

# Hotel and Leisure Lawyers

Wedlake Bell

Spring 2009

## hospitality news

**Welcome** to the Spring 2009 issue of hospitality news, the quarterly newsletter from the Hotel & Leisure Group. This issue is an employment special and contains a round-up of the latest legal issues affecting HR professionals in the hotel and leisure industry. If you need any further guidance on the issues featured, please feel free to contact me.

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## Employment Law Update

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# Managing staffing levels during the recession

As occupancy rates continue to fluctuate for hoteliers due to a deepening recession, the challenge for Human Resources in recent months has been managing the hotel's staffing levels so that they commensurate the hotel's operational requirements. Unless you have the contractual right to lay off or put employees on short time working, asking employees not to turn up for work or cutting down their contractual hours could expose the hotel to claims for breach of contract, unlawful deduction of wages and potentially constructive unfair dismissal. Even if you have the contractual right to lay off or put employees on reduced working days or hours, this is only a temporary solution as such employees can claim redundancy if the period of lay off or short time working has lasted for 4 consecutive weeks or 6 weeks over a 13 week period.

Many hoteliers have been exploring alternatives to redundancy in order to cut down costs and overheads. These measures include:-

- Hiring freeze
- Re-deployment of staff to other properties
- Asking employees to undertake alternative duties at their place of work
- Cutting working days
- Cutting employee perks
- Reducing bonuses
- Paying out a greater percentage of bonuses in company stock
- Cutting base salaries
- Asking employees to utilise their annual leave
- Asking employees to take unpaid leave
- Inviting volunteers for redundancies

To avoid legal claims, any change programme will need to be carefully managed. Where the proposed change will affect 20 to 99 employees, employees must be consulted for at least 30 day prior to implementing any contractual variation. The period of consultation increases to 90 days where 100 or more employees are going to be affected by the contractual changes.

With a carefully thought out communications strategy however, your workforce will be more likely to consensually agree to the proposed contractual variation. Experience shows that explaining the business drivers for change and whether the contractual changes are intended to be temporary or permanent will assist greatly in getting

consensual "buy in" from employees. This will either obviate the need to engage in collective consultation or reduce the length of collective consultation so that savings in employment related costs can be made more swiftly, keeping your General Manager on your side.

## Time off for public duties

Employees are currently entitled to reasonable time off (unpaid) to go to meetings or to carry out certain duties. The time must be agreed with the employer beforehand and employers can refuse the request if it is unreasonable. Whether the time off is classed as 'reasonable' depends on what the duties are, the time needed to carry them out, the impact on the employer's business, how much time off has already been taken for public duties or trade union duties

Under the current law, employees can take time off for jury service or to undertake duties as a magistrate or justice of the peace or in relation to a local authority, police authority, local education authority, educational governing body, health authority or primary care trust, statutory tribunal, environmental agency, water authority and boards of prison visitors.

With effect from 6 April 2009, the scope of duties will be extended to cover:

- members of probation boards;
- members of court boards;
- youth offender panel members;
- roles in the housing sector, such as board members of registered social landlords and tenant management organisations.

Employees who have exercised their right to time off to perform public duties are protected against suffering a detriment and unfair dismissal.

Employers should therefore review their current time off policy before 6 April 2009 and educate their line managers on the new rights

# Employing students at your hotel

With effect from 2 February 2009, all education providers must have applied to become licensed sponsors if they want to bring in non-EEA students from the end of March 2009 under Tier 4 of the Points Based System. By the end of March 2009, all students must apply under the Tier 4 scheme and pass a points-based assessment. This new system has been introduced by UK Border Agency to eliminate bogus institutions and to ensure that sponsors are responsible for assessing whether a student meets the academic requirements for the course. The student's visa is directly linked to the institution and if students want to stay on in the United Kingdom once they have successfully got their qualification, they may be eligible to switch into the post-study worker category of Tier 1.

If you employ students to supplement your work force, you will need to ensure that they do not work more than 20 hours a week during term time. There is however no limitation on hours of work during vacation time. Students who are on a work placement as part of the course cannot work more than 50% of the length of the course.

To avoid liability for hiring an illegal worker, employers should always check if the job applicant has the right to work lawfully in the UK. To rely on the statutory defence, you should: -

1. Obtain the candidate's original documents from either List A or List B
2. Check the documents
3. Save copies of the documents
4. Date the documents

You should also check who else the student works for to ensure that the permitted hours of work are not exceeded. To avoid race discrimination claims, UK Border Agency recommend that that checks are made on all new employees at the same time in the recruitment process.

Always check documents before an employee starts work and make production of such documents a condition of employment. You should also put in place a system of checking documents for all migrant workers every 12 months (particularly if you are relying on documents in List B).



# Right to request flexible working extended

Currently, employees with six or more months of continuous service may request flexible working to care for a child up to six years of age (18, if the child is disabled and is in receipt of Disability Living Allowance) or an adult who requires care (e.g. a spouse, partner, civil partner or relative or someone who lives at the carer's address) provided that they have not have made another statutory request during the past 12 months.

The flexible working request may take the form of:

- Part-time working
- Flexi- hours
- Compressed hours
- Job share
- Home working
- Staggered hours
- Time off in lieu (TOIL)
- Term-time working

The employee's request can only be turned down by the hotel if one of eight statutory business reasons applies (e.g. the burden of additional costs, detrimental impact on quality, the inability to recruit additional staff, inability to reorganise work among existing staff etc). The application must be properly considered and business reasons documented. Beware that emails and memos may be disclosed during litigation or if a 'data subject' request is made by the employee.

From 6 April 2009, the right to request flexible working will be extended to cover employees with parental responsibility of a child aged 16 and under.

You should ensure that your flexible working policy is updated to reflect the new rights. To avoid an exposure to eight weeks compensation and claims for sex discrimination, all managers should be made aware of your new policy and how to respond to such requests.

# Disciplinary and grievance policy – is your policy out of date?

The statutory disciplinary, dismissal procedures (SDDP) and statutory grievance procedures (SGP) which have caused problems for employers, employees and the Employment Tribunals since October 2004 will be scrapped with effect from 6 April 2009! In its place is the new Acas Code on managing disciplinary and grievance at work. The use of a third party mediator (internal or external) to help resolve workplace disputes is encouraged by the Code. The Code provides that the development of any disciplinary, dismissal and grievance policy should also involve employees or employee representatives.

If you are planning to dismiss an employee on grounds of conduct or poor performance on and after 6 April 2009 must follow the new Acas Code. Failure to comply with the Code will increase or decrease any compensation payable by up to 25% depending on whether it is the employer or employee who is at fault.

All other type of dismissals (e.g. retirement, non-renewal of fixed term contracts and capability dismissal on grounds of genuine ill-health cases) will not be covered by the Acas Code. Whether such dismissals are fair or not depend on whether the employer's own policy or practice is fair. This will be determined by reference to established case law.



Wedlake Bell's Employment Law team can audit your existing policy and/or train your line managers on the new Acas Code for a fixed fee. Contact [jjew@wedlakebell.com](mailto:jjew@wedlakebell.com) or **020 7406 1684** for more details.

## What's new about the Code for managing disciplinary and dismissals?

- Employers who are dismissing an employee on grounds of conduct or capability must (i) establish the facts of the case, (ii) inform the employee of the problem, (iii) hold a meeting with the employee to discuss the problem, (iv) allow the employee to be accompanied at the meeting, (v) decide on the appropriate action and (vi) allow the employee to appeal.
- Employees should be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given the opportunity to "raise" points about any information provided by relevant witnesses. Whether this new right would empower the employee to cross examine witnesses who wish to remain anonymous is unclear.
- Employers should make a decision on the evidence available to it where an employee is "*persistently unable*" to or "*unwilling to attend a disciplinary meeting without good cause*".
- There is now a right to appeal against all forms of written warnings – the Code does not however refer to oral warnings.
- When deciding whether to take disciplinary action against an employee who has criminal charges or convictions which are not related to their employment, the Code now allows employers to consider the effect of the employee's action on their business, work colleagues and customers.



### **So what should employers do before 6 April 2009?**

- Update your existing disciplinary and grievance policy to comply with the Acas Code.
- Consider if you should involve employees or employee representatives when you are devising new rules and practices or changing your existing policy.
- If you have a Performance Improvement Plan programme (PIP), consider how this will interface with the new Acas Code.
- Provide line managers with training on the new Acas Code.
- Consider if your HR team should receive training on mediation.
- Develop a network of external mediators.

### **Can employers completely forget about the current statutory procedures on and after 6 April 2009?**

There are transitional arrangements in place depending on when a disciplinary, dismissal or grievance occurred.

The SDDP will continue to apply if you have disciplined, dismissed, sent a step 1 letter or held a step 2 meeting on or before 5 April 2009. Employers should therefore think carefully about any proposed disciplinary proceedings in or around March 2009 and whether it is tactically better to issue a step 1 letter on or after 6 April.

The SGP will also continue to apply where the employer's conduct arose wholly before 6 April 2009. It will also continue to apply if an employee started a grievance on or before 5 April 2009 resulting in a step 1 letter or tribunal complaint on or before 4 July 2009 (4 October 2009 for equal pay, redundancy pay and certain industrial action dismissal claims). This means that constructive dismissal claims or discriminatory claims involving a series of events may well be caught by the SGP.

If the statutory procedures apply and you did not comply with them, a dismissal would be "automatically unfair" and the hotel will be exposed to an uplift of any compensation payable by up to 50%.

### **What's new about the Code for grievances?**

- Anything which amounts to any "*concerns, problems or complaints*" will qualify as a grievance.
- The modified grievance procedure is gone which means there is strictly no need to deal with a grievance from an ex-employee.
- There is no longer a need for employees to raise a grievance before they can issue a Tribunal claim.
- There will no longer be an automatic extension of time for employees to file a Tribunal claim.
- If a grievance and discipline issue are related, the issues may be dealt with concurrently.

# Protection of children and vulnerable adults staying at your hotel

The Safeguarding Vulnerable Groups Act 2006 (SVGA), which is expected to come into force on 12 October 2009, was enacted as a result of the Bichard Inquiry arising from the Soham murders in 2002, when the schoolgirls Jessica Chapman and Holly Wells were murdered by their school caretaker, Ian Huntley. As a result of the new legislation, the Independent Safeguarding Authority (ISA) has been established to work with the Criminal Records Bureau (CRB) to help prevent unsuitable people from working with children and vulnerable adults.

## How does the SVGA affect hoteliers?

You will need to be aware of its implications if your employees are carrying out a “regulated activity” in relation to children and vulnerable adults staying at your hotel.

## What is a “regulated activity”?

It is an activity which involves contact with children or vulnerable adults.

“Regulated activities” for children include:

- (a) any form of teaching, training or instruction of children, unless the teaching, training or instruction is merely incidental to teaching, training or instruction of persons who are not children;
- (b) any form of care for or supervision of children, unless the care or supervision is merely incidental to care for or supervision of persons who are not children;
- (c) any form of advice or guidance provided wholly or mainly for children, if the advice or guidance relates to their physical, emotional or educational well-being;
- (d) any form of treatment or therapy provided for a child;
- (e) moderating a public electronic interactive communication service which is likely to be used wholly or mainly by children;
- (f) driving a vehicle which is being used only for the purpose of conveying children and any person supervising or caring for the children pursuant to arrangements made in prescribed circumstances.

“Regulated activities” for vulnerable adults include:

- (a) any form of training, teaching or instruction provided wholly or mainly for vulnerable adults;
- (b) any form of care for or supervision of vulnerable adults;
- (c) any form of assistance, advice or guidance provided wholly or mainly for vulnerable adults;
- (d) any form of treatment or therapy provided for a vulnerable adult;
- (e) driving a vehicle which is being used only for the purpose of conveying vulnerable adults and any person caring for the vulnerable adults pursuant to arrangements made in prescribed circumstances;

## What is the level of employee contact required before it counts as a “regulated activity”?

Employees are caught if the contact is:-

- frequent (i.e. one day in a 30 day period); or
- takes place at any time during three or more days in any period of 30 days; or
- occurs at any time between 2 a.m. and 6 a.m. and the employee has the opportunity to have face-to-face contact with children or vulnerable adults (as the case may be).

## What are your responsibilities as an employer?

From October 2009, when you recruit someone new to work with children or vulnerable adults, you will need to check their ISA status. This will determine whether or not you can employ them and may affect what activities they can undertake for the hotel. It will be a criminal offence for an employer to allow a barred person, or a person who is not yet registered with the ISA, to work for any length of time in any “regulated activity”. The fine is up to £5,000. It will also be a criminal offence for an employer to take on a person in a “regulated activity” if they fail to check that person’s status.

### What are the employees' duties and responsibilities?

An individual taking part in a "regulated activity" must be registered with the ISA. It will be a criminal offence for a barred person to work for you if this involves them taking part in a regulated activity for any length of time.

### How does the vetting procedure work?

It is the responsibility of the job applicant or employee to apply to register with the ISA. It is the employer's responsibility to check a potential employee or employee's status. If an applicant is not ISA-registered they have either not applied or are on an ISA Barred List.

You will not be charged for checking someone's ISA status. Once you have registered your interest in an individual as their employer, you will automatically be contacted should their status change (e.g. if new information leads to an ISA decision to bar them).

Employers, professional and regulatory bodies, and child/adult protection teams in local authorities will be under a duty to refer relevant information to the ISA. All other employers of those working with children or vulnerable adults may provide information to the ISA.

### When will the vetting scheme start?

The scheme will start from 12 October 2009 and will be phased in over a period of time.

### How much will it cost to vet an individual?

The fee for an application to the ISA will be £64 (£28, in addition to the £36 CRB disclosure fee). This means that you will need to decide if the pre-recruitment cost is the sole responsibility of the job applicants and whether you should bear the vetting costs for existing employees in your organization.



### What kind of hotel employees would be subject to the vetting procedure?

This will depend on the type of property, facilities and services you provide to your guests. Potentially the following employees should be registered:

- Spa therapist
- Fitness club instructors
- Swimming pool attendants
- First aiders
- Housekeeping attendants who provide baby sitting services
- Employees managing a 'kids club'
- Employees who have supervision of children or vulnerable adults on work placement schemes
- Drivers

### So what should hoteliers do now?

- Audit your operational areas to identify risk groups.
- Budget early for the vetting costs.
- Ensure that new job applicants are registered with the ISA from October 2009.
- Ensure that from 2010, existing employees and volunteers with no CRB check apply for ISA registration. Those with CRB checks will also need to apply for ISA registration and you should start with staff whose CRB checks are the oldest.



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