



## Employment Law Newsletter - June 2018

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New name, new look, but the same content. Welcome to the very first Watershed Employment Law newsletter. We have been working hard over the last month to try and make sure that everybody knows about our name change. But if, somehow, we missed you, please be reassured that we're still the same people with the same skills, knowledge and desire to help. This newsletter will continue to provide ten issues per year of the same informative content. So here it is.

### Probationary periods

At the start of an employment relationship, in fact any relationship, we are all on our best behaviour. But over time, our true nature, good and bad, will emerge. That's why, as employers, we have a probationary period. It gives both parties time to decide whether the relationship is right for them.

However, probationary periods have no legal status. An employee who is on probation has the same statutory employment rights as other employees. It is the length of continuous service that defines an employee's rights, including those that relate to dismissal. This is what you should do.

#### How to manage probationary periods

**Length.** Don't assume that one size fits all. Consider the degree of skill and responsibility involved in the role along with how long it will take you to assess the employee's performance. If typically, you set three months but for some posts you need longer, then change it for them.

**Written confirmation.** Set out in the offer letter and contract of employment that the position is

subject to satisfactory completion of a probationary period. Specify its length and how you will monitor and review progress. Explain that it may be extended. This will manage your employee's expectations.

**Achieving the best outcome.** You want the employee to succeed so give them the best opportunity to do so. Regularly meet your new employee to review and discuss their progress; identify any underperformance or training needs. If they are performing poorly, tell them what you expect and give them a chance to improve with a realistic timescale.

**Contractual rights.** Set out any differences in contractual terms that apply during the probationary period. If the notice period will be shorter and or the normal disciplinary procedure will not apply, then make sure that you have told the employee in writing.

**Discipline.** Probationers will not have the requisite two years' service to present a normal unfair dismissal claim but they can claim that a dismissal was automatically unfair. Examples are reasons relating to health and safety, trade union membership or activity or whistleblowing. They could also allege that their dismissal was tainted by discrimination. Even if you will not follow your full disciplinary procedure, it is sensible to carry out some form of investigation and give the employee a chance to explain before dismissing them. Failing to do so will make it easier for an employee to claim that there was a sinister reason for the dismissal.

**Sickness absence.** Monitor sickness absence during the probationary period in the usual way. If it is frequent, it will be more difficult to assess the employee's performance. Investigate the absences to ascertain whether they were because of a disability under the Equality Act 2010. If the absences are attributable to a disability, consider reasonable adjustments. In addition to changes to the role or workplace, consider extending the probationary period so the employee can demonstrate their abilities.

**Confirming the employee in post.** Once the employee has successfully completed probation, notify them in writing. If the contract provides for a salary increase or better benefits, confirm the changes in writing and say when they will take effect. Remember that you must notify the employee in writing of any changes to their written statement of terms and conditions of employment within one month of the change taking effect.

**Dismissal.** You may dismiss at the end of the probationary period, or before it ends, because of poor performance or for misconduct. Unless you are dismissing for gross misconduct you will need to give the minimum notice under section 86 of the Employment Rights Act 1996 (one week if the employee has more than a month but less than two years' service). Your contract may provide for longer than a week. If your contract provides for greater notice following the end of probation, do not let it expire without considering whether to dismiss your employee or extend probation if you want to take advantage of a shorter notice period. In [Przybylska v Modus Telecoms Ltd](#) the EAT implied a term into the employee's contract that the probationary period should be regarded as complete when the employer failed to exercise its right to extend it.

Acas says that it is recruiting additional staff to manage the shortfall, and to cope with the sharp increase in tribunal claims following the abolition of employment tribunal fees.

## Is it harassment to ask an employee who is Muslim whether he supported Islamic State?

As always, context is everything. In [Bakkali v Greater Manchester Buses \(South\) Ltd t/a Stage Coach Manchester](#) the Employment Appeal Tribunal (EAT) considered the case of Mr Bakkali, a bus driver of Moroccan origin and Muslim. When chatting to a colleague about Syria, he quoted a journalist's opinion that Islamic State (IS) was 'trying to enforce law and order upon its subjects'. When a few days later, a colleague asked him whether he was still promoting IS, he reacted aggressively, and his employer dismissed him. The EAT upheld a decision to dismiss his claims of religious discrimination and harassment. The Employment Tribunal that originally heard the case had been entitled to consider the context in which the offending words were spoken.

### What you should do

Remember that the context in which a potentially discriminatory remark is made can be pivotal in

harassment cases.

Consider all the facts and circumstances, including the context in which any offending comment was made.

Be aware that the background to a comment will not always change its nature and prevent it from constituting harassment. The EAT noted that another tribunal may have reached a different conclusion.

The safest course of action is to have a robust harassment policy that clearly explains what behaviour the business considers to be acceptable and how it will deal with breaches.

Ensure that any harassment policy is well communicated and works in practice.

## Employment tribunal quarterly statistics for January to March 2018

On 14th June 2018, the Ministry of Justice published statistics showing increasing numbers of single employment claims following the abolition of employment tribunal fees. Compared with the same quarter in 2017, the number of single claim receipts, disposals and outstanding caseload increased by 118%, 43% and 89% respectively. As the risk of claims increases so does the importance of managing employees correctly.

## If you vary an employee's contract and they don't object, have they accepted it?

Not necessarily said the Court of Appeal in [Abrahall and others v Nottingham City Council and another](#). The council suspended its system of incremental pay progression for two years but when it proposed to extend that, several hundred employees brought claims for unlawful deductions from wages. The Court of Appeal held that it was a 'great pity' that the employees had not said unequivocally that they did not accept the pay cut and that they were working under protest. In deciding that that the employees had not agreed for their contracts of employment to be varied, the Court considered that the variation was wholly disadvantageous to the employees and that it had been imposed unilaterally without consultation.

You may wish to change employees' terms and conditions of employment for several reasons. You may need to cut costs or change duties to reflect the developing nature of the business. Varying contracts can be problematic, particularly if the employees object. So how can you do it while minimising risk?

### What you should do

**Reason for the change.** Think carefully about why you need to make the change and sell it to your employee so they agree to it. If you dismiss and re-engage someone to achieve the variation, you may need to show that you had a genuine business reason for imposing the change, and that you acted reasonably in dismissing.

**Timing.** This is crucial. Save for straightforward changes or those that are beneficial to employees, don't expect the process to be quick. Consider the nature of the change and how cooperative your workforce will be when planning how long it will take to achieve any variation. Remember that a period of formal collective consultation will be required if 20 or more employees will be dismissed and re-engaged.

**Discrimination.** Be wary of potential knock on effects of contractual changes. For example, changing working hours could constitute indirect discrimination if it makes it more difficult for employees with childcare responsibilities to attend work. This is more likely to affect women. Consider alternative, non-discriminatory, options. Only press ahead if the variation can be objectively justified.

**TUPE.** Check whether employees have transferred under TUPE. Broadly speaking, save where

their contracts permit variation, such as a mobility clause, any changes must be unrelated to the transfer or for an economic, technical or organisational reason that entails changes in the workforce.

**Check the contract.** Does an existing clause allow you to make changes? You should still take care that the clause covers the specific change you propose, you should still consult employees about the change and ensure that you act reasonably when you operate it.

**Communication.** This is key to obtaining employees' consent to the variation. Tell employees the reason for the change, how it will benefit the business, and in turn, benefit them. Get their feedback and look at ways of avoiding or reducing any negative effects of the change. Consider offering an incentive, such as a one-off payment, an additional day's holiday or help with travel costs. If the variations are to save money and the alternative is to make redundancies, then warn employees that this is the case. It would not be a threat but an explanation as to why the change is important.

**Implementing the variation.** Whether you implement the variation with the employees' consent or by exercising a flexibility clause in their contracts, you should send each employee a letter setting out the changes to their terms and conditions and when they will take effect. The letter should ask the employee to confirm that they understand and agree to the change by signing a copy of the letter and returning it to you.

**Dismissal and re-engagement.** If you propose to dismiss and re-engage employees, you should hold individual meetings with each objecting employee and offer the same safeguards that you would offer in your disciplinary process. That is, the right to be accompanied, the opportunity to state their case and the right to appeal the decision. Ensure that you give them sufficient notice: the notice required by their contracts or the statutory minimum, whichever is longer. Send each employee notice of termination, enclosing the offer of re-engagement on the revised terms. The new contract of employment should begin immediately after the expiry of the notice period.

If you would like to discuss these or any other issues facing your organisation please speak to your usual contact at Collinson Grant or Peter Howarth on +44 161 703 5611

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