhanced redundancy payments is age discriminatory. The payment increases with service. Also the statutory redundancy payment is 1½ week’s pay for each year where the employee is 41 or over and is only half a weeks pay for each year when the employee is under the age of 21. This would make most redundancy payments both directly and indirectly age discriminatory but there is an exemption in the Age Regulations for payments that mirror the statutory scheme. This can be by removing the statutory cap for a week’s pay, applying a multiplier to the amount paid for each year of service and/or applying a multiplier to the statutory redundancy payment itself, or a combination of either. It is important to remember that the different multiplier for the years over age 41 and under age 21 must be retained. Enhanced redundancy payments that do not follow the statutory scheme in this way have been found to be discriminatory.





Long term sickness and Holiday Pay:

A change to the rules

It had previously been held by the Court of Appeal that a worker could not accrue holiday whilst on sick leave. However, in its recent decision in the combined cases of *Stringer and others v Her Majesty's Revenue and Customs* and *Schultz-Hoff v Deutsche Rentenversicherung Bund* from the UK and Germany respectively the ECJ held:-

1. The entitlement to annual leave of a worker on sick leave once granted cannot be conditional upon the worker having worked that year of leave.
2. A worker can accrue up to 4 weeks paid annual leave over a year whilst he/she is on sick leave. Accordingly, in line with the provisions of the Directive, this should mean that the rate of pay that the incapacitated worker is entitled to during the leave is his/her normal rate of pay; regardless of whether he/she is on half pay, statutory sick pay, or no pay at all.
3. If a worker is not allowed to take paid annual leave during his/her sick absence he/she should be allowed to take it at another time. The right to a year's annual leave is extinguished if the worker is not able to take the leave during that leave year or the carry-over period. However, new leave entitlement will begin to accrue when the carry-over period begins.
4. The right to annual paid leave will not be taken away from an employee who has been on sick leave for the whole, or part of the year and is on sick leave when his/her contract is terminated. This means that an employee who has been on long term sick leave can claim 4 weeks pay in lieu of holiday at the end of his/her contract.

The right to sick leave and the conditions for exercising it are not governed by Community law but paid annual leave is. It therefore remains to be seen when a worker in the UK will be entitled to take that leave, but on leaving a company at the end of a period of illness he/she could claim payment in lieu of paid annual leave.

Disability related discrimination

Child Support Agency v Truman

As reported in the last Employment Law Review, the House of Lords significantly altered disability related discrimination law with its decision in the Mayor and Burgesses of the London Borough of Lewisham v Malcolm. In Malcolm it was held that to show detriment a disabled person must be compared to a non-disabled person who has the same reason for the detrimental treatment (e.g. absences from work for hospital appointments). Malcolm was a housing case and was therefore based on discrimination in the field of housing which is largely similar to the employment provisions in the Disability Discrimination Act. However, it has now been confirmed by the Employment Appeal Tribunal in the case of Child Support Agency v Truman [UKEAT/0293/2008/CEA] that the Malcolm approach does in fact also apply to employment claims.



STOP PRESS!!

The current 3 step statutory discipline and grievance procedures will be replaced on 6 April 2009 by ACAS's new Code of Practice (CoP). We'll take a detailed look at the new procedures in the next issue of ELR when the final CoP will be available.

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