

Headline

news from **Head  Office**

December 2009 

Working with children and vulnerable adults new Vetting and Barring Scheme (VBS)

On the 12th October 2009 the Independent Safeguarding Authority (ISA) will implement the first stage of the new VBS and employers will need to know how their duties and obligations are going to change. The changes affect both employees and volunteers that work with children (those under 18) and vulnerable adults.

The ISA is a public body that will make decisions about an individual's suitability to work with protected groups and their decisions are legally binding. Failure to adhere to the rules of the ISA may lead to prosecutions/convictions and a fine or even imprisonment for the people involved. The VBS will involve a registration process, providing additional strength but not replacing, the Criminal Records Bureau.

Registration with ISA will be the employee's responsibility but there will also be strict obligations on employers to check registration before allowing people to work with vulnerable groups. Registration involves a one off cost of £64 (£28 ISA/£36 CRB administration costs. Unpaid volunteers will not be subject to a charge.

Employers must check the prospective employee or volunteer is registered, this can be done for free online, before employing them. Once registered the employee does not need to reapply.

The scheme is being implemented in phases and will affect employers differently.

From 12th October 2009

Increased safeguards will be introduced, such as a wider definition of "Regulated activities", further enhancing protection of children and vulnerable adults.



The three current barring lists (POCA, POVA and List 99) will be replaced by the creation of two new barred lists (an adult and child list) that will be administered by the ISA. The lists will contain those individuals who are considered unsuitable to work with protected groups. Those people on existing lists will be reviewed and may be included on the new lists automatically. The lists will draw on information from a variety of sources including old employers.

An enhanced CRB will now check these new lists and the eligibility criteria for the enhanced CRB will be extended to include anyone working in a regulated position. Standard CRB checks will not be sufficient for those working with vulnerable groups.

Employers, social services and professional regulators have a duty to refer any information to the ISA about individuals who may pose a risk to protected groups.

Criminal penalties take effect for barred individuals who seek or undertake work with vulnerable groups and for employers who knowingly take them on.

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Human Resources • Health and Safety
supporting your business piece by piece

Helmont House, Churchill Way, Cardiff, CF10 2HE
E: info@askheadoffice.co.uk www.askheadoffice.co.uk

Introduction to

Head Office

Head Office provides an innovative and effective way to ensure that your business complies with the legislative requirements of both Human Resources and Health & Safety.

Keeping up with the ever changing legislations and pressures faced managing a team of staff is very expensive, particularly with the use of ad hoc employment lawyers and HR / health and safety consultants.

Head Office aims to reduce these expenditures through a monthly subscription which provides an insurance policy against the costs of an employee taking you to an employment tribunal and any award payouts. On a day to day basis, Head Office supports the business by providing updated guidance on new legislation and case law, a dedicated helpline staffed by HR legal experts and a contract / letter template builder which can be used both as a support mechanism for an existing HR team or as a part of an owner managed business where there is no dedicated HR resource.

Key benefits include:

- **A safety net with our exclusive insurance policy that covers the costs of getting to tribunal and any award up to £250,000**
- **Minimising the risk to your cashflow (the average costs of attending a tribunal now stands at £9,500)**
- **Budgetary certainty without the need for adhoc HR consultants / employment lawyers**
- **Improved procedures resulting in increased productivity**
- **Easy access to commercial and practical legal advice**
- **More time to focus on managing your business.**

As part of the offer Head Office will provide an initial review of your current position with the aim of recommending the most appropriate solution for your needs.

Call us now on **0845 217 8650** to speak to one of our expert advisers.

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From July 2010

New individuals to the workforce, those changing taking on new roles involving regulated activities or those changing jobs to other regulated activities MAY apply for ISA registration.

Existing employees need not register at this point, unless their roles or employers change.

The application form will change and allow individuals to apply for ISA-registration and a CRB check (including an ISA check) at the same time.

Once registered individuals will be continuously monitored and their status reassessed against any new information that comes to light.

From November 2010

It now becomes mandatory for employees to register with the VBS and for employers to check their status before employing them.

From 2011

Those currently employed or volunteering must now apply for ISA registration and employers should check this.

Regulated Activities

The scheme applied to those people working or volunteering in 'regulated positions' or that work in situations that fall under 'regulated activities'. Those meeting the following criteria will need an enhanced CRB check: -

Activities of a specified nature involving frequent, intensive and/or overnight contact with children and/or vulnerable adults (e.g. teaching, training, care, supervision, advice, treatment and transportation);

- Activities allowing frequent or intensive contact with children and/or vulnerable adults that are in a specified place (e.g. care homes and schools);
- Fostering and childminding;
- Activity that involves people in certain defined positions of responsibility (e.g. school governor, director of children/adult social services).

For these purposes 'frequent' means that the activity takes place once a month or more, 'intensive' means the activity takes place on three or more days in any 30 day period. 'Overnight' will apply to teaching, care, advice and treatment.

Automatic inclusion on the two barred lists

Should a person have been found guilty of a very serious offence under the Safeguarding Vulnerable Groups Act 2006 they will be automatically barred without further assessment. Individuals may be able to make representations against other serious offences and get removed from the list.

For the remaining cases the ISA will consider all information available on the individual and decide whether they pose a risk of harm to children or vulnerable adults and whether they should be entered on to the list.

Tips for employers

- Consider whether the rules apply to you and your employees.
- Ensure a full policy is in place detailing what checks and registrations are required for existing and new employees.
- Ensure an appropriate procedure is in place for checking registrations and CRB checks.
- Make offers of employment conditional on obtaining clear checks and ensure that they are undertaken quickly and chase if they are delayed.
- Ensure your contract of employment require the employee to have a clear CRB check and require the employee to notify you of any investigations or convictions against them.
- Act on allegations of inappropriate behaviour immediately, consider whether suspension on full pay is needed and whether the relevant authority should be notified. Ensure compliant with their rules and guidance.
- Complete any internal disciplinary procedure within a reasonable time and conduct fairly.
- Consider whether you need to notify the ISA of any information about employees who could pose a risk of harm to children and vulnerable adults to allow for an investigation.

Paternity leave likely to be extended in April 2010

The latest Government consultation on the topic of Additional Paternity leave and pay ended in November and it is thought that the proposed new legislation will come into effect in April 2010 for parents with babies due from 3 April 2011.

The proposals will allow fathers benefit from up to 26 weeks' additional paternity leave where the mother returns to work before the end of her 12 month maternity leave period.

The leave will only be able to be taken in the second six months of the child's life and payments are expected to reflect the equivalent entitlement of the mother to Statutory Maternity Pay.

At the time of writing we still await full details of the new legislation and there remain a large number of issues that will need clarification for the process to work well in practice.



Discrimination on the grounds of "Belief"



Grainger plc and ors v Nicholson, (EAT)

The EAT has held that an individual's belief that without an immediate and significant reduction of carbon emissions that the Earth faced an environmental disaster, could be classed as a philosophical belief that necessitated protection from discrimination, victimisation and harassment.

The Claimant in question had been employed as the Head of Sustainability by the Respondent until July 2008 when he was dismissed by reason of redundancy. The employee felt the real reason for his dismissal was his commitment to a green lifestyle, his belief in climate change and a series of protected disclosures he had made prior to the redundancy procedure.

The Employment Equality (Religion or Belief) Regulations 2003 were amended in 2007 in consequence of the Equality Act 2006. The change had the effect of significantly widening the scope of the regulations which now prohibit workplace discrimination on the grounds of "any religion, religious belief or philosophical belief". The claimant in utilizing these regulations contended that his belief in the catastrophic consequences of failing to take action on carbon emissions was more than just a deeply held opinion but rather a philosophy which impacted upon all aspects of his life; from what he ate, to how he travelled and what he bought.

The EAT concluded that the Claimant's commitment to reducing carbon emissions was capable of amounting to a philosophical belief as it was similar to a religious belief and;

- Genuinely held,
- A belief as to a weighty and substantial aspect of human life and behaviour,

- It was worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others.

While the above offers some guidance what amounts to a philosophical belief is going to be very difficult for employers to differentiate between an employee with a deeply held opinion and one with a belief capable of protection. It is also possible that this case will pave the way for many other non-religious beliefs to fall under the gambit of the Employment Equality (Religion or Belief) Regulations 2003.

One such example making its way through the tribunal system at the moment relates to an unfair dismissal claim by a Greater Manchester police officer, who claims his dismissal was based on his "religious or philosophical belief" that contact with the dead through psychics or mediums could be of use to current criminal investigations. In August a tribunal found that his belief in contacting the dead was genuinely held, related to a substantial aspect of human life/death and had attained a level of cogency worthy of respect in a democratic society.

These cases have prompted a great deal of comment by many who predict that the judgments will open the floodgates for many to make claims of discrimination, victimisation or harassment based on any manner of belief. However, while we will inevitably see more claims coming through the system, the guidelines offered by the EAT in Grainger should operate to limit protection to those of sufficient cohesion and importance. Otherwise it is only a matter of time before the 390,000 people across England and Wales who classed themselves as "Jedi" in the 2001 census will be arranging light sabre duels with impunity in the workplace¹.

¹Provided an appropriate risk assessment has been carried out.

Barmaid wins unfair dismissal case

A barmaid who was sexually harassed and then sacked by Stephen Hughes, a pub landlord in Doncaster, has won her case against him.

However, the South Yorkshire Star has reported that she will not receive any of the £13,204.88 she was awarded in damages as he has left the country and cannot be contacted.

Mandy Butler worked part-time at the Paddock pub in Cantley, Doncaster as well as working as a support worker for children.

The mother-of-four, who had breast enhancement surgery as a present from her husband four years ago, was sexually harassed by Mr Hughes following the operation.

He continually made sexually suggestive and inappropriate comments to Mrs Butler, even after she had told him to stop, the court heard.

She was sacked after an argument with a customer and given no warning of her dismissal.

Mr Hughes did not attend the hearing and neither did the company that ran the pub.

According to statistics published on the Child and Woman Abuse Studies Unit website, one in two women reported being subjected to sexual harassment in the workplace in a study carried out by the Equal Opportunities Commission in 2000.



Employees sick on annual leave entitled to reschedule



Pereda v Madrid Movilidad SA (ECJ)

The European Court of Justice has handed down another big case regarding sickness which is likely to impact on UK employers.

The Court ruled that a worker who is taken ill during a scheduled period of statutory annual leave under the Working Time Regulations has the right to take a period of leave equivalent to that of they were sick at another time. The right is not automatic and the employee would need to make a request to do so.

This case concerned a specialist driver who suffered an accident at work around 14 days before he was due to start a pre arranged 4 weeks of annual leave. The injury lasted for 6 weeks and therefore almost completely overlapped with the holiday and when he requested additional leave it was refused. This judgment said that this was unlawful.

The reasoning behind the decision was to protect a workers right to paid annual leave where they should have the opportunity to rest and enjoy a period of relaxation and leisure. As sickness interferes with the employee's relaxation and leisure they should be compensated for the lost opportunity.

In its judgment the Court did not detail the evidence that an employer should obtain from an employee to prove that they were sick while on leave and we see this as creating both practical and legal problems and may result in abuse by employees. As a minimum employers should follow their usual sickness reporting procedures and allow self certification for sickness absence up to 7 days and should ensure that employees report to them as usual when they are ill. This in itself may be difficult, for example, should the employee be on leave abroad.

The request to take the replacement leave will be subject to the usual rules of reasonableness and should there be a business interest present the employer may have the right to refuse. Of course an employer's holiday policy or contracts of employment may provide additional security to the employee and should be followed to avoid complaints of breach of contract, discrimination and unfair constructive dismissal. The case does not state that employers are under an obligation to notify employees of their right to request replacement leave and if the employee fails to ask then the right will not be triggered. Employers should of course be careful and ensure that they do not inadvertently refuse a request for replacement leave without thinking carefully about the employee's individual circumstances.

In practice this may cause problems when the replacement leave is not possible in the current leave year and therefore any prohibitions on the carry over leave will need to be relaxed. Head Office suggests that should your contracts of employment and policies strictly prevent carry over that employers fully consider the individual circumstances of the employee and exercise their discretion where appropriate.

Beefeater bullying results in dismissal

In November 2009, two Tower of London Yeoman Wardens, more commonly known as Beefeaters were dismissed for bullying.

Miss Moira Cameron was employed on the 1st July 2007 as the first ever Female Beefeater since they began guarding the Crown Jewels in 1485. Miss Cameron raised a grievance citing bullying and harassment by her colleagues which has resulted in the dismissal of two long standing Guardsmen.

One of the issues that has arisen from this situation is the importance of the Employer being mindful of both workplace behaviour but also behaviour of employees towards each other outside of work.

Mr Mark Sanders-Crook a former Sergeant Major with the Royal Army Medical Corps was accused of bullying Miss Cameron, however, a large proportion of the accusations surrounded activities that took place outside of the workplace.

It is alleged that Mr Sanders-Crook did not want a female Beefeater to be given the position as this was a break in tradition and that it should be a male position only. Mr Saunders-Crook is said to have sworn excessively in her presence both in work and out and made her feel uncomfortable in his presence by not involving her in work and personal activities and leaving her out of conversations or 'barking' answers at her to questions.

Mr Sanders-Crook was accused of ignoring Miss Cameron on a night out in a restaurant. Miss Cameron was asked to 'move along' the table by another colleague which resulted in her sitting next to Mr Sanders-Cook, who due to his alleged dislike for Miss Cameron ignored her as he did not want to be seen talking or socialising with her. Miss Cameron further cites an occasion where Mr Sanders-Crook's wife missed her out of a round of drinks when they were on a night out with other Beefeaters and their partners.



Whether the decision to dismiss Mr Saunders-Crook was fair remains to be seen however, the disciplinary panel rightly took into account the allegations made of bullying outside of the workplace. Bullying includes any action that can leave an Employee feeling upset, humiliated or vulnerable and therefore it is important that all Employers are aware of the relationships that their Employees have and to be pro active in resolving problems as these can clearly be escalated by any social activities that are undertaken.

Employers have a duty of care to their Employees and this case clearly shows that any interaction between Employees should be monitored to ensure good feeling, productivity and to avoid problems within the workplace.

Racial discrimination still occurring in recruitment

Human resources support services may have to do more to tackle racial discrimination in the workplace, if the results of a new survey are anything to go by.

The Department of Work and Pensions (DWP) has conducted a study which revealed that there is still some prejudice towards those from an ethnic minority within the recruitment process.

It was revealed that those applying for jobs with a name suggesting they were from an ethnic minority had to send out more applications to receive a positive response than white applicants.

Jim Knight, minister for employment at Welfare Reform, said authorities are determined to stop this "scourge on society", before adding that "the equality bill will strengthen our hand and we are already preparing to publish specific plans for dealing with discrimination in the workplace later this year".



The DWP aims to reduce welfare dependency and increase economic competitiveness by helping and encouraging people to work wherever possible.

Employer's failure to inform, allowed pregnant employee to vary maternity notice procedure

St Alphonsus RC Primary School v Blenkinsop, (EAT)

In this case an employee, a teaching assistant at a primary school in Middleborough, became pregnant towards the end of 2006.

The local education authority informed her that she was entitled to maternity leave in the usual way and she signed their maternity leave form that stated her last working day to be 25 May 2007.

The school, shortly after offered her a temporary contract from September to December of the same year which she declined as it was too soon after the birth.

She took her leave as planned and during January of 2008 she met the head teacher regarding her return to work on 25 February, nine months after the start of her leave. She was told that she was only a supply teacher and that her original post was no longer available. The head teacher argued that she indicated prior to leaving that she would not be returning to the school. She subsequently issued a tribunal claim alleging automatically unfair dismissal and discrimination on the ground that she had taken maternity leave.

In defending the claim the school argued that she was not entitled to statutory maternity leave or the right to return to her same position as she failed to comply with the appropriate notice requirements set out in the Maternity and Paternity Leave Regulations. The Regulations require an employee to notify her employer, no later than the end of the 15th week before the expected week of confinement (EWC), of;

- her pregnancy,
- her EWC and
- the date on which she intends to start her leave.

The tribunal accepted this argument as the relevant date would have been the 14 April 2007 but allowed her to rely on another part of the regulations that provides for 'where it is not reasonably practicable for her to give notice by that date [the EWC], she must give notice as soon as it is reasonably practicable for her to do so'.

The Tribunal considered the facts of the case and noted that she had not been given a written contract of employment or any information about the maternity policy, procedures, rights and obligations. In addition she had been misled as to her employment status with the school by the head teacher and therefore as they had played a large role in her failure to follow procedure they should not be entitled to benefit from it.

As soon as she found out about her rights she promptly notified the school and therefore gave her notice 'as soon as it [was] reasonably practicable for her to do so' meeting the second part of the exemption. When the school appealed the decision the EAT upheld the decision of the Tribunal of first instance.

This is another clear indication that employers should properly inform employees of their statutory rights as disputes can easily ensue and result in claims.



This does not need to extend to coaching them along the whole procedure, although this may be recommended, but at least ensuring that clear guidance and policies are contained in an up to date staff handbook.

If you have any queries relating to any of the articles in this magazine, please contact our legal advisors on 0845 217 8650



QUICK GUIDE

Statutory rates of payment

Parental payments (from 5th April 2009)		
Type of payment	Current rate (previous limit)	Max period
Statutory maternity pay (higher rate)	90% of normal weekly earnings	6 weeks
Statutory maternity pay (basic rate)	£123.06 (£117.18) a week, or 90% of normal weekly earnings if lower	33 weeks
Maternity allowance	£123.06 (£117.18) a week, or 90% of normal weekly earnings if lower	39 weeks
Statutory paternity pay	£123.06 (£117.18) a week, or 90% of normal weekly earnings if lower	2 weeks
Statutory adoption pay	£123.06 (£117.18) a week, or 90% of normal weekly earnings if lower	39 weeks

Sickness payments (from 6 April 2009)		
Type of payment	Current rate (previous limit)	Max period
Statutory sick pay (standard rate)	£79.15 (£75.40) a week	28 weeks in any 3 years



All the staff at Head Office would like to wish everyone a Happy Christmas and a prosperous New Year!

Head Office

supporting your business piece by piece

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Helmont House, Churchill Way, Cardiff, CF10 2HE
E: info@askheadoffice.co.uk www.askheadoffice.co.uk

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