

FEBRUARY/MARCH

Welcome to our second monthly newsletter of 2008, giving you a brief overview of the latest developments in Workplace and Health & Safety Law.

We present a mixed offering this month, inevitably dominated by our focus on the Corporate Manslaughter and Corporate Homicide Act 2007 which is the topic of our seminar with No 5 Chambers, sponsored by Yorkshire Bank, on 8 February. If you have been unable to attend the Seminar, let us know as we will arrange a personal presentation when convenient. We can provide relevant training and advice to your organisation or your clients on all aspects of health and safety and employment law.

We look forward to seeing you on 28 February or to hearing from you soon - if you have any questions arising from the matters discussed in this newsletter, our team would be happy to advise you!



Corporate Manslaughter

The Corporate Manslaughter and Corporate Homicide Act 2007 is due for enactment on 6 April 2008. Employers should start preparing themselves now for the new law by:

- reviewing health & safety policies;
- examining what happens in practice and how health & safety issues are enforced;



- deciding who is 'senior management' for the purposes of the Act;
- setting up procedures enabling employees to report any concerns confidentially; and
- checking whether your insurance covers criminal prosecutions, legal representation and costs.

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Unfair Dismissal

The Court of Appeal, overturning the Employment Tribunal and Employment Appeals Tribunal, in Airbus UK Ltd v Webb held that an employer may take expired disciplinary warnings into account when deciding whether to dismiss an employee.

In this case Mr Webb received a final written warning for misuse of company time stated to last for 12 months. One month after the expiry of this warning period he was caught on CCTV watching television with colleagues during company time and was dismissed. Mr Webb's colleagues, who had not pre-

viously received a final warning, were not dismissed.

The Court of Appeal held that the dismissal was fair. It was stated that reliance upon an expired warning was a relevant factor in determining whether the employer acted reasonably; however, this was the exception and not the rule.

Points Based Immigration System (PBS)

The new points based immigration system will start coming into force on 29 February 2008 when highly skilled foreign nationals currently working in Britain will have to apply under the new system if they want to extend their stay. In April the new system will begin to be rolled out overseas when anyone from India who wants to work in the UK as a highly skilled migrant worker will need to apply under PBS. By the summer this new highly skilled system will operate worldwide.

Under the new system, points will be awarded to reflect aptitude, experience, and the level of need in any given sector. This, it is hoped, will allow the UK to respond flexibly to changes in the labour market.

The new points system will consolidate more than 80 current work and study immigration categories into 5 tiers.

The five tiers have different conditions, entitlements and entry-clearance checks.

Tiers 3 and 5 are temporary routes - people in them will not be able to switch out of them once they are in the United Kingdom. Those in tiers 1, 2 and 4 will be eligible to switch between these tiers subject to

meeting the requirements of the tier they wish to switch to. Tiers 1 and 2 will potentially lead to settlement if settlement requirements are met at the time of that application.

For each tier, applicants will need sufficient points to gain entry clearance or leave to remain in the United Kingdom.

Tier 1

Highly skilled individuals to contribute to growth and productivity.

Tier 2

Skilled workers with a job offer to fill gaps in the UK labour force.

Tier 3

Limited numbers of low-skilled workers needed to fill temporary labour shortages.

Tier 4

Students

Tier 5

Youth mobility and temporary workers: people allowed to work in the UK for a limited period of time to satisfy primarily non-economic objectives.

Border & Immigration Agency if a sponsored migrant fails to turn up for their first day of work, or does not enrol on their course. They will similarly be expected to report any discontinuation of studies, or if the contract is terminated, the migrant is leaving their employment, or is changing educational institution.

There will be increased focus on compliance in the United Kingdom and additional responsibilities for sponsors whose compliance will be checked through the account management structure. Account managers will provide help and guidance to sponsors in discharging their responsibilities but where there are concerns, compliance officers will be directed to make robust checks on job roles, qualifications and salary. Serious breaches of the rules may lead to sponsors being removed from the register and prevented from employing migrant workers.

This is a brief overview of the new system, if you require further information or guidance please contact us or see the Border & Immigration Agency website.

Sponsorship and compliance

(taken from the Border & Immigration Agency website)

All applicants in tiers 2-5 will need to provide a certificate of sponsorship from a licensed sponsor. The certificate will act as an assurance that the migrant is able to do a particular job or course of study.

Sponsors will be expected to tell the

Illegal workers

From February 29th 2008 new regulations come into force (along with penalties) in employing illegal immigrants. They were contained in the Immigration Asylum and Nationality Act 2006.

Protecting yourself from the risk of action by the Border and Immigration Agency need not be a problem.

The biggest changes are not big changes in the duties on Employers, but in the penalties for non-compliance.

It has been the case for some time that employers are required to check that

prospective employees have a right to work in the UK.

Specifically there is a civil penalty of up to £10,000 per illegal immigrant and a new criminal offence of knowingly employing an illegal immigrant.

However you have a statutory defence if you check and record certain documents.

A simple check of a passport is all that is required (remember to get a copy).

Alternatively a birth certificate when produced with evidence of National Insurance

Number (such as P45, P60 or National Insurance card).

Other documents can be checked and these are listed in the draft Code of Practice on Prevention of illegal working issued by the Border and Immigration Agency.

You do need to ensure that the rules apply to all new employees to ensure that you avoid any hint of discrimination.

If you have doubts give us a ring.

Article by Phil Osborne, Consultant at WH Law LLP

“ new criminal offence of knowingly employing an illegal immigrant.”

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per
illegal
immigrant

Burden of Proof in Race Claims - two-tier approach

The Employment Appeals Tribunal have held in Okonu v G4S Security Services (UK) Ltd that the ‘reverse’ burden of proof in S.54A of the Race Relations Act 1976 (RRA) does not apply to cases of discrimination on grounds of nationality or colour (as oppose to on the grounds of ‘race’ or ‘ethnic origin’).

The burden of proof rules were designed to implement EC Directive No. 2000/43, however, discrimination on the grounds of nationality or colour is not covered by this directive.

In cases of discrimination on the grounds of nationality or colour the claimant must first establish facts from which the tribunal may draw an inference that discrimination has occurred, however, the burden will not then shift to the employer to prove there has been no such discrimination. Instead, in the absence of an adequate explanation from the employer for the treatment complained of, the tribunal may infer that race discrimination has occurred, but is not obliged to do so.

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W H Law LLP have specialists able to assist and advise both employers and employees in all aspects of Employment Law. We take a client focused approach to business and look at both the legal and practical implications associated with Employment decisions.

We provide a holistic service to businesses, focusing primarily on the assessment and management of the risks involved in employing people within a business and providing assistance with litigation where necessary.

We provide day-to-day advice, prepare and review documents (including service agreements, contracts and all procedures and policies) and conduct litigation on your behalf. We also offer training for managers and personnel officers, with particular focus on diversity issues in addition to post termination issues such as employee competition and breach of fiduciary duties.

We can offer these services through a bespoke programme with a monthly cost, negotiated with you, or on an ad hoc basis according to your needs.

Damages for Events Prior to Constructive Dismissal

Following the decision of the Court of Appeal in *GAB Robins (UK) Ltd v Triggs*, Claimants who have been unfairly constructively dismissed cannot obtain compensation for the breaches which led to the dismissal in

employment tribunals only damages for the dismissal. Claimants may, however, make a separate claim at common law in the civil courts for breach of the implied term of mutual trust and confidence.

Agency workers

The Court of Appeal in *James v Greenwich Borough Council* handed down a judgment confirming an Employment Tribunal can only imply a contract of employment between an agency worker and the end-user of his or her services on grounds of necessity.

Particular factors to be taken into consideration when deciding if it is necessary to imply a contract of employment between an agency worker and end-user are:

- the way in which the contract is performed is consistent with express agreements in place;
- substitution of one worker for another is permitted;
- the arrangements between the parties are genuine .



Disability Discrimination Act

EC Directive 2000/78 establishes a general framework for equal treatment in employment. The Advocate General has expressed his opinion, in *Coleman v Attridge Law*, that this Directive should be interpreted as protecting those who, although not themselves disabled, nevertheless

suffer discrimination or harassment owing to their association with a disabled person.

In this case the Claimant had a disabled son, although had no disability of her own. When she sought to take time off work to care for her son, her

employer called her 'lazy' and accused her of trying to manipulate her working conditions.

The Advocate General's opinion is not, however, binding on the European Court of Justice which is due to rule on this matter later in the year.