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Group News - October 2018

NEWS FROM THE HR TEAM

Refusing to work on health and safety grounds

An employees has just raised a minor concern regarding health and safety in your workplace. However, they also walk off site and claim that they can't be forced to work until it's dealt with. Does such a legal right exist?

Right to stop work

Employers are often forced to tackle situations that arise due to misconceptions about employees' legal rights. One that often crops up relates to health and safety. Many employees think or are advised that they can, point-blank refuse to work whenever a health and safety issue or concern arises in their workplace and still be paid. In other words, it's assumed that not only is there an extensive legal right here, the employee always calls the shots as to when it's triggered.

So what is the legal position

Whilst a right does exist, it is not as clear cut. A legal right to stop work in certain circumstances is provided for by the Management of Health & Safety at Work Regulations 1999. However, Regulation 8 only allows for this if staff are exposed to "serious, imminent and unavoidable danger". In other words, a situation must arise

What dangers qualify?

Even if these conditions are present, the right is only to stop work and evacuate to a place of safety, not for the employee to go home and put their feet up for the day. There's no exhaustive list as to what dangers qualify, but the following are examples of how serious an event must be to come under Regulation 8:

- missing, broken or defective machine guarding (this can cause injury, amputation or death)
- collapsing structures, for example of a roof, wall, floor or other support, such as scaffolding
- fire/explosion risks.

What if staff challenge you?

But what should you do if you come up against an employee (or a group) who is threatening to stop work, or has actually stopped working already, citing health and safety grounds?

- Where any complaint about health and safety is made you should always investigate it - never dismiss it out of hand. When doing so, explain Regulation 8 to the employee(s) concerned but put the onus on them to explain why they see the health and safety issue as being a "serious, imminent and unavoidable danger" that permits them to stop working.
- If there is a minor problem, be seen to deal with it. This shows that you take your legal responsibilities seriously. If however, you decide that no further action is necessary, explain why this is; you don't want to deter employees from raising genuine problems in future.
- Even if your workplace is low risk, you should still have clear emergency procedures and a robust health and safety policy in place which all staff are fully briefed on. Your approach only needs to be proportionate to your size and business type.

If you have concerns about your Health & Safety processes or need further advice, please call our team and we will be happy to assist.

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Care home which regarded complaints of attempted kissing and touching as a 'cultural difference' is ordered to pay £24,103.09.

A Care home worker whose employer dismissed her Spanish colleague's attempts to kiss her as a cultural misunderstanding has won her case for sex discrimination and has been awarded over £24,000.

The woman worked for Lincolns Care Ltd between January 2015 and June 2015. Her role was to support adults with mental health or learning disabilities at their homes.

In February 2015, the woman worked with a colleague, Juan Jose Guera Landazuri, for the first time. Landazuri, a Spanish national who attempted to kiss the woman. At the time, she dismissed it as a cultural issue and thought nothing more of it.

However, two days later, Landazuri stood directly behind the woman as she worked, described her as a "pretty lady" and tried to kiss her by grabbing her face between his fingers and thumb. He also attempted to put his tongue into her mouth. Then in April 2015, he ran his hands down the woman's back and touched her bottom. On a separate occasion that same month, he touched her breasts. He also asked questions about her sex life.

The woman made a complaint to Lincolns Care and it was brushed off as a cultural difference or she was told to push him away. When the situation did not improve, a manager said he would make sure the woman and Landazuri no longer worked together. No further action was taken against Landazuri by the employer.

The tribunal judgment noted the woman reported Landazuri's behaviour to the police and he was investigated. It transpired he was a convicted sex offender and had been deported from the UK once before. Employment judge Foxwell added that it was understood Landazuri had since been deported from the country for a second time.

As a result of the experience, the woman was signed off sick by her GP in early June 2015. When Landazuri returned to work later that month after being bailed, she decided she could no longer work for Lincolns Care. She found another job a couple of weeks after she left.
At tribunal, the woman claimed the incidents caused her to become "withdrawn" and she was "now fearful of being alone with men". She added "she felt that she had not been listened to by her employer who simply did not care".

Lincolns Care issued no response to the claims, neither when the complaints were initially filed in 2015 nor when the case was reinstated. The tribunal took evidence from the woman and her husband and considered a small bundle of documents submitted by the woman to determine the facts.

The tribunal awarded the woman £24,103.09. This was comprised of £18,000 for injury to feelings, £874.05 for loss of earnings and £5,229.04 in interest.

Employers are reminded to be careful when brushing off claims of sexual harassment as banter or cultural misunderstandings, as they can be held vicariously liable.

Should contracts be signed?

Contract never signed. Wess (W) started work in 1979. Her original contract provided for six months' notice to end her employment but in 2003 she was issued with a new contract following a regrading exercise and this was reduced to twelve weeks. Although she appealed against the grading of her job, she never actually objected to the change in her notice period. She continued to work for nine years without ever signing the contract. Eventually W was dismissed with twelve weeks' notice. The employment tribunal found that by working in accordance with the terms of her contract for nine years, and never protesting about the change in the length of the notice period, she had accepted them.

There is no requirement for a contract to be signed; if an employee works in accordance with the terms without protest you can presume that they are accepted. Nevertheless, avoid this sort of argument by keeping a signed contract on every personnel file

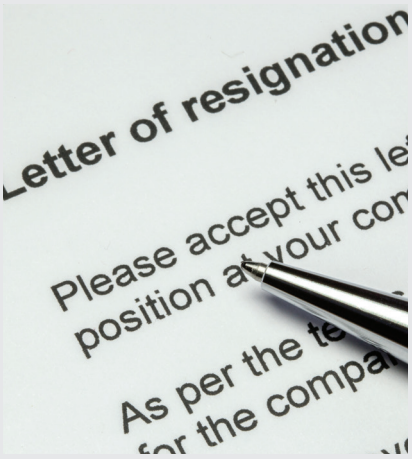
Mr N Francis-McGann v West Atlantic UK Ltd

Mr N Francis-McGann was employed as a Captain Pilot by West Atlantic. When it was discovered by the employer that a false reference had been provided by him on the application form, citing a Referee as 'Desilijic Tiure', the employee was offered the opportunity to resign on 30th June 2017, which he accepted.

However, he then pursued a claim for 3 months' notice pay and contractual notice entitlement. The employer, West Atlantic, then submitted a counter claim to recover their training costs. The recovery of training costs upon early termination of employment was a clause which had been signed by the employee, and the tribunal awarded West Atlantic £4,725.00.

It was held that West Atlantic was within its rights to dismiss and regard the employee's actions as gross misconduct. It was deemed that any potential incidents could have been catastrophic, and any subsequent enquiries would have discovered he was inadequately trained.

Employers are reminded about the importance of checking references



When giving notice does not equate to resigning

Mrs P Levy v East Kent University NHS foundation

The Employment Appeal Tribunal has ruled that a woman who 'gave notice' in a briefly worded letter, as an announcement that she was moving departments, had not resigned. Patricia Levy successfully applied for an internal transfer at East Kent Hospitals NHS Foundation Trust and submitted a letter to her manager stating; "Please accept one month's notice from the above date".

When the transfer offer was withdrawn, her manager refused to allow her to retract her 'resignation'. Levy filed a claim for unfair dismissal in September 2016, which was allowed by the EAT.

Employers are reminded to clarify any ambiguous notifications from employees, and to clarify their full intentions.