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EMPLOYMENT LAW BULLETIN

MAY 2021

Welcome to the Wrigleys Employment Law Bulletin, May 2021.

I would like to start this month by extending a very warm invitation to our annual Employment Law Conference which takes place on 10 June 2021. We are excited to announce that, after years of welcoming delegates to a face-to-face event in Leeds, the conference will take place virtually this year. The theme of the conference is Leading in Challenging Times and will look at challenges for the not-for-profit sector in leading hybrid and remote teams and managing people in the current context. It will feature a fascinating key note presentation from Susanne Jacobs, an organisational behaviour and performance specialist, focused on unearthing the secret to motivation, trust and engagement in hybrid teams. You can find out more and book for this event through the link below. I look forward to seeing you there!

In our first article this month, we highlight the upcoming changes to Right to Work checks. A return to usual practices for the physical checking of original right to work documents is scheduled for June. And from 1 July, new rules will apply when checking right to work status for EEA nationals.

There have been two useful judgments in the Employment Appeal Tribunal which we cover this month, both considering health and safety related claims. In ***Flatman v Essex County Council***, the EAT considered whether an employer had fundamentally breached the employment contract by failing to provide manual handling training to a support assistant who had to lift a disabled child on a daily basis. In ***Sinclair v Trackwork Ltd***, the EAT had to decide whether a manager had been automatically unfairly dismissed for bringing in unpopular new health and safety protocols.

We also cover a recent case on compulsory vaccination heard in the European Court of Human Rights. This case challenged a Czech law under which penalties can be imposed on parents who fail to have their children vaccinated against specified diseases. Although this case is not in an employment context and pre-dates the Covid pandemic, it provides a useful insight into how human rights based challenges of schemes to penalise vaccine refusal might be approached. You can find out more on this tricky issue for employers by attending our Employment Law Conference on 10 June.

We are always interested in feedback or suggestions for topics that may be of interest to you, so please do get in touch.

Forthcoming webinars:

Wrigleys' Annual Employment Law Conference for Charities

Leading in challenging times

10 June 2021 | 09:30 - 16:15

Full day virtual conference

Key note speaker: *Susanne Jacobs, founder and director at The Seven*
Guest speakers: *Nicky Jolley, managing director & Rebecca Armstrong, organisational & development manager at HR2day*

Click here for more information or to book

If you would like to catch up on previous webinars, please follow this link.

– Alacoque Marvin, Editor **alacoque.marvin@wrigleys.co.uk**

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Right to work checks and changes coming in 2021 for European Nationals

Article published on 26 May 2021

What employers need to know to avoid civil penalties.

All employers have a responsibility to check the rights of their employees to work in the UK, and failure to do so can lead to prosecution for a criminal offence and/ or a civil penalty of up to £20,000 per illegal worker. Full guidance for employers is available on the government website, here.

Employers can protect themselves against civil penalties by ensuring that they check and retain copies of specified documents as evidence of the individual's right to work. We consider below some of the key issues regarding right to work checks that employers need to keep in mind and highlight some key changes for European nationals in 2021.

Who needs a right to work check?

Right to work checks should be carried out for all employees who started work from 29 February 2008 onwards, regardless of their nationality.

Who is an 'employee'?

An 'employee' is anyone who works under an employment contract or contract for services or apprenticeship – essentially anyone who is not in business for themselves as an independent contractor. The semi-exception to this is agency workers or contractors where an agency or service provider is the employer, in which cases the agency or service provider have the responsibility to carry out checks.

However, in order to minimise reputational risks, employers would be well advised to ask any service providers or agencies they use for a copy of their right to work policies, and assurance that they make their own satisfactory checks, to provide some peace of mind.

The right to work check process

There are essentially two ways that employers can carry out checks.

1. Physical checks – where the employer views original documents in the presence of the employee. The employer should check that the information on the document is accurate and matches the employee, whilst taking note of any expiry dates on entitlements to work.

Employers should take a signed and dated copy of these documents, which can be stored or dated electronically to show that the check was carried out on or before the first day of employment.

Important: temporary covid-19 concessions allow employers to perform physical checks via video calls (i.e. the document is held up by the employee to the camera for inspection), but the original documents should be checked as soon as possible. This relaxation of the rules will come to an end on 20 June 2021.

2. Online checks - these can be used where an employee has a Biometric Residence Permit ('**BRP**') or has been granted an immigration status under the EU Settlement Scheme (i.e. they have pre-settled status or settled status).

Applicants will complete a form online which generates a right to work share code, which is then provided to the employer who can use it together with the applicant's date of birth to complete a

form online. The employer will then be able to check whether or not the applicant has the right to work and if there are any conditions/expiry dates.

Important: online checks will be the only way to check EEA nationals' rights to work from 1 January 2021 as their Status Outcome Letters from the EU Settlement Scheme are not proof of right to work. It is also not necessary to re-do right to work checks of EEA nationals who commenced employment before 31 December 2020.

What is the process?

The process depends on the nationality of the individual:

- British or Irish national: the employer can take a copy of their passport or alternatively copies of birth certificates and an official document with their national insurance number (for example their P45)
- EEA/Swiss nationals can present their passport or national ID card to employers up until 1 July 2021, after which these individuals will need to provide the relevant codes so that the employer can perform an online check
- Non-EEA nationals will need to provide evidence of their immigration status (e.g. a BRP) or provide details (such as their online reference number) so that the employer can perform an online check

Timing of checks

Checks should be completed before employment commences. This can be done before the first day or as part of day one on-boarding procedures. It is acceptable to check an individual's right to work status at interview, but this must be done for everyone to avoid discriminating against applicants.

Follow-up checks should be carried out if individual's right to work has expired or to check it has been extended, either under a new permit or due to an application to extend their right to remain working in the UK.

Documentation and the 'statutory excuse'

If it is discovered that someone is working illegally the employer may be able to claim the 'statutory excuse' from a civil penalty, which means that they can show they obtained certain documents establishing the individual's right to work. When looking to adopt a statutory excuse it is important to understand that there are three categories of documents which each have an effect on the length of time the statutory excuse will apply.

'List A' documents provide an unlimited statutory excuse. 'List B1' documents provide a statutory excuse until the expiry date of the documents, and 'List B2' provides a statutory excuse for six months.

For detailed guidance, employers should consider having a copy of the up-to-date Home Office's Right to Work Checklist, which can be used for all employees with physical documents, which can be found here.

Students and the right to work

Most international students in higher education have some work rights. In many cases students will be able to work a certain number of hours a week during term-time with the number of hours printed on the front of their BRP (if they have one).

Students might be able to work full-time if they are outside of term-time or if they are taking part

in a course-related placement, Employers should make a specific check on the student's working hours and obtain a letter from the student's school or University confirming term dates or the dates of their placement.

What should an employer do if the individual cannot provide documents?

If the individual cannot provide suitable documentation, a reference should be made to the Employer Checking Service at the Home Office. It is important to note that an online check is not the same as the Employer Checking Service.

For the purposes of Section 3(c) Immigration Act 1971, an existing right to work will continue beyond its expiry if an extension application is filed in time (i.e. before the expiry of the current visa).

Employers will need to ask the migrant's consent to file a request for the Home Office to check their records via an online form.

The Home Office will either confirm or not confirm that an application is pending and provide a statutory excuse for six months if an application is ongoing. If a decision has not been made on the application after six months, employers should re-submit the request to the Employer Checking Service.

What about civil penalties?

The first step of enforcement will usually be a letter/email from the Home Office requesting information about a particular employee and asking for a copy of the individual's right to work checks carried out by the employer.

The Home Office will then consider the employer's response and will either inform the employer that the employee is legally or illegally working. If the employee is illegally working, the employer will be expected to terminate the employment immediately. It is not enough to suspend an individual without pay.

If, on review, the Home Office decides that the right to work check carried out by the employer did not establish a statutory excuse, a civil penalty will be issued.

Reductions to the penalty

The Home Office starts at a fine of £20,000 per employee before applying mitigating factors. Those factors are as follows:

- First penalty in three years
- Self-reported illegal working
- Evidence of active co-operation

Each factor will apply a £5,000 deduction in the fine. First-time offenders may avoid a fine if they self-reported, actively co-operated and can show they have otherwise effective policies regarding right to work checks in place.

Other areas to be aware of

If employees are inherited by a transfer of undertakings, under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('**TUPE**'), then the benefit of right to work checks carried out by the previous employer will transfer to the new employer. However, if those checks have not been carried out, then the new employer cannot benefit from them, so it is important that due diligence exercises review the checks undertaken.

If right to work checks have not been done, or are found to be defective, the new employer must carry out a document check within 60 days from the date of the transfer to have a statutory excuse.

Practical points for employers

Employers need to have a right to work process and policy clearly set out.

In addition, it is also a good idea to state that all job offers are conditional on checks being carried out to the employer's satisfaction, and provide contractual obligations on employees to inform the employer of any changes which might affect their right to work in the UK.

In addition, it is a good idea to provide a contractual term which allows the employer to summarily terminate the employment if the employee loses the right to work. Employers who are considering terminating employment on the basis of the employee not having the right to work should take legal advice in order to help ensure that any dismissal is fair.

the Home Office requires right to work checks to be retained and kept for two years after the employment ends before it is destroyed. This should be clearly set out in an employer's data protection and privacy notice documentation.

Learning support assistant was constructively dismissed in relation to health and safety failings

Article published on 24 May 2021

Lack of manual handling training in lifting disabled pupil was a fundamental breach of contract.

Duty to take reasonable care of employees' health and safety

Employers have a duty to take reasonable care of the health and safety of their employees, to take reasonable steps to provide a safe workplace and to provide a safe system of work. This duty arises from statutory obligations under the Health and Safety at Work Act 1974 and a number of health and safety regulations, the common law duty of care, and a contractual duty implied into every employment contract.

Constructive dismissal and health and safety failings

Employees can claim constructive dismissal where they resign in response to their employer's fundamental breach of contract. One of the key questions in such cases will be whether the employer's act or failure to act is serious enough to be a fundamental breach of contract. Where the employer fails to comply with its health and safety obligations, the tribunal will consider the nature of the breach. Some health and safety failings will be serious enough to be a fundamental breach entitling the employee to resign as a consequence and to bring a constructive dismissal claim.

After a fundamental breach has occurred, employees can sometimes "affirm" the contract by doing something which shows they are putting up with the situation and acting as if the contract still exists. The case law shows that this question will be very fact-specific, but affirmation can happen where an employee fails to complain about the situation and/or delays too long after the breach before resigning.

A recent case in the EAT considered whether employers can do something to "cure" a fundamental breach of contract after it has occurred but before resignation takes place.

Case details: ***Flatman v Essex County Council***

Ms Flatman worked in a maintained school as a Learning Support Assistant. Her role was to give support to a disabled pupil and included daily weight-bearing and lifting of the pupil. Over a period of around 8 months from September 2017, Ms Flatman made repeated requests for manual handling training. Although the school managers assured her that steps would be taken to arrange this, no training was put in place. In December 2017, she developed back pain and reported this to the school.

At the beginning of May 2018, the Claimant was signed off for three weeks with back pain. The head teacher informed Ms Flatman that she would not be required to lift the pupil on her return to work and that she was considering moving Ms Flatman to another class in the next school year. The head also assured her that manual handling training was being organised for her and other staff in the following few weeks. Ms Flatman resigned at the beginning of June 2018 and she brought a claim for constructive unfair dismissal.

An employment tribunal found that the local authority employer was in breach of the Manual Handling Operations Regulations 1992, but that it had not fundamentally breached its duty to provide a safe system of work. This conclusion was based on the fact that, before the resignation, the head teacher had shown a genuine concern for Ms Flatman's health and safety and taken steps to ensure that she would not be exposed to danger in future. The employment tribunal therefore decided that Ms Flatman was not constructively dismissed.

On appeal, the EAT overturned this decision and held that Ms Flatman had been constructively unfairly dismissed. It made clear that it is not possible for an employer to "cure" a fundamental breach of contract after it has taken place. The tribunal should have considered whether at any point before the resignation the employer had fundamentally breached the contract and should not have taken into account the actions or assurances of the head teacher in May 2018.

According to the EAT, it was clear in this case that the failure over a number of months to put manual handling training in place was a fundamental breach of the duty to provide a safe system of work. In making this decision, the EAT took into account the facts that occupational therapists and physiotherapists visiting the school considered that this training was required, that Ms Flatman had made repeated requests over a number of months, and that she had actually developed back pain, but the training was still not actioned at the school.

The EAT decided that a tribunal could not have properly decided that Ms Flatman had affirmed the contract in this case. It pointed to the fact that she had persistently and repeatedly complained about the lack of training throughout the entire period. It was also relevant that the school had given her assurances which were not fulfilled, and that she had then escalated her complaints. The EAT stated that "this was not a case of an employee who had decided to live with the situation, but of an employee who had, hitherto, soldiered on for a time, because she had hoped that the promised action would occur; but instead the breach was prolonged and exacerbated".

Comment

Although in this case the head teacher was found to have genuine concern for the employee's health and safety just prior to her resignation, the employer's delay in putting in place required manual handling training was a serious breach of the employment contract which entitled the employee to resign. The plans put in place some 8 months after manual handling duties began came too late: the breach of contract had already taken place and could not be cured.

Employers should of course be mindful of their health and safety obligations and the multiple risks of a failure to take reasonable steps to protect employees. A failure to provide a safe system of work can lead to a number of legal claims, including personal injury and employment tribunal claims. Aside from constructive dismissal claims, employees might seek to bring claims in the employment

tribunal for health and safety related detriments (on this issue, please see our recent article Refusing to work because of fears about covid-19 - section 44 of the Employment Rights Act which is available from our website).

Whistleblowing claims can also arise where employees have raised concerns in the public interest about safety in the workplace and then been dismissed or subjected to some disadvantage. These claims do not require two years' service and are not subject to a statutory cap on compensation. Health and safety breaches can also trigger reports to regulators, the possibility of criminal prosecution, and serious reputational risk.

Dismissal for causing poor staff relations by carrying out health and safety duties was automatically unfair

Article published on 6 May 2021

EAT: The way H&S activities were carried out was not separable from performing the activities.

Employment tribunal claims relating to health and safety issues have been in the spotlight this year. We have published a number of recent articles on protections for workers in the context of fears about contracting Covid-19 in the workplace under sections 44 and 100 Employment Rights Act 1996 (ERA). Available on our website, these include:

- Refusing to work because of fears about Covid-19 - section 44 of the Employment Rights Act
- Are workers protected after refusing to work because of health and safety fears?
- Was an employee automatically unfairly dismissed for refusing to attend work due to the Covid-19 pandemic?

A recent case in the Employment Appeal Tribunal is a timely reminder that employees are also protected from dismissal or detriment because they have carried out health and safety activities after being designated to do so by their employer.

The EAT considered the difficult question of whether a dismissal for causing friction amongst staff in the way H&S duties were carried out was for an unlawful reason and so automatically unfair.

Case details: *Sinclair v Trackwork Ltd*

Mr Sinclair worked for just over two months for Trackwork as a Track Maintenance Supervisor. He was tasked with implementing the Trackwork Safe System of Work procedure (referred to as NR019). Trackwork failed to inform Mr Sinclair's colleagues of his mandate to implement NR019. Mr Sinclair began to implement NR019 with "all due diligence". His colleagues were unhappy with his approach, including his over-concern with safe systems of work, and they reported their concerns to management. Trackwork dismissed Mr Sinclair for the upset and friction caused by his attempts to implement NR019.

Mr Sinclair brought claims for automatic unfair dismissal related to health and safety activities under section 100 ERA, and for making a protected disclosure (whistleblowing). An employment tribunal dismissed his claims.

On appeal against the section 100 ERA finding, the EAT disagreed with the tribunal and substituted its decision that Mr Sinclair had been automatically unfairly dismissed.

The EAT made clear the two stages in deciding on such a claim:

- Determine whether the designated employee was asked to carry out activities in connection with preventing risks to health and safety and that the employee carried out, or proposed to

carry out, such activities.
- If the conditions of the first stage are satisfied, consider if the sole reason or the principal reason for dismissal was that the employee carried out such activities, or proposed to carry out such activities.

In this case, it was accepted that the claimant had been asked to carry out activities in connection with preventing risks to health and safety and had done so. The key question was whether the sole or principal reason for the dismissal was that he had carried them out or proposed to carry them out.

The EAT noted that Trackwork's given reason for the dismissal was the upset caused because of the manner in which the H&S duties had been carried out. This was the reason cited in the dismissal letter. Although there were other complaints about the conduct of the claimant, the tribunal found that they were largely exaggerated and were not part of the reason to dismiss.

The EAT concluded that this was not a case where the manner in which the duties were carried out could be separated from carrying out the duties, for example where the duties are carried out in a malicious or extraneous way. The EAT noted that the law seeks to protect employees designated with H&S duties as these will often be resisted by colleagues stating that: "It would wholly undermine that protection if an employer could rely upon the upset caused by legitimate health and safety activity as being a reason for dismissal that was unrelated to the activity itself." In this case, Mr Sinclair had simply done what his employer had asked him to do.

Comment

Employers should be alert to the special protections which apply to employees and workers who have designated health and safety duties, act as health and safety representatives, bring health and safety concerns to their attention, or who take preventative action in circumstances where they reasonably fear that they or someone else is in serious and imminent danger. Communications from an employee or worker concerning alleged legal breaches, including of health and safety law, could also qualify as protected disclosures under whistleblowing legislation where the individual could reasonably believe them to be brought in the public interest.

In the context of the current pandemic, the imposition of health and safety protocols in the workplace may well be particularly contentious due to wide-ranging new practices being brought in very swiftly to react to ever-changing guidance and levels of risk.

Employers who are considering taking steps to discipline, dismiss or subject to detriment those who are charged with carrying out health and safety roles should first consider whether there is a link between that step and the health and safety duties, or a protected disclosure, which could give rise to a claim. In order to minimise the risk of claims, employers should ensure that the lawful and fair reasons for those decisions are carefully documented. We strongly recommend that employers considering such action take legal advice before doing so.

Claims of this nature can be brought before the employee has two years' service and financial compensation awards for automatic unfair dismissal for these reasons are not subject to the normal cap (the lower of £89,493 or one year's gross salary).

In this case, the employer's failure properly to communicate with the workforce about its plans for a new safe system of work, along with its failure to guide Mr Sinclair on his approach to the changes, seem to be at the heart of what went wrong. Employers have a statutory duty to consult with staff about health and safety matters. The design and implementation of new H&S systems and measures will always be more likely to succeed and to find broad acceptance where employers include staff at all stages of the process and provide regular and consistent messaging.

Compulsory vaccination scheme was not a breach of European Convention on Human Rights

Article published on 28 May 2021

Vaccination scheme had legitimate aims and that penalties and fines were proportionate.

With the UK's vaccination scheme now in full swing the debate has been intensifying about whether vaccinations should be made compulsory for everyone who can take them.

To date the UK government has shown no intention to make vaccines compulsory by law, with emphasis being placed on encouraging vaccination and providing information. The government is taking steps to allow individuals to prove they have had vaccines, which for the time being are focused on helping individuals to travel abroad.

There have been statements from some organisations expressing support for vaccine certificates, an intention to make vaccination mandatory for some staff, or not to serve customers who cannot show that they are vaccinated. Other organisations have made clear that they do not intend to put any such measures in place.

As with many issues related to the pandemic, the law is very much in unchartered territory and there is relatively little precedent in case law to determine one way or another whether forcing employees to get vaccinated would be a breach of legal protections and rights, such as protection against discrimination. For more on the discrimination aspect of vaccines, see our article Can employers insist that employees are vaccinated against Covid-19?

Another interesting area is whether forcing people to be vaccinated would breach articles of the European Convention on Human Rights (ECHR). An interesting recent case from the Czech Republic saw the European Court of Human Rights (the Court) consider whether a mandatory vaccination scheme for school children breached their and their parents' rights to respect for a private and family life and their right to freedom of expression and belief. Although this case does not concern employment rights, it provides an interesting insight into how the Court might approach such questions in an employment context.

Case: ***Vavricka and Others -v- The Czech Republic [2021]***

Under Czech law, children must have specific vaccinations to be admitted to a nursery. From the age of compulsory education, unvaccinated children are permitted to attend school, but their parents can be subject to fines. There are exceptions to these rules where the child has health issues, for example where a condition prevents vaccination.

The applications to the court were in relation to children who had been prevented from attending pre-schools or nurseries because they had not been vaccinated according to Czech law, and fines issued against parents for failing to ensure that their children received mandated vaccinations.

The Court has previously established that compulsory vaccination is an involuntary medical intervention amounting to an interference with the Article 8 right to respect for a private and family life. In this case the Court found that, although no vaccinations had been performed in these cases, the vaccination duty and direct consequences of non-compliance amounted to an interference with that right.

However, Article 8 is a qualified right, which means it is permissible to infringe on it if interference is in accordance with the law, is undertaken in the pursuit of a legitimate aim and is necessary in a democratic society.

The mandatory vaccination programme was an obligation enshrined in Czech law and was imposed with the aim of protecting the health and rights of children, in particular with the legitimate aim of protecting those children who could not take the vaccines themselves and had to rely on the children around them being vaccinated for protection.

In assessing whether the interference with the applicants' rights had been necessary in a democratic society, the court weighed several factors. The Court noted that no vaccinations had been administered against an applicant's will, nor could they be under the domestic law. In addition, the consensus of experts and authorities on this issue was that vaccination was widely considered to be one of the most successful and cost-effective health interventions and that each state should aim to achieve the highest possible level of vaccination.

On proportionality, the indirect enforcement via fines was found not to be onerous and the exclusion from pre-school and nursery, whilst disadvantageous, did not extend to compulsory age schooling. These detriments were measured against the aim to safeguard the health of young children and the fact that it was essentially a protective rather than a punitive measure.

In conclusion, the measures complained of by the applicants were lawful and proportionate to the legitimate aims pursued by the Czech state, and could therefore be regarded as being necessary in a democratic society.

The Court also decided that the applicants' rights under Article 9 (the right to freedom of thought, conscience and religion) had not been violated because, they had not established that their critical opinion on vaccination was of sufficient strength, seriousness, cohesion and importance to constitute a conviction or belief benefitting from the protection of Article 9.

Comments

It is worth starting by saying that the UK's departure from the EU has no bearing on the impact of the ECHR in the UK and so this decision remains binding.

This decision is a useful reminder of the principles of Articles 8 and 9 ECHR in the context of mandatory vaccinations. Although it would suggest that a regime of penalties to increase take up of vaccinations might not be a breach of ECHR rights, it is important to note that any such regime would need to be proportionate in its impact on individuals. Measures which lead to dismissal from employment for a refusal to be vaccinated might in some cases be found to be disproportionate to the aim of protecting other staff and service users.

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