

## When Absence just makes trouble...

### Employment Tribunal exposes serial litigator

A 50- year old woman who achieved damages in excess of £100,000 after winning claims of ageism with 22 UK companies has been branded a "serial litigator" with no serious desire to apply for the advertised jobs in question and had her case dismissed. Margaret Keane claimed her job applications had been rejected because of her age and contravened European age discrimination laws.

But it was reported that Keane had been applying for jobs aimed at recent graduates even though she herself had received her degree some years ago, omitted to tailor her application for different roles, mislead on dates for her qualifications, had errors on her CV, and did not apply for jobs commensurate with her 18 years of experience.

This case demonstrates the relative ease with which an applicant can bring a claim against an organisation. Pinnacle's advice is to ensure you

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have the relevant Policies & Procedures in place, and adhere to them at all times to reduce your risk of loss at a tribunal if a claim is presented against you, whether by a genuine individual or a serial litigator. If you believe your organisation's procedures need to be reviewed and updated to ensure compliance with the European laws, please contact us now on 0800 907 1015 or email [contact@pds-hr.com](mailto:contact@pds-hr.com).

### \*\*\*Special Offer!\*\*\*

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## Beware of Age Discrimination when making redundancies

A recession inevitably creates redundancies as organisations try to reduce costs, and age discrimination can play a prominent part as employees challenge redundancy processes. Well-established redundancy selection criteria that have worked in the past such as length of service must be reviewed to ensure they observe age discrimination laws.

Discrimination is often initiated by stereotyping and this is no different for age discrimination. Selection criteria that are also commonly used such as “drive”, “motivation”, “adaptability”, “flexibility”, and “team fit” are also questionable as to whether they contravene age discrimination.

Employees selected for redundancy who are in excess of 50 years often assume that their age is the underlying reason as their experience and skills far outweigh those offered by younger colleagues, even if the selection criteria used was related to measurable performance such as sales figures.

Don't worry - being older and then being selected for redundancy are not sufficient in isolation to win an age discrimination claim at Employment Tribunal. The employee must be able to demonstrate that the first lead to the other, such as in cases where the retained staff members are predominantly of a younger age compared with those made redundant.

To avoid age discrimination claims, ensure you are using objectively measurable selection criteria. Simply put, the more subjective the criteria you are using, the greater the risk that a tribunal will draw an inference of discrimination based on stereotyping.



- Ensure there is no connection between age discrimination and the selection of older or younger employees for redundancy
- Cost-cutting should be one of several selection criteria - I guess you mean in terms of salary level - may need to make that clear.
- Offer redundant older employees a job with lower remuneration
- Enhanced redundancy pay must mirror the statutory pay scheme

Redundancy is often a necessary step for an organisation to keep their head above water in a recession, but many business managers and owners have no idea how to go about making a member of staff redundant. It can be a painful and personal process, particularly for smaller organisations where close working relationships within the team may prevent an objective legal process being followed.

Occasionally, employers try to cut costs by removing either a whole tier of management, or by selecting the higher remunerated employees from the redundancy pool. Both these courses of action are likely to lead to older employees being selected for redundancy. In isolation, cost cutting is unlikely to be accepted as a basis of redundancy selection in an ET, but it can be one of several selection criteria. Older employees could be offered a lower-paid job as an alternative to redundancy, which the ET would view as a proportionate means of achieving the aim of cost cutting, whilst minimising, if not eliminating, the age element.

Recently the High Court ruled that the sole redundancy criterion of Last In, First Out (Lifo) used by Rolls Royce was unlawful age discrimination, since it favoured older workers more likely to have longer service. Despite RR's aim to use objective redundancy criteria for selection, Lifo was ruled a disproportionate means of achieving it on its own. Another criterion used has been First In, First Out (Fifo) but this also breaches Age Regulations as it targets the more experienced employees for redundancy who are likely to be older.

**Pinnacle's Top Tips for avoiding age discrimination in redundancy:**

- Use objectively measurable redundancy selection criteria

It is easy for organisations to become arrogant in the way they manage employees as the pool of available employees grows weekly following redundancies elsewhere. Employees are feeling the pressure to hold on to their jobs whatever the cost, and some organisations try to take advantage of this by flouting employment legislation, especially when it comes to making people redundant or introducing radical change.

These organisations may succeed in ignoring the law, but their employees will be more resistant and they will have nothing to lose by bringing a case to Employment Tribunal which will result in high costs both financially and in terms of reputation.

Pinnacle Development Solutions are here to provide a guiding hand right from the beginning, and by asking for our help as soon as you feel the financial strain on your business, we may be able to help find a solution that avoids redundancy altogether. Above all, please don't try to take matters into your own hands without obtaining the right advice first. Even if all you want is the peace of mind that comes from knowing that what you are doing is lawful and from saving the financial cost of potentially getting it wrong, speak to the experts at Pinnacle by calling 0800 907 1015 or email [contact@pds-hr.com](mailto:contact@pds-hr.com).

## A nation of shirkers? Apparently not!

Despite long-held fears of growing absenteeism in many UK companies, welcome new research as shown that the UK's sickness absence rates are actually the second lowest in Europe.

Published in January 2009, the survey analysed figures from over 800 organisations from 24 countries in Europe and reported that UK employees took an average of 5.5 days off work a year, significantly lower than the European average of 7.4. Only Turkey had lower results, yet Bulgaria topped the list with 22 days, far exceeding the second highest, Portugal (11.9 days).

A study by the CBI and AXA in early 2008 found an average absence rate of 6.7 days in the UK, which was estimated to cost £13.2 billion a year. Of the 172 million days lost to employee absence last year, 12 per cent were estimated to be non-genuine "sickies", costing the economy about £1.6 billion.



certification form and when they require a medical certificate (sick-note) from their doctor to certify their absence

It seems that while most countries can provide information on the number of days employees are absent, only 42 per cent could identify the reasons, with disorders such as back pain being the most common.

The CIPD's absence survey in July 2008 revealed an average cost of sickness absence to be £666 per employee every year. They advise that you have an absence policy that details your employees' rights and obligations when taking time off from work due to sickness. The policy should:

- Provide details of contractual sick pay terms and how it relates to statutory sick pay
- Outline the process for taking time off sick - including when and whom employees should notify if they are not able to attend work
- Include when (after how many days) an employee should provide a self-

- Mention that the organisation reserves the right to require employees to attend an examination by a company (or designated) doctor and (with the worker's consent) to request a report from the employee's doctor
- Include provisions for return-to-work interviews - identified as the most effective intervention to manage short-term absence.

Your organisation could be losing around 4% of working time to sickness absence, so trying to manage this makes sense. However, there are many reasons for sickness absence which are not always uncovered, particularly if it is to do with something incredibly private or sensitive, or if it is relating to stress that is exacerbated within the work place.

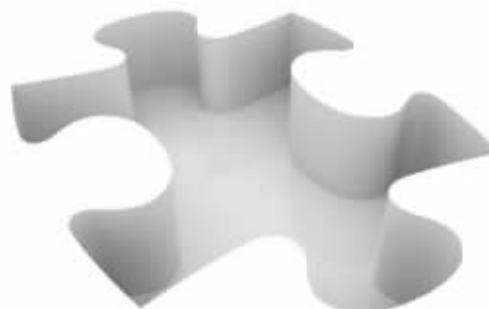
If you would like to address absenteeism within your organisation with sensitivity and confidentiality, please call us on 0800 907 1015 or email [contact@pds-hr.com](mailto:contact@pds-hr.com) to find out what steps will help to increase productivity and save your organisation money.

## Your Questions Answered

*'I don't generally have many problems with absence in my organisation, apart from employees having the odd day off here and there. However, since returning to work after the Christmas closure, and especially in that first week, I had, and now continue to have, a number of employees calling in sick for one day for minor complaints.'*

*'I do have my suspicions whether these absences are genuine for some of them, and was wondering what I can do to stop this, as it is now starting to become an issue for me and I fear it may get out of hand. Can I take disciplinary action and sack them?'*

Managing this type of 'sporadic' absence is one of the biggest challenges most organisations face. They prove extremely costly for organisations; not only in terms of sick pay, but also in terms of disruption to the work environment; arranging for colleagues to cover their work can in turn be demotivating and demoralising for them. Then of course there's the cost of management time involved with trying to resolve the situation.



placed on the organisation to ensure the employees are treated fairly.

If there is no underlying cause connecting the absences, and they appear to be 'one-off' instances of illness, then as an organisation you are entitled to expect a certain standard of attendance which should be indicated in your absence policy. In such cases, you may well be justified in taking disciplinary action and following a progressive warning approach until

Nationally, January and February are always the highest months for reported absence as people tend to struggle with the grind of winter and shorter day light hours. In fact, the first working day of the year is traditionally known as 'black Monday' and normally provides the highest level of reported absence than any other day during the year. This year didn't fail to disappoint, with nearly 2.4 million employees failing to show for the first day of work on the 5th January.

Here are our three top tips for managing absence:

### 1. Absence & Attendance Policy

Above all else, it is vital your organisation has a robust absence policy in place, which clearly defines the standards you expect in relation to attendance and details how long-term and persistent short-term absences will be dealt with. It provides both clarity to employees on what's expected of them in terms of standards of attendance, and a structured process for dealing with any issues.

### 2. Treat all Absence as Genuine

Until you have proof to the contrary, such as the employee being seen shopping when they purport to be ill, you should treat all absences as genuine - from a 'duty of care' point of view and as an organisation concerned with the welfare of its employees. Although you may be cynical about persistent short-term absences, there may be an underlying cause that could connect them all, and could even be a recognised disability as designated by the Disability Discrimination Act. If this is the case, then there are various additional responsibilities

the absences cease or you reach the point of dismissal.

### 3. Return to Work Interviews

These are the most powerful tool an organisation can use to help curb absenteeism. As the name suggests, they are a structured interview, which should be conducted on the day the employee returns to work and before they resume their normal duties. As an employer you have a duty of care to ensure the health, safety and welfare of your employees and that they are fit to return to work and resume their normal duties. Some employees will return to work as fit, but will still be continuing to take prescription drugs until they have completed the course. If this is the case it's imperative to know what drugs they are taking, and whether there are any side effects such as drowsiness which could affect their ability to undertake their normal duties, and would certainly be a health and safety risk to them as well as their colleagues if they operate machinery. The interview can also be used to check whether the latest absence is related to previous absences, or whether it is another isolated event. You can then discuss their absence record, remind them of the organisation's attendance standards, and clarify the likely course of action (disciplinary action) if their attendance does not improve to the required standards.

If absence issues are causing you concern or proving difficult to resolve in your workplace then please call us on 0800 907 1015 or email [contact@pds-hr.com](mailto:contact@pds-hr.com). In addition to assessing the situation and guiding you through the best solution, at Pinnacle Development Solutions we can also provide you with advice on return to work interviews and help you to draft an absence policy.

## Further assistance

If you would like further information on any issues raised by this bulletin, or require advice or assistance with any other human resources matters, please call us today on 0800 907 1015 or [send us an email](#).

And if you'd like complete protection against anything the growing volumes of employment law can find to throw at you, don't forget our [HR Toolkit](#) - the must-have business accessory for 2009!



The information in this newsletter is of a general nature and is not intended to replace professional advice. We recommend you to ask for specific professional advice before taking any action.

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