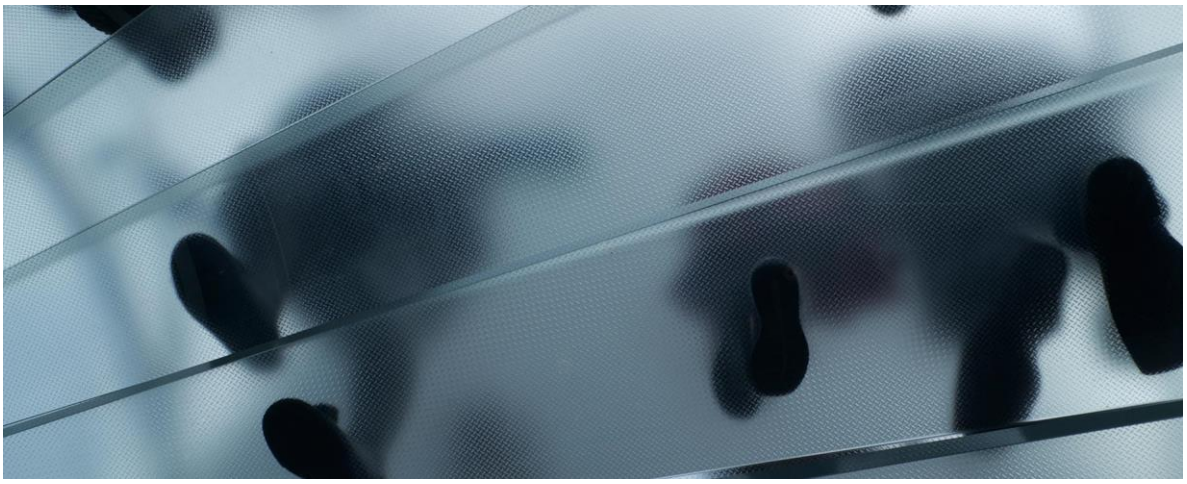

May 2019

Employment Update

Key employment and business immigration developments for employers

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In the News

Social media training

BBC5 Live presenter Danny Baker has been fired after posting an offensive tweet about the Duke and Duchess of Sussex's baby. This follows a formal warning issued to England rugby union player Billy Vunipola for making controversial comments on social media. Vunipola's comments were in response to views expressed on Twitter and Instagram by Australian player Israel Folau, who also faces having his contract terminated by Rugby Australia.

These cases are a reminder that discrimination and harassment are about the impact and not the intention. They also highlight the challenges employers can face when employees post views on social media which may be at odds with the organisation's values. This underlines the need for training and well-drafted policies on diversity and inclusion, and appropriate social media use, to help set the standards of behaviour and conduct expected of staff and to hold employees to account where they fall short.

"These incidents highlight... the need for training and well-drafted policies on diversity and inclusion, and appropriate social media use..."

Any policies or training on social media could remind employees:

- to avoid identifying themselves as working for the organisation on private accounts and/or to make clear that any views expressed are their own
- to be wary of the potential for personal views to cause offence and harm the employer's reputation
- that disciplinary action could follow for comments made on social media, even on a personal account, where there is some impact on the business.

An employer would usually be justified in taking action in relation to comments made on a private social media account where, for example, the comments have the potential to harm the employer's reputation, they amount to harassment of a colleague or confidential business information has been disclosed.

Immigration Radar

Brexit update

The EU and the UK have agreed to delay Brexit until 31 October 2019, with the possibility of an earlier exit date if the proposed withdrawal agreement can be agreed sooner.

As reported in the January 2019 **Employment Update**, all EEA and Swiss nationals and their family members living in the UK on the date of Brexit will be able to stay indefinitely, provided they apply for status under the new EU Settlement Scheme. The date of Brexit for these purposes will be 31 October 2019 or whatever date the UK actually leaves the EU. The EU Settlement Scheme opened fully on 30 March 2019, with over 50,000 applications in the first weekend of opening. The Government's proposed withdrawal agreement would give EEA and Swiss nationals (and their family members) until 30 June 2021 to apply under the EU Settlement Scheme. In a 'no deal' scenario, the Government has previously said EEA and Swiss nationals (and their family members) would still have until 31 December 2020 to apply. EEA and Swiss nationals therefore have some breathing space but many employers are encouraging staff to apply as soon as they can in order to avoid delays.

Brexit and right to work checks

The Government has confirmed that there will be no change to the way employers need to check the right to work of EEA and Swiss nationals until 1 January 2021. Until then, employers can continue to rely on an original EEA or Swiss passport or national identity card as proof of right to work. This is the case whether the UK leaves with a deal or no deal. In a no-deal scenario, EEA and Swiss nationals arriving in the UK after Brexit date would only have an automatic right to work for three months initially, after which they would need to apply for temporary leave to stay for up to a further three years (see March 2019 **Employment Update** for details). However, the announcement means employers will not need to identify when an EEA or Swiss national arrived in the UK or make any Brexit-related changes to their right to work checking processes until 2021.

"...there will be no change to the way employers need to check the right to work of EEA and Swiss nationals until 1 January 2021."

Case Watch

Suspension – is it justified?

The employee in this case was a primary school teacher. Allegations were made that she had used unreasonable force on three occasions in relation to two children with behavioural difficulties, including dragging one of them out of the classroom. The Head Teacher looked into two of these incidents and thought that the force used had been reasonable. Despite this, the employee was suspended by the Executive Head of the school to "allow [an] investigation to be conducted fairly". The employee resigned and claimed constructive dismissal. She argued that suspension was a breach of her employment contract as it was not reasonable or necessary in the circumstances.

The High Court agreed that suspension had been unnecessary. It said that suspension had been adopted as the "default" position without the school considering whether it was necessary for a fair investigation, and therefore amounted to a breach of contract. However, on appeal, the Court of Appeal has ruled that the suspension was justified. The Court said that the school had reasonable and proper cause to suspend the teacher, given the allegations made against her of using excessive force with children and the potential risk of having her remain at work.

This case is a reminder that employers should not necessarily suspend an employee every time there is an allegation of misconduct. Such a "knee-jerk" reaction could be a breach of the implied duty of trust and confidence and lead to a constructive dismissal claim. However, the case also confirms that employers can suspend pending an investigation where there are good reasons for doing so. This would usually be the case where there are concerns about the safety of other employees or a risk of interference with witnesses or evidence if the employee were to remain at work. Where suspension is necessary, the employer should normally explain why and make it clear that the suspension does not imply guilt and that no decision has been made about the outcome of the investigation.

LONDON BOROUGH OF LAMBETH V AGOREYO

Bad leaver provisions – are they enforceable?

The employee in this case was a shareholder in the employer company. When the company was sold, her shares were transferred to the buyer in return for some upfront and deferred consideration. The deferred consideration consisted of staged cash payments and an entitlement to earn-out shares and loan notes. The deferred consideration was also subject to leaver provisions which meant that the employee would become a "bad leaver" if she resigned, and would forfeit her loan notes and be required to sell back her shares to the buyer company. When the employee sought to resign, she argued that the leaver provisions were unenforceable as they were an unconscionable bargain or an unlawful penalty for resigning.

The Employment Appeal Tribunal ruled that the leaver provisions were enforceable. The provisions were neither unconscionable nor an unlawful penalty. The EAT said that for a bargain to be unconscionable, one party must be at a serious disadvantage which is exploited by another party in a morally culpable manner. However, there was no evidence the employee in this case had been unable to take legal advice or was at a serious disadvantage. With regard to the penalty argument, the EAT said this was only relevant where the penalty arises as a result of a breach of contract by the employee. However, the loss of shares and loan notes here was not triggered by any breach by the employee but rather her voluntary decision to resign.

It is not uncommon for employees to be subject to leaver provisions of this kind when granted shares or other deferred remuneration. The case is helpful as it suggests it will be difficult for an employee to challenge such provisions where they are not linked to any breach of contract by the employee and the employee has had the opportunity to seek legal advice. Employers would therefore be well-advised to encourage employees to seek advice on such leaver provisions where possible. The issue can be more complex where bad leaver treatment is linked to the employee working for a competitor or breaching post-termination restrictive covenants, as there may be an argument that the leaver provisions are unenforceable either as an unlawful penalty or as an indirect restraint of trade. Employers should seek advice in these circumstances to ensure the provisions are drafted as robustly as possible.

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New Law

Compensation for discrimination

Compensation in discrimination and harassment claims is usually made up of two elements: the employee's financial loss (eg lost earnings) plus an element for injury to feelings. There is no limit on the amount that can be awarded for either element but, for injury to feelings, Tribunals generally follow a set of guidelines known as the "Vento bands". For claims made on or after 6 April 2019, the Vento bands for injury to feelings have been uprated. The three bands are now as follows:

- £900 to £8,800 for less serious cases (eg a one-off incident or comment)
- £8,800 to £26,300 for something more serious

- £26,300 to £44,000 for the most serious cases (eg an ongoing campaign of harassment).

Good work plan

In December 2018, the Government announced in its Good Work Plan that it would take forward a number of recommendations for reform of employment law made by the Taylor Review (see January 2019 **Employment Update** for details). Regulations have now been made which implement a number of these changes. These are summarised below.

Financial penalties	For any breaches of employment law on or after 6 April 2019, where the breach is "aggravated" (eg the employer has shown a blatant disregard for employment law) an Employment Tribunal can now award a financial penalty of up to £20,000 to be paid to the Secretary of State in addition to any compensation awarded to the employee (previously the maximum penalty was £5,000).
Employment contracts	From 6 April 2020, employers will be required to provide a written statement setting out certain terms and conditions of employment for all workers, not just employees (eg casuals, freelancers and some contractors and consultants). There are also some changes to the particulars required so employers should review their template employment contracts before April 2020 to ensure any necessary changes are made.
Works councils	Currently employers are required to set up a works council where there is a request from at least 10 percent of the workforce. From 6 April 2020, this threshold will reduce to two percent (but there would always need to be a minimum of 15 employees making the request).
Agency workers	Agency workers are entitled to the same pay and basic working conditions as direct employees after twelve weeks in a given role. There is currently an exemption known as the "Swedish derogation" where an agency worker will not be entitled to equal pay where the worker is employed by the agency and paid a minimum amount in between assignments. The Swedish derogation is being abolished from 6 April 2020. Agency workers on such contracts will need to be informed of the implications by no later than 30 April 2020.

Consultation

Public sector exit payments

The Government has published draft regulations for consultation, which would impose a cap on exit payments for employees in the public sector. The proposed cap is £95,000 and would apply to severance or ex gratia payments made to employees in the public sector on termination (including enhanced redundancy payments). There are various proposed exemptions that would not count towards the cap, such as statutory redundancy pay and payments in lieu of notice up to a quarter of annual salary. The draft regulations also contain provisions for relaxing the cap in relation to discrimination, whistleblowing and TUPE-related terminations. The consultation closes on 3 July 2019 but the Government has not yet announced when the cap would come into force.

Our Work

Since our last **Employment Update**, our work has included:

- implementing a joint-contract employment arrangement for a financial services employer
- advising on subject access requests made under the GDPR
- advising on the enforcement of post-termination restrictive covenants against, and misuse of confidential information by, a departing COO
- advising on the strategy for poaching a senior executive from a competitor
- supporting a client drafting up a new "speak up" policy and procedure, and training all managers and staff in the new policy and the positive cultural impact of promoting speaking up
- advising several asset management clients on their implementation of the Senior Managers and Certification Regime (SMCR)
- advising a manufacturing client on the employment law implications of strike action by employees, including the lawfulness of ballot notices, the parameters of lawful picketing and options for covering the work of striking employees
- advising on the termination of employment of a senior executive because of a breakdown in working relations with the rest of the board
- carrying out training on discrimination and harassment.

If you have any queries on this edition of Employment Update, please contact any member of the Employment Department

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