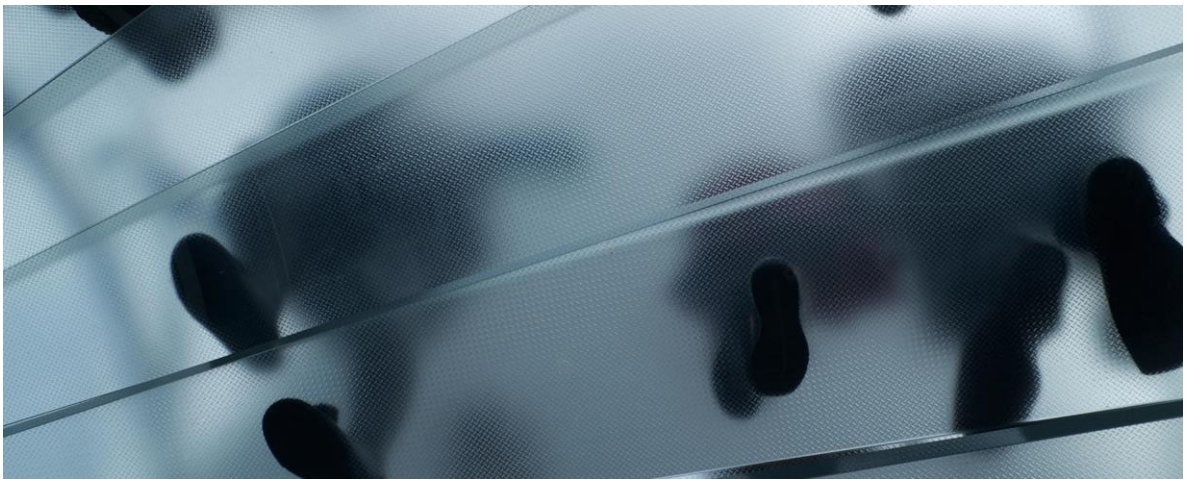

September 2018

Employment Update

Key employment and business immigration developments for employers

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In the News

Data breach – are you prepared?

British Airways has apologised for what has been described as a sophisticated breach of its security systems, leading to some customers' personal and financial details being compromised. The Information Commissioner's Office (ICO) is looking into the breach and the airline could potentially face significant fines.

With GDPR now in force, employers need to be even better prepared for such breaches than before. The GDPR introduces a duty on all organisations to report certain types of personal data breaches to the ICO within 72 hours, where possible. The employer must also inform individuals affected without delay where their rights could be adversely affected. Employers also have an obligation to record all personal data breaches, regardless of whether they are required to be notified.

Employers must therefore have robust systems in place to recognise data breaches and ensure they are escalated internally so that they can be recorded, assessed and reported if necessary. The ICO recommends that all organisations:

- have systems in place to ensure that personal data breaches can be recognised and reported within the required timeframes
- prepare a response plan for addressing personal data breaches
- allocate responsibility for managing breaches to a dedicated person or team
- ensure staff know how to escalate a data breach to the appropriate person internally
- have systems in place to inform affected individuals about a breach

"With GDPR now in force, employers need to be even better prepared for such breaches than before."

- ensure all breaches are properly documented, along with any remedial action taken.

Failure to notify a data breach could result in a fine of up to 10 million euros or two percent of the employer's global annual turnover. Fines could be issued even where a breach is reported but the ICO will take into account prompt notification and any remedial action by the organisation.

We have been working with a number of clients on training and awareness for staff in relation to GDPR compliance, as well as on the HR aspects of GDPR compliance generally. Please get in touch with your usual Employment Department contact if you would like to discuss.

Immigration Radar

Skilled visas – easing the pressure?

As reported in the July 2018 **Employment Update**, doctors and nurses were removed from the heavily oversubscribed Tier 2 work visa cap from July 2018 onwards. This has eased the pressure on the Tier 2 visa cap, meaning more work visas are available for employers.

The annual 20,700 cap on Tier 2 (General) visas is allocated on a monthly basis and had been consistently oversubscribed since December 2017. As a result of the cap being oversubscribed, the minimum salary required for a Tier 2 (General) visa went up to as high as £60,000 during this period. However, following the removal of NHS roles from the cap, the minimum salary required has fallen back down to £30,000, which is welcome news for many employers.

A glimpse into post-Brexit immigration?

The Government has announced a new two-year visa pilot scheme for seasonal agricultural workers. The pilot scheme will open from spring 2019 to allow up to 2,500 agricultural workers from outside the EU to work in the UK each year for up to six months. The new scheme will initially run until the end of the post-Brexit transition period on 31 December 2020, to address labour shortages in the agricultural sector. This may be seen as a sign of the Government's willingness to consider sector-specific solutions for post-Brexit UK immigration policy. So far, very little detail of the Government's post-Brexit, post-transition plan for immigration has been published but further details are due to be released later this year. **Employment Update** will report developments.

EU Settlement Scheme

The Government has introduced a new EU Settlement Scheme for EU nationals living in the UK. Under the scheme, EU nationals (and their family members) who have been resident in the UK for at least five years will need to apply for "settled status" around Brexit. Those who have been in the UK for less than five years will need to apply for "pre-settled status" to allow them to obtain the five years necessary to apply for settled status. The scheme opened on a trial basis on 28 August 2018 and is currently limited to specified NHS Trusts and selected universities in Liverpool. It is expected to be extended in phases before opening up fully by 30 March 2019.

"The Government has introduced a new EU Settlement Scheme for EU nationals living in the UK."

Case Watch

Misconduct – is it disability-related?

The employee in this case was a teacher who suffered from cystic fibrosis. Various adjustments were made to accommodate this but they had not been properly recorded and, when a new head teacher took over, the employee's workload was increased. The employee was dismissed for gross misconduct after showing "Halloween", an 18-rated horror film, to a class of 15-year-olds without school or parent permission. The employee claimed that this was an error of judgment due to the increased stress he was under as a result of his increased workload. He brought claims of unfair dismissal and disability-related discrimination.

"An employer... should always pause to consider whether the misconduct could in any way be linked to the disability."

The Court of Appeal ruled that the dismissal did amount to disability-related discrimination. The employee's misconduct was a result of the exceptionally high stress he was suffering, which arose from the effect of his disability under increased work demands. Accordingly, the dismissal for misconduct was related to that disability. It did not matter that the employer was not aware that the disability had caused the misconduct; it was sufficient that the employer knew the employee was disabled and that there was a causal link between the disability and the dismissal.

This case is a salutary lesson for employers. The employee in this case had maintained throughout the disciplinary process that his misconduct was a result of the increased stress he was under. An employer considering dismissing a disabled employee for misconduct should always pause to consider whether the misconduct could in any way be linked to the disability. This will usually involve obtaining medical advice about the link and whether any reasonable adjustments could be made to avoid similar incidents occurring in future. The case is also a reminder that any reasonable adjustments must be recorded and clearly communicated to the employee's manager, particularly where there is a change in management. The new head teacher in this case was not fully aware of the adjustments which had been made for the employee. Had he been aware, the situation may have been avoided altogether.

CITY OF YORK COUNCIL V GROSSET

Disability – what to ask occupational health?

The employee in this case had frequent periods of sick leave, all for different ill health issues, including stress, viral infections and high blood pressure. The employer referred the employee to occupational health (OH) and asked if she had a condition which could be a disability. The OH report stated that the employee did not have a disability and her problems were "managerial not medical". After further sickness absences, the employer began disciplinary proceedings and subsequently dismissed the employee for unsatisfactory attendance and failure to comply with absence notification procedures (as she had not always informed the employer when she was absent through illness). The employee brought a claim of disability discrimination, including a failure to make reasonable adjustments.

The Tribunal decided that the employee did have a disability, but that the employer had not known, and could not reasonably be expected to have known, that the employee was disabled, which meant it was not required to make reasonable adjustments. The employee appealed unsuccessfully to the EAT and then to the Court of Appeal. She argued that the employer should not just have accepted the OH report that she was not disabled, but carried out further investigation and reached its own decision.

The Court of Appeal confirmed that an employer should not simply adopt an unreasoned OH opinion without question, and should form its own view on whether an employee is disabled. In this case the employer had, in addition to consulting occupational health, had discussions with the employee and correspondence with her GP, and there had not been any information arising from this which suggested a disability. In the circumstances the employer could not have been expected to do more, and the employee's appeal failed.

This case is a reminder of the importance of obtaining a full occupational health report and considering it carefully. Employers should ask detailed questions of occupational health when referring the employee, and should review the report thoroughly. If the report is unclear in any way, or if questions have not been answered, then further information and clarification should be sought. Employers should also ensure that they speak to the employee on an ongoing basis about their condition, and whether there are any adjustments which might enable the employee to return to work. In some cases, for example if the employee has a complex or unusual condition, it may also be advisable to obtain a report from a specialist independent medical adviser.

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References following a disciplinary investigation – how much should you disclose?

The employee was an independent financial adviser (IFA). Following concerns about advice he had given to clients, he was required to obtain pre-approval from an internal review team before giving advice or making any sales. On two occasions the employee made a client sale without pre-approval. After the second occasion, the employer terminated the employee's authorisation to work as an IFA. The employee subsequently asked the employer for a reference, which the employer provided. The reference referred to the transactions the employee had made and its conclusion that he had "deliberately circumvented" the pre-approval process. The employee claimed that the reference was negligent because the opinions were based on an internal investigation which the employee believed was a sham.

The High Court dismissed the employee's claim. The Court confirmed that the employer's obligation when giving a reference is to review the facts objectively, and ensure that the reference is accurate and not misleading, whether by omission or implication. In this case, the employer had carefully reviewed all the relevant materials, including the statements and notes produced in the investigation, and produced a reference which was neither inaccurate nor misleading.

"An employer who provides a reference owes duties to the former employee and to the prospective employer..."

An employer who provides a reference owes duties to the former employee and to the prospective employer, to ensure that the reference is accurate and not misleading. This can cause difficulties where there have been issues with an employee's conduct or performance. Mentioning the issues are likely to mean that the employee will have difficulty getting another job, and is more likely to bring a claim. Omitting to mention the issues could lead to a claim by the prospective new employer that the reference was inaccurate or misleading (although in practice this type of claim would be unusual).

For these reasons many employers provide only a basic factual reference confirming name, position and dates of employment (although this is not possible in some regulated roles – see below). It is worth remembering that even a basic reference could be misleading to a prospective new employer if it omits a significant fact (eg that the employee had stolen from the employer).

In the financial services sector, employers who are covered by the Senior Managers and Certification Regime (SMCR) are required to provide a reference on request from a prospective new employer, which must contain certain information including details of any disciplinary sanction. Information about disciplinary investigations may also need to be provided if it could be relevant to the individual's fitness and propriety. The SMCR currently applies only to banks and building societies (and other firms which are dual regulated by the FCA and PRA) but will apply to all firms from December 2019 (and to certain insurers from December 2018).

HINCKS V SENSE NETWORK LIMITED

New Law

Childcare vouchers

In April 2017, the Government introduced a new tax-free childcare scheme to replace the previous employer-supported childcare voucher scheme. The new scheme allows working families to claim 20 percent of childcare costs for children under 12 up to a maximum of £2,000 per child each year. Unlike the old childcare voucher scheme, the new scheme does not depend on participation by employers, as it is open to all eligible working couples, where both parents are employed or self-employed and each earns at least £120 per week but no more than £100,000 a year. Existing childcare voucher schemes will be closed to new joiners from 4 October 2018. Any employee who is already a member of a childcare voucher scheme can choose whether to stay within that scheme or join the new tax-free childcare scheme instead.

"Existing childcare voucher schemes will be closed to new joiners from 4 October 2018."

Brexit – deal or no deal?

The Government has issued a technical note covering what happens to employment law in the event that there is no Brexit deal. The note confirms that most workplace rights will be preserved unchanged. However, employers with European Works Councils should review their arrangements as there will no longer be reciprocal EWC arrangements between the UK and EU in the event of no deal. The more significant issue for most employers is what happens to the rights of EU nationals in the UK in the event of no deal – the Government has so far given no firm guarantee, but previously suggested the same proposals for EU nationals would apply in the event of a deal or no deal scenario.

Watch this space

Trade union recognition

The Independent Workers Union of Great Britain (IWGB) has applied for the right to bargain collectively with the University of London on behalf of outsourced workers who are not employed by the university but by a separate facilities management company. In January 2018, the application was rejected on the basis that a trade union can only seek to be recognised by an employer in respect of workers engaged directly by the employer. However, the IWGB has now been given permission by the High Court to have the decision reviewed. The Department for Business, Energy and Industrial Strategy has joined the action as an interested party, given the potential impact for the 3.3 million outsourced workers in the UK. No date has been set for the case to be heard but **Employment Update** will report developments.

Our Work

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

- advising on an international secondment including tax and social security issues
- advising a client on the application of TUPE in relation to its transfer of service provider from a first generation outsourcing to a second generation outsourcing
- advising a client on the defence of an Employment Tribunal claim for unfair dismissal and whistleblowing
- advising a multinational tech company on the dismissal of an executive assigned to work in the UK from the United States
- advising on an Employment Tribunal claim under the Agency Workers Regulations involving issues around worker status
- preparing a response to the Government's consultation on extending the public sector off payroll rules for taxing contractors to the private sector.

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

Siân Keall
Partner

Tim Gilbert
Partner

Ed Mills
Partner

Adam Wyman
Partner

Anna West
Professional Support Lawyer

Adam Rice
Professional Support Lawyer

Ailie Murray
Senior Associate

Moji Oyediran
Senior Associate

Charmaine Pollock
Senior Associate

Alex Fisher
Senior Associate

Xabier Reynoso
Senior Associate

Zoë Dearmer
Associate

Sarah Baker
Associate

Katy Matthews
Associate

Clare Skinner
Associate

Tessa Gilligan
Associate

If you have a colleague or a contact in another organisation who would like to receive **Employment Update**, please send contact details to employment@traverssmith.com

***TSEmpLaw** is the essential employment and business immigration law app*

10 Snow Hill
London EC1A 2AL
T: +44 (0)20 7295 3000
F: +44 (0)20 7295 3500
www.traverssmith.com