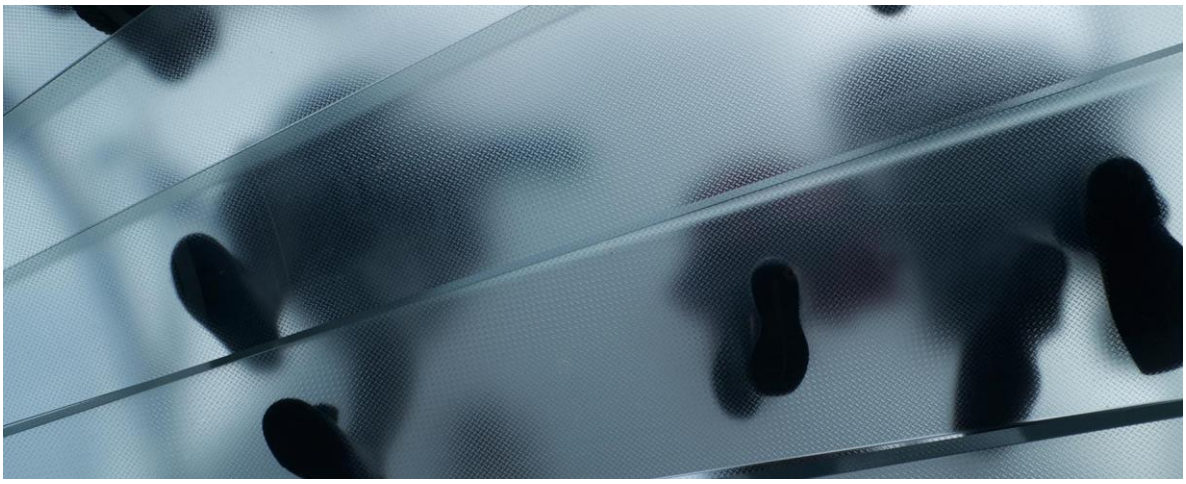

January 2018

Employment Update

Key employment and business immigration developments for employers

In the News

Safeguarding against sexual harassment

With the recent spate of high profile allegations of sexual harassment in politics, Hollywood, the media and business, many employers are reviewing their policies and procedures on the subject. The Equality and Human Rights Commission (EHRC) has also written to FTSE 100 companies and other leading employers asking for evidence of what action they are taking on the issue.

Sexual harassment occurs when a person engages in any form of unwanted conduct of a sexual nature that has the purpose or effect of violating someone's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. This covers a wide range of behaviour – such as unwelcome advances, suggestive looks and sexual comments or jokes. A one-off incident can be enough.

Employers can also be on the hook for sexual harassment by employees (and potentially also third parties), where the employer has failed to take action to prevent it.

Employers reviewing their safeguarding measures in this area, should therefore consider the following:

- **Training for staff:** All staff should receive regular awareness training on harassment and what behaviours are and are not acceptable.

- **Training for managers:** Managers dealing with sexual harassment complaints should receive specialist training on the issue, including how to support staff involved and when to escalate matters. Increasingly, we are seeing questions being raised by employees in grievances about what training relevant managers have had. Also, in any discrimination or harassment claim, the Employment Tribunal will ask what equality training managers have received.

- **Process for reporting:** Employees should have a clear channel through which they can raise concerns. This may be through the grievance procedure or through a separate process, given the sensitive and complex nature of sexual harassment issues. Whatever the case, employees should be clear where they can

go to raise concerns. Confidentiality should be maintained wherever possible (although it cannot always be guaranteed).

- **Support for complainants:** Offering appropriate support to employees who witness or are victims of sexual harassment is important, whether this is through specifically trained staff internally and/or access to external employee assistance programmes or counselling.

- **Remember the accused:** Employees accused of wrongdoing have the right to know the allegations against them and for those allegations to be kept confidential. Before any disciplinary action is taken, there should be a thorough investigation and a proper hearing for the accused to put their case forward. It will often be necessary to separate the parties pending the outcome, and the employer should take care to ensure that neither side feels penalised.

Measures to combat sexual harassment should also be viewed in a wider context of an organisation's culture and encouraging gender equality.

The EHRC has produced helpful guidance for employers dealing with workplace sexual harassment, which can be found here.

Unlimited fines for gender pay gap reporting?

According to some recent press reports, employers could face "unlimited" fines for non-compliance with the new mandatory pay gap reporting rules. However, the reality is perhaps less alarming than the reports might suggest.

Although the pay gap reporting rules do not contain any sanction for non-compliance, the EHRC has the power to enforce them. However, before any fine could be imposed, the EHRC would first have to issue a notice to the employer requiring compliance and enforce that through court orders – only if the employer still failed to comply could fines be imposed.

The EHRC has published its draft policy on enforcing the gender pay gap reporting rules, stating that it will seek an informal resolution at first and then, if this fails, would issue a compliance notice. The EHRC also says it may take action against employers who publish inaccurate data.

"Employers caught by the pay gap reporting rules should take their obligations seriously."

Employers caught by the pay gap reporting rules should take their obligations seriously. Many employers who have published incorrect or misleading information have already received negative press and employers who fail to report or publish figures late are also likely to be scrutinised. In scope employers have until 4 April 2018 to report their pay gap figures.

Fit for Work comes to an end

The Government Fit for Work service will end on 31 March 2018 (having stopped taking new referrals on 15 December 2017). Fit for Work was introduced in 2014 in order to address long term sickness, with a free referral for an occupational health assessment for employees who had reached four weeks of sickness absence. However, referral rates have been low, resulting in the decision to close the service, and there is no indication that it will be replaced with any other service. Any employers who used Fit for Work will have to revert to the support they used previously, such as external occupational health providers.

Immigration Radar

Brexit and EU nationals

The first phase of Brexit negotiations concluded in December 2017 with a deal being struck on EU citizens' rights. A "cut-off date" of 29 March 2019 has been agreed and EU citizens working in the UK legally by this date will have their rights protected. This is good news for employers, as it means existing EU employees will be able to stay in the UK and continue working beyond Brexit. The same protection will also apply to UK nationals living and working in the EU as at the date the UK leaves the EU.

While the deal comes with the caveat that "nothing is agreed until everything is agreed", it provides some welcome clarity for employers.

The UK Government proposes that all EU nationals living in the UK would be required to apply for residence documentation on Brexit confirming their status – "settled status" for those with at least five years' residence or "temporary status" for those with less than five years. The UK/EU deal endorses this approach and confirms that EU nationals will be given a grace period of two years from Brexit to apply for such documentation.

The deal also confirms that anyone who obtains a permanent residence document under the current rules prior to Brexit will be able to switch this into a "settled status" document free of charge. EU nationals who are eligible but who have not yet applied for a permanent residence document should, therefore, consider doing so.

The Government is yet to confirm details of what new immigration requirements will apply to EU nationals coming to work in the UK after Brexit. **Employment Update** will report developments.

Skilled work visa changes

On 11 January 2018, a number of changes to the work visa rules take effect for non-EU nationals. The key changes for employers to be aware of are:

- it will become easier to employ international students who have completed a UK degree, as students will be able to apply for Tier 2 visas on completing their course without having to wait until they have their final results

- the number of Tier 1 "Exceptional Talent" visas available for individuals who are endorsed as "world leaders" or "emerging world leaders" in their field will double from 1,000 to 2,000 with individuals granted visas based on "exceptional talent" able to qualify for indefinite leave to remain after three years of continuous residence while those with visas based on "exceptional promise" will continue to require five years of continuous residence

- the absence limit for indefinite leave to remain applications of no more than 180 days will be assessed on a rolling basis, "during any 12 month period" in the five years, meaning frequent travellers will need to monitor levels of travel more closely over the five years

- dependants of Tier 1 and Tier 2 visa holders who apply for indefinite leave to remain will need to meet the same UK residence requirements as the main visa holder and their absences from the UK during visa periods granted on or after 11 January 2018 should be no more than 180 days in any 12 month period of the qualifying five years of UK residence.

Case Watch

Reasons for dismissal – the dangers of sugar-coating

The employee in this case was the Group Legal Counsel for an insurance broking business. Following concerns about his performance, the employer gave him three months' notice of dismissal in accordance with his employment contract. To soften the blow, and to keep things amicable during the notice period, the employee was told that the reason for dismissal was a decision to outsource legal services (as opposed to the employee's poor performance). The employee responded saying that he believed this would constitute a TUPE transfer and asked the employer for information about the transfer. When no information was forthcoming, the employee resigned claiming constructive dismissal. With less than two years' service, he could not bring an unfair dismissal claim and was not entitled to written reasons for his dismissal but claimed notice pay for his three month contractual notice period.

The employee initially lost in the Employment Tribunal but won in the Employment Appeal Tribunal (EAT). According to the EAT, although the employer did not have to provide reasons for dismissal, once it chose to do so, it had an obligation not to mislead the employee. Deliberately giving a false reason for dismissal was a breach of the implied duty of trust and confidence, particularly where this was done to encourage him to continue working during his notice to ensure a smooth handover.

As this case shows, employers must be careful not to mislead an employee about the true reasons for a dismissal. Employers should be wary of 'sugar-coating' the reasons, even where this is done for the employee's benefit. Employees with at least two years' service would have an unfair dismissal claim if false reasons were given. Even where the employee does not have service for unfair dismissal, providing false reasons could be a breach of trust and confidence, which could give rise to a constructive dismissal claim. In turn this could also mean that any post-termination restrictions and confidentiality obligations could fall away. Also, providing a false reason (or refusing to give a reason) will make it more difficult to defend a claim that discrimination or whistleblowing is the real reason behind the dismissal.

"...employers must be careful not to mislead an employee about the true reasons for a dismissal."

RAWLINSON V BRIGHTSIDE GROUP LTD

Holiday back pay for workers

The claimant in this case worked for a manufacturer of windows and doors as a self-employed, commission-only salesman. He received no salary and was not paid for any holiday or sickness absence. After nine years, the employer offered him an employment contract but he refused. When his engagement came to an end, he claimed holiday pay for accrued but untaken holiday during the 13 years of his engagement. While he had taken some holiday, he said that he did not take (or ask to take) his full holiday entitlement each year because it would have been unpaid.

The Employment Tribunal ruled that he was a "worker" and was therefore entitled to paid holiday. The Tribunal awarded pay in lieu of all holiday which had accrued but not was taken throughout his 13-year engagement. The case was appealed to the Employment Appeal Tribunal and the Court of Appeal, and then referred to the European Court of Justice (ECJ).

The ECJ upheld the claim for payment in lieu of accrued but untaken holiday. It ruled that if a worker does not take some or all of their holiday entitlement because the employer refuses to pay for it, the worker has effectively been prevented from taking their holiday. The accrued but untaken leave then automatically carries overs until the worker has the opportunity to take it or until termination of the engagement, regardless of

whether or not the worker has asked to take the leave. On termination, the worker must be paid in lieu of the accrued, untaken leave.

The decision is alarming for any employer which treats individuals as self-employed when they are, in reality, workers. It means that the worker can potentially claim holiday pay back to their start date (back to 1998, when the right to statutory holiday was first introduced). It is a particular blow to "gig economy" employers, given the spate of recent cases where individuals treated as self-employed have been found to be workers. It may prompt employers in all sectors to review the contracts and working practices of the different individuals they engage, including casuals, contractors, consultants and freelancers.

"...the worker can potentially claim holiday pay back to their start date..."

KING V THE SASH WINDOW WORKSHOP

Right to work – when can you dismiss?

The employee in this case was a bus driver. He was a Jamaican national who had the right to live and work in the UK, without requiring a visa. The employer conducted an audit of its right to work documentation. When the employee was unable to produce evidence of his right to work, he was suspended without pay. He was given a further opportunity to produce the documents but failed to do so and was dismissed for illegality. He brought an unfair dismissal claim and a claim for unlawful deductions from wages for his suspension.

The Employment Appeal Tribunal found that the employee in fact had the right to work in the UK. It was therefore not illegal to employ him, even without proof of the right to work, so it could not be fair to dismiss for illegality. However, because the employer genuinely believed his employment was illegal, the dismissal could potentially be fair for "some other substantial reason". The case was sent back to the Employment Tribunal to consider whether the dismissal for this reason was fair.

The employer in this case was caught between a rock and a hard place. If the employee turned out to be working illegally, the employer would have faced a fine of up to £20,000. The only way to avoid such a fine is to ensure that the employee has presented appropriate evidence of their right to work in the UK. Employers should, therefore, always insist on correct right to work documentation from employees. Failing to do so not only exposes the employer to fines if the worker turns out to be illegal but, if the employer is a licensed sponsor, it could also jeopardise the sponsorship licence. These factors usually outweigh the risk of an unfair dismissal claim and, in any event, a dismissal may be justified for "some other substantial reason" where the employer has a pressing need to ensure compliance or genuinely believes the employee is working illegally. Although we do not know the final outcome for the employer in this case yet, it is hoped that the Tribunal will take a pragmatic approach to whether the dismissal was fair for "some other substantial reason".

"Employers should...always insist on correct right to work documentation from employees..."

BAKER V ABELLIO LONDON LTD

New Law

Statutory sick pay

On 9 April 2018, the rate of statutory sick pay will increase from £89.35 to £92.05 per week.

Maternity pay rates

On 9 April 2018, the lower rate of statutory maternity pay and the rate of statutory paternity, adoption and shared parental pay will increase from £140.98 to £145.18 per week (or 90% of the employee's average weekly earnings if lower).

Watch this space

Employment status claims

As reported in the November 2017 **Employment Update,** the Employment Appeal Tribunal (EAT) dismissed an appeal by Uber last year against a ruling that two of its drivers were "workers" and therefore entitled to some employment rights, such as national minimum wage and paid statutory holiday. Uber has appealed that decision. Uber originally tried to 'leap frog' the Court of Appeal and go straight to the Supreme Court but has been told the appeal must go to the Court of Appeal first. The appeal will now be heard by the Court of Appeal some time in 2018.

Separately, Pimlico Plumbers has appealed the Court of Appeal ruling that one of its plumbers was a "worker" rather than a self-employed contractor. The appeal will be heard by the Supreme Court in February 2018. **Employment Update** will report developments.

Our Work

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

- advice regarding remuneration policies for listed companies
- advising on s.188 collective consultation obligations for a client on a site closure
- analysing and advising on the arrangements a client has in place for 'self-employed' contractors against the growing focus on the gig economy
- advising on the question of whether TUPE applies in a second generation outsourcing where no service documentation exists to allocate responsibilities
- advising on immigration sponsor licence compliance and undertaking mock audits
- advising a private equity backed restaurant chain on the departure of its CEO
- advising a global asset management organisation in relation to a team of departing employees who are planning to set up a competing business.

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

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