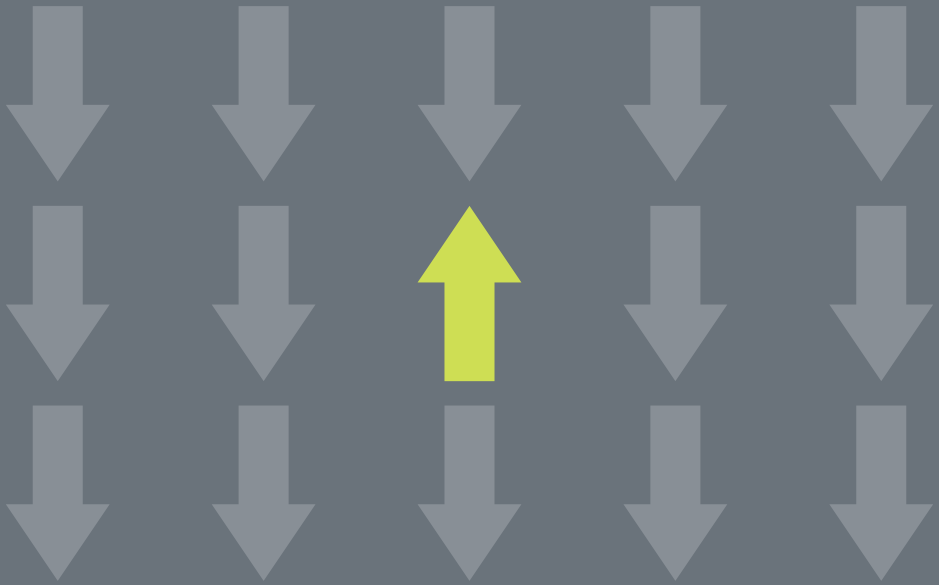
GQ | Littler

GLOBAL EMPLOYMENT LAWYERS



THE EMPLOYER'S ALTERNATIVE GUIDE TO EMPLOYMENT LAW

"EMPLOYMENT REGULATION IS A BURDEN AND EMPLOYMENT LAWYERS ARE A NECESSARY EVIL."

EVERY BUSINESS WE'VE EVER MET.

INTRODUCTION

Many law firms fail to really grasp the fact that employers generally see employment regulations as overly complex and burdensome and just want to get on with running their business. **GQ|Littler is different**. Unfortunately, we can't make employment law disappear, but we can promise a modern, dynamic, solution-based approach that is focused on working in partnership with you and on facilitating your business objectives in line with your risk appetite. We don't just tell you why you can't do things or bore you with employment law technicalities.

For this reason we've written this guide to help you cut through the technicalities. We've picked 10 issues that are often overlooked, or regularly perplex or annoy our clients, and have given you the practical view of the law.

Employment law isn't about being either 'hard' or 'soft'– it's about picking the right option (based on your culture and attitude to risk) for each situation. As you will see, we have focused on the practical – ignoring the strict legal requirement might be the right option for you!

'Employment law isn't about being either 'hard' or 'soft' – it's about picking the right option (based on your culture and risk profile) for each situation.'

1 IT'S THE REALITY OF THE SITUATION THAT COUNTS

> Key point

The employment contract matters less than you think.

During our working lives most of us refer to our employment contracts about as often as we look at the title deeds of our houses or the small print on the back of sales order forms.

Of course, when things go wrong everybody suddenly wants to look at the contract. However, the employment contract is only a starting point and other factors such as verbal agreements, changes in the law and customs that have been applied over the years also determine the terms of employment. This is especially important if the employment contract was signed twenty years ago!

As a general rule of thumb, although the written contract is important, courts and employment tribunals look at the reality of the situation – so should you.

Case study

A good example of where this can cause problems is where an employer describes an individual as a contractor who is self-employed but really it is an employer/employee relationship. Being caught out on this can result in significant extra employment and tax liabilities.

2 IT'S ABOUT REASONABLE LOSSES, NOT "EVENING STANDARD" DAMAGES

> Key point

Tribunal awards are usually much less than you think.

The press regularly reports stories about employees claiming hundreds of thousands of pounds from their ex-employers, but these cases are exceptional. Even if an employee has been horrendously treated and has the best claim in the world, the damages they will get are usually fairly limited. Damages are generally based on two key elements: (a) the length of time the individual was or will be out of work; and (b) compensation for injury to the individual's feelings. Employees who are dismissed are obliged to try to minimise their loss by seeking alternative employment.

If an individual wins an unfair dismissal claim, there is no compensation for injury to feelings. If the individual was only out of work for two months before getting another job at a similar or higher salary, the damages will be around two months' salary. If an individual wins a discrimination claim, although they can be as high as around £40,000 in extreme cases, awards for injury to feelings tend to be under £10,000. Therefore, awards from employment tribunals tend to be much lower than employees expect. This means that in many situations it is possible to take more risk than you think and drive a hard bargain in settlement discussions.

Case study

The median award for discrimination claims is around £10,000 - £15,000 and for unfair dismissal it is £7,500.

3 FAIRNESS IS A LEGAL CONCEPT THAT CAN BE TOO NARROW

> Key point
Focus on 'reasonableness'.

"It's not fair" is increasingly heard as often in the workplace or the employment tribunal as in the playground!

In the employment law context, however, "fairness" has a very limited meaning and is often related to procedure. A situation may be unfair, but that doesn't make it unlawful. However, just focusing on whether a course of action is legally fair or not can create difficulties with members of staff who feel 'wronged'. **Rather than fairness, focus on reasonableness**. If there is one guiding principle in employment law it is to be reasonable. This is not being 'fluffy' – there are three very good reasons for this:

a) If you act reasonably, there is a good chance you will be acting within the law as most legal tests assess whether the employer has acted reasonably in the circumstances.

b) Acting reasonably has the added advantage of feeling equitable which means that employees are likely to respond positively rather than feeling the need to raise grievances/claims.

c) Judges like merits, not just technical legal arguments. They are often swayed by which party they believe has behaved better. If you act reasonably, a court or tribunal will be more likely to view your position favourably.

Remember – acting reasonably does not simply mean agreeing to an employee's request.

Case study
If you are having a meeting with an employee to discuss a lengthy period of sickness absence, he/she may ask if a close friend or relative can attend the meeting as well to support them. Legally, it is fair to refuse this request. However, depending on the reason for the absence, and who the employee wants to support them, the reasonable thing may be to agree to the request and this may well avoid the situation becoming hostile and entrenched.

4 WHAT IS THIS THING CALLED TUPE AND SHOULD I CARE?

> Key point

TUPE is less painful than you may think.

TUPE is the acronym for regulations which apply when a business transfers from one company to another company and the employees go with the business. It does not usually apply to pure share sales, but it does apply when work is outsourced or insourced and when one service provider replaces another.

Case study

After buying another business an employer wants to harmonise terms so that all employees are on the same terms. If the changes leave the employees no worse off and are agreed to, it is very unlikely that they will be challenged. Practically, having all employees on the same terms will often outweigh the potential risk of challenges anyway.

There are two key issues for businesses when TUPE applies:

a) TUPE requires that employees impacted by the business transfer are informed about the transfer and consulted about any changes that will happen after the transfer. Not consulting can result in having to pay each employee 13 weeks' pay.

b) The new employer after the transfer cannot change the employment terms of the transferring employees for a reason connected to the transfer. Strictly this is the case even if the employees agree to the changes.

TUPE can create significant liabilities so you should pay attention to it but there is more flexibility in practice than is often thought.

5 SOMETIMES IT IS CHEAPER TO MAKE THE WORST CASE ASSUMPTION

> Key point

Think about taking the hit and moving on rather than spending lots of management time and money trying to find a complex technical solution.

One of the real frustrations with employment law is that sometimes you do not know the answer until an employment tribunal or higher court has told you what it is. For example, often it is not clear at the time whether someone has a disability from a legal perspective (requiring the employer to make adjustments for the employee) or whether TUPE applies.

Depending on the comparative costs and management time implications, it is sometimes better to simply assume the worst and get on with it rather than waste time and money on legal fees trying to find a clever way to avoid a legal requirement.

Case study

An employee claims that she is disabled and certain adjustments need to be made for her. It is not totally clear if the individual is actually disabled. However, rather than dealing with grievances, claims and medical assessments, it will usually be cheaper and quicker to accept that she is disabled and make the reasonable adjustments that can be made. Remember - you don't need to make adjustments the employee demands, just those that are reasonable in the context of your business.

6 DO I CONSULT?

> Key point

Employee consultation can be avoided – at a cost…

If TUPE applies, or if an employer is proposing to make more than 20 dismissals in a three month period, the employer is legally required to carry out collective consultation with employee representatives. This consultation can be quite restrictive in terms of the length of time it must begin before business proposals can be implemented. If 20-99 dismissals are proposed consultation must start at least 30 days before the dismissals take effect, but if more than 99 dismissals are proposed the consultation must start at least 45 days in advance. In TUPE cases, there is no set period for consultation, but it generally needs to last for at least 2–4 weeks.

Therefore, consultation in accordance with legal requirements can delay key business proposals which might mean, for example, that a business sale which is dependent on the workforce being slimmed down cannot go ahead within the required time period. Furthermore, in some cases, businesses do not want to consult for fear of employee representatives leaking information that is shared with them.

So - do you really have to consult? In short, the answer is "No, but it will cost you". Failing to consult can result in having to make a payment of 13 weeks' pay to each employee and the costs of defending unfair dismissal claims from employees who are dismissed also need to be factored in.

Case study

Due to concerns about leaks, a business does not want to consult with employee representatives about a large-scale redundancy programme. To secure certainty, the business could offer to make compensation payments to employees in lieu of consultation under a settlement agreement, which would avoid any legal costs in defending claims from employees. Alternatively, the business could make no payments and fight/settle claims that are actually brought, which may be cheaper if not all employees actually bring a claim.

7 AGE DISCRIMINATION – WHAT'S THE REALITY?

> Key point

It can be permissible if there are sound business reasons.

Age has become an increasingly hot topic following the removal of the ability to retire employees at age 65, even if they want to work longer, and the issue is likely to become an increasingly difficult one for employers to manage as many employees will want to work beyond age 65.

On top of the retirement issue, businesses also need to think about whether other practices they operate might (inadvertently) discriminate against either younger or older employees.

This all feels like a business cannot do anything without being criticised from one age group or another and that it will be left with an aging workforce and lots of frustrated younger employees seeking promotion. However, there is a glint of light: a defence to age discrimination claims called "objective justification". This means that businesses can have age-related practices (including a compulsory retirement age), provided that they can justify the need for that practice.

The bar is set quite high but, if employers do have sound business reasons to explain decisions they make in an age context, there is at least the potential for flexibility. The process of justifying age-related practices will involve a certain amount of red tape, but from a business perspective it may well be worthwhile red tape!

Case study

A business is unable to retain talented junior level employees (who are generally younger) because promotions only become available when older employees decide to leave. Therefore, many junior employees leave because they see no career progression opportunity. Provided that the employer can show that this issue exists and that it is adversely impacting the business, it could insist on a compulsory retirement age. It is likely that the employer will also need to minimise the impact on the employees forced to retire, e.g. by offering adequate pension benefits to ease the impact of enforced retirement.

8 NOT ALL SICKNESS IS A DISABILITY

> Key point

It is possible to get rid of employees who are ill.

Sickness is always difficult to manage as it involves separating the genuinely ill from those who are trying it on. The best rule is to take medical advice, be reasonable and act in the best interests of the business.

All too often an employee who has a lot of sickness absence claims that they are disabled and (a) they can demand whatever adjustments they want and (b) they cannot be dismissed. This is not the case:

- If someone is disabled but there are no reasonable adjustments you can make to bring them back to work then you are entitled to terminate their employment.
- If someone is ill (but not disabled), there is no prospect of recovery in the short term and there is no clarity on when they will recover, you can terminate their employment.

What is reasonable will depend on your size and resources, and dismissing an employee receiving benefits under a permanent health insurance scheme will create additional complexities, but this does not mean that you have to keep employees who are ill.

Case study

An employee is suffering from a series of colds which means that he is regularly unable to come into work. It is not clear how long it will take for him to recover and this is causing significant disruption to the business. It is very unlikely that this would constitute a disability and, therefore, there is a reason to discipline/ dismiss on the grounds of capability.

9 FLEXIBLE WORKING IS NOT A RIGHT

> Key point

If it doesn't work for your business, you don't have to offer it.

Many employees, especially parents or mothers returning from maternity leave, believe that they have a right to work flexibly, whether that be part-time, working from home or working different hours.

There might be very good reasons to allow an employee to work flexibly, but no-one has the right to work flexibly. Employees can, in certain circumstances, ask to work flexibly but these requests can be turned down if there are business reasons to support the refusal that fit within the fairly broad legal parameters.

Case study

A female employee with a long daily commute is due to return from maternity leave. Due to her commute and childcare arrangements, the employee asks to work reduced hours or to work from home. If the working arrangements that the employee requests are not workable for the business, the employer can refuse the employee's request.

10 LITIGATION IS ABOUT PSYCHOLOGY

› Key point

Think about your opponent and how far they will go.

Legal hearings are about judges, courts and law, but the litigation process is primarily about psychology. It is a game of poker where the stakes can be high and can involve reputational issues, high costs and significant diversion of management time, so it's worth taking some time to consider your own psychological profile and that of your opponent.

When a dispute arises, ask some key questions and use your knowledge of the individual bringing the claim:

- Is he/she naturally conservative or a risk-taker?
- How far will he/she go?
- Is he/she generally a logical person or prone to irrational behaviour?
- What is his/her financial situation?
- Is he/she focused on money or 'righting a wrong'?
- Does he/she need to save face in some way to resolve the issue?

For example, if you know that the individual has very limited funds and is not insured, you might decide to take a very hard line in settlement discussions even though you have a weak case. Alternatively, if your opponent is very well funded and acting irrationally, it may be better to try to settle early (even if this involves paying a premium) to avoid the situation becoming entrenched and settlement proving impossible later on.

Ultimately you need to gather and consider as much information about your opponent as possible at the early stages in order to make the best decisions.

Case study

It sounds harsh but think about the individual's personal circumstances. If they are unlikely to be able to last long without money they may well accept a lesser sum straightaway rather than going to the employment tribunal. Equally, if your business has a reputation for paying out to settle claims rather than fighting them, this will need to be factored into your thinking.

ABOUT GQ|LITTLER

GQ|Littler is a specialist employment law firm and part of the biggest employment law practice in the world with over 1,500 lawyers. Rather than sitting in an ivory tower, we work like in-house lawyers which means we work in partnership with our clients in an **integrated** way and we invest time to understand every client's culture and business objectives.

This approach means that we deliver practical solutions that reflect your culture and, crucially, your risk appetite. If it will be cheaper and quicker to simply ignore certain strict legal requirements (and it fits your risk profile), we will tell you! Equally, we will set out how to be fully compliant in a quicker, simpler way.

To deliver this type of service requires **expert** lawyers. Our team have all worked in top City law firms, but more importantly we also have significant experience working in-house or outside the legal world so we understand how businesses work and are able to come up with creative, commercial and practical solutions.

We specialise in resolving complex, high value issues. We work with clients across all sectors from global investment banks to start ups and we are experienced in advising on all issues, from complex change projects, high stakes litigation or senior dismissals to everyday HR queries. Our collegiate approach means that you benefit from our combined experience and you get hands-on involvement from senior lawyers.

If you think our 'bigger picture' approach would suit your business, do get in touch.

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"RULES ARE FOR THE GUIDANCE OF WISE MEN AND THE BLIND OBEDIENCE OF FOOLS."

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