



Newsletter

Summer 2008

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“Sold As Seen” Machinery Must Still Be Safety Checked

Firms buying second hand industrial machinery must ensure that it is safe to use at all times when being installed, used, cleaned and maintained.

The Health and Safety Executive has warned buyers and sellers of machinery that “sold as seen” is no protection from liabilities under health and safety laws.

The warning followed a HSE prosecution of both a supplier of second-hand machinery and a buyer following an incident where an experienced machine operator sustained serious hand injuries which left him partly disabled.

A Principal Inspector of the HSE's Manufacturing Sector, said: “Suppliers should, so far as is reasonably practicable, safeguard second hand machines or first obtain a written undertaking from the purchaser that they should take specified steps to ensure that the article would be safe.”

The machine in question was supplied “as seen”, by a previous user who had stored it for some years. No changes had been made to the machine by the supplier before delivery and no documentation other than an invoice stating “free from any damage other than normal wear and tear” and a user's manual was supplied.

The supplier did not obtain a written undertaking from the new user that they would ensure safety before first use. The firm who bought the machine was fined £5000 plus costs of £698; the supplier was fined £2800 with similar costs.

Onus falls on Employers to Prevent Illegal Working

The Immigration Asylum and Nationality Act of 2006, which came into force on the 29 February 2008 places employers under threat of substantial fines and even imprisonment if they are found guilty of employing an illegal worker.

Under the new rules, if an employer employs an illegal worker they could be:

- Fined up to £10,000 per illegal worker; and
- Prosecuted for the offence of knowingly employing an illegal worker and if found guilty face an unlimited fine and/or a prison sentence of up to two years.

What is a definition of an illegal worker?

An illegal worker is defined as a person who does not have current and valid permission to be employed in the UK. Alternatively a person who does not have valid permission to do the type of work the employer is offering.

Does the employer have a defence?

If the employer has mistakenly employed an illegal worker they can claim a “statutory excuse”. For such a defence to be valid the employer will need to demonstrate that certain original documents have been checked and copied before the employee started work. You should also undertake follow-up checks on an annual basis.

The actual documents that you need to check are identified in the UKBA's Summary Guidance for Employers. Visit their website at www.bia.homeoffice.gov.uk/employers/preventingillegalworking.

Broadly the documents are under three lists:

- List A: documents which establish a statutory excuse for the employee's employment with the employer. That is to say that they have the right to live and work in the UK on a permanent basis.
- List B: documents which establish a statutory excuse to live and work in the UK for a limited period.
- Documents which do not provide employers with a statutory excuse.

What should employers do?

The key action is to check the UKBA Guidance notes, be sure that you understand what is required and then to take copies of relevant documentation and to keep them safe. Records should be kept for two years after the employees employment has ceased.

What checks do I need to undertake for existing employees?

If you carried out the employment check required under the previous legislation for employees recruited since 27 January 1997 then there is no need to carry out further checks on existing employees. The new requirements only apply to employees who commenced work from 29 February 2008.

It is essential that you check their records as you could still be liable for criminal prosecution if you did not verify and retain copies of documents required under the old regime. Essentially it would be sound practice to undertake an audit of all such records.

Issuing Main Terms and Conditions of Employment / Staff Handbooks

Many employers are not aware of the importance of issuing written main terms and conditions of employment and staff handbooks in a timely manner. It is not uncommon for an employer to only issue these documents upon completion of a probationary period – commonly some three months in duration.

However, it is a statutory requirement under the Employment Rights Act 1996 that employees whose employment lasts for at least one month must be provided with this written information within two months of their start date. Furthermore, there is no benefit whatsoever in withholding this information and it should be provided as a matter of good practice from the outset of employment. Terms and conditions / policies and practices relevant to employment and the nature of the employer's business are of no use if the employee is not aware of these.

It is therefore good practice to provide prospective employees with this information prior to their start date, making an offer of employment conditional upon return of signed documentation to confirm that the employee has read, understood and accepted them. There can then be no argument that the employer has not met its legal obligation and/or that the employee was not aware.

Recruitment – Age Discrimination

A short reminder of the need to ensure appropriate wording is used in recruitment advertising.

In the case of *McCoy v McGregor & Sons Ltd*, an employer used an advert asking for "youthful enthusiasm". It was held that the use of such wording therefore had a correlation between age and motivation, meaning that a 58 year old applicant was the subject of age discrimination.

Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)

These regulations came into force on 1 June 2008 and businesses have until 30 November 08 to register.

Businesses that manufacture or import (from outside the EU) 1 tonne or more of any given substance each year are responsible for registering a dossier of information about that substance with the European Chemicals Agency. Because substances in articles also count (if these substances are intended to be released), it's possible that some manufacturers/importers of such articles will be registrants.

The registrant directs downstream users in the appropriate risk management measures for any particular use of the substance and responds to other players on other aspects of REACH. Registrants should consider pre-registration of substances between 1st June 2008 and 30th November 2008.

Downstream users include any business using chemicals, which probably includes most businesses in some way. Companies that use chemicals have a duty to use them in a safe way, and according to the information on risk management measures that should be passed down the supply chain. There is also an opportunity to pass information about use back to registrants so that this can be taken account of when assessing the risks of chemical used.

Downstream users may need to supply risk assessment and risk management measures to the European Chemicals Agency if they don't want their supplier to know about how they use the chemicals. Some users may also be importers and have a duty to register.

Businesses that sell chemicals have specific duties to pass information down to their customers, and also to pass information back to their own suppliers when customers ask them to do so.

You need to decide whether you are a manufacturer/importer, a downstream user or other actor selling chemicals. If you do not register your substances, then the data on them will not be available and as a result, you will no longer be able to manufacture or supply them legally, i.e. no data, no market!

REACH has several aims:

- To provide a high level of protection of human health and the envi-

ronment from the use of chemicals.

- To make the people who place chemicals on the market (manufacturers and importers) responsible for understanding and managing the risks associated with their use.
- To allow the free movement of substances on the EU market.
- To enhance innovation in and the competitiveness of the EU chemicals industry.
- To promote the use of alternative methods for the assessment of the hazardous properties of substances.

Capability / Ill-health Dismissals – Alternative Provisions

A recent EAT decision upholding a Tribunal's decision that an employee had been unfairly dismissed has highlighted the need to consider all potential alternatives prior to dismissing employees on the grounds of capability / ill-health.

Whilst capability / ill-health are potentially fair reasons for dismissal, as long as reasonable consultation and a correct dismissal procedure has been followed, there is an obligation on the employer to consider alternatives to dismissal.

In the case of *First West Yorkshire Ltd t/a First Leeds v Haigh*, the employee would have qualified for an ill-health retirement pension if he was permanently incapable of carrying out his normal duties. However, without waiting for medical confirmation, the employer dismissed the employee on grounds that he was not permanently incapable and ill-health retirement was not offered.

It was held at the subsequent Tribunal that the employer's decision was based predominantly on a desire to avoid the cost of ill-health retirement and thus the dismissal was unfair.

Furthermore, when the employer attempted to argue that compensation should be reduced on the grounds that it would have dismissed the employee in any instance upon receipt of the medical confirmation, it was held that the employer's conduct was flawed to such an extent that the compensatory award would not be reduced.

Employment Tribunal Costs

A business may run for many years without having a problem concerning staff issues or disputes. During this period the business will probably dismiss some employees for a variety of reasons. This then opens up the possibility of a dismissed employee making a claim of unfair dismissal.

An employer may be convinced that they have acted correctly in the way that they have dealt with the dismissal and as a result would decide to fight the claim. The result in Tribunal is a day of legal argument in surroundings similar to a normal court and win or lose this is likely to be a traumatic experience.

Having won a case an employer is faced with a legal bill and in a worse case if the Tribunal was lost having to pay compensation to the dismissed employee. Although such financial costs are unwelcome another significant aspect of Tribunals is the amount of time it takes to prepare for the case. Many hours are spent working on the presentation for the Tribunal which includes documents, witness statements and the collation of all the information necessary. In addition to this a day in Tribunal is stressful because it involves sitting opposite an ex-employee who may at one time during their employment have been a valued member of staff.

The employer of course is being accused of being unreasonable or unfair in the treatment of that employee and as such it becomes an extremely personal and often emotional situation for the employer.

Quite often the employer feels that they have treated the ex-employee fairly during their time with the Company and are upset at the initial claim and also the information which is openly discussed as part of the case. Being cross examined in the same way as you might be in any other court only adds to the stress.

Representatives could be solicitors or Barristers and will try to catch the witness out or confuse them into appearing to not know what actually happened at the time of the dismissal or the period leading up to the dismissal. It therefore goes without saying that a day spent in Tribunal is not exactly the best way or most productive way to spend a day even if you win. If however the case is lost the financial penalty could be anything from a few hundred pounds to an often typical award being anything up to ten thousand pounds. Furthermore if the case is a discrimi-

nation one the compensation might be potentially much higher.

The chances of being the subject of a Tribunal claim are increasing year on year as the number of claims increases. Also the complexity of cases seems to be on the increase. Therefore it is almost imperative that Companies are represented by professional advocates.

Most Companies particularly small to medium sized invariably don't know the law or have anyone in house who can deal with a typical Employment Tribunal claim. Many cases are settled because of the potential costs which a Company can see them having to face. This does not go down particularly well with Companies when they believe they have acted reasonably although the decision becomes a business one in that the cost of a settlement can be significantly less than the cost of defending the action.

The fact that the ex-employee does not incur any costs in lodging the initial claim and in many cases representing themselves means that all costs are at the employer's door. This in some cases results in what can only be deemed frivolous cases being lodged. It can therefore be seen from the above that the financial burden falls almost without exception on the employer.

Summary Dismissal – Disciplinary Procedures

There is commonly a great deal of confusion regarding the right to summarily dismiss employees in the instance of an act of gross misconduct.

Summary dismissal is the dismissal of an employee without notice. However, this should not be construed as a right to show the employee the door' immediately upon discovery of an alleged act. There is always potential that perception of the alleged act has been distorted, whether by genuine misconception or malicious intent.

In accordance with ACAS guidance, summary is not necessarily the same as instant and incidents of gross misconduct should always be investigated as part of a formal procedure.

continued overleaf

New Noise Exposure Rules

New noise exposure rules that affect the music and entertainment sectors came into force on the 6 April 2008 under the requirement of The Control of Noise at Work Regulations 2005.

These regulations are relevant to those businesses in England, Scotland and Wales in which live music is played in the workplace or in which recorded music is played, including restaurants, bars, public houses, discotheques, night-clubs, or alongside live music or a live dramatic or dance performance.

As an employer the regulations state that you shall:

- Carry out frequent risk assessment to assess the risks to your employees
- Take action to reduce noise exposure that produces those risks
- Provide your employees with hearing protection if you cannot reduce the noise exposure enough using other methods (for example, they could wear hearing protection during rehearsals if you play live music)
- Make sure the legal limits on noise exposure are not exceeded
- Provide your employees with information, instruction and training

Where required, ensure that:

- Hearing protection is provided and used
- Any other controls are properly used
- You provide information, training and health surveillance

When carrying out a noise risk assessment you should take into account:

- The work they do or are likely to do
- The ways in which they do the work
- How it might vary from one day to the next

Under environmental regulations, you have to consider the impact of workplace noise on people who live or work near your business.

Summary Dismissal – Disciplinary Procedures

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An employer must therefore always be cautious when addressing an alleged act of gross misconduct.

A failure to thoroughly investigate the alleged act and follow a disciplinary/dismissal procedure could subsequently lead to the dismissal being held as unfair.

Any decision to dismiss must be factually based and have sufficient evidence to support the decision if challenged.

It would not matter if the employer had a genuine belief that an act of gross misconduct had occurred, although in such a case a compensatory award could potentially be reduced due to the employee's contributory conduct.

Changes to Maternity Leave

There are changes to Maternity leave for those whose EWC is on or after 5 October 2008.

The difference in the treatment of Ordinary Maternity Leave (OML) and Additional Maternity Leave (AML) for terms and conditions will be removed. This means that benefits accrue during the whole Maternity leave period. This is important for employers who limit the provision of benefits (other than remuneration) during AML as this will need to change.

Common examples are employers who recover company cars at the end of OML, those who stop private medical cover, or those who only allow statutory holiday leave accrual as opposed to contractual leave accrual. This "simplification" of the law does not alter the difference in rules about the job to which the employee returns, which may still vary between OML and AML.

The other key difference is for employers who provide benefits based upon service, but have excluded time spent on AML, as this will also need to change. All maternity leave will now need to count for all benefits/rights not just the period of OML.

These changes will only apply to those whose expected week of child-birth is on or after 5 October 2008. In practical terms this will apply to maternity leave after the 5 April 2009.

Changing Employment Contracts

Contracts of Employment are the same as any other legally binding agreement in that they cannot normally be varied unilaterally by the employer. They can however be changed but care needs to be taken in the approach to changing them and the process that occurs.

An employer may wish to change a contract of employment as a means of ensuring the business functions better. This can involve a change to staff hours, working patterns, rates of pay and the way that employees carry out their jobs. Also benefits may be the subject of a change.

Employees may agree to a change in their contracts of employment in which case it is relatively straightforward to implement. However, there may be a need to recompense employees in the way of an inducement to agree to a change. This could involve a one off payment, an increase in pay, a different job title or other benefits. It may also be that the employer has an express right to vary the contract, however, if that is not the case then there may be an implied right to vary. For example an employer may be able to expect staff to be flexible or to change in accordance with new technology. Also an employee may be expected to change their place of work provided it's within a reasonable travelling distance of the original location. In some situations an employer may make a change and the employees will alter to accommodate that change. It could therefore be inferred that the employee has accepted the change. However in the case of *Aparau v Iceland Frozen Foods* the Employment Appeal Tribunal decided that consent cannot be inferred where the employee simply continues to work as before in the face of the imposed change. However conversely in the case of *Heating Ltd v Akers* the Employment Appeal Tribunal decided that a group of employees had agreed to a contractual change when they added the phrase "under duress" to their signatures on the agreement affecting the change.

Where staff refuse to agree to changes they could be served with notice to terminate their employment and re-engage them on the revised terms as soon as the notice period expires. When the notice expires if the employees continued working for the Company then they would be accepting a new terms and conditions. However if the employment

terminated and the employee left at that point they could be in a position to make a claim of unfair dismissal and breach of contract.

In such a case it would be for the employer to justify their actions on the basis that there were sound business or operational reasons to take the action they did. This defence would come under the "some other substantial reason" defence justifying the dismissal. Also in order to ensure a fair dismissal the employer would also have to comply with the current statutory dispute resolution procedures.

A unilateral change of a contract by an employer could result in the employees affected by the change seeking an injunction to prevent the change or a claim for damages for breach of contract. Also if an employee resigns as a response to a fundamental variation of a contract a claim for constructive dismissal might follow. Equally, if the variation leads to a reduction in pay then the employee may claim that there is an unlawful deduction from wages. A further implication of a unilaterally imposed change of contract is that the employer may be unable to enforce restricted covenants against the affected employees.

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