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Regards

Nigel

## In this month's issue we look at:

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**EVADING THE QUESTION** The law says that tribunals can draw inferences from evasive answers given in discrimination questionnaires, but the appeal tribunal has just held that answers that are less than complete are not necessarily "evasive or equivocal". [[more...](#)]

**NEGLIGENT STATEMENT** We look at a case in which the court said that employers may have to pay damages to employees if they make negligent statements about them to a former employer. [[more...](#)]

**IN BRIEF** The government has announced that it will retain the right to request time off for training to employees in large organisations. [[more...](#)]

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## REDUNDANCY

The law defines the circumstances in which there is a genuine redundancy situation, but if employers don't apply it correctly, they may end up facing unfair dismissal claims from affected employees. This update provides a brief overview of existing law, giving employers an outline of their obligations.

### What is a redundancy?

There is only a redundancy if an employee is dismissed because the business as a whole, or the particular workplace where the employee worked, has closed down. Likewise if there has been a reduction in the size of the workforce needed to do work of a particular kind. A collective redundancy situation arises when an employer proposes to make 20 or more employees redundant at one "establishment" within a 90-day period.

### Can a redundant employee claim unfair dismissal?

As redundancy is one of the potentially fair reasons for dismissal, an employee who has been made redundant can only win an unfair dismissal claim if they can establish one or more of the following:

- There was no genuine redundancy situation
- They were selected for an unlawful reason
- The selection procedure was either unfair or was applied unfairly
- The employer did not properly consult
- The employer failed to consider suitable alternative work or did not allow the employee enough information to enable them to decide whether to take an alternative job offered
- The employer acted unreasonably in some other way

### Who do employers have to consult and when?

Employers have to consult appropriate representatives of employees who are likely to be made redundant. If they recognise a trade union, then they must talk to an official of that union. If not, then they have to either talk to other existing representatives or offer employees the chance to elect their own.

However, the Employment Appeal Tribunal (EAT) said recently in **Phillips v Xtera Communications Ltd** that employers don't have to hold a ballot to elect reps if the number of employee nominees matches the number of representatives needed.

Employers have to start consulting their employees "in good time" but if they are proposing to dismiss 100 or more employees, they have to start at least 90 days before the first of the dismissals takes effect. If between 20 and 99, then at least 30 days before the first dismissal takes effect. They must complete the consultation process before they issue any redundancy notices. Where an employer fails to comply with these consultation and/or election requirements, a tribunal can make a Protective Award of up to 90 day's pay for each affected employee.

In addition to consulting collectively, employers should also consult with individual employees. Employers with over 50 employees also have to take into account the Information and Consultation Regulations 2004.

If 20 or more employees are to be made redundant, the employer must also give the

Department for Business, Enterprise & Regulatory Reform (BERR) written notification of the redundancies at least 30 days before the first dismissal takes place and give copies of the notice to the representatives. Failure to notify is a criminal offence.

### **Who can claim redundancy pay?**

Under the Employment Rights Act, an employee (including those working on fixed-term contracts of at least two years) can only claim redundancy pay if they have been employed for two years or more.

For each full year of continuous employment, up to a maximum of 20, an employee is entitled to the following:

- up to age 21 - half a week's pay per year of service
- from age 22 to 40 - one week's pay per year of service
- age 41 and over - one and a half weeks' pay per year of service

There is a limit to the basic weekly pay which can be claimed (currently £400) and which is updated every year. The maximum redundancy payment that can be awarded is currently £12,000 and is also updated every year.

Employers may, of course, offer a more generous package under the terms of the contract.

### **Are employers obliged to find suitable alternative employment?**

If the employer fails to take reasonable steps to find alternative employment (similar status and pay) for an employee, the dismissal may be unfair.

If an employee accepts further employment with their employer and the terms do not differ from the old employment, then there is no dismissal. But if the terms are different, employees are entitled to a statutory trial period of at least four weeks in the new job. If an employer denies someone the right to the statutory trial period, the employee can bring a claim of unfair dismissal as well as redundancy.

An employee who has received notice of dismissal has the right to ask their employer for paid time off during working hours either to look for new employment, or to make arrangements for training for future employment. The amount of time off should amount to no more than a couple of days (or what is reasonable in the circumstances).

### **Can an employer dismiss a woman who is pregnant?**

It is automatically unfair to select a woman for redundancy because she is pregnant, has given birth or taken maternity leave. Any woman made redundant during her maternity leave is entitled to be offered suitable, alternative work.

However, in **Eversheds v De Belin**, the EAT said that any special treatment offered to women in connection with pregnancy or childbirth must be proportionate.

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## EVADING THE QUESTION

The law says that tribunals can draw inferences from evasive answers given by respondents in questionnaires when defending claims of discrimination. In **Deer v Walford and the University of Oxford**, the EAT said that even if the answers are less than complete, it does not necessarily follow that they should be characterised as “evasive or equivocal”.

### What happened?

Ms Deer, an academic, decided in December 2008 to apply for a junior research fellowship and asked her former D.Phil supervisor, Professor Walford, for a reference. He initially agreed but, having read the criteria for the application, he said there was no point as she didn't have a chance.

She was very upset and decided that the real reason for his refusal was because he knew about an earlier sex discrimination claim she had made against the university in 2007.

In February 2009 she served a sex discrimination questionnaire on him. He stated, among other things, that he had very little knowledge of her 2007 complaint (although it had had widespread media coverage), except that it had some link to the university. He also said that he supplied very few references every year, that he had refused references in the past if he felt he could not support them and that he did not keep copies of them.

Ms Deer argued that the tribunal should infer from the hostile tone of his refusal to supply a reference that Professor Walford knew more about her previous claim than he admitted. She also claimed that his refusal to provide evidence of previous refusals was evasive.

The tribunal, however, did not agree. It said that the reason Professor Walford refused the reference was “transparently genuine” and nothing to do with the fact that Ms Deer had taken proceedings against the university. It held that a hypothetical comparator who had made a similar request for a reference in support of a fellowship and who had had little contact with their professor for eight years but had not brought a claim against the university, would have been treated the same way.

The EAT agreed. It said that, far from being evasive, Professor Walford's answers were “clear, straightforward and indeed unsurprising”. But even if they had been “less full than they should have been”, it did not necessarily follow that they should be characterised as “evasive or equivocal.”

It said that the process to decide what, if any, inference should be drawn in the case of an evasive or equivocal answer was no different from any other case involving an inference of discriminatory behaviour.

“The question is always whether, in the circumstances of the particular case, the act or omission in question tends to show that the respondent acted in the way complained of – typically that he [sic] acted with a discriminatory motivation”.

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## NEGLIGENT STATEMENT

Common law (made by judges) says that employers owe employees a duty of care when writing references. The High Court has now said in **McKie v Swindon College** that employers may also have to pay damages to employees if they make negligent statements about them to a former employer.

### What happened?

When he left Swindon College in 2002 to go to Bath College, Mr McKie received a glowing reference. In 2007 he went to Bristol City College to work, but in May 2008 was offered and accepted a post at the University of Bath which oversees degree courses at some further education colleges, including Swindon.

In June 2008, the human resources manager at Swindon College e-mailed the university, saying that because of serious safeguarding and staff relationship problems during his time there in the past, he could not let Mr McKie onto the premises or allow him access to students.

The reason that the college had not taken any formal action against him at the time, he said, was because Mr McKie had left before the allegations could be investigated. He added that he understood that similar issues had arisen at Bath College. The university invited Mr McKie to a meeting at which he was summarily dismissed. He claimed that the college owed him a duty of care for negligent misstatement.

Mr McKie was able to provide substantial witness evidence to show that the contents of the email had no foundation. The judge agreed with him, saying that the evidence used by the college provided no justification for the email, and that the procedure it adopted when sending the email failed to "comply with any sort of minimum standards of fairness".

It was blindingly obvious, said the judge, that the e-mail would have an impact on Mr McKie's employment situation. At the very least, the college should have undertaken a formal meeting, discussion and examination of his personnel record and formally recorded the processes that led to the decision, rather than "winging off an email" after talking to two members of staff, who did not even know him when he was at Swindon.

The judge strongly criticised the university's disciplinary process. Firstly, the letter inviting him to the meeting did not indicate it was a disciplinary meeting which might give rise to dismissal; and secondly, the university included a board member from Swindon college on the disciplinary panel who clearly had a conflict of interest which contradicted every rule about decision making in a quasi-judicial matter.

Although Mr McKie did not have enough service to make a claim of unfair dismissal, the court held that the college owed him a duty of care. The damage was foreseeable, the relationship was sufficiently proximate, the claim was fair, just and reasonable and there was a causal connection between the negligence in sending the email and the damage claimed by Mr McKie.

The college was therefore liable for its negligent misstatements about him.

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## IN BRIEF

Following its decision earlier this year not to extend the right to request time off for training to employees in small to medium-sized enterprises (SMEs), the government has now announced that it will retain the right for employees in large organisations.

This follows a consultation last year seeking views on whether to:

- Continue with the extension of the right as planned
- Retain the right only for large firms
- Delay the extension of the right to SMEs until the economic conditions improve
- Repeal the right in full.

The government has now published its response to the consultation and concluded from the responses received that it could not proceed with the planned extension of the right to all employees in April 2011. Equally, however, because of the strong support for the measure "in some quarters", it has decided that it should not repeal the right in full.

Given this position, the right to request for time off to train will therefore not be extended to employees of small and medium-sized organisations "for the foreseeable future". The right will continue to be available to employees in large organisations with 250 or more employees.

The government has also committed to formally evaluate the right to request time to train so that the merits of the policy can be reviewed by April 2015. This, it says, will enable an evidence based decision to be made on whether the right should then be extended to employees in SMEs in April 2015, remain as now or be repealed.

To read the response in full, go to: <http://www.bis.gov.uk/assets/biscore/further-education-skills/docs/c/11-1052-consultation-right-to-request-time-to-train-regulations-response.pdf>

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