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## Insolvency Payments

One of the impacts of an insolvent business is what the employees would be entitled to in terms of final payments. Invariably, there is no money within the business to make these payments, therefore employees dismissed as a result of a business becoming insolvent would have to make a claim to the Insolvency Services Redundancy Payments office to claim their entitlements. This service is able to make payments as follows;

- Wages up to eight weeks arrears but with a maximum calculating figure of £350 per week
- Up to six weeks Holiday Pay.
- Notice Pay
- Basic award for Unfair Dismissal
- Unpaid Pension Contributions.

In addition, HM Revenue and Customs is able to meet the cost of SSP, SMP, SPP and SAP on behalf of an insolvent employer.

A business is said to be insolvent if it is unable to meet its debts as they fall due or where the business has liabilities which exceed its assets. An individual operating as a sole trader or a partnership can be made bankrupt. Limited liability partnerships can be liquidated through a process of winding up and companies can also be put into administration. Where administration is concerned, an Administrator is appointed who is able to run the business with a view to keep operating it to obtain the highest value in respect of a possible sale of the business.

## CHANGES TO TERMS & CONDITIONS OF EMPLOYMENT

In the ongoing economic climate, unprecedented steps are being taken by employers in order to save their businesses. Cost cutting is now considered the norm and, in many cases, has resulted in redundancies across the whole spectrum of staff.

In the past, it has been unthinkable that employees would be willing to agree to a reduction in hours of work or pay. However, evidence shows that this has become a more common way of reducing costs. Reductions in pay and changes to general terms and conditions, such as benefits, may well be sufficient to keep the threat of redundancies at bay and employees will take the view that to have a job on lesser terms is better than not having a job at all. This has put the employer in a favourable position in terms of negotiations, although it is not a situation that they would have welcomed in the first place. Therefore, we need to look at how companies can approach the changing of employees' terms and conditions of employment.

In some industries, apart from a shorter working week or reduction in pay and benefits, they have closed the operation down for a set period of time. Some have also introduced an annual hours contract whereby when work picks up, employees will work longer hours to compensate for quite periods: but would be paid the same amount of wages equally over the twelve month period. How then, can an employer make alterations to terms and conditions?

If a proposal is put to the workforce and agreement is reached then there are no problems because the change can take place at an agreed point and this can be confirmed to the employees concerned. If there is a split between those agreeing to changes and those not agreeing, then the company is faced with a situation whereby they would be unwise to have part of the workforce on lesser terms and conditions. Therefore, they would have to go through a process of agreeing with the workforce that if they have a vote on the matter, then the majority carry the decision. In this scenario, the "majority" would be pre-defined.

If agreements could not be reached to take such a route, then the company would have no option but to serve the contractual notice each employee is entitled to; that the current contract will be terminated and they will be offered a new contract, with continuity of employment, on the differing terms and conditions. This is probably a last resort which would need to be justified by the situation within the business. However, if taking this route and on the date of the termination of the existing contract some employees leave then the company is open to a potential claim of unfair dismissal.

The defence, of course, would be the business situation and the need to take such action and that a proper procedure was followed. However, a tribunal would look closely at the facts of the matter and, therefore, changes to terms and conditions cannot be used as an easy way to diminish what employees currently receive. Because there are various options available to organisations when the need to reduce costs becomes an issue it is important that advice is sought on the alternatives available and the correct way of implementing those alternatives.

# Health & Safety Offences Act 2008

## Health & Safety Offences Act 2008

As of January this year, executives and managers are at greater risk of being sent to prison for up to two years for a breach of health and safety legislation. The Health and Safety Offences Act 2008 increases the number of circumstances in which employees may be imprisoned for health and safety breaches.

Employees could find themselves in prison under the new law if they fail to take reasonable care of the health and safety of others or even themselves. In addition, a director and senior manager can infringe the law where the problem was caused with their consent, connivance or negligence. The highest fine that can be imposed by the lower courts has risen from £5,000 to £20,000. Higher courts can impose unlimited fines.

Businesses can protect themselves by ensuring staff are well trained and that documentation and instructions are sent to staff so they are aware of their obligations and directors can, in some cases, protect themselves through taking out insurance policies.

There are no changes to the existing legal duties of businesses and the HSE has made it clear that its enforcement policy will target "those who cut corners, gain commercial advantage over competitors by failing to comply with health and safety law and who put workers and the public at risk." Good employers and managers have nothing to fear.

Brian Nimick, CEO of the British Safety Council says: "The changes introduced in this Act demonstrates society's increasing unwillingness to tolerate serious harm or injury to workers and promotes the legal protection of all workers".

"It highlights the importance of the use of best practice in the workplace and sends a very clear message to employers that neglecting health and safety regulation is not acceptable and will be punished".

Hand-in-hand with the changes to the law that the Act introduces, the BSC strongly supports the need for improved sentencing guidelines for judges and magistrates including greater clarity concerning the appropriate level of fines per particular offence.

Lord McKenzie, Parliamentary Under-Secretary of State, Department for Work and Pensions says: "Good employers and diligent managers and directors have nothing to fear from the Bill, indeed they have much to gain as it tackles the commercial advantage that unscrupulous businesses gain from non-compliance".

If you need advice on health and safety compliance and the impact of the new law on you, please *contact The AP Partnership* for further information.

# Environmental Liability

**The Environmental Damage (Prevention and Remediation) Regulations 2009**, which came into force on 1 March, and implements the EU's Environmental Liability Directive.

The rules impose a new obligation on organisations to prevent environmental damage and to notify the authorities if damage is about to occur or has already happened. Where environmental damage cannot be prevented, the directive requires organisations to carry out much more comprehensive clean-up work than they may have done previously.

Organisations must not only put right the pollution they cause, but will also have to rehabilitate a site back to its original condition. If that is impossible, or if it may take a long time to complete, an organisation can be obliged to compensate for blighting the area.

So, for example, if chemicals released from a firm's site resulted in a nearby river being polluted, causing the death of large numbers of fish, the firm may be required to not only clean up the spill but also to restock the river. But if the river could not be fully restored the firm may be made to enhance a river nearby to complement the rehabilitation work at the polluted site, and compensate for the time that the polluted river can't be used or enjoyed.

Organisations must now know the condition of their sites and that of their surrounding area, in case they need to rehabilitate it in the event of damage.

"Your site is no longer defined by the boundary of your property. It now includes the area around your site," says Gary Marshall, Risk Manager at printing firm Polestar, and the leader of AIRMIC's special interest group on liability.

Organisations must also monitor their sites so they can detect any changes that may constitute damage and notify the authorities. If they fail to do so, they risk fines and legal action.

Many organisations that had not previously thought of themselves as being at high risk of causing environmental damage may need to consider whether to buy specialist environmental impairment insurance as a result of the new regulations.

## Health & Safety Law Timetable

<b>1 March 2009</b>	<b>Environmental Liability</b> Making polluters responsible for preventing and remedying environmental damage
<b>April 2009</b>	<b>Manufacture and Storage of Explosive</b> Corrects some issues relating to regulations introduced in April 2005
<b>April 2009</b>	<b>Health and Safety Information</b> Changes to the way in which health and safety information must be displayed and communicated to employees
<b>June 2009</b>	<b>Dangerous Substances</b> EU directive for additions and changes to the classification list of Dangerous Substances
<b>2010</b>	<b>Batteries Directive</b> Changes to the rules governing manufacture and recycling of batteries and accumulators

# AVOIDING TRIBUNALS

The words "Employment Tribunal" creates fear in most peoples minds with visions of being taken to court and questioned and cross examined by ex-employees or their representatives and coming out at the other end questioning the sense of the whole process.

Year on year, the number of claims brought to tribunal increases and it is likely that in recessionary times these numbers will continue to increase. Therefore, in order to avoid a tribunal claim, prevention is the watch word. The starting point is to have procedures in place for dealing with discipline, dismissal, grievances and appeals. This documentation is essential and should be communicated to all employees in an easy to understand format. Going through these procedures should form part of the induction for new starters. This will demonstrate that they are joining a company which has proper procedures in place.

The training of managers is important to enable them to spot the early signs of problems amongst the workforce. There are certain areas that are more likely to cause problems even though they may not result in a tribunal claim. These tend to be areas such as performance, absence, equal opportunities, discrimination and bullying. Make sure the procedures inform staff of how to make an approach if they have a problem with these issues and how to make a formal complaint if it is relevant. If you are an organisation without in-house expertise on employment law then you will need to possess sufficient knowledge of the law to be able to operate within its confines. This is why it is cost effective to use outside expertise because the cost of that expertise is minimal compared to the likely cost of getting something wrong, ending up in tribunal and facing paying out significant compensation. This cost does not take into account attending the tribunal, the damage it may have on the Company's reputation and the effect it may have on the morale of the remaining employees.

Whenever you are faced with a tribunal it is possible to settle the case prior to any hearing. Regardless of the rights or wrongs of the matter, given the implications of going to tribunal it is worth considering the commercial settlement to avoid time consuming preparation and the stress associated with the lead up to the case, and also the tribunal hearing itself.

Therefore, in order to equip yourself with the right tools it is essential to have an understanding of the law, procedures in place, and managers who know how to operate within the confines of those procedures. Moreover, those Managers should be consistent with the implementation of the procedures and also have a resource externally for professional advice.

## ***Mitigating Losses***

In an employment tribunal case where the claimant wins, there are a number of factors which determine how much compensation the ex-employee will receive. One of the factors in determining compensation is what efforts the ex-employee has made to mitigate their losses. This is dependant upon what efforts they have made to try to find alternative employment and how successful they have been.

In recessionary times, it can be assumed that with jobs hard to come by it will be harder for ex-employees to mitigate their losses in this way. The consequence of this is that employers faced with compensation claims at tribunal will probably have to pay out increased amounts. However, failure by the employee to make proper efforts to find other work could result in the claim for compensation being reduced. The ex-employee is therefore required to do everything they reasonably can to mitigate their loss. This may depend on the individual circumstances and the job market at the particular time. Sometimes, it is not possible for the person to find a job which is equal to the one they lost in both salary and benefits. This may mean them taking a job at lesser terms and conditions.

However, failure to accept such a job may not always constitute a failure to mitigate loss.

In one case, a claimant was found to have acted reasonably when they waited for a six month period before accepting a job which was nearly 50% lower in salary to the one they had previously. Also, the High Court considered it counter productive for a former chief executive to lower his sights too early because of the impression that would create to the outside job world. Therefore, it is not necessary for a dismissed employee to take the first job that comes along in order to mitigate loss. If claimants fail to mitigate their loss, tribunals will look at the reasons they have failed to find alternative employment. If they have refused offers of employment the tribunal will consider whether they should have accepted these, and will look at things like the suitability of the job, the status, the salary and the location to determine whether the refusal was reasonable.

Both sides will look at the situation and employers will no doubt argue that the ex-employee has not made sufficient efforts to obtain alternative employment. Conversely, the

claimant will try to show that they have made every effort and have not been successful. Both sides would need to provide evidence to support their stands and this may involve such things as the employer being able to show the state of the jobs market and give vacancies that were available. This could be done through employment agency information, newspaper adverts and expert evidence on how long it may take the claimant to find a job given their circumstances, qualifications and the jobs market at the time. The ex-employee however will seek to show the number, regularity of their job applications, that they have registered with agencies and that the jobs they have gone for have been suitable to there circumstances etc. They would need to show a paper trail of applications, interviews and rejections in order to satisfy the tribunal that they made every effort.

All these factors will be taken into account when the tribunal assesses compensation for future loss. However, each side has argued its case, in the end it is up to the tribunal and their opinion based on the information to determine what the actual amount awarded will be.

# Some Common Health & Safety Myths Exposed

## **Myth: Health and safety laws banned hanging baskets**

### **The reality**

Back in 2004, a town did briefly take down its hanging baskets over fears that old lamp posts would collapse. This was an overly-cautious reaction to a low risk.

However, after quick checks the hanging baskets were replaced and have been on lamp posts in the town every year since.

Despite this, the story continues to be repeated and the danger is someone will believe it and follow suit.

## **Myth: Safety Experts' New Year resolution is to make the life of business people as miserable as possible**

### **The reality**

Not according to businesses. Those who have had contact with the HSE were asked about the HSE's helpfulness;

- 90% of employers and chief executives/ senior directors rate them as helpful
- 90% of chief executives/ senior directors consider that health and safety requirements benefit their company as a whole.

## **Myth: Every possible risk needs a safety sign**

### **The reality**

Using too many signs just guarantees no one will read any of them.

Safety signs are useful when there's a significant risk which can't be avoided or controlled in any other way. But that doesn't mean you should add a sign for every possible risk, however trivial.

Where there are serious risks in your workplace, don't just rely on signs - take practical steps to deal with them. If you do need a sign, make sure it has the right symbol and is clearly visible

## **Myth: Egg boxes are banned in craft lessons as they might cause salmonella**

### **The reality**

This story started after a school briefly banned children from using cardboard egg boxes to make things;- threatening years of Blue Peter tradition. They were concerned that children might catch salmonella.

Within a few days the school realised there was guidance, making clear that

as long as egg boxes and toilet roll centres look clean, there is no reason why they should not be used.

Just another storm in an egg cup...

## **Myth: HSE has banned stepladders**

### **The reality**

The HSE have not banned stepladders - nor have they banned ladders! Despite this, the allegation is regularly repeated and some firms have fallen for the myth and acted upon it.

For straightforward, short duration work stepladders and ladders can be a good option, but you wouldn't want to be wobbling about on them doing complex tasks for long periods. A large number of workers are seriously injured or killed using ladders and stepladders each year.

So;

- Yes - the HSE want people to use the right equipment for the job
- Yes - there are some common-sense rules for using them safely
- But no - they have not banned them!

## **Myth: All office equipment must be tested by a qualified electrician every year**

### **The reality**

No. The law requires employers to assess risks and take appropriate action.

HSE's advice is that for most office electrical equipment, visual checks for obvious signs of damage and perhaps simple tests by a competent member of staff are quite sufficient.

## **Myth: HSE bans this, that and the other**

### **The reality**

There have been many reports of HSE, and health and safety law, being responsible for banning all sorts of things. For example, flip flops at work, knitting in hospitals, school sports days, a charity Christmas swim and even cuddly toys on dustbin lorries.

Actually, HSE has banned very little outright, apart from a very few high-risk exceptions (e.g. asbestos which kills over 4,000 individuals a year). HSE believes that health and safety should be about taking practical steps to manage real risks, not bureaucracy leading to the banning of everyday activities.

Next time you hear of a 'ban', if in

doubt check it out.

## **Myth: Children are banned from throwing snowballs**

### **The reality**

Every year we hear inaccurate stories about children who aren't allowed to throw snowballs, and swimmers who can't take their traditional winter dip in the local lake. All this in the name of health and safety.

If we spend time on the trivial risks there's a chance we'll miss the most important ones. We need to focus on finding ways for things to happen, not reasons to stop them - a sensible approach to managing risk focuses on practical action to tackle risks that cause real harm and suffering.

## **Myth: Even Mr Punch needs a written risk assessment**

### **The reality**

A Punch and Judy man received a standard letter from an event organiser asking him to submit a health and safety risk assessment. However when he questioned the need for it, they 'backed-off' and no paperwork was required. It sounds like wires got crossed somewhere and perhaps the standard letter was sent in error.

HSE's guidance is clear: if there is genuinely no significant risk, nothing needs to be written down.

If a written assessment is needed - keep it fit for purpose, and crucially: act on it. Paperwork without action does no one any good.



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