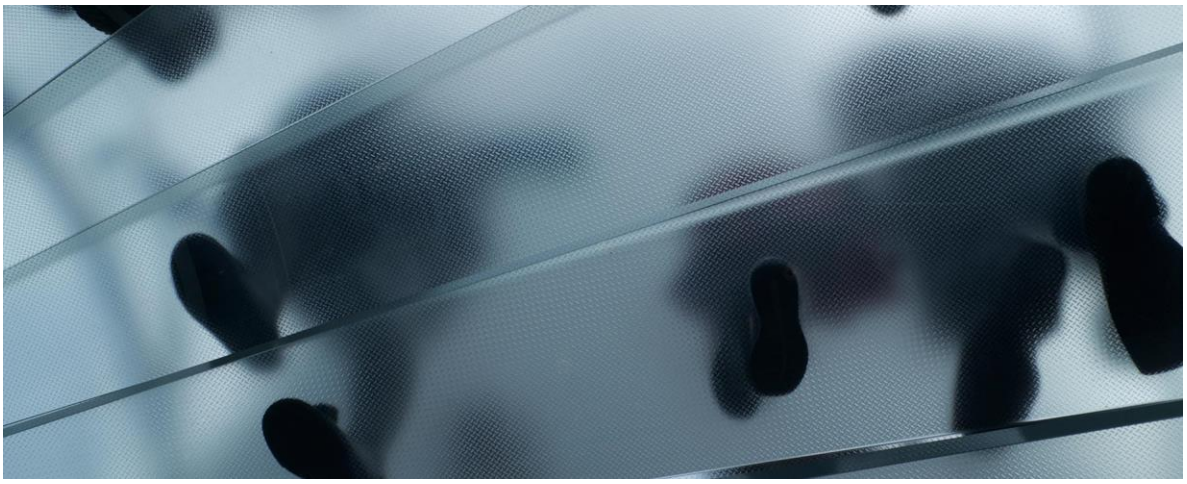

November 2015

Online Update – Essential Information for Employers

In the News

Redundancy consultation – have you done your paperwork?

For the first time, the Government is prosecuting directors and officers who have failed to notify it about plans to make mass redundancies. The CEO of Sports Direct, Dave Forsey, and three former directors of City Link have been charged with the criminal offence of failing to notify the Government's Insolvency Service about potential large-scale redundancies.

The prosecutions all arise out of insolvency situations. In the case of Sports Direct, the charges follow the insolvency of its fashion chain, USC, which led to a warehouse closure and around 200 redundancies in January 2015. The City Link prosecutions arise from the collapse of the company, which led to the loss of 3,000 jobs over the 2014 Christmas period.

Among those being prosecuted is a former non-executive director of City Link, who had acted as a representative of the company's private equity owner.

"Failure to notify is a criminal offence punishable by an unlimited fine."

Under the Trade Union and Labour Relations (Consolidation) Act 1992, employers have a duty to consult a recognised trade union or elected employee representatives where 20 or more redundancies are proposed within a rolling 90-day period. Employers must also notify the Secretary of State for Business, Innovation and Skills about the proposals. Such notifications are made by way of a form known as the "HR1 Form", which must be submitted to the Government's Insolvency Service at least 30 days before the first redundancy takes effect (or 45 days where 100 or more redundancies are proposed).

Failure to notify is a criminal offence punishable by an unlimited fine. As well as the employer, any individual directors, officers or managers involved can be prosecuted.

Until now, no one has been charged with the offence, despite it being introduced some 20 years ago. However, the recent prosecutions appear to mark a change in approach by the Insolvency Service. Accordingly, employers proposing multiple redundancies (or changes to terms and conditions affecting 20 or more staff) should ensure an HR1 Form is filed as early in the process as possible.

Case Watch

Disciplinary hearings – who can employees bring?

The employee in this case was a professor at a university. However, he spent most of his time overseeing clinical trials for an NHS trust. An inspection by a regulatory body found various breaches of good clinical practice in the trials he was running. The university suspended him from his duties while it carried out its own investigation. The employee was invited to an investigatory meeting under the university's disciplinary policy. The policy, which was contractual, allowed employees to bring a companion to an investigatory meeting, so long as the companion was a trade union official or a work colleague.

The employee was not a member of a trade union. In addition, he did not know anyone at the university other than colleagues who were also involved in the clinical trials he was running and who would, therefore, be called as witnesses in the investigation. However, he was a member of the Medical Protection Society ("MPS"), which is a body that defends and supports medical professionals. He had sought advice from the MPS during the process and asked to be accompanied by an MPS representative at the investigatory meeting. The university refused and the employee applied to the Court for an order that he should be allowed to bring the MPS representative to the investigatory meeting.

"Employers should consider allowing more flexibility where the allegations are particularly serious and could have a wider impact on the employee's career..."

The Court granted the order, saying that the university should have allowed the employee to be accompanied by the MPS representative. According to the Court, failure to do so would be a breach of the implied duty of trust and confidence. The Court said that the investigatory meeting was a critical part in the process, as it aimed to unearth the truth about serious allegations, which could have significant implications for the employee's career. It would also be unfair for the employee not to have a companion simply because he was not a member of a trade union and did not know any work colleagues who could assist. On top of this, the university's investigating officer was allowed help from an external technical expert.

Employees have a statutory right to be accompanied by a trade union official or a work colleague to a disciplinary or grievance hearing. This right does not extend to a disciplinary investigation meeting but many employers offer a similar right expressly under their disciplinary policies or simply as a matter of practice. Normally employers are justified in refusing a companion who is not a trade union official or work colleague. However, this case shows that there might be circumstances where it would be unfair to deny the employee a companion who is outside of these categories. Employers should consider allowing more flexibility where the allegations are particularly serious and could have a wider impact on the employee's career, or where the employee could otherwise be left without a companion. Whatever the case, employers should have clear reasons either for saying 'yes', in order to avoid setting a precedent, or for saying 'no', in case the decision is later challenged.

STEVENS V UNIVERSITY OF BIRMINGHAM

Dismissal – same but different?

The employer in this case, a bank, invited staff to an evening event at a racecourse to celebrate its 20th anniversary. Employees were told it was a work event and that normal standards of behaviour and conduct would apply. Two employees were engaged in some jokes and banter initially, which included some physical contact. One employee, Mr Jones, had his arm around the other employee's sister. The colleague, Mr Battersby, kneed him in the back of the leg and Mr Jones turned around and punched Mr Battersby in the face. After Mr Jones had left the event, Mr Battersby sent him several text messages threatening serious physical violence. The employer investigated the incidents and both men were called to separate disciplinary hearings. Mr Jones was dismissed for gross misconduct. Mr Battersby was also found guilty of gross misconduct but was given a final written warning. Mr Jones brought an unfair dismissal claim, arguing that he received unfairly harsher treatment.

An Employment Tribunal initially ruled that Mr Jones' dismissal was unfair because both men had been guilty of gross misconduct and the inconsistency of treatment was unreasonable. However, on appeal, the Employment Appeal Tribunal ruled that the dismissal was fair. The employer was entitled to treat a deliberate punch in the face at a work event as being more serious because it was without real provocation and had the potential to cause reputational harm. In contrast, while the text messages contained serious threats, they were never carried out and they were in direct response to a serious physical assault.

The case highlights the importance of ensuring consistency of treatment when taking disciplinary action for misconduct. Employers must ensure both consistency between employees involved in the same incident and, where possible, that any sanction is consistent with how the same behaviour has been dealt with in the past. However, the case is a good reminder that it is possible to treat different employees involved in the same incident differently where there are good reasons for doing so. Here, the employer was entitled to treat one employee more harshly than another because he had physically assaulted a colleague in public at a work event, without any serious provocation. The colleague's behaviour, while unacceptable, had been provoked and this justified a more lenient sanction.

MBNA LTD V JONES

Whistleblowing – is it in the public interest?

The employee in this case was a driver of a heavy goods vehicle. He submitted a written complaint, along with three of his colleagues, regarding the way in which overtime was allocated. One of their concerns was that some drivers were losing out on income. There was also a suggestion that overtime was being withheld from drivers who were more concerned about safety and the roadworthiness of vehicles. The employee was later dismissed. He brought a claim arguing he had been dismissed for blowing the whistle.

At a preliminary hearing, an Employment Tribunal struck out the claim. The Tribunal ruled that the employee's complaint about overtime could not be a protected disclosure, as it related to an internal dispute about terms of employment and was, therefore, not in the public interest. However, on appeal, the Employment Appeal Tribunal ruled that the overtime complaint could be a disclosure in the public interest. The EAT said that a group of employees could be considered a section of the "public" and it is possible for a dispute about terms and conditions to be in the public interest, particularly where, as here, there was an underlying concern about safety and roadworthiness of vehicles. The employee was therefore allowed to proceed with his claim.

To qualify as a whistleblower, a worker making a disclosure must reasonably believe that it tends to show some form of wrongdoing and is in the public interest. This case confirms that it will be relatively easy for most whistleblowers to satisfy the "public interest" test.

"...it will be relatively easy for most whistleblowers to satisfy the "public interest" test."

The worker's concern need not affect the public at large and it will be sufficient if the issue impacts a section of the employer's workforce. A concern about a manager's bullying or harassing behaviour, for example, is likely to be in the public interest, even if it is targeted at only one individual, as it could potentially impact others. In contrast, a complaint about a purely personal matter (eg one employee not receiving their full holiday entitlement) is unlikely to be in the public interest and the individual would not be protected as a whistleblower.

Once a worker can show they are protected as a whistleblower, they face an additional hurdle to succeed in any claim. They must also show that any dismissal or detrimental treatment is because they have blown the whistle. Employers should, therefore, be clear about the reasons for treatment of a worker where there is a history of them having raised concerns about wrongdoing.

UNDERWOOD V WINCANTON PLC

New Law

Modern slavery reporting

On 29 October 2015, new rules came into force which require large employers to make a public statement on slavery and human trafficking.

The requirement applies to all commercial organisations operating in the United Kingdom with a global annual turnover of £36 million or more. Such organisations are required to produce an annual statement for each financial year ending on or after 31 March 2016 outlining how they keep their businesses and supply chains free of slavery and human trafficking. The Government has published guidance on the new requirement which suggests the statement might include information about:

- the organisation's structure, its business and its supply chains
- its policies in relation to slavery and human trafficking
- the due diligence processes in relation to slavery and human trafficking in its businesses and supply chains
- the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and steps it has taken to assess and manage that risk
- its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate and
- the training about slavery and human trafficking available to its staff.

"The requirement applies to all commercial organisations operating in the United Kingdom with a global annual turnover of £36 million or more."

The statement should be signed by a director (or equivalent) and published on the organisation's website, with a link in a prominent place on the homepage. Our Operational Risk team has produced a more detailed briefing note on the new reporting obligation. Please speak to your usual Employment Department contact or email employment@traverssmith.com if you would like a copy.

Zero-hours contracts

The Government has published guidance for employers on zero-hours contracts, ie contracts where the worker is not guaranteed any work and is only paid for work done. The guidance is non-binding but it suggests that, as a matter of best practice, employers should:

- provide information about a worker's employment status and rights when offering zero-hours contracts
- only use zero-hours contracts in appropriate circumstances (eg for seasonal work or to cover sickness absence) and avoid inappropriate use (eg where work is regular or predictable) and
- consider alternatives to zero-hours contracts, such as offering overtime or annualised hours, or using part-time or fixed-term contracts.

Following rules introduced in May 2015, exclusivity clauses in zero-hours contracts are unenforceable. An exclusivity clause is any provision which seeks to prevent a zero-hours worker from working for another employer. The Government has now published draft regulations to support the ban on exclusivity clauses. Under the draft regulations:

- a zero-hours worker would have an automatic unfair dismissal claim if they were dismissed for failing to comply with an exclusivity clause, regardless of their length of service and
- a zero-hours worker would also have a detriment claim if they were subjected to any other detriment (eg having pay reduced or hours withheld) for failing to comply with an exclusivity clause.

No date has been given for implementation of the new regulations at this stage.

Watch This Space

Tougher visa rules

As reported in the July 2015 edition of **Online Update**, the Government is looking to tighten the rules on sponsored work visas. The most significant change for employers is the proposal to increase the salary thresholds for Tier 2 sponsored work visas.

Employers can only sponsor Tier 2 visas where they have a sponsorship licence to do so and where the role is paying above a set threshold – currently, the baseline threshold is £20,800 but higher, role-specific thresholds also apply. The Government's Migration Advisory Committee is in the process of reviewing the minimum salaries for sponsored roles, with a view to recommending increases of between £10,000 and £25,000 in most cases. It is also advising the Government on a proposal to introduce a new skills levy on employers who wish to sponsor workers from outside the European Economic Area (EEA).

A report is expected in mid-December 2015, with any changes likely in early 2016. Employers may wish to begin considering the impact of the changes on recruitment plans for the coming year. **Online Update** will report developments.

"The most significant change for employers is the proposal to increase the salary thresholds for Tier 2 sponsored work visas."

Our Work

Since the last edition of **Online Update**, our work has included:

- advising on the extent to which a practice of enhanced redundancy payments has become contractual through custom and practice
- assessing the impact of recent holiday pay cases for a client, including quantifying historic liability and the risk of claims, and identifying a strategy for operations going forward
- organising a programme of "witness familiarisation" for witnesses due to be giving evidence at trial for one of our clients in an Employment Tribunal
- advising a selling client on a TUPE information and consultation process with a collective redundancy exercise conducted by the buyer in the pre-transfer period
- advising a restaurant chain client on the transition of its Senior Operations Adviser, engaged as a consultant, who is now assuming the role of Operations Director, to be employed under an executive service agreement
- providing diversity and discrimination training to all managers and staff at a media client
- advising a global IT client on the judicial mediation of Employment Tribunal claims for sex discrimination, disability discrimination and whistleblowing being pursued by a former senior executive.

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

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