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## CHILTERN HR NEWSLETTER AUGUST 2016

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### Introducing wellbeing to the workplace

In working to get the very best out of a business, many managers are choosing to adopt practices to enhance staff wellbeing. Wellbeing is a term that includes the way staff feel about their lives, their work and their workplaces. A focus on wellbeing can be a way to make improvements in individual staff performance as well as that of the overall business or organisation. Research has shown that generally, if an employer is able to raise wellbeing in their workforce, they are also likely to see improvements in the performance of their workplace.

It is essential to the success of any wellbeing programme that a business is built upon foundations of good processes that meet the legal requirements and are well understood by management and staff. Getting the basics on rights and responsibilities at work correct is a vital part of running a successful business. For an employer, developing legally-sound policies and procedures, which all staff understand, is fundamental in building trust between employees and managers.

### New guidance for employers on e-cigarettes

Public Health England has published new guidance on the use of e-cigarettes in public places and workplaces.

It recommends that employers:

- Make clear the distinction between vaping and smoking
- Ensure that policies are informed by the evidence on health risks to bystanders. It says that the evidence of harm from second hand exposure is not sufficient to justify the prohibition of e-cigarettes, e-cigarette use is not covered by smoke free legislation and should not routinely be included in a smoke free policy, the interests of individuals with asthma and other respiratory conditions should be taken into account
- Identify and manage risks of uptake by children and young people, for example by not allowing adults to vape in view of them
- Support smokers to stop smoking and stay smoke free, for example by not requiring vapers to use the same space as smokers
- Support compliance with smoke free law and policies
- Keep policies under regular review to take account of developments in the evidence base and changes in the regulatory environment



### **ACAS Code only applies where there is 'culpable conduct'**

The Employment Appeal Tribunal has confirmed that the ACAS Code of Practice on Disciplinary and Grievance Procedures does not apply to a dismissal for ill health where there is no suggestion of poor performance as the Code only applies where there is 'culpable conduct'.

'Culpable conduct' is misconduct or poor performance that requires either correction or punishment.

In cases where ill health leads to a failure to comply with sickness absence procedures or where there is an allegation that the ill health is not genuine, the Code would apply because there would be alleged culpable conduct on the employee's part.

However, where there is no suggestion that an employee has breached their employer's rules giving rise to a disciplinary situation there is no need for the employer to follow the Code.

Employers should always take specific legal advice before embarking on disciplinary or capability proceedings.

### **Dismissal following whistle-blowing was unfair**

The Employment Appeal Tribunal has held that the decision by HR, who were not in possession of the true facts, to dismiss an employee, who had been subjected to a detriment for making protected disclosures was automatically unfair.

In this case the employee's line manager was set 'up a paper trail which set her to fail' which led to her dismissal by HR on grounds of capability. The manager also lied to HR about the disclosures made by the employee.

A decision of a person made in ignorance of the true facts whose decision is manipulated by someone in a managerial position responsible for an employee, who is in possession of the true facts, can be attributed to the employer of both of them.

HR managers should always carry out thorough investigation where whistleblowing is an issue and be careful not to automatically take an employee's line manager at their word.

### **Dismissal of disabled employee was discriminatory and unfair**

The Employment Appeal Tribunal has held that a tribunal was entitled to find that performance review and dismissal of the employee were discriminatory and unfair because the employer had not made reasonable adjustments which had a chance of allowing the employee to achieve acceptable performance in her work.

The dismissal was discriminatory and unfair because recommendations for adjustments to her work had been made and the employer had treated her unfavourably by subjecting her to



performance reviews before they had made the adjustments and finally dismissed her before they had been fully implemented.

The technical aids, which had been recommended, were not provided within the time recommended and no more than 20 hours of specialist training was provided, whereas 40 hours had been recommended.

If adjustments have been recommended for a disabled worker they should be implemented where it is reasonable to do so. The worker should then be given adequate time to improve before capability proceedings are started.

### **Discrimination claim can be brought against work placement provider in a tribunal**

The Court of Appeal has held that a university student could bring a discrimination claim against a work placement provider in an employment tribunal.

A discrimination claim can be brought in the employment tribunal directly against the provider of a work placement where the individual has suffered discrimination by the provider during the placement.

The County Court, however, remains the appropriate forum for a claim against a university in connection with the discriminatory provision of training or a work placement.

Employers who are faced with a claim whether in a tribunal or a court should take specific legal advice.

### **Unfair constructive dismissal where grievances were dismissed**

The Employment Appeal Tribunal has held that an employee was constructively unfairly dismissed when she resigned after grievances over a reduction in her shifts and pregnancy related grievances were dismissed.

The Employment Appeal Tribunal said that on the facts there was no other decision to which a reasonable tribunal, properly directed itself in law, could have come.

Employers should handle grievances in accordance with their grievances policy and should be careful not to discriminate against pregnant workers.





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## **Newspaper can report on employment claim against Sir Elton John**

The Employment Appeal Tribunal has upheld an order discharging a Restricted Reporting Order (RRO) obtained during the course of proceedings brought by an employee of Sir Elton John claiming unfair dismissal and sex discrimination and which included allegations of sexual misconduct.

The Employment Appeal Tribunal said that the tribunal had the jurisdiction to consider the RRO notwithstanding the fact that the claims had been withdrawn on settlement. It also said that the RRO did not expire automatically upon withdrawal of the claim. In this case there was no error of law or principle in the balancing exercise conducted by the tribunal and, therefore, there was no reason to interfere with the tribunal's conclusion that the privacy orders should be revoked.

Employers involved in high profile cases, the reporting of which could be damaging to their business, would be wise to consider the possibility of settlement as early as possible and ensure that any settlement reached is accompanied by confidentiality provisions.

## **Regulations on mandatory gender pay gap reporting introduced**

Under s.78 of the Equality Act 2010, employers are required to publish information showing whether or not there are differences in pay between male and female employees. The new requirement will apply to private companies and voluntary sector organisations that employ 250 or more employees.

The Government is consulting on the draft Equality Act (Gender Pay Gap Information) Regulations 2016. The draft Regulations apply to private companies and voluntary sector organisations. The Government will publish regulations for public authorities separately. The draft Regulations prescribe the specific details of the requirement, including which elements of pay are included in the calculation of pay and bonus pay. There is a statutory requirement for employers to publish the differences in mean and median pay and mean bonus pay between male and female employees, expressed as a percentage. Employers must also provide information on the number of male and female employees employed in quartile pay bands for the overall pay range.

The information must be published annually on the organisation's website and in English, accompanied by a signed statement confirming that the information is accurate, and must be available on the website for at least three years. In addition, the information must be provided to the Government via a designated website.

Organisations must publish their first report within 12 months of 30 April 2017. The Government will issue guidance on the Regulations.



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**Note: Changes to employment law come into force in April and October every year, so you need to make sure your contracts are updated.**



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