

Welcome

Welcome to the December edition of In Focus, our quarterly update keeping you informed of developments in employment law.

For further information on employment issues, please email roger.bull@burgess-salmon.com

Under the influence

The new **Acas Guide on Conducting Workplace Investigations** is essential reading for anyone who conducts disciplinary or grievance investigations, whether they are experienced or not. The Guide is particularly welcome following the recent decision in *Ramphal v Department for Transport* which makes it clear that the role of an HR advisor in a disciplinary process should be contained within appropriate limits and the HR advisor must be careful not to cross the line when supporting a manager conducting a disciplinary investigation.

The role of the HR advisor should be limited to giving advice on questions of law, procedure and process. If the HR advisor crosses the line and strays too far into giving advice on culpability or sanction, this could give rise to an inference of improper influence and compromise the fairness of the disciplinary process.

HR advisors should be mindful as to the parameters of their advisory role and the extent to which they can legitimately affect the disciplinary process. An HR advisor may:

- ensure line managers have been trained on conducting disciplinary investigations and hearings and explain the company's disciplinary policies and procedures, the Acas Code of Practice on Disciplinary and Grievance Procedures and the Acas Guide on Conducting Workplace Investigations.
- ensure the investigating manager has addressed all necessary matters in his or her report and highlight any matter that the investigating manager ought to have considered or witnesses to whom the manager may want to speak.
- seek clarification of any point that is unclear and test the investigating manager's findings by playing "devil's advocate" but the HR advisor should be careful not to influence the findings unduly. Any



recommendation of changes to a report should not affect the substance of the report. If the investigating manager changes his or her initial finding for good reason (for example, new evidence comes to light), a record should be kept of the reason for the change.

- check factual evidence against disciplinary or absence records and give evidence of how similar matters have been dealt with in the past and guidance on consistency but this should not restrict the investigating manager.
- consider taking legal advice. A lawyer can talk directly to the investigating manager and, although legal professional privilege is limited, it may be possible to apply legal privilege to the advice so that it will be kept confidential. If there are sensitive discussions to be had, it may be advisable to seek to take advantage of privilege.

The key point is that, at the end of the investigation, the substance of the investigation report should be the product of the investigating manager's enquiries. Although there may be business pressure to change the manager's findings, there are risks in doing so and the HR advisor must take care not to exercise improper influence.

Interesting cases

- Data protection and safe harbour agreements – *Schrems v Data Protection Commissioner & Digital Rights Ireland Ltd*. Please see our [briefing](#) for further information.
- Working time and travel – *Federación de Servicios Privados del Sindicato Comisiones*

Obreras v Tyco Integrated Security SL. Please see our [briefing](#) for further details.

To access our recent email alerts please visit: www.burgess-salmon.com/practices/employment/news/

New legislation and guidance

- Businesses with a total turnover of £36 million or more will be obliged to prepare an annual slavery and human trafficking statement for each financial year ending on or after 31 March 2016, as a result of section 54 of the Modern Slavery Act being brought into force on 29 October 2015. Please see our [briefing](#) for further information and the Home Office [guidance](#).
- The government has published a draft of [The Public Sector Exit Payment Regulations 2016](#) and its [response to the public sector exit payments consultation](#), which give details of its proposals to introduce a cap of £95,000 on the total aggregate value of most public sector exit payments.



- New rights for employees working under zero hours contracts not to be unfairly dismissed and for workers not to be subjected to a detriment for failing to comply with an exclusivity clause have been published in [draft Exclusivity Terms in Zero Hours Contracts \(Redress\) Regulations 2015](#). The government has also published [guidance for employers](#).

News round-up

- In his Autumn Statement, the Chancellor of the Exchequer has announced that the findings of the Office of Tax Simplification's report on employment status will be taken forward and that new criminal offences will be introduced in the Finance Bill 2016 for tax evasion and for companies who facilitate it. However, the expected changes to reduce the use of personal services companies have not yet been announced.
- The Chancellor has also announced that the Apprenticeship levy, which will apply to larger employers, will be introduced in April 2017 at a rate of 0.5% of an employer's payroll. This will be paid through PAYE. Each employer will receive an allowance of £15,000 to offset against their levy payment. This means that the levy will only be paid on any payroll in excess of £3 million and that less than 2% of UK employers will pay it.
- The government has announced that it intends to include bonus information within gender pay gap reporting and to extend the obligation to publish gender pay data to public sector employers. We are currently awaiting the draft regulations and the government's response to the consultation on [Closing the Gender Pay Gap](#).
- BIS have announced [measures to improve compliance with the national minimum wage and the national living wage](#) (when this is introduced in April 2016).

Events and publications

- Huw Cooke and Grace Malone have written an article for Employers' Law on [Settlement Agreements – how to satisfy the employee while keeping costs down](#).
- Akshay Choudhry has written an article on [Holiday Pay: A practical guide to the law](#) for The Manufacturer Online.
- The employment team has published guidance and contributed to a number of articles on [gender pay](#).

The next seminar in our popular seminar programme is our annual employment law update: **Hot Topics in Employment Law** which will look at the important case law and legislative developments in 2015, and look ahead to what employers can expect in 2016.

Please register to secure a place:

Bristol – 26 January 2016

London – 4 February 2016

Alternatively, please contact seminars at seminars@burgess-salmon.com.

In the office

As we are increasingly advising on global transactions, we have developed strong relationships with a network of independent, overseas law firms who share our high standards of legal advice and work with us to deliver a co-ordinated service. Please see our [brochure](#) for further details.

One Glass Wharf
Bristol BS2 0ZX
Tel: +44 (0) 117 939 2000
Fax: +44 (0) 117 902 4400

6 New Street Square
London EC4A 3BF
Tel: +44 (0)20 7685 1200
Fax: +44 (0)20 7980 4966

www.burgess-salmon.com

Burgess Salmon LLP is a limited liability partnership registered in England and Wales (LLP number OC307212), and is authorised and regulated by the Solicitors Regulation Authority. It is also regulated by the Law Society of Scotland. Its registered office is at One Glass Wharf, Bristol BS2 0ZX. A list of the members may be inspected at its registered office. Further information about Burgess Salmon entities, including details of their regulators, is set out in the 'Who we are' section of the Burgess Salmon website at www.burgess-salmon.com.

© Burgess Salmon LLP 2015. All rights reserved. Extracts may be reproduced with our prior consent, provided that the source is acknowledged. Disclaimer: This briefing gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.

Your details are processed and kept securely in accordance with the Data Protection Act 1998. We may use your personal information to send information to you about our products and services, newsletters and legal updates; to invite you to our training seminars and other events; and for analysis including generation of marketing reports. To help us keep our database up to date, please let us know if your contact details change or if you do not want to receive any further marketing material by contacting marketing@burgess-salmon.com.