Employment Law Newsletter – September 2018

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As we return from our summer breaks to our daily commute, the news is littered with celebrities facing accusations that they have been misbehaved behind the wheel. What if it were one of your staff?

How should you deal with an employee who has been banned from driving?

A potentially fair reason to dismiss an employee is because you, the employer, would contravene the law if you continued to employ them. The most common scenario in this category is where an employee has been disqualified from driving. So, what should you consider?

How will it affect their work? Consider whether they could do their job effectively without driving. Can they use public transport, or can their driving duties be allocated to another employee? If driving is only an incidental part of their role and their ban is short, this may be straightforward.

Can they be redeployed? If driving is an essential part of their job or the ban is lengthy, consider redeploying them elsewhere in your business. Meet your employee to discuss the available options and attempt to agree an alternative role. Give your employee a chance to suggest ideas. You should consider any alternative, even if it involves retraining but you are not obliged to create a vacancy that does not exist.

Are they at fault? Your employee may have lost their licence through no fault of their own. DVLA may have revoked their licence because they have been diagnosed with a disability such as

epilepsy or diabetes that is deemed to affect their ability to drive. If so, the Equality Act 2010 will apply, and you will be obliged to make reasonable adjustments to their work or your practices with a view to continuing their employment.

Where your employee has caused the ban, for example though a conviction for drink-driving or traffic offences, you may wish to treat it as a disciplinary matter. Particularly if they committed the offence when on duty and driving a company vehicle. Address it under disciplinary procedure. Depending on the circumstances, it may be gross misconduct.

Recovering training costs from a leaver

When you agree to fund the cost of training a new recruit, you will be keen see a return on your investment by retaining their skills in the business. If they leave too soon, you will want to recoup some of those training costs. In Mr N Francis-McGann v West Atlantic UK Ltd, an airline recruited a pilot, whose main reference turned out to be unreliable because its purported author was Jabba the Hut, a Star Wars character. The airline generously allowed the pilot to resign with immediate effect, but unwisely he pursued them for his notice pay. An employment tribunal dismissed his claim and ordered him to repay £4,725 in training costs.

Deductions from wages are lawful when authorised by statute, for example tax and national insurance, when authorised by a provision of the worker's contract or the worker has signified their consent to the deduction in writing. So how do you provide an incentive for someone to join your business and remain in the job, while protecting against the difficulties of unlawful deductions from wages on termination?

Ensure that you have an express written agreement. Protect your position by asking your employee to enter into a training fees agreement before starting their training. This should be tailored to the particular training rather than a broader deduction clause that may exist in the contract of employment. Include a clause reserving the right to make a deduction from your employee's final salary for any outstanding training fees if they leave.

Operate a sliding scale. Avoid an accusation that the repayment clause acts as a penalty clause or a restriction of trade by using a sliding scale so the longer your employee remains with you the less they have to repay. So, liability for training costs of £2,000 could reduce every six months after successfully completing the training.

Prepare for your employee not completing the training. Include a provision that addresses the scenario where your employee leaves before completing the course. Speak to the training provider to understand whether you can recoup some of the fee from them as well as your employee.

Using the repayment clause. If your employee's final pay doesn't cover the full amount of the outstanding fees, ask them to refund the balance under the terms of the agreement. If they fail to pay, enforce the agreement as a civil debt. However, consider your former employee's ability to pay before incurring fees that you cannot recover.

The Parental Bereavement Act

The Parental Bereavement (Leave and Pay) Act 2018 will give all employed parents a statutory right to two weeks' leave if they lose a child under the age of 18 or suffer a stillbirth after 24 weeks of pregnancy. Employed parents will also be able to claim statutory parental bereavement pay for this period, if they meet the relevant eligibility criteria, which are similar to those for statutory paternity pay.

The final text of the Act has not yet been published but it is expected that the new rights will come into force in 2020, once regulations have been made setting out the detail of how parental bereavement leave will be taken. Such regulations will provide that the leave must be taken within 56 days of the child's death.

Employment Tribunal Quarterly Statistics

The Ministry of Justice has published the employment tribunal quarterly statistics for the period April to June 2018. During this period, single claim receipts, disposals and outstanding caseload all increased in comparison with the same period in 2017 (by 165%, 56% and 130% respectively). Receipts in multiple claims increased by 344% (owing to a large airline claim) while disposals fell by 13%, leading to a 34% increase in the outstanding caseload.

Confusion over carer sleep-in payment rules

In our last edition we praised the Court of Appeal's clarity in deciding that the only time that counts for national minimum wage purposes is time during which the sleep-in worker was required to be awake for the purpose of working. Previously the social care sector faced a back pay liability of up to £400m.

While we await official guidance from the Department of Business, Energy and Industrial Strategy (BEIS), HMRC has been accused of muddying the water by telling service providers that it will continue to operate its social care compliance scheme (SCCS) without changing its timeframes or requirements. The scheme was set up to allow care-sector employers to volunteer back payments to sleep-in staff who had been underpaid.

Those in the scheme should conduct a self-review to identify underpayments in light of the Court of Appeal judgment but hold off from reporting until the deadline, either 12 months after applying to SCCS or 31st December 2018, whichever is sooner. BEIS may issue its guidance before you are required to report.

If you would like to discuss these or any other issues facing your organisation please speak to your usual contact at Watershed or Keith Morgan on +44 161 703 5611

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