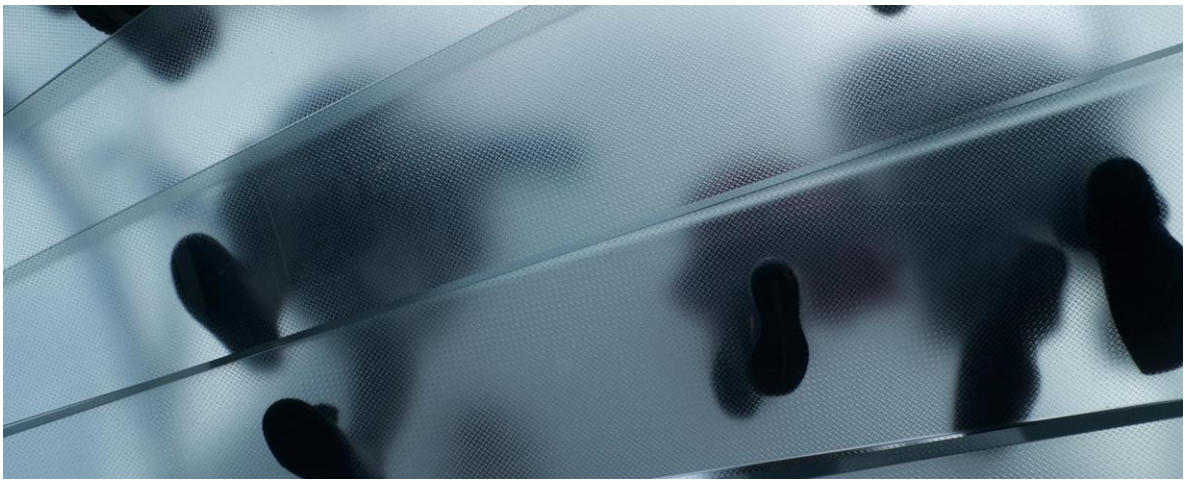

September 2016

Online Update – Essential Information for Employers

In the News

Byron grilling over immigration raids

Hamburger chain Byron received a public grilling for cooperating with Home Office arrests of illegal workers in late July 2016. Thousands took to social media to encourage a boycott, criticising Byron for "misleading" workers into attending a health and safety briefing at which Home Office officials arrested suspected illegal workers. Two London branches were also forced to close temporarily after activists released cockroaches, locusts and crickets in protest.

The incident highlights the difficulties employers face when dealing with illegal working and Home Office investigations.

Employers have a duty to prevent illegal working and can face fines of up to £20,000 per worker for failing to do so. As part of this, employers must conduct 'right to work' checks of prescribed identity documents for all employees before they start work. Employers must also repeat such checks on the expiry of any work visa.

"Employers have a duty to prevent illegal working and can face fines of up to £20,000 per worker for failing to do so."

Where there are suspicions of illegal working, reporting concerns to the Home Office and cooperating with any investigation will go a long way towards mitigating any potential fines the employer might receive. Employers who are registered immigration sponsors also have a positive duty to report any suspicions and cooperate fully with the Home Office. Byron escaped fines here because it cooperated with the Home Office and had carried out the correct checks on staff; the illegal workers had "sophisticated" forged documents.

However, cooperating with the Home Office can also lead to significant adverse publicity, as this case shows. Misleading staff could also potentially lead to claims for unfair dismissal or race discrimination from employees sacked or, perhaps more likely, affect the morale of those left behind. Byron was clearly caught between a rock and a hard place but the case shows the range of employee and public relations issues

employers need to consider in these circumstances on top of the employment law issues, typically in a very short space of time.

Cyber-vetting – what are the risks?

A recent survey of 4,000 HR professionals by Monster and YouGov suggests an increase in "cyber-vetting" – viewing candidates' social media profiles as part of the recruitment process.

More than half of those surveyed admitted that candidates' online profiles had influenced hiring decisions. Just over a third said they had declined to interview a candidate, or rejected an applicant, after checking their social media posts. Sixty-five per cent said that they had "Googled" prospective employees.

But what are the employment law risks of such cyber-vetting?

Viewing a candidates' social media profile would constitute pre-employment vetting, ie gathering personal data from sources other than those provided by the candidate. The Information Commissioner's Office (ICO) states in its Code of Practice on Employment that employers should only vet candidates for roles where there are particular risks to the business or clients, and this should not be done as a matter of course. The ICO also states that vetting should be used to find out specific information, rather than as a means of general intelligence gathering, and that candidates should be told what vetting will take place and be given the chance to respond to any information that affects the employer's decision.

"...it could be used by a rejected candidate to mount allegations of discrimination."

An employer that fails to follow the Code could in theory face compensation claims from rejected candidates but such claims are very rare and difficult to pursue. The employer could also face enforcement action from the ICO but this is likely to take the form of an 'enforcement notice' with a chance to remedy any breach before any fines would be imposed.

Perhaps the greater risk here is a potential discrimination claim. Checking up on social media profiles is likely to reveal all sorts of personal information about candidates, which could include things like their religion, political beliefs or sexual orientation. Even if this does not affect the employer's recruitment decision, it could be used by a rejected candidate to mount allegations of discrimination.

Clearly, cyber-vetting has some advantages. It may reveal information about candidates that they would not disclose in an interview. However, employers should weigh this against the data protection and discrimination risks. Employers may consider a policy on viewing social media profiles to ensure consistency across the organisation. However, the most effective strategy is to ensure recruiting managers are trained on the risks and told to be very clear about their reasons for rejecting any candidate in their notes of interviews and shortlisting decisions. The reasons for rejection should be linked to the objective requirements of the role.

Case Watch

Whistleblowing dismissal – who knew?

The employee in this case worked in sales at Royal Mail. She blew the whistle to her line manager after suspecting a colleague had breached the company's policy and Ofcom's rules on offering price discounts. Her line manager convinced her to retract the allegation and admit that it was a mistake. He then required her to attend weekly meetings with him to monitor her progress and set her an "ever changing and unattainable" list of objectives.

Relationships broke down and the employee was signed off sick. Her case was referred to another senior manager, who did not see the original whistleblowing disclosures but was told by the employee's line manager in brief terms that she had made some allegations and subsequently withdrew them as a misunderstanding.

The employee was dismissed for poor performance. She brought an unfair dismissal claim, alleging that she had been dismissed for blowing the whistle.

The employee won her claim, even though the manager who made the decision to dismiss had little knowledge of the whistleblowing and was not motivated by it. The dismissing manager genuinely thought the employee was a poor performer. However, the employee's line manager was aware of the whistleblowing and had deliberately kept the details from the dismissing manager. He had also deliberately set the employee up to fail in the performance management process, by setting unrealistic objectives. In these circumstances, the Tribunal felt the real reason for dismissal was the whistleblowing, rather than the employee's performance.

The case shows that an employee can succeed in a whistleblowing claim where the decision-maker is not motivated by whistleblowing but has been manipulated or influenced by another manager who is. The case highlights the role of Human Resources in ensuring the decision-maker has all the available information and documents. The decision-maker in this case was not shown the employee's whistleblowing emails, which may have affected the decision or led to different lines of inquiry. It also highlights the need for the decision-maker to probe allegations of poor performance, and seek specific examples, rather than accepting a line manager's account at face value.

ROYAL MAIL GROUP LIMITED V JHUTI

Reasonable adjustments – how far does the duty go?

The employee in this case worked for a security company as an engineer maintaining automatic teller machines. He suffered from a back injury, which constituted a disability and meant he was unfit for heavy lifting and working in confined spaces. After a period of sickness absence, he began working in a new role as a "key runner", delivering materials to engineers at various locations. His salary as an engineer was maintained initially. However, the employer decided to make the key runner role permanent, with a 10 per cent reduction in pay to reflect the fact that it did not require engineering skills. The employee refused to agree to the pay reduction and was dismissed. He brought a claim of failure to make reasonable adjustments and discrimination arising from his disability.

"...the employer must consider maintaining the employee's pay, as part of its duty to make reasonable adjustments."

The employee succeeded in his claim. The Employment Tribunal ruled that that the employer was required to maintain the employee's salary as an engineer as a reasonable adjustment, even though he was performing a different role. The employer was a large company with substantial resources and it had, in fact, maintained the employee's salary for around a year and had led him to believe this would be long-term. On appeal, the Employment Appeal Tribunal (EAT) agreed. The EAT said that employers are not required to maintain an employee's salary in every case where a disabled employee is moved to a different role. However, protecting the employee's pay in such circumstances can amount to a reasonable adjustment and should, therefore, be considered.

Where an employee is prevented from doing their job because of a disability, the employer must consider whether there is other suitable work available for the employee to do. The employer does not necessarily need to create a role but must consider what potential vacancies exist within the organisation. Where the new role involves a reduction in pay, this case confirms that the employer must consider maintaining the employee's pay, as part of its duty to make reasonable adjustments. However, this does not mean that employers must protect the employee's pay indefinitely in every case; rather, this is something that must be considered as a potential adjustment. The costs of doing so must be weighed alongside other factors such as the practicability of the adjustment, the resources available to the employer and the potential impact on other staff. In some cases, it may be appropriate to protect the employee's pay for a period as a reasonable adjustment, perhaps with a gradual reduction over time. However, as this case shows, the employer must be clear at the outset what the

arrangements are. It was unhelpful here that the employer had not been clear whether maintaining the employee's original salary was a temporary or permanent arrangement.

G4S CASH SOLUTIONS (UK) LTD V POWELL

New Law

National minimum wage

On 1 October 2016, the annual increase in the rates of the national minimum wage will take effect. The rates from 1 October 2016 will be:

- £7.20 per hour for workers aged 25 and over (no change from the current National Living Wage introduced in April 2016)
- £6.95 per hour for workers aged 21 to 24 (rising from £6.70 per hour)
- £5.55 per hour for workers aged 18 to 20 (rising from £5.30 per hour), and
- £4.00 per hour for workers aged under 18 years (rising from £3.87 per hour).

The apprenticeship rate, for apprentices under 19 or in the first year of their apprenticeship, will also increase from £3.30 per hour to £3.40 per hour.

Gender pay gap reporting

As reported in the July 2016 edition of **Online Update**, employers with 250 or more employees will be required to publish figures on the gap between male and female pay within their organisation. Draft regulations were published in February 2016 and final regulations were expected over the summer, to come into force in October 2016. However, the timetable has been delayed. The regulations will now be published in the autumn and will come into force in April 2017. In scope employers will be required to make their first report by 30 April 2018 from information gathered from the pay period which includes 30 April 2017 and, in respect of bonuses, the year ending 30 April 2017.

Tax on termination payments

The Government has announced proposals to change the way termination payments are taxed from April 2018.

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). In contrast, where there is no PILON clause in the contract, the first £30,000 is usually free of income tax and the entire amount is free of NICs. It is proposed that, from April 2018, all notice payments would be subject to income tax and NICs, and on the entire amount, regardless of whether there is a PILON clause in the contract.

"It is proposed that, from April 2018, all notice payments would be subject to income tax and NICs..."

For other termination payments over and above notice pay, the first £30,000 will continue to be free of income tax and NICs but it is proposed that, from April 2018, any amount above £30,000 would be subject to both income tax and employer NICs (but not employee NICs). Currently, amounts above £30,000 are subject to income tax only and are free of NICs.

The Government has published draft legislation for consultation until 5 October 2016, with a view to the changes coming into force in April 2018.

Immigration

A number of changes to Tier 2 visas are due in force in autumn 2016 which will affect licensed immigration sponsors. No date has been set but this is likely to be some time in October 2016. The key changes are that:

- the minimum salary threshold for Tier 2 General visas will increase from £20,800 to £25,000. In order to sponsor an employee under Tier 2 General, employers will need to pay at least £25,000 or the salary set out in the UKVI codes of practice for the role, whichever is higher;
- the minimum salary threshold for short-term Tier 2 Intra Company Transfer visas (less than 12 months) will increase from £24,800 to £30,000. In order to sponsor an employee under a short term Tier 2 Intra Company Transfer visa, the employer will need to pay at least £30,000 or the salary set out in the UKVI codes of practice for the role, whichever is higher;
- the Tier 2 Intra Company Transfer – Skills Transfer subcategory will be closed. This subcategory currently allows sponsors to transfer new recruits from an overseas group company or branch to the UK for up to six months to share skills and knowledge; and
- all Tier 2 Intra Company Transfer applicants will need to pay the Immigration Health Surcharge of £200 per year of the visa, which is paid upfront at the time of applying for the visa. Currently Tier 2 Intra Company Transfer applicants are exempt from the surcharge.

Further changes have also been announced to take effect in April 2017, which include:

- all employer sponsors will be required to pay an Immigration Skills Charge of £1,000 per year for each employee on a Tier 2 visa;
- the minimum salary threshold for Tier 2 General visas will increase to £30,000 (or the salary set out in the UKVI codes of practice for the role, whichever is higher);
- the resident labour market test will be waived for Tier 2 General visas which are associated with the relocation of a high-value business to the UK or which support an inward investment (with guidance on what constitutes a "high-value business" or "inward investment" to be released);
- the current 12-month service requirement for applicants for a Tier 2 Intra Company Transfer visa will be waived for employees being paid over £73,900; and
- the maximum length of a Tier 2 Intra Company Transfer visa will be increased from five to nine years for employees earning at least £120,000.

"...all employer sponsors will be required to pay an Immigration Skills Charge of £1,000 per year for each employee on a Tier 2 visa..."

Consultation

Salary sacrifice

HMRC has published a consultation on proposals to change the way income tax and NICs apply to some benefits provided through salary sacrifice schemes. HMRC is proposing that where a benefit is provided through salary sacrifice (eg private medical insurance or a company car) an amount equivalent to the benefit would be subject to income tax and employer NICs. The change would also affect benefits provided under some flexible benefits schemes. However, it would not apply to salary sacrifice arrangements involving employer pension contributions, childcare vouchers, employer supported childcare, workplace nurseries and cycle to work benefits. The proposals are designed to help stem the rising costs to HMRC of salary sacrifice schemes. The consultation is open until 19 October 2016.

Our Work

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

- advising on the employment and immigration arrangements surrounding the secondment of a US executive from New York to London
- advising on strategy and process in relation to the termination of employment for a long-term sick employee
- advice in relation to the redundancy process in the UK for a multinational employer, including issues around pooling, selection criteria and enhanced redundancy payments
- advising an international client with multisite UK operations on a gender pay gap reporting project, and
- advising a PLC client on complex conduct-related disciplinary and grievance matters resulting in the departure of a senior executive under a settlement agreement.

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

Partners: Siân Keall, Tim Gilbert, Ed Mills

Anna West, Adam Rice, Ailie Murray, Adam Wyman, Christopher Thomas, Charmaine Pollock, Alex Fisher Xabier Reynoso, James Champness, Will Dixon, David Harford, Zoë Bristow, Sarah Baker

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

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