

Newsletter

Autumn 2008

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Do you know what your employees get up to at lunch times?

Not many of us do, well why should we they're not at work are they.

A judge decided that a young man who fell and died while trying to retrieve a ball from a fragile factory roof during a kick about at lunch was not at work. The Health and Safety Executive begged to differ. We tend to agree with the HSE, yes he was at lunch but he was still on company premises. Do we not have a duty of care for everyone who could be affected by our business? Have a re-read of your health and safety policy statement to remind yourself what you actually put in it; you will be surprised. This is our way of demonstrating our management philosophy and commitment to health and safety by putting it in writing. Think back to when you signed it, did you read it and more importantly did you understand what you actually signed for. Most of us said that we will take reasonable steps to look after the health, safety and welfare of all persons who come into contact with our activities and our property. We would certainly not suggest taking that particular statement out of your policy to "get rid of the problem"; it is a requirement of the Management of Health and Safety at Work Regulations 1999 that we shall take reasonable care of our employees and non-employees who could be affected by the operations of our business.

If this young lad had known about the dangers of walking on a fragile roof he may still be with us. If you knew this young man was 16 does that make a difference. What do you think you could you have done to have prevented this type of accident.

The National Staff Dismissal Register (NSDR)

What is it?

A secure list of permanent and temporary individuals dismissed by member employers for intentional damage to property, fraud, forgery, falsification or theft against the employer, colleagues or customers. It should be noted that this is following disciplinary proceedings in which the proper investigations and evidence support the decision to dismiss. The dismissal could still be deemed as unfair if the statutory disciplinary and dismissal procedures are not followed.

There has been a significant increase in organised and collusive crime and the register will allow prospective employers to share details of employees who have been dismissed or who left employment during investigation for dishonest acts. The register will also prevent job applicants from concealing their past conduct.

This is an initiative designed to reduce staff perpetrated losses, prevent damage to businesses and employees and safeguard customers. As an employee you may be comforted by the fact that a colleague who was dismissed from their previous job for dishonesty has not concealed their past before joining the company. As a customer you have the right to know that the employees of the company you deal with are honest, most importantly if they have access to your personal and/or financial information.

Can everyone see the entire list?

No. Only employers who have met the qualifying criteria can look up specific names on the list and only as a final stage in the recruitment process.

Can anyone join?

AABC (Action Against Business Crime) will restrict membership to employers that comply with data and employment legislation. The employer will have to demonstrate all the proper recruitment, disciplinary and grievance procedures eliminating the danger of misuse of personal information, security lapses or suspicion of grudges. Employers will not be able to add names to the list as and when they choose and can only add names to the list if they qualify to join, after dismissal for the dishonest conduct, if they have informed the employee in advance, given the employee the right to appeal and allowed the employee the opportunity to record on the register their side of the story.

Is this over the top?

In the last 6 years staff theft and fraud cost retailers more than £2.9 billion (statistics posted by British Retail Consortium) and almost half of theft against employers is committed by their own employees. This impacts on the honest employees who fall under suspicion. Other points to consider are lost revenue which could impact on job security and put dishonest employees at an advantage when applying for jobs through concealing their dismissal/dishonest conduct.

The concerns centered around innocent employees finding themselves victims of employers with a grudge against them. Under the rules this would be impossible as no name can be added without that person being informed in advance and they must be given ample opportunity to appeal and put their side of the story. The process can only be started once the employee has been dismissed for dishonest conduct. Should there be a breach of the rules then the employee would have a legal route they could take to correct the situation and could claim against the NSDR or any of its members.

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Case Roundups

Procek v Oakford Farms

Procek raised an "informal" grievance in writing with his employer, which he stated was not being raised under the statutory grievance procedure. He reserved the option of later bringing a formal grievance. He subsequently brought a race discrimination claim without first submitting a further formal grievance. The tribunal held that as he hadn't complied with step one of the statutory procedure, it had no jurisdiction to hear the claim. The EAT reversed this, saying that the initial written grievance, although qualified by Proceks statement, did comply with the requirements for a step one grievance letter.

Todd v Sanquhar Home Ltd

This is one of the first reported cases on the employer's duty to consider working beyond retirement. The claimant was given only 12 weeks notice of her retirement date rather than the minimum six months. The employer admitted its breach, so the tribunal felt compensation should be awarded. But as the employer had agreed to the claimants request to work beyond retirement, the breach was purely technical. So only one weeks pay was awarded.

Mixer-tap mix-up costs hospital trust £8000 for scalding incident

The court heard that on 10 October last year, an elderly lady, who was due to leave the John Radcliffe Hospital that day, was taking a bath in which the temperature of the water from the hot tap was approximately 55 degrees Celsius. She suffered burns to her body, which required her to remain in the hospital for a further six weeks.

The Hospital appeared before the magistrate to plead guilty to a charge under s3 (1) of the HSWA 1974 for failing to ensure the safety of its patient. It was fined £8000 and ordered to pay the HSE's prosecution costs of £2286.15.

The woman's family was keen to point out that, apart from this incident, the standard of care provided for her had been exemplary.

When Discrimination Issues Overlap

Since the Sex Discrimination Act of 1975 we have gone on to have increasing legislation to now cover discrimination on the grounds of sex, race, religion or beliefs, age and gender. So it was inevitable that at some point these issues of catering for individuals rights would overlap. As an employer you then have to decide whose rights you are going to uphold or more sensibly look for a way to cater for every person's rights.

A Christian Registrar, Lillian Ladele, employed by Islington Council won a landmark legal battle in July this year. Her problems began in 2004 when legislation permitting civil partnerships at Town Halls between gay and lesbian couples would require her, as a Registrar, to preside over the ceremonies. Miss Ladele raised her concerns but was ridiculed. Her boss said her stance was akin to a Registrar refusing to marry a black person.

Lillian Ladele said she was treated like a pariah by colleagues and left in an intimidating, hostile, degrading and humiliating environment. She told the Tribunal how she was given an ultimatum by her employers to perform the ceremonies or face dismissal for gross misconduct.

Miss Ladele holds the orthodox Christian view that marriage is the union of one man and one woman for life and this is the God-ordained place for sexual relations. This then creates a problem for any Christian if they are expected to do or condone something that they see as sinful.

In 2006 Miss Ladele and another Christian colleague were accused of discriminating against the homosexual community. In May 2007 the Council launched an internal disciplinary investigation into this situation. Four months later Miss Ladele was told that if she did not co-operate she would be sacked. She took the Council to Tribunal claiming discrimination, harassment and victimisation on the grounds of religion or beliefs.

The Tribunal agreed that she had been unfairly treated. In its ruling, which could have implications for the administration of the 18,000 same sex ceremonies conducted every year, the Tribunal said: "this is a situation where there is a conflict between two rights or freedoms. It is an important case which may have wider impact than the dispute between the parties." "The Tribunal accepts that it would be wrong for one set of rights to trump another."

The evidence before the Tribunal was that Islington Council rightly considered the importance of the rights of the gay community not to be discriminated against but did not consider the rights of Miss Ladele as a member of a religious group.

The Council decided that the service it provided was secular and that the rights of the lesbian, gay, bisexual and transsexual community must be protected. In so acting it took no notice of the rights of Miss Ladele by virtue of her orthodox Christian beliefs. Compensation has not yet been decided but there are no limits to the amount that can be awarded for religious discrimination.

Employers may now need to think about whether their instructions and the tasks expected of staff might cause people with religious beliefs more problems than others. This may also apply across the spectrum of discrimination.

This victory could encourage thousands of others to bring claims. Though this Tribunal decision does not set a precedent – because the level of the Tribunal is not high enough (it needs to be upheld by the Employment Appeal Tribunal, EAT). If the Council does appeal and the decision of the Tribunal is upheld at that appeal then this will set a precedent.

However, employers would be wise to consider carefully how to accommodate religious and minority groups to avoid similar claims. For example, actions could be brought from Muslim supermarket workers who do not wish to sell alcohol or Roman Catholic hospital staff refusing to assist in the carrying out of abortions.

Did you know.....

- that there were 6404 reported acts of violence at the workplace last year (2007). 5468 were off work for more than three days. 932 ended up in hospital or had an injury that required major treatment and four died. There was only one death the previous year (2006);
- that in the United Kingdom there is an accident resulting in personal injury every two minutes.

Migrant Workers

It is estimated that 10% of the UK workforce are overseas workers. So who is responsible for the health and safety of migrant workers?

If you employ a migrant worker direct you have the responsibility to protect their health and safety.

If you use a migrant worker supplied by an independent labour provider, then you and the labour provider have a shared responsibility to protect their health and safety.

A **migrant worker** is considered to be someone who is or has been working in Great Britain (GB) in the last 12 months, and has come to GB from abroad to work within the last 5 years.

A **labour provider** is considered to be a person or company who supplies workers to a third party. This includes employment agencies, employment businesses and gangmasters.

A **labour user** is a person who hires or uses workers.

A migrant worker is likely to be your employee if:

- you make deductions for national insurance and income tax from the money you pay them;
- you direct and control where, when and how they work;
- you supply most of the materials and equipment they use at work; and
- they cannot supply a substitute when they are unable to work.

If you are a labour user you should:

- carry out a risk assessment of the tasks the worker will be expected to undertake;
- ensure the control measures identified in the assessment are effective, are in place and are maintained;
- pass relevant information on to your labour provider(s).

If you are a labour provider you should:

- ensure that your clients have carried out risk assessments for the tasks the workers you are supplying will be carrying out;
- agree with your client who will check the implementation and maintenance of the identified control measures, eg providing any necessary personal protective clothing.

Workers may be more at risk because of:

- relatively short periods of employment in Britain;
- limited knowledge of British health and safety system;
- their different experiences of health and safety regimes in Britain compared with their own countries;
- their motivation in coming to Britain, particularly if the objective is to earn as much as possible, in as short a time as possible;
- their ability to communicate effectively with other workers and supervisors, particularly in relation to their understanding of risk;
- limited access to health and safety training and difficulty in understanding what is being offered;
- the failure of employers to check on their skills for work and their language skills;
- employment relationships and unclear responsibilities for health and safety, in particular where workers are supplied by recruitment agencies or labour providers or are self-employed; and
- their lack of knowledge of health and safety rights and how to raise them, including how they can get help.

Both labour providers and users should take account of the needs of overseas workers

- language issues;
- basic competencies, eg literacy, numeracy, physical attributes, general health, relevant work experience etc; and
- whether their vocational qualifications are compatible with those in GB;
- ensure that assessments are regularly reviewed to ensure they keep up to date with any changes to processes or working practices.

Do you charge workers for transporting them on public roads.

Vehicles and drivers used for transporting workers on public roads can be subject to special arrangements if the passengers are charged for the journey.

Any vehicle with nine or more passenger seats used for hire or reward must be registered as a Public Service Vehicle (PSV) and the driver must have a Passenger Carrying Vehicle entitlement on their driving licence.

Changes to the National Minimum Wage

From 1 October 2008, the National Minimum Wage rates will rise as follows:

22 years and older – £5.73 per hour
18 - 21 years – £4.77 per hour
16 - 17 years – £3.53 per hour

The Government is also proposing to amend the National Minimum Wage Act ('the Act') in order to bring in a new system of dealing with arrears and introduce a penalty payment for employers. These proposals are covered under the Employment Bill ('the Bill') currently being discussed in Parliament and will come into force on 6 April 2009 if approved.

The proposed changes would mean that arrears of National Minimum Wage ('NMW') would be calculated using the rate of NMW at the time of any claim, even if the rate was lower when the underpayment took place. This may therefore require an employer to repay a higher amount than would have been due had the correct payment been made earlier.

The Bill also covers proposed changes to enforcement of the NMW, whereby employers who fail to make correct payments would be required to make an additional penalty payment.

In addition, the Bill also proposes increased powers for HMRC, whereby they would be entitled to take information away from the employer's premises in order to copy it. Finally, the Bill also contains proposed changes to the investigation and prosecution of criminal offences under the Act, including the most serious offences being dealt with in the Crown Court.

Given the above, there may be serious implications for an employer who fails to pay in accordance with NMW rates, even if this was a genuine mistake, and checks should be made to ensure correct payments are made accordingly.

Open Training Courses 2008

Managing Disciplinary Problems
Full Day – 24 September 2008
Peterborough
Employment Law and
Health & Safety Update
Half day – 9 October 2008
Peterborough

Forthcoming Legislation

Date	Legislation	Details	Area
1 April 2009	Working Time [Amendment] Reg 2007	Will effect employers who give statutory minimum holiday entitlement. Statutory minimum will increase to 28 days or 5.6 weeks per year, inclusive of bank/public holidays.	Holiday Entitlement
1 October 2008		National Minimum wage increased to: 22 years and above – £5.73 18 - 21 years – £4.77 16 - 17 years – £3.53. Accommodation offset will increase to £4.46 per day [£31.22 per week]	National Minimum Wage
5 October 2008	Sex Discrimination Act 1975 [Amendment] Regs 2008	Pregnant employees with an expected week of childbirth on or after 5 October 2008 will be entitled to receive the same benefits in the Additional Maternity Leave period as in the period of Ordinary Maternity Leave.	Sex Discrimination

Dismissal over Immigration Status

An employee who was a non EEC National was granted leave to remain in the UK. She had been employed by a local council who dismissed her believing that her continued employment contravened immigration legislation. The dismissal was for some other substantial reason.

The council didn't follow any dismissal procedures and argued that this did not apply because the dismissal was for a breach of a statutory restriction. The employee had at the time of dismissal been entitled to work in the UK. She had applied to the Home Office for further leave to remain and it was deemed that she was entitled to continue working pending that application. Further confusion arose because the employee had been detained by the police for immigration offences and was released conditionally on her not taking up employment.

The council received a copy of that form with the condition outlined. The employee brought an unfair dismissal claim. The employment tribunal found that the dismissal was unfair as there had been no restriction on the council employing her and the dismissal procedures had not been followed. The council appealed and the Employment Appeal Tribunal overturned the decision. Following this the employee appealed to the Court of Appeal.

The Court of Appeal was satisfied that the employee had made a valid application for leave to remain before her visa expired and that she could work until that application had been determined. It also found that conditions imposed by an immigration officer following her detention could not cancel her entitlement to work while her application was being considered.

The Court of Appeal did however accept that the council genuinely believed that the employees continued employment would breach a legal restriction. The council had made enquiries with the Home Office and received information that suggested the employee could not continue to be employed.

The Court of Appeal found that this genuine but mistaken belief amounted to a potentially fair reason for dismissal. However in this particular case because the council had not followed the correct disciplinary procedure the dismissal was still deemed to be unfair.

The conclusion of this case is that an employer can dismiss an employee on the ground that the employment breaches a statutory restriction. The statutory dismissal procedures would not apply to such a dismissal however a dismissal in that way can only be fair where there has been an actual breach of immigration legislation. Therefore if the decision is to dismiss on the basis that the employer believes the employee is working illegally it should still follow the statutory dismissal procedure in order to avoid an automatically unfair dismissal.

The National Staff Dismissal Register (NSDR) continued from front page

Should we be worried?

The innocent employees will have nothing to fear from this register, however the dishonest workers if they lie will have plenty of problems. It is important to note that employers should not always exclude ex-offenders and you must be mindful of the discriminatory legislation but, if you are an employer looking to invest in this individual, a customer who wants assurance that the employees you are dealing with are honest or an employee who wants to be protected from staff perpetrated crime this will work if it discourages dishonest applicants concealing their dismissal for work based conduct.

Important point to note: The NSDR limits inclusion to a maximum of three years.

Will it succeed?

The register offers a tool to safeguard employers, employees and customers. A fairer playing field for the honest majority competing for jobs with candidates deliberately concealing their dismissal due to dishonest conduct. Also employers will no longer have to wait several weeks for the Criminal Records Bureau to process applications and discourage dishonest applications.

Personal information is a concern however as long as we apply the principles of Data Protection and protect personal information the register will make life fairer for the honest applicants.



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