



Equality & Rationalisation - An Autumn Update Seminar

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macROBERTS

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Equal Pay & Job Evaluation

By Stephen Miller

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Every pay system in every organisation makes it possible to rank all the jobs in that organisation in order of value.

It may not be fashionable to think of an organisation as a hierarchy and it may not be true in everyone's eyes that value is measured according to money, but when it comes to equal pay law, the two concepts of pay and value are inextricably linked.

For this reason it becomes extremely important to make sure the rank order of jobs is correct.

There are many methods to achieve this.

If the organisation chooses to measure the jobs by assessing such factors as skill, effort and decision-making then it will be using a job evaluation study.

This paper will consider the advantages and disadvantages of using such a study from a litigation perspective.

Use of a Job Evaluation Study

Advantages

One of the attractions of using a job evaluation study is that, should any employee take equal pay proceedings using the argument that his or her job is of equal value to a colleague, the employer can apply to have that claim dismissed if the organisation's own job evaluation methodology shows the jobs to be of different values.

Such a complete defence will only be sustained if the job evaluation system is shown to be analytical and thorough, and free from any discrimination in the factor plan (that is, it does not disproportionately reward factors which one or other sex is predisposed to do (e.g. physical effort and males, fine motor skills and females)).

Disadvantages

To do it correctly, therefore, job evaluation will inevitably come with a high cost of implementation and upkeep. There is a more subtle disincentive: if the analytical job evaluation reveals a disparity in pay between similarly-valued jobs (which will usually be the case, at least in respect of some jobs) and that disparity is sex-tainted (perhaps based on a perception of what is women's - and therefore lower paid - work) then the most immediate activity which will follow the job evaluation might be the lodging of historic equal pay claims which can reach back five years.

The Job Evaluation Scheme itself is not retroactive; but in reality its effects might be.

Not using Job Evaluation**Advantages**

As pay and grading methodology is less likely to be transparent the very opaqueness of the pay system may disguise inequality and therefore protect against claims.

Disadvantages

Those choosing job evaluation can legitimately control and influence the factors particularly valued in the client organisation. In contrast, those with no job evaluation lose control of that dimension in any equal value proceedings which are taken. The Employment Tribunal is likely to ask a member of the ACAS Independent Panel of Experts to carry out the evaluation... according to their own standards.

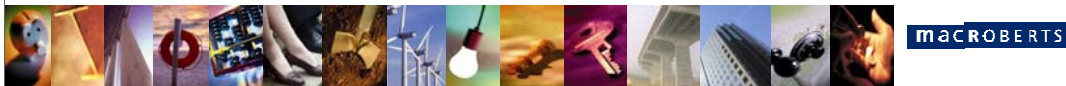
Further, a great deal of time and intensive examination is required in the preparation for that independent evaluation (e.g. drafting and exchange of lengthy job descriptions), somewhat negating the benefits of not investing in job evaluation in the first place.

Summary

Equal pay is not just a public sector issue. There has never been greater awareness of the existence of the problem, nor greater understanding of what claims involve. Specialist Claimant advice (often on a "no win no fee" basis) is readily available.

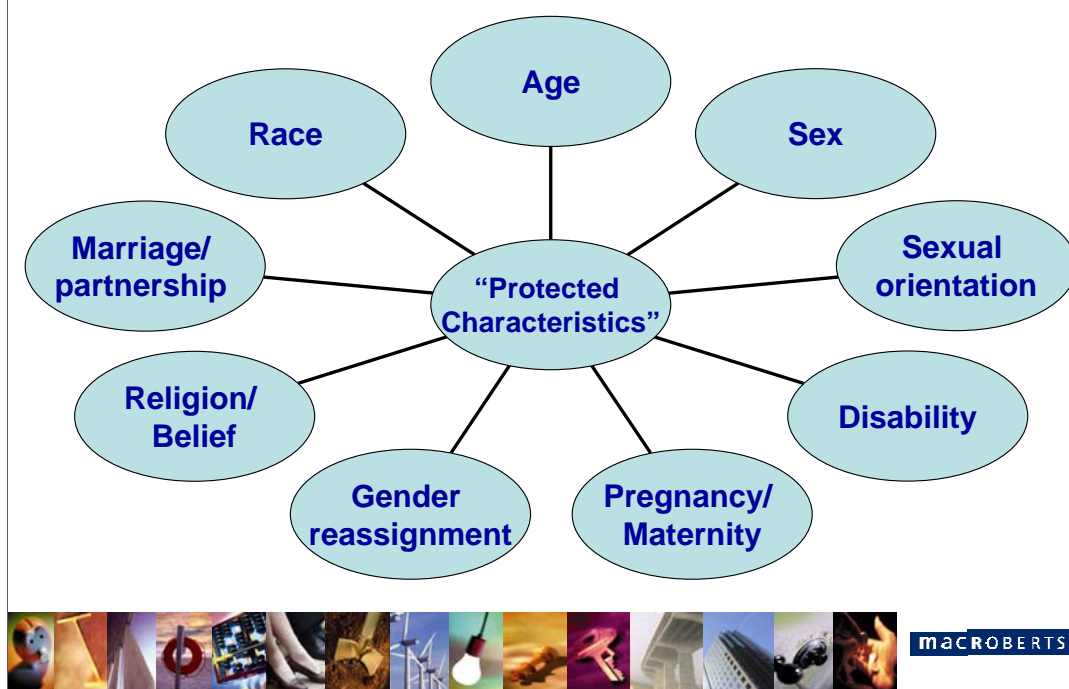
In our view, the increasing possibility of claims means that organisations of all sizes would be well advised to introduce analytical job evaluation.

EQUALITY ACT 2010 “Rationalise & Strengthen”



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Protected Characteristics



Section 4: Protected characteristics

The Act tackles discrimination in employment, education, housing, service provision voluntary and community sector associations and public functions by prohibiting discrimination against protected characteristics.

The Act lists what characteristics are protected -

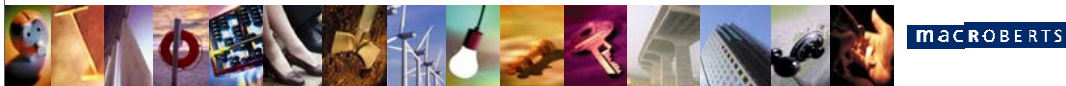
Age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

The Act does not alter the characteristics previously protected by law.

Direct & Combined Discrimination

A person discriminates against another if, because of a protected characteristic, they treat them less favourably than they treat or would treat others.

A person discriminates against another if, because of a combination of two protected characteristics, they treat them less favourably.



Direct Discrimination

There is a change from treatment “on the grounds of” a protected characteristic to treatment “because of” a protected characteristic. According to the Explanatory Notes, “This change in wording does not change the legal meaning of the definition, but rather is designed to make it more accessible to the ordinary user of the Act”. That remains to be seen – you can’t change the wording without risking argument about a change in meaning.

It should be noted that the victim does not require to have the protected characteristic and accordingly associative discrimination and perceptive discrimination are therefore included.

e.g. If a white applicant is refused work because they are married to a black man, this would amount to associative discrimination.

e.g. If a white applicant is refused work following written application because they have an African sounding surname and are erroneously presumed to be black, this would amount to perceptive discrimination.

Combined Discrimination

The Government is still considering whether to implement this.

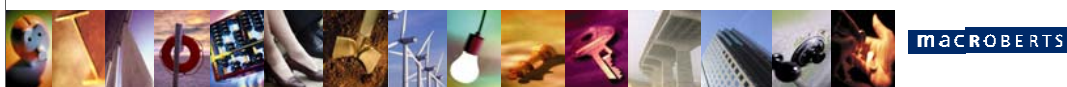
Previous legislation only protected discrimination based upon a single characteristic.

e.g. if black women are treated less favourably than white men (but treated the same as white women and black men) then this would now amount to less favourable treatment.

Nevertheless, it is arguable that this new form for discrimination is plugging a non-existent gap. Under previous case law, the discriminatory reason does not have to be the sole reason.

Third Party Harassment

An employer must take reasonably practicable steps to prevent a third party from harassing an employee if the employee has been harassed by any third party on at least two other occasions



In addition to the normal harassment provisions, an employer must take reasonably practicable steps to prevent a third party harassing an employee if the employee has been harassed by any third party on at least two other occasions.

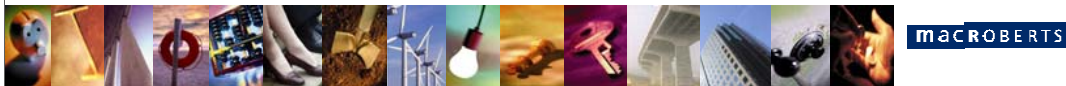
This extends the liability of employers to cover persistent harassment of their employees by third parties. The previous harassment may be by different third parties.

e.g. an elderly customer regularly harasses a young employee about being barely out of nappies and too inexperienced to serve him.

[In force Oct 2010]

Disability

Normal day to day activities are no longer restricted to the eight specified capacities i.e. mobility, manual dexterity, physical co-ordination etc.



Section 6 & Sch 1: Disability

When determining disability, normal day to day activities are no longer restricted to eight specified capacities; namely, mobility, manual dexterity, physical co-ordination, continence, ability to lift; speech and hearing, memory, perception of risk etc.

The list of eight capacities has been abandoned but the general requirement of an impairment which has a substantial and long term effect on a person's ability to carry out normal day to day activities remains.

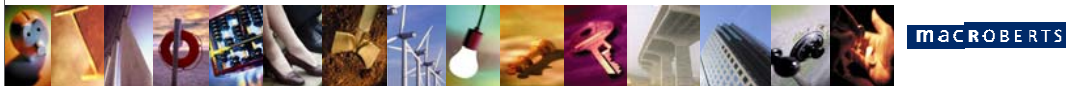
e.g. It is easier for an employee whose mental impairment causes impaired judgement to qualify as disabled.

The protected characteristic is the particular disability in question and not disability in general.

(In force Oct 2010)

Discrimination Arising From Disability

A person discriminates against a disabled person if they treat them unfavourably because of something arising in consequence of their disability



Section 15: Discrimination arising from disability

*“A person (A) discriminates against a disabled person (B) if –
A treats B unfavourably because of something arising in consequence of B’s disability, and
A cannot show that the treatment is a proportionate means of achieving a legitimate aim.”*

This is intended to restore the protection against disability related discrimination which applied prior to the House of Lords in *London Borough of Lewisham –v- Malcolm* 2008. Mr Malcolm had sublet his flat in breach of his tenancy agreement and his landlord served notice to quit. The House of Lords interpreted the old phrase “to whom that reason does not apply” to mean a non-disabled comparator in the same circumstances. Even though Mr Malcolm had sublet, because of his schizophrenia, the court held it was not disability related discrimination because the Landlord would have served notice to quit on a non disabled tenant who had sublet.

According to the draft Code this section now covers “anything which is the result, effect or outcome of a disabled person’s disability”. Under the new provisions Mr Malcolm would potentially have suffered discrimination arising from disability.

To take a further example a disabled employee dismissed for significant absences may have suffered disability related discrimination pre Malcolm but not post (assuming a non disabled employee would also have been dismissed). Under the Equality Act, they will have suffered discrimination “arising from disability” unless that treatment can be justified.

By way of completeness indirect discrimination is also now extended to cover disability. It anticipated that indirect disability related claims will be difficult to establish. Disabled employees would need to show that persons who have the “same disability” are similarly disadvantaged.

The Act now also explicitly prohibits passing on the costs of reasonable adjustments to the disabled person.

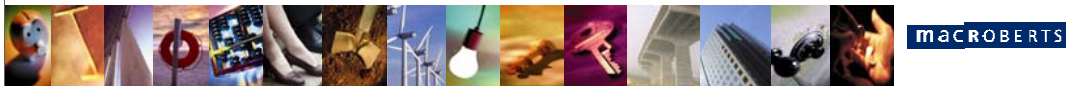
(In force Oct 2010)

Pre-employment Health Checks

Applicants for work must not be asked about their health or any disability before being offered work or being included in a selection pool.

Exceptions:

- ▣ Determining fitness to undergo interview/ assessment
- ▣ Determining fitness to carry out an intrinsic function
- ▣ Monitoring diversity
- ▣ Supporting positive action
- ▣ Where disability is an occupational requirement
- ▣ National security



Section 60: Pre-employment Health Checks

Applicants for work must not be asked about their health or any disability before being offered work or being included in a selection pool.

Exceptions:

Determining fitness to undergo interview/ assessment

Determining fitness to carry out an intrinsic function

Monitoring diversity

Supporting positive action

Where disability is an occupational requirement

National security

This requirement applies to written applications, medical questionnaires and interviews.

The provision is not as restrictive as it might seem at first glance and it is likely that the exceptions will become the rule. e.g. it is arguable that regular and effective attendance at work is an intrinsic function of any job and it is therefore reasonable to enquire about past absences before making unconditional offers. The key is to ensure that medical questionnaires ask for no more information than is necessary to determine fitness to perform the job.

Furthermore it appears that candidates can be asked about health and disability once included in a pool for selection. These restrictions could arguably be circumvented by creating large selection pools.

Breach is enforceable by the Equality and Human Rights Commission and action is likely only in the case of persistent offenders.

However, in any direct discrimination claim which follow, the burden of proof shifts to the employer.

(In force Oct 2010)

10 Discontented Employees to Avoid

By Karen McGill & Katy Wedderburn

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Half of workers would like a new job

By Rashmi Kumar

15 September 2010

Gone are the days when you find a job, and stay with it for years on end.

The trend today seems to be one of changing jobs.

And, despite rising unemployment figures, and fears, yet again, of a double dip [recession](#), many discontented employees are planning on shifting jobs.

Aon Consulting, an employee benefits and risk management firm, conducted a study on this rising trend and found that nearly half of the workforce in the UK plan on looking for a new job.

Suffering from major dissatisfaction at the work place, nearly one in two will start job hunting by the end of the year.

Whether the economic conditions will allow them to do so remain a question, but this seems to be a wake-up call to employers who don't want to lose their best workers.

Aon suggests that companies should begin a review of their staff retention policies and programs to make sure that their best staff don't leave them hanging.

The survey of more than 7,500 workers from across 10 leading economies of Europe threw light on the countries with the most disgruntled employees.

The 47% of people surveyed in the UK likely to want to change jobs, these were beaten only by the Irish unhappy with their lot, with 49.4% of the workforce looking to swap jobs.

On the other hand, workers in the Netherlands and Belgium seemed to be the most satisfied, with less than 20% in each country saying they would start job-hunting this year.

The study also showed a difference in attitudes among the young and those older than 55. While more than 50% of those aged between 18 and 24 years were interested in moving jobs, older people seemed more content continuing what they were doing, or possibly less convinced they would find a new role.

With austerity plans underway in most of the European countries, and salary freezes and cutting pay being the talk of the day; it is not surprising that many are looking to change their jobs.

Peter Abelskamp, executive director of health and benefits for Europe, Middle East and Africa at Aon Consulting, said, 'Not surprisingly, high performing employees are starting to feel unmotivated and trapped and with a glimmer of hope for economic recovery, many such individuals in the UK are now asking themselves whether better opportunities lie elsewhere.'

'The result of this discontent is a significant hike in the number of people intending to seek a job with a new employer.'

'Whether these jobs are out there remains to be seen, but the risk to companies of losing key personnel is definitely very real. This could seriously undermine an organisation's competitive position once the recovery takes hold.'

Read more:

http://www.thisismoney.co.uk/work/article.html?in_article_id=514546&in_page_id=53928#ixzz13HEAyX28

NO 1

Sue Storer claimed constructive dismissal and sex discrimination, after leaving her position as deputy head of Bedminster Down secondary school in Bristol. She tried to sue Bristol city council for £1m because it refused to replace a chair which resulted in a "farting" noise every time she sat down, and therefore regularly subjecting her to jokes.

She told the tribunal that she was given an old, uncomfortable chair when she started at the school and had requested for it to be replaced. However, when she received the new chair, it proved to be equally unsatisfactory. "It was very embarrassing to sit on," she complained. "I asked for a chair that didn't give me a dead leg, or make these very embarrassing farting sounds. It was a regular joke that my chair would make these farting sounds, and I regularly had to apologise that it wasn't me, it was my chair."

Mrs Storer added that the chair caused her a great deal of distress, particularly on parents' evenings and when she was speaking with colleagues. Matters came to a head when the two other deputy heads (both male) received new executive seats in their offices, and she was overlooked.

Her case was thrown out; with the tribunal ruling that she had not been discriminated against and that she was in a position to buy a replacement chair herself.

NO 2

Sommer de la Rosa, a former teaching assistant at the Dorothy Stringer School in Brighton, made a claim of unfair dismissal, claiming that the reason that she was dismissed was because she was a witch.

Sommer de la Rosa, a practicing white witch of the Wiccan faith alleged that she was banned from discussing her faith and wearing a pentagram - a symbol of her faith. Education officials denied that they had banned her from wearing the pentagram or mentioning her faith. They claimed that they had merely suggested that religious symbols remain hidden in order not to distract pupils.

She claimed that she was sacked as result of prejudice against her Wicca faith. However, the school and Brighton and Hove City Council said that she was sacked due to her poor attendance and inappropriate disclosures to pupils regarding spells that she could put on people. She had 21.5 days off during her six-month probationary period - her attendance rate had been 20% (this being the equivalent to one day a week at work during the school calendar).

She was accused by the tribunal of using her beliefs as a scapegoat for her being sacked. The dispute was eventually settled out of court.

NO 3

A teaching assistant refused to listen to a child read a Harry Potter book because she was of the view that its magic theme was against her Christian faith.

The mother of a seven-year-old girl who was a fluent reader had complained to the girl's teacher that the book that Sariya Allen had given her was too easy. The girl then chose a Harry Potter book from her reading folder, but Ms Allen refused to listen to her reading it because God had stated in the Bible that witchcraft was "an abomination".

Ms Allan quit her job after she was disciplined by her employers after she told the seven-year-old pupil "I don't do witchcraft in any form" and claimed that she would be "cursed" by hearing the J K Rowling novel. She emphasised her view that the book glorified witchcraft and that it was against her Christian faith. She claimed that she was discriminated against as a born-again Christian and that she was put at a disadvantage compared with other teaching assistants who were not of her faith.

She took her dispute with the school to an Employment Tribunal, citing religious discrimination and claiming for damages.

She lost her case.

NO 4

A Muslim insurance salesman claimed that he had suffered religious discrimination because his employers offered alcohol as a performance incentive. Imran Khan, who works for Direct Line Insurance, sought damages for "hurt feelings" under the Employment Equality (Religion or Belief) Regulations 2003.

He claimed that the bottles of wine on offer meant that he was at a disadvantage because as a Muslim, he could not drink alcohol and therefore he was not able to claim the prizes.

The tribunal heard that Mr Khan was one of a team of 14 who were offered rewards for sales of pet and household insurance policies.

Mr Khan's team leader Louise Cummings at the tribunal said that she had simply introduced the incentives as a means of "improving staff morale and performance". "If I had realised that I had hurt anyone's feelings, then I would have taken steps to rectify that immediately," she added.

Tariq Sadiq, for the company, said that another Muslim worker who had won an alcoholic prize in a similar scheme had simply just exchanged it for an alternative prize.

Needless to say, he lost his claim for religious discrimination. In the judgement, it was stated that a tee-total person who was not a Muslim would have been in exactly the same position.

The difficulties in ensuring that employees are not discriminated against are perhaps highlighted by this case. However, cynics may suggest that he was simply "trying it on"!

NO 5

Wayne Simpson an energy salesman lost his job after sending a customer a picture of himself sitting naked drinking whisky in a bubble bath.

Mr Simpson had met the female customer while selling door-to-door in Tyneside and thought that he had got on very well with the woman. He had obtained her number and later sent the picture with a message saying "Fancy going out for a drink sometime?"

The woman didn't wish to take him up on the offer and instead reported him to the company and the police. Simpson accused his employer of lacking a sense of humour and overreacting, emphasising that the picture together with the message was merely a bit of harmless fun. "I wasn't even showing off my naughty bits," he said

His employer however took this incident very seriously and at the time, they stressed their position. They said that Mr Simpson had broken an industry-wide code of practice which was aimed at promoting consumer confidence and providing consumers "with standards of protection over and above those provided by law".

NO 6

A mayor of 67 years of age admitted experiencing a "sexual thrill" when his young town clerk, Mrs Bing, 34, stood close to him. Tony Prior, who was mayor of Chard, Somerset, told an employment tribunal he soon became 'infatuated' with Sally Bing after becoming aware that she was no longer wearing her wedding ring following the breakdown of her marriage. The married former mayor of Chard in Somerset is said to have bombarded her with phone calls. Mrs Bing claimed his persistent pestering forced her to take time off work.

Mr Prior had invited Mrs Bing out for lunch and had even offered to take her on a holiday to Andorra. Mrs Bing claimed that he looked down her cleavage, made comments about her pretty blouse, blew her a kiss, and touched her hand during a meeting.

The tribunal also heard how he made a drunken phone call to her home while on holiday with his wife, and later sent her an e-mail after drinking sherry, wine and whisky at his home.

Mr Prior said that he gave her a £500 cheque to take herself somewhere if she declined his offer of Andorra. Mrs Bing declined the holiday and gave the cheque back. She said she was "stunned" by his offer and was subsequently signed off work for four weeks following the incident.

In the judgment it was stated that Mrs Bing had behaved "impeccably" and that Mr Prior's invitation to Mrs Bing to go on holiday to Andorra with him had a sexual motive.

Mr Prior was ordered to pay £33,697 in compensation for sex discrimination and victimisation.

NO 7

Two solicitors with London law firm Charles Russell found themselves in trouble over an e-mail that suggested that a black secretary who had resigned be replaced with a 'busty blonde'.

When Rachel Walker resigned, assistant solicitor Adam Dowdney emailed partner Clive Hopewell asking: "Can we go for a real fit busty blonde this time? She can't be any more trouble and at least it would provide some entertainment!" Hopewell responded to the email with: "I was about to say the same!"

Ms Walker accidentally came across the e-mail and despite receiving letters of apology from the two, she took the case to an employment tribunal.

The two lawyers wrote letters apologising for their behaviour. Clive Hopewell, the partner, made out that the e-mail was no more than simply a "a childish joke" which he did not want to create a "sour a good working relationship" and offered the secretary the chance to "chat" about it over lunch. She turned down his offer. Adam Dowdney described it as merely a "senseless and thoughtless joke". He also thought that all those involved could simply put the incident behind them.

Ms Walker said she was so upset by the e-mail that she had sought medical attention from her doctor, who signed her off work. The claim was settled for an undisclosed sum, although it is thought that she was awarded somewhere in the region of £10,000

NO 8

in 2007, at Hexham-based department store, rather than follow proper redundancy procedures in relation to its 140 staff, the firm's bosses set off the fire alarm, assembled everyone in the car park and

read out a short statement to the effect that all their jobs were to go. Then, before being ordered back to work, they were told not to talk to the media about the situation.

NO 9

An office boss threatened his staff with DNA tests after chewing gum got stuck on a director's trouser suit. Tony Price, the managing director of IT firm WStore UK was so annoyed after he found the chewing gum squashed and stuck under a desk. Following this discovery, he sent out a memo insisting that every single one of his 80 staff take a DNA test to reveal the person responsible.

However, after the plan devised by Mr Price was leaked to the media, he claimed that he was only joking - but that he was simply very angry that his chewing gum ban had been blatantly ignored.

However, following the leak to the media, he vowed to track down the employee who alerted the press by forcing workers to take a lie detector test! Mr Price, who admitted to being a huge fan of television detective dramas such as BBC's Waking The Dead, said: "Gum was a problem in the office".

He cheekily added: "We are now waiting for a dry cleaning bill or the invoice for the replacement trousers."



MEMORANDUM

TO: All Employees
Tiger Oil Company
Tiger Drilling Co., Inc.

DATE: September 25, 1978

FROM: Edward Mike Davis

SUBJECT: Vacations

As you know, after one full year of employment you receive two weeks' vacation and two weeks respectively each year worked thereafter. Effective immediately, the two weeks per year must be taken one week at a time and begin the end of the week - you cannot start your vacation in the middle of the week. There will be no more taking one or two days at a time and combining them with holidays and weekends. If, in my opinion, you deserve additional time off you must obtain it from me proving to me that you have worked hard enough to get it - not trying to edge a day here and a day there combined with the holidays. I am not a fool - I know you can take two weeks and stretch them into two months properly done so don't insult my intelligence. Ask for it like a man. Also, in your absence, you must arrange to have someone perform your duties.



EDWARD MIKE DAVIS



MEMORANDUM

To: All Employees
Houston Office

Date: January 12, 1978

From: Edward Mike Davis

I swear, but since I am the owner of this company, that is my privilege, and this privilege is not to be interpreted as the same for any employee. That differentiates me from you, and I want to keep it that way. There will be absolutely no swearing, by any employee, male or female, in this office, ever.



EDWARD MIKE DAVIS

Memorandum
January 12, 1978
Page 2

I don't want any excuses about not being able to find anyone to work on rigs, drive trucks, or work in the yards -- just find the people you need, and if we have to pay more money to get them, it will all balance out in the end.

Anyone who lets their hair grow below their ears to where I can't see their ears means they don't wash. If they don't wash, they stink, and if they stink, I don't want the son-of-a-bitch around me.

Any truck driver or employee who ruins a piece of equipment due to negligence or abuse will be terminated immediately by his boss, and if the boss doesn't do this, then the boss will be terminated by Mike Davis.

Each driver will be assigned boomers and chains. A check list will be kept by Duane Brown and Fred Addison, and equipment issued to each truck will be checked off weekly. A driver will pay for any equipment not on his truck or if it is ruined. If lost, turn it in to Duane or Fred. All truck drivers will be cautioned about tearing up fences, ditches, etc. with their trucks. Truck drivers will check oil and everything else on their trucks every day - just like the Army.

When hauling any equipment, all boomers will be wired after they are closed and checked for load shift. They are not to come loose or gnaw holes in what it is bound against.

Each driver will inspect his truck for loose bolts, nuts, corrosive battery cables, water leaks, oil leaks, tires, etc. throughout the truck. If a minor repair can be fixed, fine; if not, notify Duane Brown or Fred Addison, and they will get it fixed immediately. Everything will be inspected like the Army.

Each truck driver will either sleep in his truck or get a room for at least six hours sleep per each 24 hours, and not be found in a bar drinking anything, and that includes beer. You want to drink, then drink on your own time and your own money and not mine. Truck drivers will be given one day per week off, to be scheduled by their superior. Anyone found popping pills to stay awake will be discharged.

Do's & Don'ts Of Employment Tribunal Procedure

By John Macmillan & Gina Wilson
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For those of you who are brave enough to conduct Employment Tribunals yourselves, these tips may save the day. If, however, you are instructing a representative, it will be very useful for you to know this information in order that you can inform your witnesses.

1. What to Wear

It is important that witnesses present themselves in a smart and professional fashion in order that the Tribunal gets the impression that witnesses are professional and organised. One of our clients recently asked, ahead of an eight-day Hearing, whether they required to buy a rather smart £600 suit. We were pleased to note that they were taking their attire seriously. That said, one does not require to buy Prada; Marks & Spencers would suffice! In addition to dressing smartly, it is important that witnesses do not give the wrong impression of their character by reason of the style of their dress. If one of your senior female managers is alleged to have sexually harassed a young male member of staff, it would not be advisable for her to attend at Tribunal wearing a low cut top, short skirt and red finger nails, etc.

2. When to turn up?

The Tribunal hours are generally from 10.00am until 1.00pm and then picking up after lunch at 2.00pm and running on until 4.00 pm. It is important that there is some flexibility in your availability and that of your witnesses, as Tribunals sometimes run on at the end of the day in order to finish a line of questioning or witnesses' evidence.

3. Who to bring?

In general, someone needs to be there to give instructions. As you will probably be aware, that is usually the HR Manager who has been overseeing the process. As regards witnesses, in Scotland,

witnesses cannot be in attendance in the Tribunal room until they give evidence. Therefore, it is important to try to predict (as far as possible) when witnesses will be required to be at the Tribunal to give evidence. To keep a Judge and two panel members and the other side waiting for your witnesses, will not go down well. On the other hand, however, to keep your witnesses, in particular, senior managers, waiting in the Tribunal waiting room for many hours, similarly will not go down well. Accordingly, there has to be a juggling act where you keep under regular review when your witnesses will be required to attend at Tribunal. The Scottish position also applies for Northern Ireland.

As regards the position in England, all witnesses require to be in attendance in the Tribunal room for the entire period of the Employment Tribunal Hearing, unless you have sought the Judge's permission for them to be excused on the basis that there is a very good reason for them being excused. It is important to note the differences in the Employment Tribunal procedure in England as failure to do so means that you are inadvertently in trouble with the Judge, in breach of a Tribunal Order or, worst case, in contempt of court.

4. What does an industrial jury actually mean for you?

Unlike the jury in the form of 12 Angry Men, an industrial jury is made up of a Judge and two lay members. The Employment Judge is legally qualified and will have had many years of experience practicing in employment law. In addition to the Judge, there are two wing members from lay backgrounds. These two wing members usually comprise of one from an employee or trade union background and the other from an employer or management background. The lay members have received some training in order to prepare them for sitting as a member at the Employment Tribunal. The wing members are generally there more to assess the credibility of the witnesses and the reliability of the evidence presented.

5. What to call the Judge

If the Judge is male, he should be addressed as Sir. If the Judge is female, she should be addressed as Madam. The same applies for the wing members.

6. What if the Judge/Member is biased?

The first scenario that you could be presented regarding bias is where the Judge or wing member declares, usually at the outset of the case, that they have some knowledge or, or relationship with, a party or someone within the party's organisation. You are then faced with a dilemma: do you ask that

they recuse themselves due to their potential bias or you are happy to proceed on the basis that there should be no or very little bias? This usually involves a quick and important judgment call to be made.

The second scenario that could arise in relation to bias is where the Judge or wing member makes a comment, asks a question or otherwise conduct themselves in such a way that it appears that they may be biased. If this situation arises, again, a quick important judgment call requires to be made as to whether to raise a reasonable objection at this point in time or whether to await the Judgment and thereafter consider lodging an Appeal on the basis of bias and/or perversity.

7. What documents?

As regards the importance of documents, there is one Employment Judge in the Glasgow Tribunal Office who regularly says *"an ounce of documents is worth a ton of recollection"*. That is very true. If there is a document before the Tribunal setting out, for example, a contractual term, it saves a lot of evidence and conjecture regarding the supposed existence of such a document. Accordingly, producing all relevant documents usually streamlines the process and reduces the length of the Hearing. It is important, therefore, that all documents supporting your case are included in your Bundle of Productions. The Bundle of Productions should be in chronological order. The Bundle should be produced based on original documents, where available, in order that the authenticity of the documents is not in question.

8. What about the Hidden Bomb?

In England, however, there is a general rule in the procedure that all documents pertaining to the matter must be disclosed by each side, regardless as to whether the documents are helpful or unhelpful to the parties' case. Failure to comply with this disclosure requirement can be very serious. If one is preparing for and presenting an English Employment Tribunal, it is mandatory that this rule is complied with. On the other hand, we have seen situations where someone is not familiar with preparing and presenting cases in Scotland and they assumed that the English rules of procedure apply which means that they then produce documents which are unhelpful to their case. This allows the other side to cash in on it.

9. What if you need a comfort break?

Given that usually the longest part of the Employment Tribunal proceedings is the three hours from morning until lunchtime, most people do not require a comfort break during that time. If, however, a

comfort break is required, the person conducting the case or a witness is entitled to politely ask the Judge if it would be possible to have a short comfort break. However, it does not look at all good if a witness, who is struggling at a crucial point in the cross-examination, requests at that crucial time that they have a comfort break.

10. What do you do if the opponent is a plonker or an arrogant so-and-so?

As tempting as it is to rise to the bait when your opponent is a plonker or arrogant, one must resist this urge. In conducting Employment Tribunal proceedings, it is fundamental that one acts professionally and is polite at all times.

If the conduct of the proceedings by your opponent could be said objectively to be unreasonable, you could have grounds for seeking an award of expenses for the conclusion of the Employment Tribunal proceedings. It could be that a mention of the possibility of seeking such an application would be enough to change the behaviour of your opponent. Otherwise, you may decide that tactically it is best to allow them to continue to conduct the proceedings in an unreasonable manner in order that you could found upon all of their unreasonable behaviour at a later date.

11. What can we do with our charm and personality?

Often Employment Tribunals can be quite dry, dull and boring. If Employment Tribunal proceedings are allowed to be too boring, it can result in the Judge and members losing interest. It is always better if the parties conducting the proceedings can entertain the Tribunal in the appropriate manner in order to brighten up what would otherwise be very boring proceedings, without being the village comedian. Some light-hearted humour can be introduced where relevant and appropriate. It is for a skilful adviser to highlight the issues, sometimes in an animated or otherwise interesting way, in order that they remain in the minds of the Employment Tribunal. There is much consideration and preparation that requires to go into the conduct of examination in chief of witnesses but, in particular, cross-examination. The manner and timing in which issues are raised is key to highlighting to the Tribunal discrepancies and weaknesses in the other side's case, etc. and doing so in such a way that it is memorable for the Employment Tribunal when they adjourn to deliberate.

12. What law we will need

It is fundamental that you are familiar with the legal framework if you are presenting a case at the Employment Tribunal. It would be counter productive to present the Tribunal facts which, after

application of the law, were contrary to your interests. The starting point is understanding the legal tests that you need to fulfil. Thereafter, you require to present to the Tribunal the facts which will hopefully allow you to succeed in proving your case. It is at the end of the case, once the evidence has been completed, that the legal submission is presented. During the legal submission, it would be usual to present to the Tribunal your analysis of the legal framework and the supporting facts that you have presented to it. Thereafter, one would usually invite the Tribunal to reach certain conclusions after applying the law to the facts. The relevant applicable case law is usually presented to the Tribunal at the time of the submission. The reason for that is that the Tribunal Judges do not have access to all the resources to which we have access. In addition, it would be best to assist the Judge by presenting him or her with the authorities which are of help to your case, rather than have the Judge hunt around and try and find them.

13. Mobile Phones, Food and Drink in Tribunals

One of the easiest ways to aggravate the Judge and wing members is to leave your mobile phone on and have it ring during the Employment Tribunal proceedings. This usually has the consequence of angering your client as well. Accordingly, it is fundamental that mobile phones and all other electronic devices are turned off during the Employment Tribunal proceedings.

Whilst the Tribunal allows the parties and witnesses to drink water which is provided within the Tribunal room, all other drink, and also food, is strictly prohibited.

Disclaimer

The material contained in this handout is of the nature of general comment only and does not give advice on any particular matter. Readers should not act on the basis of the information in this handout without taking appropriate professional advice upon their own particular circumstances.

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