ActifHR

Where people matter...

October 2018 Update

Welcome to this month's update - where we discuss the latest guidance and legislation.

In this Edition we report on:

- Providing References - Update
- Managing High Sickness Absence
- Constructive Unfair Dismissal

Providing References - Update

What should be included in references? This is a question we regularly get asked. In particular, what happens if the ex-employer receives a form with many questions on it about a job applicant?
Often these forms include questions like:

* the applicant's absence levels;
* confirming the reason for leaving;
* information about the job applicant's skills and abilities
* details about the applicant's character, strengths and weaknesses;
* questions relating to the suitability for the role they have applied for

Tel: 01327 317537
M: 07947567661
E: caroline.robertson@actifhr.co.uk/info@actifhr.co.uk
ActifHR Ltd, Innovation Centre, Silverstone Park. NN12 8GX

Previous employers are able to answer the basic facts about the applicant. They can at times find it very difficult to answer additional questions that may be asked, particularly if there has been disciplinary, performance or attitude issues which failed to be resolved. Additionally, previous managers and colleagues might also be requested to provide character details.

So, what should be included in a reference? References must be a true, accurate and fair reflection of the job applicant. Try and stick to the basic facts of the dates the employee was employed, job roles and responsibilities and avoid giving opinions and character references. If you do feel obliged to reply to a question on the suitability of a job applied, then ensure that your answers are based on fact.

Unbeknown to senior managers or directors, often managers within a business give more detailed refences. You need to be clear with all managers in the business, on the style and format for references.

Resolving problems with references. If a job applicant is unhappy with a reference provided about them they can request, usually in writing, a copy of any reference sent to a new employer. Under the General Data Protection Regulations, they may make a subject access request to see a copy of the reference provided.

If an external job applicant believes a reference provided for them was inappropriate they may be able to claim damages in court. However, the job applicant must be able to show that the information was inaccurate or misleading and that they have suffered a loss, for example the withdrawal of a job offer.

Employers: Plenty of employers are adopting a policy of standard factual references only. If you do this, ensure you are making this very clear to your managers.

Contact us: We can advise on giving references and reference requests.

Managing High Sickness Absence

Huge pressure if placed on businesses due to high sickness absence. Carrying out disciplinary action is easier if an employee has short-term frequent spells of sickness for a variety of reasons. However, how easy is it to take disciplinary action against a disabled employee for high sickness absence? The Employment Appeal Tribunal (EAT) looked at this issue recently in a case where the employee was absent for 60 days in a 12-month period.

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Mrs O'Connor had a disability and very high sickness absence over several years. Her employer had made reasonable adjustments and dealt with the absence sensitively. They had authorized her to have substantially more absence than their policy usually allowed. By 2016, they decided to issue Mrs O'Connor with a written warning and ceased her company sick pay.

She brought a claim for disability discrimination. To defend such a claim an employer would need to demonstrate that the less favourable treatment could be objectively justified by showing that what the company did was a proportionate way of achieving a legitimate aim. Mrs O'Connor won her discrimination case at tribunal. The company appealed but the EAT agreed with the tribunal.

It was agreed that the company had the legitimate aims of assuring adequate attendance levels across the workforce and in trying to improve Mrs O'Connor's attendance. However, the written warning was found to be an unreasonable course of action.

The company had not followed its own policy of referring an employee to occupational health before taking disciplinary action. Therefore, the warning was not a proportionate way to achieve any of the employer's legitimate aims.

Employers: This is a reminder of the difficulties in dealing with disability related absence. Make sure you can justify how the warning helps achieve your stated aim.

Contact us: We can advise you through sickness absence procedures to assist with justification arguments for actions taken.

Constructive Unfair Dismissal

The law on constructive dismissal has been considered by the courts recently. Sometimes, employees claim constructive dismissal, which means they resign usually saying something amounting to a 'last straw' pushed them to leave. The courts have recently contemplated whether a fair disciplinary process – no matter what the outcome – can ever be considered that 'last straw'.

Ms Kaur was a nurse with Leeds Teaching Hospitals. She received a final written warning for inappropriate behaviour, which included an altercation with another member of staff.
She appealed against this sanction. When her appeal failed, she resigned claiming constructive dismissal. Her claim was based on what happened in the altercation and the disciplinary proceedings. She claimed the 'last straw' was her appeal being rejected.

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The Court of Appeal gave some useful guidance on 'last straw' constructive dismissal cases. Where there is a course of conduct which creates a serious breach of contract, the most recent act can revive earlier affirmed breaches. What this means is that if Mrs Kaur had accepted earlier breaches by not resigning at that point, then a new breach of contract could revive them. So, she could bring her constructive dismissal claim.

This case overrules the recent *MacKenzie v Pets at Home* case. However, it will be comforting for employers to know that Mrs Kaur's case was struck out for having no reasonable prospects of success.

Employers: The Court of Appeal confirmed a fair disciplinary process can never form part of a serious breach of contract, so the appeal decision could not be a 'last straw'.

Contact us: We can help with disciplinary and grievance procedures.

Caroline Robertson, CEO

Caroline has a wealth of experience supporting business clients with practical hands on HR and Employment Law advice. Caroline's pragmatic approach helps businesses of all sizes deal with complex HR situations. She qualified as a Solicitor in 1999 and now acts as a specialist Human Resource / employment Law Consultant to business.

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