EMPLOYMENT LAW
NEWSLETTER

We are pleased to share the latest edition of our employment newsletter. In this edition we consider why P&O made the headlines for all the wrong reasons, take a look at probationary periods, provide a further update on right to work checks, and let you know of recent increases to certain statutory payments.

Grab a coffee, perhaps even finish off an Easter egg or hot cross bun, and enjoy…

P&O FERRIES – HOW NOT TO LET STAFF GO!

As has been widely reported in the press, last month P&O decided to let go 786 staff without any form of consultation or notice, breaking the news via video call the same day. The reason given: to protect the viability of the business given its reported substantial financial losses. There were news reports of some staff being physically removed from the vessels they were working on. The back lash has been immense with substantial damage caused to P&O's reputation and the Insolvency Service now launching both criminal and civil investigations into events.

Whilst it has since been reported that the majority of those affected may have agreed to accept enhanced severance packages in return for not bringing legal claims, it is also common knowledge that those affected were, in effect, being replaced with cheaper agency labour. The question that has been on many people's lips is "how can this be redundancy?" and they would be correct.

When does a "redundancy" situation arise?

Strictly speaking the legal definition of redundancy under Section 139(1) Employment Rights Act 1996 is:

"…an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to-

(a)the fact that his employer has ceased, or intends to cease-
(i)to carry on the business for the purposes of which the employee was employed by him, or
(ii)to carry on that business in the place where the employee was so employed, or

(b)the fact that the requirements of that business-
(i)for employees to carry out work of a particular kind; or
(ii)for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish"

Very clearly P&O's situation does not fit within the above definition despite early reports of the label "redundancy" being used.

In reality there will be a number of instances where a business looks to restructure its current operations out of need or to drive efficiency, but where the above definition will not technically be met. This does not mean a business is prevented from implementing that restructure. Subject to following an appropriate consultation process first this can still be a valid reason to dismiss under Section 98(1)(b) of the Employment Rights Act 1996, known as "some other substantial reason" or "SOSR".

Here P&O did not even seek to implement any form of consultation process, either with the relevant Trade Union or employee representatives, before letting the affected staff go, which is key to protecting employers from claims of unfair dismissal. It is a very rare instance indeed where an employment tribunal will find a dismissal of an individual with a minimum of two years' service fair, notwithstanding the lack of any consultation process.

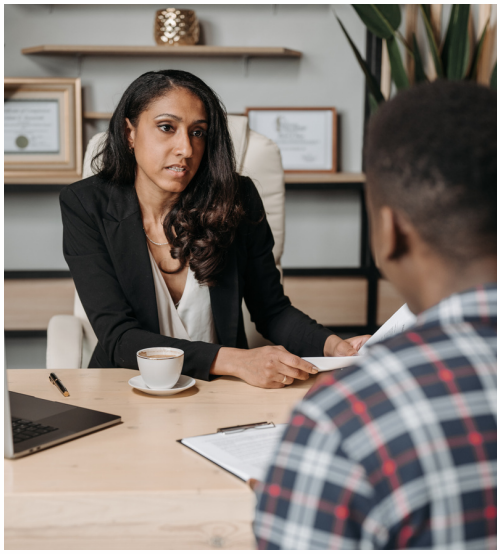
The requirement for collective consultation

For any business looking to potentially dismiss at least 20 staff in a 90-day period, be it redundancy or SOSR, there is a legal obligation to carry out a minimum period of consultation, known as "collective consultation" with any applicable Trade Union or employee representatives, lasting no less than either 30 or 45 days before the first dismissal, depending on the number of potential dismissals. Failure to do so will entitle those affected to bring a claim for up to 90 days' pay, regardless of length of service.

In addition, there is a legal requirement to notify the Secretary of State for Business Energy and Industrial Strategy (BEIS) of intentions, again at least either 30 or 45 days before the first dismissal, depending on the number of potential dismissals. Failure to do so is a **criminal offence**.

So what should employers do?

The moral of the story is to always take legal advice before making any redundancies or mass dismissals. Where there is a risk you will be letting at least 20 staff go in a 90-day period ensure you are fully aware of your legal obligations when it comes to collective consultation and notifying the BEIS. We have helpful "How To" guides and templates that can assist you here. Your future reputation may depend on it!



PROBATIONARY PERIODS

Many but not all employers include probationary periods in their employment contracts. Research carried out back in 2014 found that around 1 in 5 employees fail to pass their probationary period. As part of the same research, 22% of employees questioned admitted they put in more effort while they were on probation, with nearly half of those questioned also reporting that they felt insecure whilst "on probation", which can negatively impact performance.

Whilst the use of probationary periods do not prevent performance or conduct issues arising later, for many businesses there are benefits to introducing probationary periods. Indeed, during such periods there will often be reduced notice entitlements with certain other contractual benefits only applying once the individual has successfully passed "probation".

If you do include them as standard in your employment contracts then for the greatest possible protection from employment claims requiring no minimum length of service, such as discrimination or protected disclosure claims, it is important to use these periods as intended.

Effective monitoring during the probationary period

It is important that you:

- Ensure the employee is aware of the approach you intend to take in terms of monitoring from the outset. Have regular review meetings, making sure the employee is aware of any specific goals or requirements they are expected to achieve between meetings and the date of their first/next meeting.

- Ahead of each meeting gather up to date information on the employee's performance allowing enough time for this to be considered ahead of and discussed during the meeting.

- Give feedback (both positive and constructive) and keep appropriate records. Whilst this can be given informally employees may not always appreciate constructive feedback is intended to warn them that they are not meeting expectations. Such feedback should also be given and confirmed at formal review meetings, with a record kept and a copy given to the employee. Any outcomes or extensions to the probationary period should also be confirmed in writing.

- If the employee is absent for part of the probationary period because of sickness, disability, or even a bereavement or unexpected family emergency, resist the temptation to automatically regard their performance as unsatisfactory and instead consider exercising any contractual right to extend their probationary period so that the employee has a fair chance to prove themselves. If you do not have a contractual right to extend the probationary period look to agree an extension with the employee. The extension also ensures you have sufficient opportunity to make an informed assessment of their performance.

- Make sure any final meeting happens as close to the end of the probationary period as possible, not several weeks or months later by which point they will consider themselves as having passed by "default". Confirm either way the outcome, not just if they do not pass and are being let go.

Extending the Probationary period

If you are extending the probationary period make it clear to the employee why you are doing so and the standards of performance and behaviour that are expected of them in order to pass the extended period, so that they can understand what is letting them down and what they can do to improve.

Any extension must be confirmed **before** the original probationary period ends. You must have a contractual right to extend it, or otherwise agree the extension with the employee concerned. Giving yourself a contractual right to extend is best practice.

Set a new date for the expiry of the extended probationary period. Make sure this mirrors your contractual entitlement. Ensure you continue to have regular meetings during the extended period as before, continuing to effectively monitor their progress and giving feedback, as above.

Termination of employment

In many instances an employee will have insufficient continuous service at the end of their probationary period, or any extension, to bring a claim for unfair dismissal if they are unhappy with your decision.

However, certain employment claims do not require the employee to have any minimum period of employment and you should always make sure you are comfortable that there is no risk of such a claim here, taking advice as necessary. This not only includes claims for discrimination under the Equality Act 2010. You also need to be content that the employee has not raised any complaint that could be classed as a “protected disclosure”, which protects them from either suffering a detriment or being dismissed as a result. Letting someone go immediately on their return from taking some form of statutory leave (even if unpaid), such as time off for dependents, is also not recommended.

If your disciplinary processes are contractual (not recommended) then you may find yourself having to follow these prior to dismissal to avoid a claim for breach of contract/wrongful dismissal.

In the event of any concerns it is always safest to take legal advice before informing the employee of your decision to terminate their employment. Effective monitoring during the probationary period, as above, will also help provide documentary evidence protecting you against such claims and assisting you in demonstrating the real reason for their dismissal if your decision is challenged.

RIGHT TO WORK CHECKS – A FURTHER UPDATE

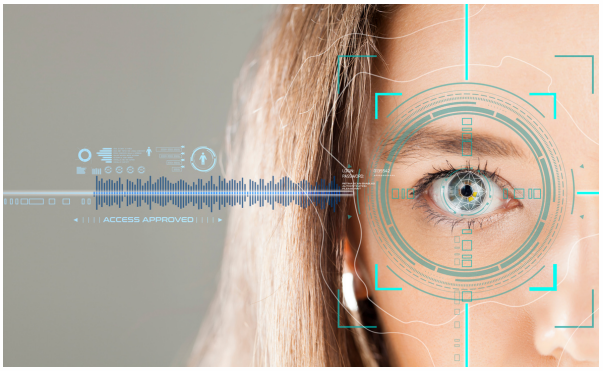
New important changes were introduced on the 6 April 2022 to right to work checks for both employees and workers, and which as a reminder should always be carried out before the individual's engagement commences. These include, but are not limited to:

New optional online checks

For British and Irish Nationals it will remain possible to continue with manual document-based checks. However, from 6 April 2022 there will also be an option to conduct right to work checks online via a certified identity document validation technology (IDVT) identity service provider.

Provided it is reasonably believed that the IDVT identity service provider has complied with statutory requirements, that the photograph of the individual contained within the IDVT identity check is the employee and the employer receives and retains a clear copy of the IDVT identity check, along with a copy of the document checked in a format that cannot altered, employers will have a statutory excuse if the individual is later found not to have the right to work in the UK.

Use of such online checks will be optional with the Government's updated guidance on right to work checks found here. The updated guidance stipulates that you must not treat less favourably individuals who do not hold a valid passport or wish to provide evidence of their right to work by way of a traditional manual document-based right to work check.



New Online mandatory checks

From 6 April and for those with Biometric Resident Permits (BRP), Biometric Residence Cards (BRC) and Frontier Work Permits (FWP) it will become mandatory (rather than optional) to use the Home Office online Employer Checking Service (https://www.gov.uk/view-right-to-work) to verify their right to work in the UK. You will no longer be able to rely on a manual document-based check for these individuals.

You will also need to store and retain evidence of the online check including the "profile page" which will include a photograph of the individual and the date of the check. You will naturally also need to satisfy yourself that the individual presenting themselves for work is a true likeness to the photograph on the online right to work check.

For those manual document-based checks carried out before 6 April 2022 there will be no obligation to carry out a retrospective check in respect of those individuals already engaged.

It naturally remains important to ensure you keep up to date with and properly implement the correct right to work checks required if you wish to ensure you have a **statutory excuse**, providing protection from civil penalties of up to £20,000 should it be found that you have employed someone not actually entitled to work in the UK. There are also criminal sanctions where an employer "knowingly" engages someone who does not have the correct permission.

Finally in our October Newsletter we reported that the temporary adjustments introduced allowing remote right to work checks during the pandemic had been extended to 5 April 2022. This has since been extended further to 30 September 2022, which is expected to be the final extension.

STATUTORY PAYMENTS – UPDATE

With the month of April comes an increase in certain statutory payments, including the following:

National Minimum Wage:	£9.50 for those aged 23 and above (national living wage), £9.18 for 21-22 years, £6.83 for 18-20 years, £4.81 for those under 18, and apprentices under 19 or during first year of their apprenticeship.
Statutory maternity, paternity, adoption pay, shared parental pay and parental bereavement Pay:	£156.66 per week* or 90% of employee's average earnings, whichever is lower. * employee entitled to 90% of their average earnings for the first six weeks of any period of statutory maternity or adoption leave.
Statutory redundancy pay (Weeks' pay):	£571 per week, an increase from £544 per week. An online statutory redundancy calculator can be found here (https://www.gov.uk/calculate-your-redundancy-pay)

HOW CAN WE HELP?

We can help you with any employment law needs, but we thought it would be useful to summarise how we can help you if you come across any issues or needs relating to the content of this newsletter, so please do get in touch with us if that's the case (contact details below):

1. Advice and guidance should you ever need to consider making potential redundancies including "How to" Guides and practical templates.

2. Advice on probationary periods, including probation review templates and template clauses for your employment contracts.

3. Advice and guidance if you are considering letting a member of staff go, even if they have less than two years' service, to ensure you are protected as far as possible from potential claims.

4. If you are looking to recruit for the first time since April 2020 now would be a good time to get your employment contracts reviewed to ensure they are compliant with legal requirements, and we can assist with this.

Please note that the information in this newsletter is not designed to provide legal advice or create a solicitor – client relationship. No liability is accepted for any loss caused in reliance upon its content. You should always seek legal advice before relying on the content of this newsletter as every situation is different and the law in employment is ever changing.

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