HUMAN RIGHTS & EQUALITY CONSULTANCY

PUTTING LAW & POLICY INTO PRACTICE

A TOOLKIT FOR EMPLOYERS

HOW NOT TO DO IT - THE MOST COMMON MISTAKES EMPLOYERS MAKE

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The Recruitment process

1. ***Failing to advertise widely enough or in the right media to attract the most diverse range of applicants***

2. **Application process is not user friendly**

Many organizations use automated applications systems, but these can be time consuming and cumbersome; and hard-to-use job application are known to deter applicants. Test your own company's job application software/system and if you find it awkward, then consider changing to a more user friendly alternative.

3. **Failing to consider older people because of stereotypical views about their health and productivity**

There is a significant amount of discrimination against older workers and much of this is based around the notion that older workers are less productive and are likely to have periods of sickness absence. Research shows that older workers, waste less time, are more engaged and stay longer than younger workers.

4. **Recruiting only in your own image - Not taming the dragon of unconscious bias**

5. **Not Using Structured Interviews**

Many employers use an unstructured interview format/informal chat, rather than using a structured interview questionnaire based on relevant competencies and applying it to all candidates. This is a big mistake as structured interviews have been shown to be more than twice a reliable indicator of likely future performance than an unstructured interview. Always use structured interviews.

Candidate experience

6. Fail to Prepare the Interviewers

Interviewers need to meet in advance and think about what they want to test in the interview and how best to test it. They should decide on who is responsible for which types of questions? What aspect of the candidate's credentials is each person assessing?

7. Rely on the Interview to Evaluate a Candidate

A lot of interview time is spent giving the candidate information about your organization. Even more time is invested in different interviewers asking the candidate the same questions over and over.

Organizations are smart when they develop several methods for evaluating candidates in addition to the interview.

How not to treat your employees

8. **Failing to following a disciplinary policy at all**

If the employer has a contractual disciplinary policy but does not follow this the employer will be in breach of contract.
If you are dismissed without your employer following a contractual disciplinary policy you can bring a claim for breach of contract in a County Court or High Court, or wrongful dismissal (i.e. dismissal in breach of contract – regarding the notice period and loss of salary over the period in which the disciplinary period should have been followed) and unfair dismissal in an Employment Tribunal. If you are dismissed before you have 1 years continuous service (or 2 years for employment starting from April 2012) then you do not have a right to claim unfair dismissal but you may have the right to claim breach of contract if the situation above applies to you.

9. **Not warning the employee of the possible consequences of any disciplinary action before the disciplinary meeting**

The employer must tell the employee the possible outcome of any disciplinary action, in order to give him or her a fair chance of defending the allegation properly, so it should not come as a surprise to the employee later on that dismissal is a possibility.

10. **Not setting out the nature of the accusations clearly to the employee**

The employer should set out the alleged misconduct clearly and should, throughout the disciplinary process, be consistent in what it is accusing the employee of. Any disciplinary sanction must be imposed only in respect of allegations that were properly investigated and brought to the employee's attention as part of the proceedings.

11. **Not giving the employee the relevant evidence against him or her**

The employer should provide the employee with all the evidence, typically in the form of witness statements, in advance of the disciplinary hearing. Ideally, the evidence should be provided when the employee is invited to the hearing, or at least far enough in advance for him or her to be able to prepare a proper 'defence'.

12. **Not giving 'lesser' warnings where they are appropriate**

In some cases, the alleged misconduct will be so serious that summary dismissal for a first offence will be justified. However, in cases of minor misconduct, a series of warnings before dismissal will be more appropriate.
In a case in September 2013 (Brito-Babapulle v Ealing Hospital NHS Trust) the Employment Appeal Tribunal found that when considering the fairness of a dismissal, and in particular whether the decision to dismiss falls within the band of reasonable responses open to a reasonable employer, an employer (or Tribunal) should not jump straight from a finding of gross misconduct to a conclusion that dismissal was within the range of reasonable responses. The Tribunal should consider any mitigating factors, such as exemplary service, the consequences of dismissal (for their career), any provocation, length of service – a finding of gross misconduct will not necessarily justify instant dismissal.

13. **Suspending unnecessarily/without cause or review**

It is increasingly common for employers to suspend employees whenever there is a sign of misconduct. Some employees become concerned that they have been suspended simply to put pressure on them, or to make their misconduct appear more serious than it is. Whilst in some cases this might well be true, the law is quite clear that suspensions should only be considered where there is likely to be a finding of serious misconduct or negligence and where there is a clear need to keep the employee away from work – for example, to investigate or to limit the damage of misconduct or negligence.
Suspensions, even though the employee will be on full pay, need to be kept under regular review and lifted once no longer needed, to ensure that the actions taken by the employer are regarded by the Employment Tribunal as reasonable.

14. **In performance cases**

dismissing in the absence of adequate evidence of poor performance Employers often believe that their employee is poorly performing but do not necessarily have enough evidence to show this. This could lead to an employee suggesting there is an ulterior motive for their dismissal – such as whistleblowing or discrimination. It is important that employers have enough evidence to support their underlying belief. This is yet another reason for ensuring a thorough investigation. Employers dismissing for poor performance need to show that they have highlighted their employee's shortcomings, made clear what is expected of them, and allowed them sufficient opportunity and the required support to improve. Employers should ideally put in place a clear capability procedure which addresses how they present capability issues to their staff, what improvement is expected, and what the employer will do to assist them to reach the required standard. A failure to set realistic targets or give the employee a fair chance could render a dismissal unfair and allow the employee to claim greater compensation.

15. Not carrying out a sufficiently thorough investigation.

A common pitfall for an employer is not carrying out a sufficiently thorough investigation. An investigation should be fair and even-handed. It should look not only for evidence that makes the employer sure that their employee has not performed or conducted themselves as expected, but also look for evidence which points away from 'fault'. The investigation should look at the full circumstances in which the employee has acted. It should be fair, balanced and seek the truth. An investigation which is biased or selective is likely to lead to a finding of unfair dismissal.

16. Not allowing the employee to be accompanied at a disciplinary hearing.

It is a statutory right to allow the employee to be accompanied at a disciplinary hearing. The right to be accompanied arises when a worker who is invited by his or her employer to attend a disciplinary or grievance hearing makes a reasonable request for a companion (i.e. a fellow worker or trade union representative) to attend the hearing.
A 2013 Employment Appeal Tribunal case ruled that employees exercising the statutory right to be accompanied at a disciplinary or grievance hearing are entitled to have present whomever they choose, provided the individual is a relevant union representative or work colleague. Employers cannot refuse a particular companion on the grounds that their presence is 'unreasonable' – the 'reasonable' requirement does not extend to the identify of the companion. This ruling contradict the Acas Code of Practice so is surprising.

The maximum compensation for breach of the right to be accompanied is 2 weeks' pay (subject to the statutory weekly pay cap).

17. **Not taking disability into account**.

If an employer is taking disciplinary action over performance or conduct, they need to consider why the situation has arisen. If the employee is disabled there is a possibility that the reason for their under-performance or misconduct is connected in some way to their disability or to the disability of someone they are caring for. In these situations, reasonable adjustments should be made in making any decision to discipline or dismiss as this could become an inadvertent act of disability discrimination.

Even if an employee's disability does not explain their conduct or performance, it may be necessary to take this into account when following the disciplinary procedure; for example, by allowing additional time in the process, by scheduling breaks during meetings, or by extending the right to be accompanied. A failure to make reasonable adjustments could expose an employer to additional claims of disability discrimination.

18. **Relying on evidence from one particular source/witness with no other corroborative evidence**.

There may be limited circumstances where one individual's evidence is enough to lead to a disciplinary sanction, but an employer should always look for more. Employers should be alert to the problems of relying on one person's evidence and always look for corroborative evidence, where this is possible.
In Farnaud v Dr Hadwen Trust Ltd, 2011, Mr Farnaud was a Science and Education Director at a medical and research charity. He had a heated discussion with his line manager, Mrs Eglington, who went onto to submit a grievance about him. Dr Farnaud was disciplined and found to be guilty of aggressive and threatening behaviour and was summarily dismissed for gross misconduct.
The Employment Tribunal found that he was unfairly dismissed as the Employer had not interviewed Mrs Eglington (relying on her written grievance only) and had not interviewed the witness to the event (relying on Mrs Eglinton's interview of that witness). The Tribunal found that the Employer could not have had reasonable belief about Mr Farnaud's guilt based on reasonable grounds and did not conduct a thorough investigation or disciplinary process.

19. **Not giving an adequate appeal stage**.

The right of appeal is fundamental to ensuring natural justice. Employers should give the employee the opportunity to appeal when the outcome of the disciplinary hearing is communicated to him or her. Appeals should be unbiased and not be a "foregone conclusion".

20. **Not keeping adequate, clear records of the whole disciplinary process.**

21. **Delays in dealing with disciplinary issues.**

Most cases should be dealt with in a matter of weeks and unexplained delays in the disciplinary proceedings will always be frowned upon by tribunals. However, more complex or difficult cases (for example, where fraud or a criminal offence is alleged) will inevitably take longer.

22. Having the same person deal with the whole disciplinary process.

A common failing found in tribunal claims is that the same individual is in charge of the disciplinary process from start to finish. Ideally, different people should carry out the investigation, disciplinary hearing and appeal stage, although this will not always be practicable, particularly for small employers.

23. Offering the employee a chance to resign.

Many employers consider that it is proper to allow their employee a chance to 'jump before they are pushed'. While in some cases this leniency does not lead to a Tribunal claim, it can just as easily backfire. If the employee is left to feel that they had no choice but to resign, a forced resignation could result in a claim for unfair dismissal and/or constructive unfair dismissal as a breach of trust and confidence had taken place. In these circumstances it would be more difficult for the employer to show that a fair process had been followed. Employers who are tempted to invite their employee to resign, either as an act of kindness or to save the time of going through a fair capability or disciplinary process, need to act with extreme care.

24. Offering a Settlement Agreement.

It is a common misconception that employers could offer their employee what was formerly known as a Compromise Agreement and is now called a Settlement Agreement in the course of a grievance, capability or disciplinary process. However, offers of Compromise Agreements and Settlement Agreements will only be inadmissible in cases where the employee goes on to bring an ordinary unfair dismissal claim. If an employee raises issues such as discrimination or issues which would result in an automatic unfair dismissal claim or breach of contract claim being brought, then the employer would not be able to rely on these protected conversations. Offers of Settlement Agreements are therefore best reserved until after the employer has instigated the disciplinary or capability process so that there is a paper trail which shows this is an ordinary dismissal situation.

25. Redundancy selection –

When faced with the unpleasant situation of reducing headcount, many employers struggle to be objective and fair when identifying who should be made redundant. An employer might have a good idea who is their weakest performing employee, but unless their dismissal results from properly drawn-up criteria – which the employer consults about properly – the fairness of their selection and any subsequent dismissal

could be undermined. Regardless of the end result, employers must be seen to do things fairly and

Maternity mistakes

26. Confusions about pregnancy-related sickness

Some women experience health problems caused or made worse by their pregnancy, and have to take a lot of sick leave. You may think that this can be taken into account in the same way as other sick leave. For example, if there is a sick leave record which is used in making decisions, perhaps you have included pregnancy-related sickness in that record. In fact, pregnancy-related sickness has to be ignored. It is specially protected and you shouldn't record it with other sickness. It will use up sick pay, but otherwise it cannot be taken into account in any way which affects a woman badly – to do so would be sex discrimination.

You can make a woman start her maternity leave four weeks before a baby is due if she is absent from work for pregnancy-related reasons (pregnancy-related sickness or health and safety grounds connected with the pregnancy).
You cannot force a woman to start her maternity leave any earlier than four weeks before the birth, although it does start automatically the day after a baby is born if this happens before maternity leave has started.

27. Failing to act on health and safety considerations

Employers often fail to carry out a risk assessment when they should, or fail to follow up on the findings of a risk assessment. Once a woman has told you that she is pregnant in writing, there may be an obligation to carry out a health and safety risk assessment. A general risk assessment for pregnant women in the workplace should be done anyway, if you employ women of childbearing age. A specific one for a pregnant employee should be done if there is evidence of a risk – this could be because the woman's doctor has expressed concerns about what she should be doing at work. Following a risk assessment, steps must be taken to remove any risks. This could involve giving a woman different duties for a while, cutting her hours or even suspending her from work entirely. But she must be paid her normal pay, so that she does not lose out. Normally, something safe can be found in the workplace to avoid the problem.

28. Getting it wrong on maternity leave and pay

Mistakes about maternity leave are often to do with how long it lasts. A woman is entitled to a year off, regardless of how long she has worked for you. However, maternity pay currently lasts for 39 weeks (9 months). A woman does not have to come back when her pay finishes. It is up to her when she returns, although if she is going to come back before the year is up, then technically she should give you at least 8 weeks notice in writing.

It's a good idea to have a discussion with your employee before she goes on maternity leave, so that she knows what she needs to do and when – it may be written in your maternity policies, but reading these, and taking in all the information, isn't always easy. It would be sex discrimination to try to force a woman to come back early or to pressure her into making a decision. On the other hand, if she comes back early and hasn't given

you the 8 weeks notice, you could be within your rights to tell her that she cannot come back until 8 weeks have passed, or until her maternity leave would have ended, whichever is earliest.

29. Not staying in touch with a woman on maternity leave

You may think that you are not supposed to have any contact with a woman on maternity leave. Of course it is not a good idea to hassle someone who is about to give birth or who is at home coping with a new baby. On the other hand, you must keep a woman informed about things which would be useful for her to know. It could be sex discrimination if a woman loses out because her employer fails to tell her about developments in the workplace. It may help to talk to your employee about what sort of contact she would prefer (for example, email, phone calls, letters).
A woman is allowed to work for up to ten Keeping in Touch (KIT) days without it breaking her maternity leave. You do not have to offer KIT days, and a woman does not have to accept them. Discussing possible KIT days before maternity leave can help, although your employee may not be able to decide whether she definitely wants to do KIT days until she has had her baby.

30. Giving a woman a different job if she has been on maternity leave of more than six months

A woman has an automatic right to return to her original job if she has only taken 'ordinary maternity leave' (the first six months). After the first six months, her right is to return to the original job unless 'it is not reasonably practicable'. However, this doesn't mean that it is fine for you to just give a new mother a different job. 'Not reasonably practicable' is a strong test. If a woman's original job still exists, she probably has the right to return to it. A suitable alternative job must compare to the woman's original job in terms and conditions of work and in the content of the job and skills required.
If a woman's job doesn't exist any longer and there is no suitable alternative, this could be a redundancy situation.

S.14 Enterprise and Regulatory Reform Act 2013
111A Confidentiality of negotiations before termination of employment

(1)Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111. This is subject to subsections (3) to (5).

(2)In subsection (1) "pre-termination negotiations" means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.

(3)Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in, or made under, this or any other Act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed.

(4)In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.

(5)Subsection (1) does not affect the admissibility, on any question as to costs or expenses, of evidence relating to an offer made on the basis that the right to refer to it on any such question is reserved."

- Subsection (1) of section 111A provides that an offer to terminate the employment relationship on agreed terms is not admissible as evidence in any subsequent unfair dismissal case.

- This applies to offers made by either the employer or employee.

- It applies to the offer itself and also to the content of any negotiations about the offer

- that the confidentiality provided by *subsection (1)* does not apply in cases where the employee claims to have been dismissed for an automatically unfair reason.

- where the employer or employee behaved improperly in making or negotiating the offer the tribunal may consider this as evidence in an unfair dismissal claim. This is intended to mirror the test of 'unambiguous impropriety' which has been established in case law as an exception to the common law principle of without prejudice.

- The offer of settlement is not admissible as evidence when a tribunal considers whether to award costs or expenses at the end of a case , unless the party which made the offer stated otherwise when doing so. So it will still be possible to make a settlement offer on the basis that it will be admissible when determining costs in any subsequent claim.

What offers does it apply to?

"pre-termination negotiations" means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.

What is 'undue pressure'?

- an employer not allowing an employee a minimum of ten calendar days to consider the formal offer
- an employer reducing the value of an offer during those ten calendar days
- an employer saying dismissal is inevitable
- an employee threatening to undermine the organisation's public reputation

Acceptable behaviour'…

- setting out in a neutral manner the reasons that have led to the proposed settlement agreement

- factually stating the alternatives if agreement cannot be reached, including the possibility of disciplinary action if relevant

There are, however, some exceptions to the application of section 111A. Claims that relate to an automatically unfair reason for dismissal such as

- whistleblowing
- union membership or
- asserting a statutory right are not covered by the confidentiality provisions set out in section 111A.
- discrimination, harassment, victimisation or other behaviour prohibited by the Equalities Act 2010, or
- claims relating to breach of contract

The differences between without prejudice discussions and pre-termination discussions

Without Prejudice	Section 111A Employment Rights Act 1996
Applies in any legal situation	Only applies to those unfair dismissal situations that are not automatically unfair
Can be relied upon in any situation where the parties are contemplating making offers or having discussions for the purpose of settling an "existing dispute" between the parties	It is wider that without prejudice discussions as it applies to any offers or discussions between an employer and employee with a view to the employment relationship being terminated on agreed terms. There is no requirement to have an existing dispute
This provision does not apply where there has been fraud, undue influence	Wider exception – it does not apply where there is improper behaviour

or some other unambiguous impropriety such as discrimination	