

# RightFocus

*We focus on employment issues important to you*



*Marie MacDonald*

Marie is head of the Employment Unit and is accredited by the Law Society of Scotland as a specialist in Employment Law and Discrimination Law (only one of three accredited specialists in Scotland).

She is a member of the Law Society of Scotland Employment Law Group and a Committee Member of the Scottish Discrimination Law Association.

Marie has also recently been appointed Committee Co-chair of the International Lawyers Network Labour and Employment Group and is on The Firm Magazine's editorial steering panel. Marie is HR Network Scotland's Employment Lawyer/Employment Partner of the Year 2007.

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## Benefits of providing detailed employee statement of terms and conditions of employment

The majority of employers are fully aware of their obligation to provide their employees with a statement of terms and conditions of employment. This statement, which must contain the information detailed within the Employment Rights Act 1996, acts as a basic contract of employment, and must be provided to all employees within 2 months of the employment relationship commencing.

In the past, some employers viewed the obligation to provide this statement as nothing more than an administrative burden. Such an approach to the matter resulted in these employers failing to comply with their statutory duty. It is important to note that, from 2002, where an employer fails to comply with this duty, and an employee proceeds to bring a claim it is possible, in certain circumstances, for the Employment Tribunal to make an award of 4 weeks pay in the employee's favour. This is clearly a liability which all employers would be keen to avoid.

However, in addition to avoiding having to make payment of such a financial penalty, there are a number of other benefits which an employer can obtain by ensuring that they comply with their statutory obligation. In recent times, the Employment Tribunal and courts have issued a number of judgments which have curtailed the rights an employer could have through implying

the necessary term into the contract of employment. For example, in the case of *Morrish V NTL Group Limited*, the Court of Session ruled that without an express contractual right to do so, an employer would be in breach of contract where they sought to make a payment in lieu of notice. Additionally, in the case of *William Hill Limited v Tucker*, the Court of Appeal in England reached a similar conclusion with regards an employer's ability to place an employee on garden leave.

These recent decisions show the importance of carefully drafting an employee's statement of terms and conditions. By giving proper consideration to this contractual document, an employer can provide itself with a number of important rights which could be of significant value at a later point in the employment relationship. In addition to the above examples, post termination restrictions, the creation of intellectual property during the employment relationship and the non disclosure of sensitive, confidential information are all matters which can be regulated to the employer's advantage within a statement of employment particulars.

Whilst the provision of such a statement may appear to be a burden, it need not be so in practice. Employers should carefully consider whether they are fully utilising their statement of employment particulars to their benefit.

### New Offences Under The Immigration, Asylum and Nationality Act 2006

On 29th February 2008, new provisions under the Immigration, Asylum and Nationality Act 2006 came into force which could have significant implications for employers. Under the terms of this act, it is unlawful for an employer to employ someone who is not entitled to work in the UK. The two new offences which have been introduced are:-

1. An employer that negligently hires an illegal worker will commit a civil offence and will be liable to a fine of up to £10,000, unless the employer can show that they checked the relevant documentation before employing the individual.
2. An employer that knowingly hires an illegal worker will commit a criminal offence and will be liable to a custodial sentence of up to 2 years and/or an unlimited fine.

These new statutory offences allow for significantly greater sanctions to be imposed against employers, and as such, it is vital for employers to have proper checks in place to ensure that those individuals whom they employ are entitled to work within the UK.

The documentation which an employer must obtain to verify an individual's entitlement to work will depend on where they are from. For example, those individuals who are nationals of those countries who were members of the EU prior to May 2004 (including the UK) are, in the vast majority of circumstances, free to take employment in the UK. Those individuals who are nationals of the states who joined the EU in May 2004 (the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia) must be registered with the Home Office under the Worker Registration Scheme to be allowed to work within the UK and the relevant confirmation should be sought. The documentation which nationals of other states require to work lawfully within the UK will vary from case to case.

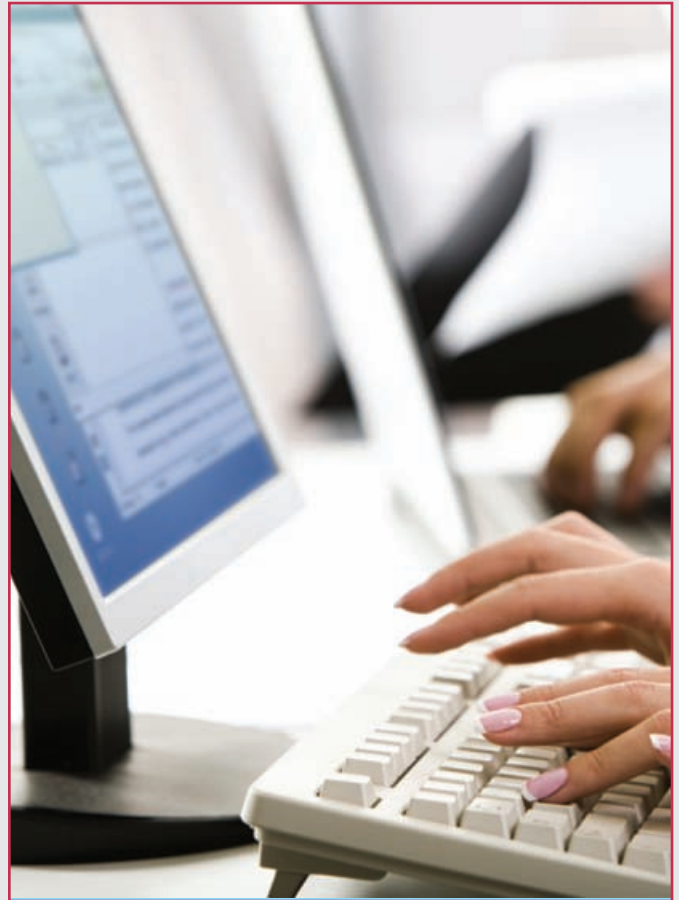
However, to ensure that there is no possibility of an employer breaching the new provisions of the 2006 act, it is essential that they properly verify the nationality of any prospective new employee as a starting point. Once this fact has been verified, the employer should then proceed to obtain sight of the necessary documentation which that individual requires to work legally. It is also essential to ensure that this process is completed in advance of the employment relationship commencing to avoid falling foul of the act.

Finally, it is important that employers verify the nationality of all prospective employees, including those whom they believe to be of British origin. Should employers simply request verification from those individuals thought to be non-British, then they will be leaving themselves open to claims of direct race discrimination under the terms of the Race Relations Act 1976.

Further information can be obtained from the UK Border Agency website: [www.bia.homeoffice.gov.uk](http://www.bia.homeoffice.gov.uk)



Stephen Connolly



### Debate over the dismissals database

Controversy continues to rage over the launch of the National Staff Dismissal Register, an online database of workers who have been sacked for theft or other misconduct, regardless of whether or not they have been officially charged by the Police.

Set up by Action Against Business Crime (AABC), a partnership between the Home Office and the British Retail Consortium (BRC), the new service is being accused by some of potentially preventing people from ever getting another job.

Trades Union Congress (TUC) Policy Officer Hannah Reed, told the BBC: "The TUC is seriously concerned that this register can only lead to people being shut out from the job market by an employer who falsely accuses them of misconduct or sacks them because they bear them a grudge. Individuals would be treated as criminals, even though the police have never been contacted."

Human rights watchdog Privacy International has even questioned its legality, and has suggested that it could be libellous or defamatory, particularly if it prevents candidates from getting a new job.

Mike Schuck, chief executive of AABC, says that all participating companies will be obliged to abide by the Data Protection Act and that workers named on the database, maintained by AABC, will have the right to change their entries if they are inaccurate.

### Important changes to Sex Discrimination Act 1975

On 6th April 2008, the Sex Discrimination Act 1975 (Amendment) Regulations 2008 came in to force. One of the most significant changes made by these Regulations was the introduction of employer liability for harassment of an employee by a third party. Prior to the introduction of these regulations, an employer could only be found liable for harassment where the act or acts complained of were committed by the employer itself, or another employee.

This new measure increases the obligations which an employer will owe to an employee. An employer will be liable for third party harassment where:-

1. A third party subjects an individual to harassment in the course of their employment;
2. The employer has failed to take such steps as would have been reasonably practicable to prevent the third party from doing so; and
3. The employer knows that the individual has been subject to harassment in the course of their employment on at least 2 other occasions by a third party.

This definition makes it plain that an employer must be vigilant with regards to the actions of third parties who come in to contact with members of their workforce. Whenever an employer becomes aware that an employee has been subjected to harassment, they should take immediate steps to try and prevent such a situation from arising again in the future.

The law on employer liability for third party harassment has changed several times. Interestingly, the 2008 regulations return the law to a position which was originally set out in the case of Burton and Rhule



v de Vere Hotels. This case related to complaints which were made by two waitresses, working for de Vere Hotels. The waitresses complained following on from their being subjected to sexist comments by the comedian, Bernard Manning, who was giving an after dinner speech at one of de Vere Hotel's properties. In that case, the Employment Appeal Tribunal found that the employer's failure to take steps to protect the waitresses from Mr Manning's comments (i.e. the comments of a third party) amounted to an unlawful act of discrimination for the purposes of the Sex Discrimination Act.

Difficult as it may be to imagine, the 2008 regulations now take us back to this position, making Mr Manning something of a pioneer when it comes to equality in the workplace!



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