



Claims Implications in a Change Environment - Record keeping and employment law issues

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Lack of record keeping - a bad news case study



- Concerns a batch of work related upper limb disorder claims brought by employees who were being made redundant
- The difficulties of defending the lead claim in the absence of the key documentation, and the effect on other claims
- The negative financial impact on the company and its insurance history

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Potential consequences of failing to make or keep records



- Civil aspects
 - Liability more likely to be established
 - Worse claims record
- Criminal aspects
 - Commission of offence?
 - HSE more likely to prosecute

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Getting personal

- Offences under the Health and Safety at Work Act 1974 (H&SWA) and regulations made under it can also be committed by certain individuals where the offence has been committed with that individual's
 - consent; or
 - connivance
- The individuals are:-
 - Director;
 - Company Secretary;
 - Manager who decides corporate policy and strategy;
 - Any similar officer

Good record keeping achieves the desired result
- further case study

- Fatal accident occurring when employee failed to follow proper system of work
- Insured had good training in place and could produce documents in support
- HSE were impressed by insured's record keeping and praised that at the inquest
- Result – open verdict; no HSE prosecution



Legal obligations to maintain health and safety records



- **Records of notifiable accidents, diseases and dangerous occurrences.**
 - RIDDOR requires retention for 3 years
- **Accident claims**
 - Regulations impose certain limited obligations to make a record e.g. the significant findings of a risk assessment required by the Management of Health & Safety at Work Regulations 1999
- **Disease claims**
 - Regulations impose more significant obligations to make, and also to retain, records e.g. the obligation to maintain air monitoring records to be kept for 5 or 40 years and the obligation to maintain health surveillance records for 40 years from the last entry under the Control of Substances Hazardous to Health Regulations 2002 and the Control of Asbestos Regulations 2006

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Record keeping for long tail claims – case examples



- Retention of product drawings
- Retention of photographs of former premises
- Retention of audiograms

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Retaining records of insurance cover



- Employer's Liability (Compulsory Insurance) Regulations 1998
 - Introduced requirement to retain copies of EL certificates for 40 years
- Employer's Liability (Compulsory Insurance) (Amendment) Regulations 2008
 - Removed that requirement
- Employer's Liability Insurance Bureau Bill
 - Private Members Bill introduced by Andrew Dismore MP
- There has been no requirement to keep public liability or product liability (or any other type) of insurance certificates
- It is good advice to retain certificates for as long as claims might be made, or else the insured party risks becoming effectively uninsured

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More good news – another case study



- A successfully defended claim for CTS brought against a QBE insured
- The usual allegations found in an RSI type claim were made, but there were also complaints of (1) increased workloads and (2) the work being harder because of a faulty machine
- Upon disclosure, the insured were able to produce documents to establish compliance with the Six Pack Regulations. However, the insured were able to go further and to produce key documents to refute the additional allegations by way of (1) production records and (2) periodic hardness testing records
- Result: discontinuance
- Reason for result: making and keeping records

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Employment law aspects of change



- Currently the most significant legal issues which arise when dealing with organisational change are:-
 - Complying with the law in relation to redundancy procedures
 - Managing changes to terms and conditions of employment

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Redundancy - Is there a genuine redundancy situation or is it merely a re-organisation?



- The statutory definition covers three specific situations:-
 - The closure of a business
 - The closure of a particular place of work
 - A diminishing need for employees to carry out work of a particular kind
- Redundancy procedure checklist
 - Selection
 - Consultation
 - Consideration of alternative employment

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Redundancy - Selection Factors



- The type of work that employees are carrying out
- Whether other employees are doing similar work
- Whether any other jobs are interchangeable
- Whether any agreed procedure should be followed
- Whether the union has agreed the selection criteria

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Redundancy - commonly used selection criteria



- Skills and knowledge
 - Attendance records
 - Disciplinary records
 - Last in: first out
-
- There is a need to take reasonable steps to find alternative employment

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Change in terms of conditions of employment



- The most common methods of change are:
 - By agreement
 - By having contractual flexibility terms
 - Through collective agreements
 - By unilateral change through termination of existing contract and issue of new contract

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