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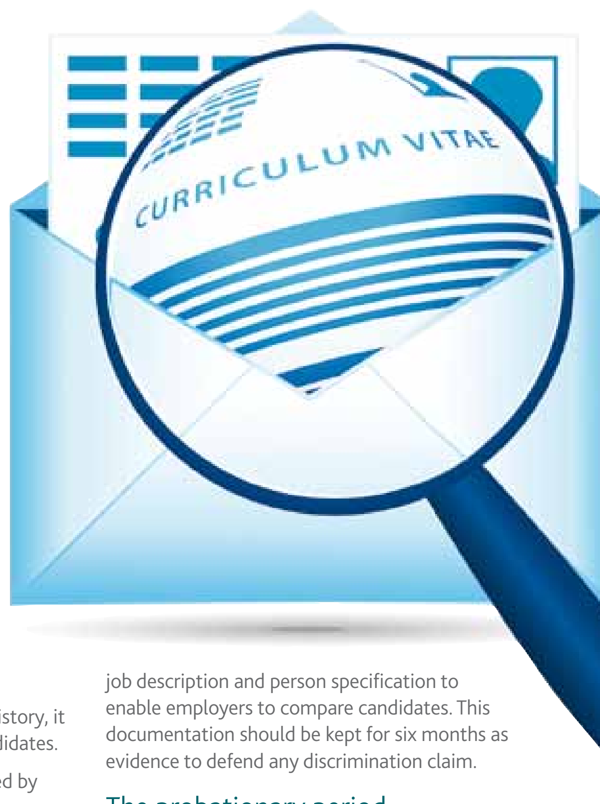
Recruiting right

More and more employers are recognising the importance of using a thorough and rigorous recruitment procedure which will enable companies to ensure a “right fit” solution when filling vacancies, while avoiding the problems caused by employing unsuitable candidates. The following guidance is aimed at assisting employers in achieving this.



Job description and person specification

The first step is for employers to prepare a job description and person specification for the vacancy which ensure the role is accurately defined and the appropriate type of candidate is identified. These should outline the key functions and responsibilities of the role for potential applicants and clarify the essential skills required for the role. When preparing these documents, it is necessary to consider the main duties, the skills, aptitude and level of knowledge and experience required for the job, and any essential personal criteria, bearing in mind any possible unlawful discrimination.

CV or application form?

Application forms enable the same information on each candidate to be compared easily. By asking for evidence of competencies, rather than just employment history, it can assist in identifying the most suitable candidates.

Employers need to verify information presented by the candidate in order to avoid recruiting on the basis of false information. Pre-employment checks are therefore critical, such as using conditional offers subject to satisfactory references and requirements to provide documentary evidence of qualification prior to commencement.

Planning for the interview

Preparation is essential to optimise the interview process. CVs and application forms should be reviewed and interview questions formulated to identify that skills and experience match and explain or clarify any gaps. This can be used in conjunction with a structured method of selection based on the job description and person specification to enable employers to compare candidates. This documentation should be kept for six months as evidence to defend any discrimination claim.

The probationary period

A common pitfall is being uncertain whether someone is right for the job, but taking the person on anyway for a probationary period. However, if the employee is not a suitable fit, this can be both disruptive for the business and expensive in terms of rerecruitment and retraining. It is best to aim to find the right person for the job from the start.

Interview issues for employers in Northern Ireland

Employers in Northern Ireland must comply with the fair employment legislation. Vacancies must be advertised in a way so that both Catholic and Protestant communities have fair access. Furthermore, all internal vacancies should be advertised too rather than promoting internally. Application forms rather than CVs should be used to demonstrate fairness of selection. The application form will need to be accompanied by a separate statement of community affiliation which has to be kept separate from the interview process and must be retained for annual monitoring requirements.

The interview will need to follow a standard format for all candidates. Where practicable, it should be carried out by two members of staff representing the two communities. An assessment form will need to be completed on each candidate so that the employer can demonstrate that the successful candidate was selected, based on the requirements laid down by the job description and person specification. This documentation should be retained for 12 months in case of a complaint.

What about pre-employment health checks?

While the information gathered from pre-employment health checks can be useful for employers, it is vital that the information gathered is used appropriately and in a non-discriminatory way. For example, it would be unwise for an employer to refuse to list an applicant for an interview simply on the basis of answers to a pre-employment health questionnaire, which indicate that the candidate had a potential disability. This could result in a claim for disability discrimination.

Employers should also be aware that under the provisions of the Equality Act 2010, which is due to come into force on 1 October 2010, restrictions will be imposed on questions that can be asked during the selection process. However, employers will be permitted to ask such questions so as to determine whether a candidate can comply with the requirements of the selection process, to decide whether reasonable adjustments are required for interview, whether the candidate is able to carry out a function intrinsic to the role applied for, to monitor diversity, to take positive action, or in relation to the genuine occupational requirement provisions. If they fail to comply with these provisions, they may face legal action by The Equality and Human Rights Commission, as well as a potentially very expensive discrimination claim.

In this issue: Challenging convictions · Expert view · Event diary · Controlling contractors · Case law update · Ask an expert

Challenging convictions

Employers face difficult decisions when an employee is arrested on suspicion or charged with a serious criminal offence that is unconnected with work. Furthermore, more serious disruption can occur if the employee is then convicted. So how should employers deal with such situations?

Employers should avoid treating criminal charges or convictions that occur outside the course of a person's employment as an automatic reason for dismissal. The employer must consider whether or not the offence is one that has a direct effect on the employee's employment. Employers will then need to decide, having considered all of the facts of the matter, whether or not it is reasonable to instigate the disciplinary procedure. This should not be done as a knee-jerk reaction to an employee being arrested or even remanded in custody.

What if an employee is remanded in custody?

In these circumstances, an employer must consider, in accordance with the needs of the business, whether or not the employee's position can be kept open. In order to make this decision, the employer should try to obtain information as to how long the employee is likely to be remanded in custody.

Disciplinary action

If the crime does affect the employee's employment — for example, a driver charged with dangerous driving or an accountant charged with fraudulently obtaining monies — employers may consider taking disciplinary action. It is imperative that before any action is taken, the employer conducts a thorough investigation to ascertain all of the facts. Where the conduct needs prompt attention, the employer should not wait for the outcome of the criminal trial.

Other reasons for dismissal

Where the crime is unconnected with employment, the only issue to be dealt with is where the employee is remanded in custody. In such circumstances, where it is impossible to keep the position open, it may be advisable to follow a fair procedure and terminate the employee's employment for some other substantial business reason, ie that the employee is unable to attend work, rather than going down the disciplinary route.

It may be possible to argue that the contract of employment has been frustrated, ie that due to the employee's incarceration continued performance of the contract is impossible. At first glance, this can appear to be the answer to the employer's dilemma, as if a contract is frustrated in law it automatically comes to an end.

However, frustration of contract is a common law doctrine not an employment law based approach and stems from a complex principle that can be difficult to rely on. If there is a different way to end the relationship, ie a dismissal, it is advisable that employers who find themselves in these circumstances follow one of the other routes outlined above in order to effect a potentially safe and fair dismissal from an employment law perspective.

Latest stress statistics from the HSE

The Health and Safety Executive (HSE) has recently highlighted its latest statistics on stress at work. The HSE wants to emphasise that stress is a major issue in workplaces and is directing health and safety professionals to examine its statistics on the issue, in order to ascertain the magnitude of the problem in the UK.

Some of the key points about stress in the UK are as follows.

- In 2008/09, an estimated 415,000 individuals in Britain who worked in the previous year believed that they were experiencing work-related stress at a level that was making them ill.
- Around 16.7% of all working individuals thought their job was very or extremely stressful.
- The annual incidence of work-related mental health problems in Britain in 2008 was approximately 5126 new cases per year. However, the HSE says: "This almost certainly underestimates the true incidence of these conditions in the British workforce."
- Data from general practitioners indicates that 30.9% of all diagnoses of work-related ill health are cases of mental ill health, with an average length of sickness absence per certified case of 26.8 working days.
- Occupation groups with the highest levels of self-reported work-related stress are teachers, nurses, and housing and welfare officers, customer service workers, and certain professional and managerial groups.
- People working within public administration and defence also have high prevalence rates of self-reported work-related stress.
- Other groups with high incidence rates of work-related mental illness include medical practitioners and those in public sector security-based occupations, such as police officers, prison officers, and UK armed forces personnel.

The HSE is urging health and safety professionals to manage and prevent work-related stress. Further information on stress at work can be accessed at *www.hse.gov.uk/stress/index.htm*.

Expert View

Industrial action: injunctions and other remedies

A number of subscribers have enquired further about the remedies available to employers when faced with impending strike action. This month's article sets out such remedies in question and answer form.

Lawful industrial action

It is unlawful under common law to induce people to break a contract or to interfere with the performance of a contract. When an employee or worker takes industrial action, he or she will usually be in breach of his or her contract of employment or contract for services. If a trade union calls for, threatens to call for or otherwise organises industrial action, it is, in practice, calling for the breach, or interference with the performance, of employment contracts. It may also be interfering with the ability of the employer of those taking the industrial action, and of other employers, to fulfil commercial contracts.

Statute, however, expressly gives trade unions immunity from legal action under civil law if, "acting in contemplation or furtherance of a trade dispute" they meet certain statutory conditions when organising industrial action — particularly in complying with the statutory balloting and notice requirements (see the article in the June issue of *Solutions*).

What happens if a trade union does not have this statutory immunity?

Where a union or individual fails to meet any or all of these statutory conditions, any resulting industrial action will not be covered by the statutory immunity. As a result, employers and others who suffer damage — or are likely to suffer damage — by the action may take civil proceedings in the courts against the union and/or individual organising the industrial action.

What remedies are available to the employer?

The remedies include: (interim) injunctions in the civil court; the withholding of pay; and the dismissal of employees who have taken part in the industrial action. These are considered below.

Injunctions

The party to the contract broken by a potential strike or threat to strike may apply to the courts for an interim injunction, pending a full hearing of the case. The trade union or individual against whom the injunction is sought has the right to state their case in court.

Failure to obey an injunction can lead to a finding of contempt of court and a consequent heavy fine, which could culminate in the sequestration of the union's funds.

Withholding the pay of striking employees

The right to receive pay is dependent on the employee being ready and willing to work. Where employees and workers take strike action they are in breach of contract and usually lose their right to pay for the hours they did not work.

The situation is more complex where workers take action short of an all-out strike, eg refusing to carry out particular duties. The employer can choose whether or not to accept partial performance; if the employer does so accept, then it cannot refuse to pay that part of the job carried out by the employee.

Dismissal for taking industrial action

The situation can be summarised as follows:

- The dismissal of any striking employee during the first 12 weeks of lawfully organised official industrial action — the "protected period" — will be deemed unfair if the reason for the dismissal is because the employee took industrial action.
- The dismissal will also be unfair if the employee is dismissed after the protected period, but had stopped taking part in the industrial action before the end of the period or the employer had failed to take reasonable steps to resolve the dispute.
- Unfair dismissal claims may also be brought if the employer discriminates between employees by dismissing some of those taking part in the action, but not others, and offering re-engagement selectively to some employees but not others within three months of the dismissal.
- A dismissal can be fair after the protected period if the employer can show that it made genuine attempts to negotiate a settlement with the trade union and has not unreasonably refused requests for third-party conciliation or mediation. This must include the proper use of any joint disputes resolution procedure.
- An employee dismissed while taking part in unofficial action cannot generally claim unfair dismissal, unless he or she can show that the employer dismissed him or her for another reason (eg family reasons, health and safety, or whistleblowing).

Note that, where employees have been dismissed unfairly, any such dismissal will be deemed automatically unfair, with no qualifying service required in order to bring the claim.

What about after the industrial action?

During the three months following dismissal, an employer cannot selectively re-engage some employees and not others. However, after this three-month period, the employer can offer to re-engage any of the employees dismissed, provided that the same terms are offered to all.

As reported in the July issue, employers have sought, often successfully, to prevent industrial action by challenging technical breaches of the statutory conditions. The whole issue is now to go before the European Court of Human Rights to determine whether the statutory balloting and notice provisions are incompatible with the right to freedom of expression and association.

Top business issues

Every month we bring you the top issues from callers to our telephone advice lines. These were the top issues in July.

Tax & VAT	Employment	Legal	Health & Safety
1. Capital Gains Tax — strategies for realising a gain in light of potential changes to rate of capital gains tax.	1. Conduct.	1. Contract.	1. Accident recording and reporting.
2. Changes to "place of supply" rules for VAT purposes.	2. Absence/sickness.	2. Company.	2. Risk assessment.
3. HMRC information powers and years outside the enquiry window.	3. Disciplinary procedures.	3. Property and leases.	3. Legislation.

Event diary

Legislation timetable

For more information or to book please contact:

Employment on
01455 897193

or Health & Safety on
01455 897192

Fax: **01455 897026**

All our courses can be designed to meet your specific requirements and are available on an in-house basis.

Event diary — Open Course Schedule 2010

Health & Safety

Course title	Duration	Date	Location
Health & Safety in the Workplace Level 2	2 days	14–15 September	York Pavillion
Manual Handling Training for the Trainer	2 days	21–22 September	Holiday Inn, Reading
Health & Safety in the Workplace Level 2	2 days	28–29 September	Mercure London City Bankside
CIEH Food Safety Level 2	1 day	6 October	Croner Consulting, Hinckley, Leicestershire
Manual Handling Training for the Trainer	1 day	7 October	Beechlawn Hotel Belfast
Health & Safety in the Workplace Level 2	2 days	12–13 October	Felbridge Hotel & Spa, East Grinstead

Employment

Course title	Duration	Date	Location
Managing Investigations	1 day	3 August	Ramada Swansea
Performance Apraisal	1 day	12 August	Croner Consulting, Hinckley, Leicestershire
Dealing With Discipline	1 day	19 August	The Russell Hotel, Maidstone
Postitive Absence Management	1 day	2 September	Bedford Lodge Hotel, Newmarket
Essential Employment Law	1 day	9 September	Holiday Inn, Leeds Garforth
Essential Employment Law	1 day	14 September	Aztec Hotel & Spa, Bristol

IOSH Managing Safely Croner Consulting also offer 4-day IOSH Managing Safely courses. 23–26 August 2010 at Felbridge Hotel and Spa, East Grinstead. 18–21 October 2010 at Croner Consulting at Hinckley. The 4-day course costs £600.00 plus VAT, and fills up quickly, so please book soon to ensure your place! **For further details on this IOSH course, please contact Emma Newman on Tel: 01455 897192**.

Legislation timetable

Area	Legislation	Details	Date
Discrimination	Equality Act 2010	The aim of the Act is to consolidate existing discrimination law, introduce positive action on recruitment for under-represented groups; make it unlawful to prevent employees from discussing their pay; extend discrimination by association to all aspects of discrimination; prohibit employers asking questions to job applicants about their health; enable the Secretary of State to order employers with 250 or more employees to publish information on pay (subject to further consultation and not to come into force before 2013); introduce wider powers for employment tribunals to make recommendations in discrimination claims; create a single equality duty on public sector employers to include duties in relation to gender reassignment, age, sexual orientation and religion or belief; and extend age discrimination law to the provision of goods and services.	The majority of provisions are expected to come into force in October 2010
Additional Paternity Leave	The Additional Paternity Leave Regulations 2010	Additional Paternity Leave will be available for fathers at 20 weeks after the birth of the child for a maximum of 26 weeks, if the mother returns to work. The remainder of the mother's statutory maternity pay will be paid to the father.	The Regulations will benefit parents of babies due on or after 3 April 2011 or children matched for adoption on or after 3 April 2011
Agency Workers	Agency Workers Regulations 2010	Temporary agency workers will be entitled to equal treatment after 12 calendar weeks in the same job, but this will not apply to occupational pension schemes or occupational sick pay.	1 October 2011
Pensions	Pensions Act 2008	The Government is proposing to provide access to a private pension to all employees aged between 22 and state retirement age, who are earning more than £5000 a year and are not currently enrolled in a workplace pension scheme.	2012
National Minimum Wage	The National Minimum Wage Regulations 1999 (Amendment) Regulations 2010	The new rates of the National Minimum Wage, which will come into force on 1 October 2010, will be: £5.93 per hour for low paid workers aged 21 and over; £4.92 per hour for 18 to 20-year-olds; and £3.64 per hour for 16- and 17-year-olds. Until October 2010, the adult rate applies from a worker's 22nd birthday. After October 2010, the adult rate applies from a worker's 21st birthday. An apprentice minimum wage of £2.50 per hour will also be introduced. The new rate will apply to those apprentices who are under 19 or those that are aged 19 and over but in the first year of their apprenticeship. The accommodation offset will rise from £4.51 to £4.61 per day.	1 October 2010

Controlling contractors

Contractors can be engaged to perform many activities. This could include relatively simple tasks, such as building maintenance and maintenance of office machinery. It also includes more hazardous work, eg entering into confined spaces, window cleaning or maintenance of electrical systems.

The use of contracting by organisations has greatly increased in recent years, allowing businesses to concentrate on their core activities. Accidents — and subsequent criminal prosecutions — have led to a plethora of case law, as well as huge sums having to be paid out in fines and compensation. Consequently, there is a strong need to manage the risks of contracting.

The law

Employers are required, as far as is reasonably practicable, to:

- ensure the health, safety and welfare of their employees (including protecting them from contractors' activities)
- provide and maintain systems of work that are safe and without risks to health
- provide adequate instruction and training (this duty has been extended to non-employees, ie contractors, by case law)
- carry out their activities in such a way as not to harm the health and safety of those not in their employment
- ensure the health and safety of persons other than their employees, including contractors.

The Management of Health and Safety at Work Regulations 1999 require employers to:

- carry out an assessment of the risks to the health and safety of their own employees and persons not in their employment, ie contractors, that might arise as a result of their (the employer's) work activities
- ensure co-operation with other employers, who have employees working in the same premises, on health and safety arrangements
- supply any necessary health and safety information to the employers of any visiting employees
- inform any such employees of any qualifications or skills necessary for them to carry out their work safely
- inform contractors of any health surveillance arrangements
- inform any employment agency of any qualifications or skills necessary for that employment agency's staff to carry out their work safely, and of any specific health and safety features of the work to be carried out
- be reasonably satisfied that any contractor assigned to construction work is competent to carry out the job.

The Construction (Design and Management) Regulations 2007 require that no persons — which includes employers — shall arrange for a contractor to carry out construction work unless they are reasonably satisfied that they are competent to carry out the work.

The organisation's responsibilities

It is necessary to be clear about any work being undertaken for an organisation and the status of the workers doing it. Depending on circumstances, the work may or may not be contract work, or the workers either contract employees or employees of the client/host organisation.

Many organisations contract out certain aspects of work, either on a short-term basis (eg to undertake modifications or repairs) or for a longer period (such as the outsourcing of maintenance, catering or security).

It is important for an organisation to be aware of its responsibilities with regard to contract work. The organisation's policy and arrangements for contract work can take the form of a policy statement. The policy should include elements such as:

- a clear definition of roles within the organisation, including personnel responsible for contract work
- other arrangements, including:
  - ~ procedures for assessing contractors
  - ~ safety rules and procedures
  - ~ equipment requirements
  - ~ co-ordination of each contract
  - ~ reporting of problems or safety issues
  - ~ arrangements for meeting requirements under the CDM 2007.

The Health and Safety Executive has published guidance on the responsibilities of all parties when working with contractors in *INDG368 Use of Contractors*.

Roofing firm in court after apprentice plunge

A Carmarthenshire roofing company has been prosecuted after a teenage worker fell three metres through a fragile roof, breaking his arm.

On 7 October 2009, the company had been hired to replace a roof at a single-storey cottage at Derwydd Mansion, Ffairfach, Carmarthenshire. An 18-year-old apprentice from Llanybydder was removing the ridge from a metal sheet roof when a sheet he was standing on buckled, causing him to fall to the ground below.

His employer, a specialist roofing company based in Maes yr Hendre, Cwmann, was prosecuted by the Health and Safety Executive (HSE) after the incident and the firm pleaded guilty to a breach of regulation 4 of the Work at Height Regulations 2005.

The HSE's investigation revealed that there had been no specific risk assessment carried out for the job, and there was nothing to break a fall placed beneath the roof as it was being removed. The apprentice also had no training in using roof ladders, and his supervisor had no health and safety training.

The roofing company was fined £2000 and ordered to pay £1500 in costs.

According to the HSE, nearly a quarter of those killed in falls from height are roofers.

Case law update

BP plc v Elstone and another

Mr Elstone had a long career in operational management in the petrochemical industry. He had worked for BP for 25 years and then moved to work for Petrotechnics Ltd, where his role was to evaluate and oversee safety processes for BP. While he worked there, he made a number of disclosures to two senior BP employees about his concerns in respect of safety issues. He was dismissed on the basis of these disclosures by Petrotechnics who considered this to be confidential information and his actions, therefore, to be gross misconduct. Mr Elstone took up an appointment with BP as a consultant three days later but was later told that BP was no longer prepared to engage him when it became aware of his dismissal for disclosure of confidential information.

Mr Elstone brought a claim against BP for subjecting him to an unlawful detriment for making a protected disclosure.

The employment tribunal held that to be covered by the protection of the statute, the claimant needed to be in employment at the date of the relevant disclosure and that the employer did not need to be one and same at both the times of disclosure and detriment.

BP appealed and Mr Elstone cross-appealed against the decision that a disclosure must be made by a worker to be protected. At the Employment Appeal Tribunal (EAT), the employment tribunal decision was upheld.

The legislation identified a "worker" and not a "person" as the individual making a qualifying disclosure and, therefore, the employment tribunal had correctly found Mr Elstone to be protected by the legislation.

In addition, the EAT upheld the tribunal's decision that there was no restriction in the legislation which meant that the worker must be in the employ of the employer that subjects him or her to the detriment when he or she makes the disclosure. The EAT's construction of the statute was that no such restriction should be implied and the key element was to ensure that whistle-blowers were afforded protection from later retribution by an employer. The important aspect of this was considered to be the protection, rather than the identity of the employer.

Ask an expert

Each month, one of our employment experts will be answering a question in this section. If you have an employment question that you would like our experts to answer, please e-mail it to **croner@wolterskluwer.co.uk**

Q: A number of our employees are over the age of 65. One of these employees has requested to continue working beyond 65 indefinitely.

Under current legislation, there is no requirement to provide a reason for retirement, but she has already stated that "she will take us all the way" if we insist on her retiring. If she does take us to tribunal, will it be our responsibility to prove that the termination of employment was retirement, and not related to her conduct or performance, to defend a claim that the dismissal is automatically unfair?

A: The duty to consider procedure, as introduced by the Employment Equality (Age) Regulations 2006, obliges an employer, when a valid request to continue working is received, to hold a meeting with the employee "within a reasonable period" to discuss the possibility of continued working, provide a decision as soon as is reasonably practicable after the meeting and allow a right of appeal against any refusal.

Should an employer fail to follow the above procedure, then the employee's dismissal on grounds of retirement will be automatically unfair. The burden of proof in these circumstances is on the employer to convince the tribunal that the reason for the employee's dismissal was, in fact, retirement and not a pretext for some other reason. However, so long as the duty to consider procedure has been followed in full, including any appeal process, the employee will be unable to bring a claim for unfair dismissal at an employment tribunal.

In this case, I would recommend that you follow the full duty to consider procedure to retire this employee, and to prevent her from having the opportunity to bring a claim in the employment tribunal.

You do not need to give reasons for retiring the employee, as there is no requirement for you to do so in law. However, you should make sure that the employee cannot point to a discriminatory factor (other than age discrimination) behind her retirement, as this could give rise to a claim if she were to argue that this was the real reason for the dismissal.

Contact us

If you have any questions about the topics covered in Solutions please call 0800 634 1700, or e-mail croner@wolterskluwer.co.uk

Alternatively, call the number on your advice line card to speak to a consultant, or if you are not currently a client, call 0800 634 1700 for further information on how Croner can help your business.

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