Employment Law update November 2016

Eligibility to Work in the UK

Employers in the UK now face harsher penalties for hiring illegal workers under the Immigration Act 2016. This includes not having proper processes in place to check when visas expire, and not carrying out 'right to work' checks following a TUPE transfer.

Previously, the Home Office had to show an employer actually knew an employee was working here illegally, but since July an employer who has reasonable cause to believe an employee is working illegally is committing an offence. The maximum penalties have also been raised to up to five years' imprisonment and/or a civil penalty of £20,000 for each illegal worker.

Immigration is such a hot topic for the Home Office at the moment that employers need to take their responsibilities on this seriously and ensure they monitor and police their workforce effectively to eradicate illegal working. It is essential that all employers have robust employment practices on the legality and immigration status of their employees. These should include carrying out the correct 'right to work' checks on all staff before they start work and tracking visa expiry dates.
At the same time, employers must ensure they do not slip into potentially discriminatory practice. They should:

- ensure written procedures make clear that all applicants will be granted fair and equal treatment
- carry out checks on all applicants, not just those where there may be an issue
- keep a job open to allow an applicant the opportunity to demonstrate his or her right to work (unless there is an urgent need to fill the position)

If someone in the workforce is discovered to be working illegally it is important to examine the evidence carefully and ascertain the immigration status of the individual concerned as this is not always clear.

Unless it is immediately obvious there is no irregularity, the employee should be suspended so the situation can be investigated without the organisation being at risk of continuing to employ someone illegally. The employee should be sent a follow up letter explaining why he or she has been suspended.

Having taken legal advice, employers should consider reporting their suspicions to the Home Office, as actively co-operating with the department can help to mitigate a civil penalty and can help ensure employers are dealing with employees fairly.

Terminating someone's contract when his or her continued employment would be in breach of the

immigration rules, is certainly a potentially fair reason for dismissal, but it is not an automatically fair reason, and so it is important to follow a fair process at all times.

Flexible Working and Maternity Returners

Everyone who's worked 26 weeks is eligible to apply for flexible working. Flexible working means changing hours or working arrangements – **an employee doesn't need to have childcare or family responsibilities to make a request**. They could ask for flexible working for anything from pursuing a new qualification to looking after a pet.

- An employer can't just ignore a flexible working request and must respond to it in a reasonable way. This includes in relation to how long it takes to provide a reply.

- Employers must be able to justify refusing to allow women returning from maternity leave to move on to part-time hours. It is difficult for employers to justify a policy that employees must all work full-time.
- Employers should have a policy in place to deal with flexible working request Employers can explore the possibility of a trial period.

If an employee makes a claim about a flexible working request being refused, an Employment Tribunal can order an employer to reconsider its decision and can order compensation. From April 2016, compensation is limited to a maximum award of £3,832.

The most common reason for a flexible working request is undoubtedly childcare. It is worth noting that almost 2,000 people turned to Citizens Advice for help with pregnancy and maternity discrimination issues between April 2015 and March 2016; an increase of almost 25% on the previous year. So it is important that employers take steps to support new mothers on their return to work.

Employers are prohibited from treating employees unfavourably either because of their pregnancy (or an illness arising from it). Compensation for discrimination claims is uncapped, so such claims pose a significant financial risk to employers.

So what can employers do to minimise claims and ensure they are properly supporting pregnant employees or those on maternity leave?

1. Make employees aware of their rights

Employees will generally be aware of the more obvious rights, such as maternity leave, but may not know they have the right to carry over untaken holiday where their maternity leave spans two leave years.

2. Communication is key

Ensuring effective communication is crucial, although contact during maternity leave must be limited to what is 'reasonable'. Having open discussions with pregnant employees early on should enable employers to plan for the effective management of the leave.

3. Right to return

It can be tempting for employers to consider making temporary members of staff covering maternity leave permanent, particularly where they are perceived to be 'better' than the employee on maternity leave. Employers need to be careful not to overlook the fact that employees who have been absent for 26 weeks or less are legally entitled to return to the role they held before their absence, or a suitable alternative role, on no less favourable terms.

QUESTION AND ANSWER CORNER

Q: ***An employee has requested time off for prayer time which has been granted but we now seem to be getting constant demands for more time off from a member of staff. We agreed to extended lunches for this, especially on a Friday, as long as they worked the contracted hours, unfortunately he doesn't do that which is another ongoing issue. Now the employee is asking for two 'lunches' so they can pray twice a day. We have been provided with a prayer timetable from the member of staff to show when he needs to pray. Needless to say we want to oblige where possible but it is being noticed by other staff. Do we need to provide a prayer room?***

A: This is not an uncommon request. As an employer, you have an obligation to "seek to accommodate an employee's individual religious needs" where possible. While you are not obliged to give the employee time away from employment if this would be detrimental to the needs of the business, you should see what can be done as an alternative.

The timetable this employee has given you indicates two (or possibly three) prayer times during the working day. This should be discussed with the employee and this time can be agreed as additional unpaid breaks. This alleviates the concern you might have that the employee is not making up the time.

The employee will need a quiet area where he will not be disturbed. As you don't have a prayer room you could look at allowing access to an office, or perhaps an area normally only used occasionally by staff which would mean the employee is not disturbed.

Any time off for this reason does not need to be paid time off and could either be taken as unpaid, or the employee could be allowed the opportunity to make the time up. But if you

feel that he is abusing the “making time up” policy then simply agree that his working day will be reduced to allow him to pray.

Q: ***We have an employee who has been off work sick for more than five weeks. Can we go ahead and dismiss this employee?***

A: Employees who are off work sick for more than four weeks are generally considered to be long-term sick.

Dealing with long-term sickness can be a delicate issue. A sympathetic response may be required as the illness may be serious and could involve a mental health problem; at the same time, it can represent a strain on the business and decisive action needs to be taken.

The employer may simply decide to keep in touch with the employee and give him or her the time needed to get better. It is essential, where reasonably possible, to keep in regular contact with the employee about his or her position.

If a decision to dismiss is considered, then it should be the last resort. Before doing this employers must:

- consider if the employee can return to work — it may be working flexibly or part time or even doing different and less stressful work — with appropriate training also provided
- consider all reasonable adjustments to the job or work environment which could make it easier for the employee to return to work. There may also be a requirement to offer any available suitable alternative employment to an employee who falls within the definition of “disability” under the Equality Act
- consult with the employer about when he or she can return to work and if the health problem is likely to improve.

The employee should be aware of the reasons for the proposed dismissal and have an opportunity to state his or her case before a decision to dismiss is taken. All staff need to know what pattern of absence will act as a “trigger point” for the organisation to take action.

The decision to dismiss the employee must be within the range of reasonable responses of a reasonable employer, having regard to the prognosis for the employee’s return to work and the impact of the absence on the business. A dismissal in this situation will usually be on grounds of capability.

Q: ***One of our most valued and long standing employees has walked out, saying she had resigned after an altercation with a junior member of the team. Can I ask her to reconsider?***

A: Despite what the employee may have said at the time, it could be dangerous for you to conclude that she meant what she said to the junior member of the team "in the heat of the moment" and for you to act as if the contract has ended. If she has at least two years' continuous service with you, she could claim unfair dismissal at the employment tribunal.

The best response is to have a "cooling off" period and then, if possible, to contact the employee and establish whether or not she actually meant to resign and all the surrounding facts relating to the situation.

Above all, do not say or do anything that could be misinterpreted as a dismissal.

In this way you may be able to resolve the problem and you can then agree with the employee that she returns to work, without any break in her continuity of service.

If you can't contact her, wait a reasonable time before confirming that her resignation has been accepted.

If you have a particular question that you would like answered email training@scottishwholesale.co.uk or call 0800 9995 121 and we will publish next month – all names will be removed to ensure confidentiality.