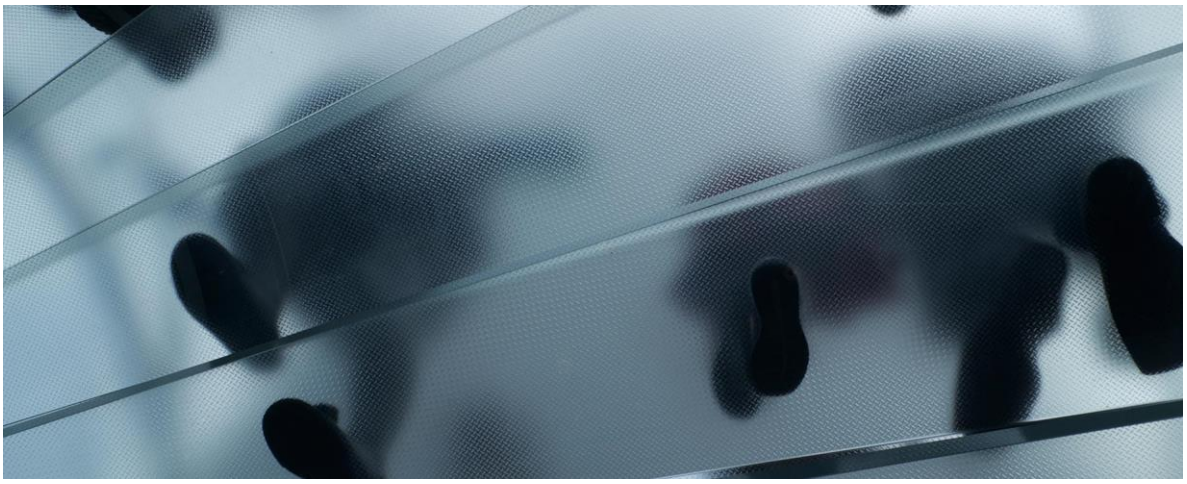

May 2016

Online Update – Essential Information for Employers

In the News

Right to work checks

A number of directors have been disqualified recently for failing to prevent illegal working at their companies. A director of a Birmingham-based cooked foods wholesaler has been disqualified from acting as a director for seven years, after his company was fined twice for failing to carry out right to work checks correctly and the company went into liquidation before paying the fines. Another director was banned from acting as a director for six years after his fast-food restaurant failed to pay fines for employing three illegal workers. This highlights the need for employers to ensure right to work checks are being conducted properly.

Employers have an obligation to check that all employees have the right to work in the UK. Failure to do so can expose the employer to fines of up to £20,000 per employee working illegally. In addition, it is a criminal offence to employ someone knowing that they do not have the right to work. The offence is punishable by an unlimited fine, and any director or officer involved can also face imprisonment of up to two years (soon increasing to five years under Government proposals).

To avoid liability, employers should ensure they have robust systems in place to check employees' right to work and ensure that appropriate records are kept. Checks must be undertaken on all employees and must be carried out before the individual starts work (including before any induction or training takes place).

" ...employers should ensure they have robust systems in place to check employees' right to work..."

When conducting checks, the employer should ensure that:

- the individual produces an original document or documents from the Home Office's prescribed lists of documents
- original documents are inspected in the presence of the individual to ensure they appear genuine and valid, and relate to the individual
- the employer retains a copy or scan of the documents securely throughout employment and for two years after it ends
- the date of the check is recorded and this record is also kept throughout employment and for two years after it ends and
- for anyone who has a temporary right to work in the UK (eg a work visa), the expiry date is diarised so that a repeat check can be conducted on expiry.

The same checks should be carried out for all candidates at the same stage of the recruitment process to avoid any race discrimination issues. For existing employees, it is advisable to operate a "traffic light" system of checks at say, three months, two months and one month before expiry, to allow time for any necessary extension applications to be made.

Employers who are licensed sponsors must allow access to their records by the Home Office at any time on request. One of the things Home Office inspectors will assess is compliance with the right to work checking regime.

The Home Office has produced guidance on conducting right to work checks, which can be found on its website at: https://www.gov.uk/check-job-applicant-right-to-work.

Case Watch

Discretionary bonuses – can they be challenged?

The employee in this case was a trader on the money market derivatives desk of a large bank. He was entitled to a discretionary bonus, a portion of which was required to be consistent with peers at a similar level of compensation. For two years, he received a bonus of one percent of the profits he generated, while two other members of the money market derivatives desk received bonuses of eight percent and eleven percent respectively. The employee brought a claim arguing that the bank had breached his contract by awarding a bonus much less than his peers. He also claimed that he had been told at interview to expect a bonus of at least five percent of profits even in "bad" years. He claimed that the bonus of one percent awarded breached his reasonable expectations based on the interview.

" ...employers should ensure they have clear reasons for any bonus decision and, wherever possible, should ensure these are documented."

The High Court rejected the employee's claim and awarded summary judgment in favour of the employer. Although the employee was entitled to a bonus consistent with peers of a similar level of compensation, the two colleagues who received higher bonuses were not on a similar level of compensation. Their bonuses were based on a set formula, which had been individually negotiated with them in order to retain them. The bank, therefore, had good reasons for paying different bonuses and its decision could not be said to be irrational. The Court also said that, whatever the employee had been told at interview, he did not have a reasonable expectation of a minimum five percent bonus because his employment contract made it clear that it superseded any prior verbal offers or representations.

While this case is fact-specific, it is helpful as it shows that employees will usually have an uphill struggle when seeking to challenge the amount of a discretionary bonus. The employee would generally have to show that the employer's decision was irrational or perverse, in that no rational employer would have awarded a bonus of that amount. Where an employee is entitled to a discretionary bonus, it will generally be easier for the employer to defend awarding a small bonus than nothing at all. In any event, to reduce the risk of a successful challenge, employers should ensure they have clear reasons for any bonus decision and, wherever possible, should ensure these are documented. Ideally, the bonus terms would be drafted as widely as possible, to allow the employer to take into account any factors it considers relevant. However, where the bonus scheme specifies particular factors to be considered (eg the employee's performance, bonuses awarded to peers etc), the employer should ensure these are taken into account, as failure to do so would leave the bonus decision exposed to challenge.

PATUREL V DB GROUP SERVICES (UK) LTD

Religion at work – what are the limits?

The employee in this case was a senior manager at a mental health services facility operated by an NHS Trust. She described herself as a born again Christian. She set up an initiative where volunteers from her church provided religious services at the facility but this was later suspended, after concerns were raised about improper pressure on staff and service users. The employee was warned informally about maintaining boundaries. A couple of years later, a complaint was made that the employee had tried to impose her views on a junior Muslim colleague. This involved inviting the colleague to church functions, praying with her during a one-to-one meeting and, on one occasion, laying hands on her. The employee argued this was consensual and had been initiated by the colleague. However, following a disciplinary hearing, she was issued with a formal written warning for failing to maintain appropriate professional boundaries. She brought claims of religious discrimination and harassment.

The Employment Tribunal and Employment Appeal Tribunal rejected her claims. Although the context for the disciplinary process was the employee's religious acts, the reason for the warning was that the employee's behaviour blurred professional boundaries and placed improper pressure on a junior employee.

Employers must tread a careful line when dealing with employees who manifest religious beliefs in the workplace. Taking disciplinary action against an employee for expressing religious or similar views is likely to constitute discrimination or harassment on the grounds of religion or belief. However, as this case shows, employers can take action where the manner of expressing those views is inappropriate, such as where an employee "foists" their views on others or expresses their beliefs in an offensive way. In many cases, an informal word with the employee concerned would be appropriate in the first instance – it was relevant in this case that the employee had been warned informally about the need for boundaries prior to formal action being taken. Where formal disciplinary action is taken, employers should be very clear about the reasons in order to avoid straying into discriminatory territory.

WASTENEY V EAST LONDON NHS FOUNDATION TRUST

Preventing illegal working – when is dismissal safe?

The employee initially worked for Royal Mail under various work visas which expired in 2010. Prior to the expiry of his work visa, he applied for a student visa. Royal Mail confirmed with the Home Office that the employee was allowed to continue working under his old work permit while his application for a new visa was being considered. Royal Mail's policy was to carry out checks on a six-monthly basis for employees awaiting an outstanding application or appeal. After two years had passed, Royal Mail sought to check the position with the Home Office again but the Home Office simply said that no further checks were required. Royal Mail continued to make enquiries of the employee and warned him that failure to provide evidence of his

immigration status could result in dismissal. The employee was eventually dismissed after he failed to provide any further evidence. He brought an unfair dismissal claim, on the basis that he did in fact have the right to continue working because his application was still being considered.

The Employment Tribunal and Employment Appeal Tribunal rejected his claim. The employer had taken reasonable steps to check the employee's immigration position, including contacting the Home Office and making repeated requests of the employee. The employer also had reasonable grounds to conclude that the employee's immigration status may have changed; the application process had taken much longer than for other employees and the employee had refused to contact the Home Office himself for confirmation. It did not matter that the employer's conclusion may have been wrong, so long as it was genuine and reasonable. The dismissal was justified on the basis of "some other substantial reason".

The case highlights the difficulty employers can face when checking an employee's immigration status. Where it is clear an employee no longer has a right to work in the UK, the employer should dismiss immediately, as continuing employment is likely to lead to criminal liability. However, it is not always clear whether an employee has the right to work or not. In this situation, employers should obtain all the information they can from the Home Office and the employee before taking any decision to dismiss, as well as warning the employee of the possibility of dismissal. Where doubt remains, dismissal is often the safest option to avoid the risk of criminal liability. In any event, as this case shows, an employer that has done all it can to ascertain the employee's immigration status will have good grounds for defending an unfair dismissal claim.

NAYAK V ROYAL MAIL LTD

New Law

National Living Wage

The Government has announced the new national minimum wage rates that will apply from 1 October 2016. The rates from 1 October 2016 will be:

- £7.20 per hour for workers aged 25 and over (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.

Strike law reform

The Trade Union Act, which has been progressing through Parliament since last summer, has received Royal Assent. The Act will introduce measures designed to make it harder for trade unions to call strikes and easier for employers to manage them.

Currently, for industrial action to be lawful, it must be supported by a majority vote in a ballot of the workforce or part of the workforce striking. However, there is no minimum number of workers who must participate in the ballot, meaning strikes can happen where only a small proportion of the workforce has turned out to vote. The Trade Union Act introduces a 50 per cent turnout threshold, so that a strike ballot is only valid if at least 50 per cent of the workforce actually votes, and a majority of those voting vote in favour of it. In essential services (the health, education, fire, transport, border security and nuclear decommissioning sectors), a higher threshold will apply of at least 40 percent of the entire workforce voting in favour of the strike.

Other measures in the Act include:

- a new requirement for trade unions to include details of any industrial action in their annual returns
- an increase in the length of notice of industrial action that trade unions must give the employer from seven to 14 days
- a time limit of six months from the date of the ballot within which the industrial action must be taken (otherwise a fresh ballot would be required) and
- a new requirement that any picketing organised or encouraged by a trade union must be supervised by a picket supervisor.

The Government has not yet indicated when the Act will come into force.

Data protection – new requirements

New data protection rules have been agreed in Europe, which will make significant changes to UK data protection law. On 14 April 2016, the European Parliament approved a new EU General Data Protection Regulation and, once this has been published officially (likely to be mid-May), the UK will have two years in which to implement it. The new rules are therefore expected to be in force in spring 2018. Employers should begin preparing for the changes now, to ensure compliance from day one of implementation.

" it will become much harder for employers to rely on consent in the employment contract as the basis for processing employee data."

One of the key changes is that it will become much harder for employers to rely on consent in the employment contract as the basis for processing employee data. Under the new rules, consent must be freely given and "explicit", and any request for consent will need to be presented in a manner which is distinguishable from other matters (eg separate to the body of the employment contract). Most employers will look to rely on grounds other than consent for processing personal data wherever possible (although consent is likely to continue to play a role in specific contexts, such as such as obtaining medical reports on employees).

The rules on "subject access requests" – an employee's right to see all data held on them – are also changing. Under the new rules, employers will have one month to respond to requests, rather than the current 40-day time limit. In addition, employers will have to provide more information about the data, including the envisaged period of storage and details of the employee's data protection rights.

The new rules also extend employees' data protection rights to have information about them corrected and deleted, under the so-called "delete it, freeze it, correct it" principles.

The Information Commissioner has published 12 steps for businesses to take now to prepare for the changes, which include:

- ensuring that decision-makers and key individuals in the organisation are aware that the law is changing (and the operational and financial costs involved)
- auditing what data is held by the organisation, where it came from, who it is shared with and the legal basis for processing the data
- checking procedures to ensure they cover all the rights individuals have (such as rights to have personal data deleted or provided electronically)

- updating procedures for handling subject access requests, and
- designating a "Data Protection Officer" with responsibility for data protection compliance.

Consultation

Non-compete clauses

The Department for Business, Innovation and Skills (BIS) has published a public "call for evidence" on whether post-termination non-compete clauses act as a barrier to innovation and entrepreneurship. Many employers include such provisions in employment contracts, which prohibit ex-employees from working for a competitor or setting up a competing business after leaving the employer's employment. Such non-compete clauses are notoriously difficult to enforce; the courts will only enforce them to the extent they go no further than is reasonably necessary to protect the employer's legitimate business interests. However, they are commonly used for the deterrent effect. The Government would like to know whether they are having a stifling effect on innovation by hindering start-ups and small businesses from hiring the most talented people. The question is being asked as part of the Government's move to develop an "Innovation Plan" aimed at making Britain the most attractive place in Europe to start a business. The results of the call for evidence will be fed into the Innovation Plan, due to be published later this year. The call for evidence closes on 22 May 2016.

Watch This Space

Immigration skills charge

The Government has confirmed that it will introduce a new Immigration Skills Charge on all employers who are registered immigration sponsors. The charge, which will apply from April 2017, is designed to discourage reliance on migrant workers. Employers will be required to pay £1,000 per employee per year for each non-EEA employee sponsored under Tier 2 of the points based system. A reduced rate will apply to small employers (but what constitutes a small employer has not yet been defined). Exemptions will also apply for PhD level roles and international students switching from student visas to sponsored Tier 2 visas. **Online Update** will report developments.

Gender diversity and financial services

HM Treasury has launched a new voluntary charter designed to improve gender diversity in senior roles in the financial services industry. The charter follows a review by Jayne-Anne Gadhia, the Chief Executive of Virgin Money, into the underrepresentation of women in senior managerial roles in the industry. Financial services firms that sign up to the charter commit to taking the following action:

- appointing a member of the senior executive team to be responsible for gender diversity and inclusion
- setting internal targets for gender diversity in senior management
- publishing progress annually towards those targets, and
- linking executive pay to the targets on gender diversity.

HM Treasury is encouraging firms to sign up to the charter and take action voluntarily. However, if insufficient progress is made, it may revisit whether a more prescriptive approach is required.

Our Work

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

- advising a client on the TUPE implications surrounding a second generation change of service provider
- advice regarding the pensions lifetime allowance
- advising on a collective consultation redundancy process together with organising multiple settlement agreements through "town hall" meetings
- advising on the extent of a reasonable investigation and disciplinary process for an employee suspected of serious misconduct
- analysis of employed versus self-employed status
- drafting a new senior level employment contract for a financial services client and advising on strategy and process for the roll out of this new contract to existing staff; and
- delivering training on diversity and performance management to a client's UK and US executive committee.

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

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