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SOLICITORS

Crossmans Guide
**Employment
and
Redundancy**

Cambridge Head Office

5 St. Andrews St
Cambridge CB2 3AZ
Tel: 01223 362414

Fax: 01223 322475

Email: solicitor@crossmans.co.uk

Cambridge Branch Office

Elmhurst, 22a Brooklands Ave
Cambridge CB2 8DQ
Tel: 01223 488690

Fax: 01223 312844 **Email:**

solicitor@crossmans.co.uk

www.crossmans.co.uk

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Employment and Redundancy

Redundancy has been part of our legal system for almost 40 years yet there is still a great deal of confusion and misinformation as to what redundancy is and how the process works.

Redundancy has become a term used in many terminations of employment to give a neutral and honourable title to what has gone on.

Strictly speaking, before there is any question of redundancy, the employers' need for employees to do work of a particular kind must have diminished or ceased. This means that the employer does not need as many people to do that particular work.

If it is the case that for whatever reason, the demand for a certain kind of employee has reduced or stopped then the employer must carry out a proper procedure. This requires the employer to carry out a number of processes.

Firstly, the employer must decide how many employees are actually redundant. It must then draw up criteria for selection for redundancy. Having identified the criteria, the employer must then decide which employee is to be affected. It is essential for the treatment of a fair redundancy that no selection is made at this stage. Identifying potential candidates for redundancy is not the same as selecting the redundancy candidates.

Prior to selection, a consultation process must take place. The consultation process involves discussing the redundancy with the employee in order to establish not only if the employee is willing to volunteer for redundancy but also, what other work the employee may be willing to do. Employees should never assume that employees will not work different hours, accept a different pay structure or indeed accept different work.

The employer must be careful to consider all relevant candidates. If for example there are three people in different departments doing the same job and one department is to close then it is unlikely to be a fair process if the redundancies simply concentrate on the department which is closing rather than considering whether the employees who have the same skills as those required in other departments are better qualified, have longer service or otherwise more appropriately retained than the people currently in post in those departments that are not closing. Similarly, a policy based on last in first out and with no other factors is unlikely to succeed in this day and age.

Once consultation has been undertaken, the outcome of the consultation needs to be considered and then a selection process can be made.

Often, redundancy is a label accepted by both parties. If that is what has happened and everyone is happy then fair enough. However, employers ignore the procedure and requirements of redundancy at their peril. As failure to follow legal requirements can lead to an Employment Tribunal Claim. Seek advice before effecting a redundancy. Crossmans can help through this process.



Constructive Dismissal

Constructive dismissal is one of the most common and misunderstood concepts in employment law.

An employment contract is a contract like any other even if it is not written down. It requires both parties to comply not just with what has been agreed but also with the spirit of the contract between employer and employee.

It is a general rule of contract that there are certain clauses or conditions in a contract which are so important that they go to the very heart of the contract. If they are not performed then the contract really is not working as it should. Breach of one of those potential clauses can amount to breach of contract. This is known as a fundamental breach.

A fundamental breach of contract does not end a contract. The innocent party who receives the fundamental breach can choose either to accept the breach and this will bring the contract to an end or can overlook or ignore the breach in which case the contract continues. Subject to whatever changes the breach has made.

Putting this into employment terms, payment of wages is a clause going to the heart of the employment contract. If the employer pays wages on a different basis perhaps using a different payday or pays at a reduced rate then this would be likely to be a fundamental breach of the employment contract. The employee could either accept the fundamental breach and end the contract or ignore the breach in which case the contract continues and the clause in the contract dealing with payment is amended to reflect the new arrangements.

A fundamental breach of employment by the employer ends the contract by the employee resigning. This gives rise to the constructive dismissal.

Historically, many constructive dismissals are risen from actions which whilst the legal responsibility of the employer where not actually within the employer's knowledge or consent. Examples might include bullying by a manager without the knowledge or the authority of superior management or sexual harassment by a colleague. None of these actions will be the responsibility of the employer because the legal doctrine of vicarious liability means that an employer is responsible for the actions of the employees during their working duties even if those actions are not authorised or permitted by the employer.

A perceived unfairness arose whereby an employer could be liable to claim for constructive dismissal in the circumstances where the employer was unaware of a situation and did not have an opportunity to remedy it. In some cases the employer was horrified to discover what had happened.

It is now the case that a claim for constructive dismissal will be unlikely to succeed unless the employee has already gone through a grievance procedure outlining the matters in regard complained of and giving the employer the opportunity to remedy matters. This does make it much



more difficult in some circumstances for employees to seek redress because bringing in a grievance claim will be extremely prejudicial to employment relations. In cases such as bullying, there can be hard choices to be made.

Employees who are considering resignation on the grounds of constructive dismissal should take careful advice before they act as rights maybe lost of the matter is not proceeded with an accordance with legal requirements.

Statutory Disciplinary Procedures

Since October 2004, there are compulsory disciplinary and grievance procedures in place. These are complex and failure to comply could make a dismissal unfair.

Employers should ensure that their procedures comply.

Seek advice now. If you wait till you have a grievance on a disciplinary matter, it could be too late.