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**Trade union blacklisting to be outlawed**

**Employee mistakenly paid double wins case**

**Review of default retirement age brought forward**

**'Dual discrimination' to aid older women TV stars?**

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## **Fraud-ian tendencies**

DUCK islands, wisteria removal, helipads and moat-clearing... As well as offering a fascinating glimpse into our politicians' domestic lifestyles, the MP claim-and-shame scandal has catapulted the issue of expenses abuse into the media spotlight.

### **Chits happen...**

Away from the Westminster sleazebowl, HR professionals face perennial problems from staff making fictitious and inflated expenses claims.

A survey last year by hoteliers Travelodge revealed that British workers fleece their bosses to the tune of more than £1 billion a year through spurious swindle sheets. A smug 43% of those polled believed it to be a legitimate way of making extra cash, while an astonishing 84% didn't feel guilty about inventing claims.

### **Cash points**

Here's a pocketful of pointers for cracking down on dodgy expenses claims:

- Make sure you have a clear expenses **policy** and apply it firmly and consistently. Sounds straightforward enough, but it's a holy grail that's eluded the House of Commons...
- Specify that only claims for '**legitimate business use**' will be reimbursed. Consider setting a limit, above which expenditure needs prior approval.
- Spell out types of claims that are **unauthorised**—the, ahem, 'adult' films famously ogled by Jacqui Smith's husband, for instance. Cost aside, the last thing you need is discrimination and harassment claims triggered by a 'boys' club' culture of entertaining clients at lap-dancing clubs and so on.
- If suspicious claims come to light, conduct a full **investigation** to determine whether disciplinary action is necessary. Minor or inadvertent breaches of the expenses policy should generally attract a lenient sanction – at least for a first offence.
- Claims that are blatantly exaggerated or dishonest will normally warrant summary dismissal for **gross misconduct**. Where appropriate, involve the police and any relevant regulatory body.
- It's probably OK to make a **deduction from wages** to recover overpaid expenses – but best play safe and include a specific right in the employment contract.

Just a few little hints for refining your fiddle schtick...

## Aporkalypse now?

NOSES in the parliamentary trough aside, the other story hogging the headlines lately has been swine flu. There's a good chance the pandemic will intensify during the autumn and winter.

At the risk of being boar-ing, businesses should prepare for workplace issues that may arise – it could be sow important.

### **Sty-ing in control**

The Government has warned that a quarter of employees could contract swine flu if the outbreak takes hold. Careful forward planning is crucial if employers don't want to make a pig's ear of it.

Despite most cases being mild, widespread absenteeism could have a devastating impact. There's a delicate balance between ensuring staff stay at home until completely better and discouraging unwarranted sick leave. Not to mention issues concerning employees requesting time off to care for sick dependants.

The key priority will be preserving business continuity whilst taking proactive steps to protect staff, especially vulnerable groups such as pregnant women and employees with pre-existing conditions. Formal risk assessments will often be necessary.

Employers exposing workers to unnecessary harm could potentially face personal injury claims - although claimants might have difficulty establishing that infection occurred specifically through work. That might save your bacon, but don't take it for grunted...

### **Where there's a swill...**

Other useful contingency plans include establishing minimum front-line staffing levels, facilitating flexible and home working, redeploying staff into alternative roles and organising ways to hire and train temporary staff at short notice.

Any changes in working arrangements should be implemented carefully with prior consultation. Ham-fisted measures could prompt legal challenges.

Similarly managers should steer clear of rash(er) decisions on taking disciplinary action – where employees unreasonably refuse to attend work, for instance. Such cases require sensitive handling, taking account of individual circumstances. Squeals to tribunals about unfair treatment are the last thing you want.

Snout to worry about really, though... We're hardly talking Parma-geddon.

## Fit for purpose?

EVEN without swine flu, sick leave is estimated to cost the economy over £100 billion a year including around 172 million lost working days. Stress-related absence triggered by a declining economy is likely to make matters still worse.

Little wonder, then, that the Government is looking at ways to separate the work-shy from the genuinely ill and stop people drifting into long-term unemployment.

### **Can-do attitude**

The most eye-catching proposal is to scrap the traditional paper sick note doctors have used since 1948 to sign people off work and replace it with computer-generated 'fit notes'. The idea is to focus on what employees can do rather than what they can't. Following consultation, the new system will be introduced in spring 2010.

Whereas sick notes just specify the ailment and time off required, the fit note will have three categories: fit for work; not fit for work; and 'may be fit for some work now'. A GP placing a patient in the third category will describe the functional effects of the condition and be able to suggest temporary arrangements that might assist a return to work – e.g. reduced hours, altered duties.

### **Healthy debate**

The plan has been broadly welcomed in spirit, although some aspects have been criticised as ill-judged and poorly thought out. One concern is that doctors aren't occupational health experts and will often only be able to give generic advice based on what the patient tells them. ("OK for work not involving stressful situations.")

Another worry is that, whilst fit notes may promote dialogue between GPs and employers, employees could potentially feel frozen out of the process. Also, how will fit notes impact on the employer's duty to make reasonable adjustments under the Disability Discrimination Act, where it applies?

We still reckon this is a promising initiative that could spark constructive dialogues between employers and employees on returning to work. All in all, we're prepared to give it a cautiously optimistic prognosis.

That's if you can decipher our handwriting...

*Reforming the medical statement: consultation on regulations,*  
Department for Work and Pensions, May 2009

## **Creative cutbacks**

READERS of *Good Housekeeping* would traditionally find it in the women's section at WH Smith, but these days it's as likely to be sitting alongside the business journals. Penny-pinching frugality is de rigueur as recession-clobbered companies struggle to shave costs.

### **Doing the math**

Redundancies are an obvious option, but downsides include loss of valuable skills and experience and damage to staff morale. What's more, axing jobs is itself pricey – £16,375 per employee, according to a complex mathematical formula devised by the Chartered Institute of Personnel and Development. (We'd explain, but the dog ate our homework...)

As a result, employers have been thinking laterally and broaching alternatives such as short-time working, pay reductions and unpaid leave. Telecoms giant BT, for instance, has offered staff various possibilities, including up-front payments in return for taking sabbaticals or agreeing to go part-time.

British Airways even had the chutzpah to ask its employees to work for free. Pay packets were so 2008, as Bruno might say... The policy wasn't in fact as radical as it first appeared. Unpaid work was one of a range of options and salary deductions were spread over a period of months - presumably to comply with BA's national minimum wage obligations.

### **Changing times**

Consideration of redundancy alternatives invariably warrants expert advice on the relevant legal obligations and pitfalls. We would say that, wouldn't we?

When ushering in part-time or short-time working, for example, the devil's in the detail. Issues such as impact on benefits and entitlement to return to 'normal' working should be carefully addressed.

Most vital to take on board is that economy measures will often entail the temporary or permanent variation of employees' contractual terms. Whilst introducing such changes with clear, individual consent is fine, imposing them unilaterally is fraught with potential liabilities.

In particular, if 20 or more employees are affected, the legal duty to consult collectively with worker representatives could be triggered. Failure to comply can lead to a tribunal award of 90 days' pay per employee.

So much for trimming costs!

# Blackballing blacklisting

IN our modern age of touchy-feely industrial relations, surely there can't still be shady organisations keeping tabs on 'subversives' and 'bolshie troublemakers'? It sounds like a relic of the cold war era or a forgotten scene from *I'm All Right Jack*.

## Construction slights

Don't you believe it. Earlier this year, an investigation by the Information Commissioner's Office uncovered a hush-hush database used to vet building workers for employment. Operated by the innocuously named Consulting Association, it listed over 3,200 individuals who were active trade union members or otherwise vocal on issues such as health and safety in the industry.

The owner of the firm has been successfully prosecuted for myriad breaches of the Data Protection Act. We'll spare the blushes of the major construction firms – over 40 of them – that subscribed to the database. Some of them are now likely to face legal action themselves.

The saga has had salutary effect on the Government, which is now bringing in a law to prevent trade unionists being denied employment through covert blacklists. The regulations will operate alongside the Commissioner's data protection enforcement powers.

## 'Shopping' lists

But note that only blacklisting of workers for their union membership or activities will be outlawed. Other types of controversial employment databases can continue to operate, so long as they comply with data laws. The National Staff Dismissal Register, for example, informs its member companies about individuals who've been dismissed or resigned while under investigation for dishonesty.

The register is said to be struggling to persuade employers to sign up - suggesting that many consider the benefits of using it to be outweighed by the negative press they might attract by doing so.

Is this a legitimate way for employers to avoid hiring potential blackguards? Or a potentially unjust blight on innocent workers' livelihoods? We'll leave you to decide.

Let's just say it's not a black and white issue...

*The blacklisting of trade unionists: consultation on revised draft regulations*, Department for Business Innovation & Skills, July 2009

## Windfall warfare

SAY you received your payslip one day and noticed that out of the blue your salary had been doubled. Tempting as it would be to keep schtum, surely most of us would put our hands up and query the figure?

But just look what happened in the following eyebrow-raising – nay, buttock-clenching – tribunal case...

### **Well if you insist...**

Natasha Keenan was paid £9,520 a year as a part-time complaints adviser with the Woolwich Building Society, but was promised a 'significant' pay increase when the business was taken over by Barclays in 2006. She must have been chuffed, to put it mildly, when new particulars of employment from Barclays a few months later gave her annual salary as £17,000.

You've probably guessed that the pay rise was a monumental cock-up. It was based on full-time employment and should have been calculated pro rata for the 19 hours a week Natasha worked. Worse still, the bank didn't pick up the discrepancy for over two years – not even when it approved a staff mortgage application in which Natasha stated her salary.

Frantically backtracking, Barclays demanded that Natasha repay the overpayment and insisted her salary would have to be chopped back to the pro rata amount. The dispute couldn't be resolved and ended up in court.

### **No mistake about it**

Barclays argued that higher salary term should be declared void under the crusty legal doctrine of 'mistake'. But the tribunal judge was convinced Natasha was an honest woman who simply couldn't have been expected to realise her bosses' oversight. She was legally entitled to stay on her current salary keep the full amount of her past wages.

The case is a salutary reminder, if you needed one, of the importance of avoiding major misunderstandings over employees' terms and conditions. On the other hand, take comfort from the fact that the law is normally quite accommodating for employers seeking to claw back overpayments from unjustly enriched staff.

Just don't bank too heavily on it...

## **Veterans' day cometh**

TOM Watson's remarkable performance at the British Golf Open was inspirational - not just for greying sports stars but for anyone determined to continue hacking away at their career despite advancing years.

There is, of course, a major handicap for many such people – the law. The 'default retirement age' (DRA) under the Employment Equality (Age) Regulations makes it par for the course for employers to force employees to retire when they reach 65. Rough stuff...

### **Slice of fortune**

But what's this? Eagle-eyed readers may have spotted the Government flagging up a switch of course. The Age Regulations specified a review of the DRA in 2011, but this has been brought forward 12 months on account of a 'change in economic circumstances' since its introduction.

There's a fairway yet to go, but ministers have teed off by dropping some heavy hints about wedge way they'll go. The DRA will at least be raised or more likely abolished – which would mean employers being required to justify enforcing a fixed retirement age. The consultation runs until October, so feel free to pitch in with comments.

The Confederation of British Industry, adopting a bunker mentality, called the move 'disappointing' and said there was 'no workable alternative' to the DRA. But there are powerful drivers behind the decision. Increased life expectancy, lower birth rates and declining pension pots all point towards declaring mandatory retirement out of bounds.

### **Open questions**

Meanwhile, a little birdie has told us that the High Court's ruling on Age Concern's long-running challenge to the DRA – the so-called 'Heyday case' - is due this autumn. That could force the Government's hand in any event.

And here's another important Ryder: we're going to have a General Election before too long (oh joy). Compulsory retirement isn't a bread-and-putter issue and it's far from clear what spin the Conservatives might put on it.

The upshot is we can't predict what'll happen yet. At least not caddy-gorically...

# Discrimination doublethink

STAYING with age discrimination, fans of *Strictly Come Dancing* will be aware of the furore surrounding the BBC's decision to replace 66-year-old judge Arlene Phillips with the 30-year old singer Alesha Dixon for the next series.

## Refresh meant?

Denying ageism, the BBC claimed it was simply refreshing the *Strictly* brand. Hmm... interesting none of the three male judges has been 'refreshed'. The BBC also pointed out there were other older women on TV such as, er, 60-year-old Anne Robinson.

The weakest link in the Beeb's argument is the spate of recent allegations about female TV presenters being 'pushed out' once they reach a certain age – newsreaders Anna Ford, Moira Stewart and Selina Scott to name but three.

In addition, there has been fresh speculation about the oldest female *Strictly* dancer, Karen Hardy, 39, being told to foxtrot off in favour of two dancers in their twenties.

Whether or not true, such stories suggest a significant link between sex and age discrimination. With impeccable timing, the Government is cha-cha-changing the law by adding a 'dual discrimination' clause to the Equality Bill currently before Parliament.

## It takes two...

The idea is to protect those who suffer direct discrimination because of a combination of two protected characteristics. Whereas the current law can be problematic if the threshold for (say) sex discrimination or, separately, age discrimination is not met, the new provision would remove the need to attribute all acts to one ground or the other.

Another example given by the Government is that of a Muslim man treated less favourably by being stereotyped as a potential terrorist. Dual discrimination would allow him to show that the reason for the treatment was the specific combination of his gender and his religion or belief.

All well and good in deserving cases. But there have been dire warnings of the reform increasing tribunals' caseload by 10% at least, clogging up an already overflowing system.

So let's hope the new provision is interpreted quite *Strictly*. Otherwise, employers may not know waltz hit 'em...

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