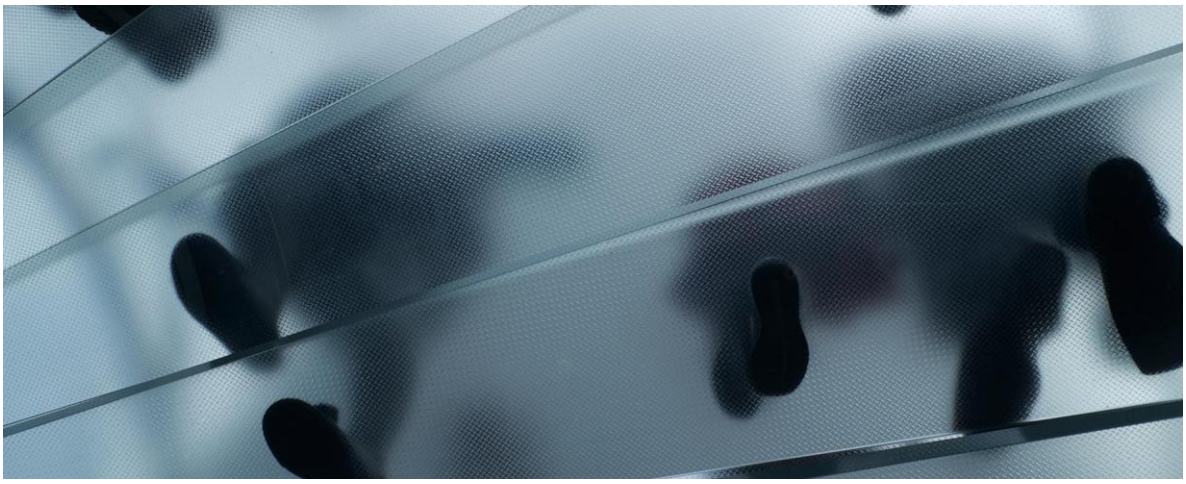

May 2017

Employment Update

Key employment and business immigration developments for employers

In the News

Whistleblowing

As reported in the press, the CEO of Barclays Bank, Jes Staley, has been reprimanded by the bank for his attempts to uncover the identity of an anonymous whistleblower. As well as breaching the bank's whistleblowing policy, his actions have also sparked an investigation by the FCA and the PRA into the adequacy of the bank's whistleblowing systems and his individual responsibility as a senior manager. Mr Staley apologised at the bank's annual general meeting, where 16 percent of shareholders either abstained or voted against his re-election as CEO.

The case highlights the need for senior officials in any business to be trained appropriately in the organisation's policies and procedures on whistleblowing. In Barclay's case, it was found that the CEO "honestly, but mistakenly" believed it was permissible to try to identify the whistleblower.

The case also highlights the benefits and drawbacks of "confidential hotlines" which allow staff to raise concerns anonymously. Such hotlines allow people to raise concerns in confidence and help prevent reprisals against those who speak up, but it can be difficult to investigate allegations raised anonymously. Regardless of the pros and cons, US-listed companies and their subsidiaries are required to offer anonymous hotlines. Large banks, building societies and insurers in the UK are also required by PRA and FCA rules to provide a channel for anonymous and confidential disclosures to made. While not binding for other financial services firms, the PRA and FCA rules on whistleblowing represent best practice in the industry.

Whatever whistleblowing procedures are in place, employers should respect a whistleblower's desire for anonymity and confidentiality wherever possible and should act on all disclosures, even if made outside formal channels.

" ...employers should respect a whistleblower's desire for anonymity and confidentiality wherever possible..."

Immigration Radar

Brexit – where do EU nationals stand?

With the formal Article 50 process now triggered, we are on a countdown to March 2019 when the UK will formally exit the EU. The status of EU nationals in the UK has been identified as an early priority in negotiations, and the European Commission wants to see their rights guaranteed for life.

Whilst the status of EU/EEA nationals working in the UK remains unchanged until Brexit, beyond that, the position remains unclear. EU/EEA nationals who wish to protect their status as much as possible can:

- apply for an EEA Registration Certificate to evidence their right to live in the UK, or
- if they have worked in the UK for five years, apply for a document certifying their right to permanent residence.

These documents do not give additional rights but may be helpful evidence of an individual's status once the UK formally exits the EU. EU/EEA nationals who hold a document certifying permanent residence and who have lived in the UK for six years, may go on to qualify for British citizenship.

We have been working with a number of clients to offer various levels of support for EU/EEA staff, including:

- presentations to UK/EEA staff members to provide information on the current position and their available options
- surgeries for EU/EEA nationals to offer general guidance and advice on Home Office applications, and
- specific advice and assistance in support of applications for EU residence documentation.

"Whilst the status of EU/EEA nationals working in the UK remains unchanged until Brexit, beyond that, the position remains unclear."

Our news

We are delighted to announce that Moji Oyediran has joined the team as a dedicated immigration specialist to enhance and consolidate our business immigration offering. Moji has a wealth of experience advising corporate clients on all aspects of their immigration needs, including providing strategic and practical advice on the immigration implications of Brexit on EU nationals and employers, as well as right to work, sponsorship issues and work visas. If you have any questions or would like to discuss any business immigration developments, please get in touch with Moji (moji.oyediran@traverssmith.com) or speak to your usual Employment Department contact.

Changes for licensed sponsors

A number of significant changes to the rules on sponsored visas for non-EU/EEA nationals came into force on 6 April 2017. Key changes include:

- **New hires:** The high earner threshold for new hires under Tier 2 General has increased from £155,300 to £159,600. No resident labour market test is required where the salary meets or exceeds the high earner threshold but below this level, the employer must advertise the role and be satisfied there is no suitably qualified candidate from the local workforce.
- **International transfers:** Normally employees or secondees transferring from an overseas office or group company must have 12 months' service to be eligible for a Tier 2 Intra Company Transfer (ICT) visa. However, this requirement has now been waived for employees with an annual salary of at least £73,900 –

at this level, the employer can recruit abroad and transfer immediately to the UK. The usual limit of five years on a Tier 2 ICT visas has also been extended to nine years for those earning £120,000 or more.

- **Short term transfers:** The Tier 2 Intra Company Transfer – Short Term (12 months and under) subcategory is now closed. This means that all international transfers and secondments must be processed under the Long Term Staff subcategory and the minimum salary will be £41,500 for all transfers (or the higher job-specific rate set out in the sponsor codes of practice).

- **Additional costs:** All licensed sponsors must now pay an Immigration Skills Charge of £1,000 per year for each employee sponsored under Tier 2 (General or ICT), which is paid upfront at the time of issuing a sponsorship certificate. The Immigration Health Surcharge of £200 per year is also now payable for all Tier 2 ICT visa applications (previously ICT visa applicants were exempt).

Case Watch

Long term absence – when can you dismiss?

The employee in this case was a Head of Department at a school. She was assaulted by a pupil and went off sick with stress when she felt the school was not taking her safety seriously. After almost a year's absence, the school sought information about her likely return to work. However, the employee simply referred the school to her GP and the GP, in turn, advised the school to speak to the employee. With no clear evidence on prognosis, the school decided to dismiss for incapability. The employee appealed her dismissal internally. On appeal, she presented a "fit note" saying that she was now fit for work and a note from a psychologist suggesting she would be fit to return after a course of therapy. The appeal panel found this evidence contradictory and upheld the dismissal.

The Employment Tribunal and Court of Appeal ruled that the dismissal was unfair and amounted to disability discrimination. Given the new evidence raised on appeal, it was reasonable for the school to "wait a little longer" and investigate further, particularly where there was no evidence that the employee's absence was causing significant cost or disruption to the school.

This case is a salutary lesson for employers. While dismissal for incapability following an extended absence can be fair, employers should always ensure they act on the most up-to-date medical evidence. This means that, where new evidence is raised at the last minute or on appeal, even if it looks unconvincing, the employer should consider it and may need to probe further or seek additional medical advice to get to the bottom of the situation. Any decision to press ahead should be based on pressing business needs, which are backed up by evidence (eg the ongoing cost of additional cover, the impact on service or the strain on the rest of the team). Such evidence will be crucial in defending any subsequent claims for unfair dismissal or disability discrimination.

O'BRIEN V BOLTON ST CATHERINE'S ACADEMY

"...employers should always ensure they act on the most up-to-date medical evidence."

Dismissal – looking at prior warnings

The employee in this case was a senior producer at the BBC. He was given a final written warning following two incidents in 2013 which were considered by the BBC to constitute gross misconduct. The first involved him shouting at a senior manager (for which he apologised) and the second related to a decision to prioritise coverage of a Sri Lankan historical event over the birth of Prince George. The final warning was still "live" when fresh allegations arose of bullying and intimidation and refusal to obey instructions. Following a disciplinary hearing, the employee was dismissed for gross misconduct and brought claims of unfair dismissal and discrimination on the ground of race and religion or belief.

The Employment Tribunal concluded that the final written warning had influenced the decision to dismiss. It also ruled that the final written warning was "manifestly inappropriate" and should not have been issued – neither of the 2013 incidents constituted gross misconduct and the employee had an otherwise unblemished record over 18 years. However, the Tribunal went on to say that the employee would still have been dismissed if he was on an ordinary (rather than final) warning. Since this would have been reasonable, the dismissal was ruled to be fair (the discrimination claims were also rejected). On appeal, the Employment Appeal Tribunal ruled that the case had to be reconsidered. Having decided the final warning was inappropriate, the Tribunal should have focused on how much of a role it played in the dismissal, rather than the hypothetical question of whether dismissal would have been fair if an ordinary warning had been given.

This case shows that Employment Tribunals can, in some circumstances, look back over the circumstances of a previous warning when deciding whether a subsequent dismissal is fair. If the Tribunal decides the previous warning is "manifestly inappropriate" this can affect the fairness of the dismissal. An employer that is considering dismissal off the back of a previous warning may, therefore, wish to satisfy itself that there was nothing inappropriate about the previous warning. If there is any doubt, it will be much safer for the employer to make its decision without relying on the final warning. Alternatively, the employer might want to make it clear that it would still dismiss if the prior warning was an ordinary, rather than final, warning.

BANDARA V BRITISH BROADCASTING CORPORATION

New Law

Failure to prevent facilitation of tax evasion

Two new corporate criminal offences for failure to prevent the facilitation of tax evasion are being introduced under the Criminal Finances Act 2017. The offences are likely to come into force by September 2017, although the commencement date is still to be confirmed in legislation.

One of the offences relates to the failure to prevent the facilitation of UK tax evasion, while the other relates to the failure to prevent the facilitation of foreign tax evasion. A company (or an LLP or partnership) will commit an offence where it has failed to prevent the criminal facilitation of tax evasion by a "person associated" with the company – ie someone who provides services for, or on behalf of, the company (eg an employee, contractor or supplier). The aim is to encourage companies to put in place, and communicate, good corporate governance on preventing tax evasion – it is a defence if the company has "reasonable prevention procedures" in place. The offences therefore require UK and foreign companies, irrespective of size or sector, to review their business and supply chains for potential tax evasion risk, and to update their compliance policies and procedures to ensure the company satisfies the defence. Companies should be considering their policies and procedures now, in advance of the expected commencement date in September.

"Two new corporate criminal offences for failure to prevent the facilitation of tax evasion are being introduced..."

Our Tax Department has produced a more detailed briefing on the new corporate offences. Please speak to your usual Employment Department contact or email employment@traverssmith.com if you would like a copy.

Tax on termination payments

Planned changes to the tax treatment of termination payments, which were due to come into effect in April 2018, have been dropped from the Finance Bill. However, it is likely the changes will still be made – they are likely to be re-introduced into a new bill after the election and may still come into effect in April 2018 as planned.

Currently the tax treatment of a notice payment depends on whether there is a payment in lieu of notice (PILON) clause in the employee's contract. Where there is a PILON clause, the payment is subject to income tax and national insurance contributions (NICs). Any termination payment over and above the PILON may be paid free of income tax up to the first £30,000 and free of NICs entirely. In contrast, where there is no PILON clause, the notice payment together with any amount paid in respect of the termination may be paid free of income tax up to the first £30,000, and free of NICs entirely.

Under the planned changes, from April 2018:

- the notice element of any termination payment will be subject to income tax and NICs, regardless of whether there is a PILON clause in the contract, so the £30,000 tax exemption will only be available for any termination payment over and above notice pay, and

- any termination payment above the £30,000 will be subject to employer NICs (as well as income tax), meaning an additional cost to employers.

While there is no need to take any specific steps now, employers may wish to consider whether to include PILON clauses in contracts for new joiners, as the tax advantage of not having a PILON clause will disappear under the planned changes.

Watch this space

Zero-hours contracts – what's the cost?

Employers who engage workers on zero-hours contracts could be forced to pay them a higher rate of national minimum wage. Matthew Taylor, who was appointed by the Government to lead an independent review into employment practices, has suggested that a premium for zero-hours contracts could deter "lazy" employers from using them and encourage more employers to guarantee minimum hours. However, the proposal is just one of many ideas up for debate as part of the independent review, and Mr Taylor acknowledges that it could make national minimum wage unduly complex. The independent Taylor review is set to continue until 17 May 2017 (which is the deadline for the submission of evidence) and a report is not expected until June 2017 at the earliest.

Gig economy workers

The Work and Pensions Committee has published a report following its inquiry into the growth of self-employment in the gig economy. In view of the growing use of self-employed workers, and recent rulings such as the Uber decision challenging the "self-employed" label, the report calls for a presumption of worker status. Employers claiming that workers are self-employed would have the onus to prove this, otherwise the individual would be deemed to be a "worker" with basic employment rights. The report will feed into the Taylor review on employment status.

Separately, Uber has been granted the right to appeal against the ruling that two of its drivers are "workers" and are entitled to basic employment rights such as paid holiday and national minimum wage. The appeal will be heard by the Employment Appeal Tribunal on 27 and 28 September 2017. **Employment Update** will report developments.

Our Work

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

- advising on a number of applications for permanent residence documents for EU nationals and their non-EU dependants
- advising on the enforcement of post-termination restrictive covenants against a departing LLP member
- working with a client who was bringing an outsourced IT function back in house, in particular considering the application of TUPE and the contractual protections in the original outsourcing documentation
- advising a client on the implementation of a collective consultation redundancy programme, including the election of representatives and the specific stages of the consultation process
- defending a number of employment tribunal claims across a range of different sectors, and
- advising an asset management client on the new regulatory references regime and assisting with initial planning for next year's implementation of the senior managers and certification regime.

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

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