

Best Practice - Is it lawful to deduct training costs?

The Employment Appeal Tribunal ("EAT") in the UK has recently considered whether employers are able to recoup the cost of training incurred during an employee's probationary period.

In *MBI UK Limited v Quigley*, the employer was held to have made an unlawful deduction from an employee's final salary payment in respect of "conventional induction training". The employer sought to rely on the fairly standard repayment clause in the contract of employment which purportedly entitled the employer to deduct a sum of up to £500 to cover the costs of training undertaken by him if he subsequently left the employment within the probation period.

The EAT upheld the Tribunal's decision in finding that, on the facts, the employee had not received any material training, just a 2 day induction process, and therefore it did not amount to the type of training contemplated by the clause. The EAT also held that such a repayment clause only permitted a claw-back in relation to costs actually incurred by the employer.

Clauses such as this are common in contracts of employment. However, this case makes it clear that the court is not likely to be sympathetic to the employer unless such clauses are drafted appropriately. Equally, it may be difficult to prove the cost to the business of some training and as such, employers may need to consider whether they can collate evidence of the costs actually incurred. Consideration should also be given to the wording of any claw-back clauses to ensure that they are effective and construed as being reasonable.

Discrimination by Association

While it is arguable that Guernsey's laws pertaining to discrimination in the employment field are somewhat scant, a landmark court ruling of the European Court of Justice ("ECJ") may open the flood gates in claims for discrimination by association in the UK.

The long running case of *Attridge Law v Coleman* concerned disability discrimination and involved a mother of a disabled child for whom she was the primary carer. She left her job as a legal secretary after it was alleged by her employers that she was using her child's disability as a way to manipulate her requests for time off. She took voluntary redundancy but then brought a claim for constructive dismissal against her former employers. She claimed that she was forced to take redundancy because, compared to her fellow employees who did not have a disabled child to care for, she was not afforded as much flexibility in her working hours.

The ECJ ruled that an able-bodied person can also be covered by the Disability Discrimination Act by association. The ruling is likely to have huge ramifications, not just for carers of disabled people, but also for employees associated with, or connected to employees protected by other discrimination legislation.

Previous convictions - Are your employees disclosing enough?

It is a widely accepted policy in employment spheres that prospective employees need not disclose "spent" convictions i.e. those convictions which can effectively be 'ignored' after a period of rehabilitation. The law defines the time after which a conviction becomes "spent", by reference to the sentence originally imposed and the seriousness of the offence.

Under the terms of the Rehabilitation of Offenders legislation, when an employer is seeking information from an employee, prospective or otherwise, regarding previous convictions (or offences, conduct or circumstances), the question can only relate to "unspent" convictions. The employee, therefore, has no obligation to reveal spent convictions. However, there are exclusions and exceptions to this general rule which were introduced in the aptly named "Rehabilitation of Offenders (Commencement, Exclusions and Exceptions) Ordinance". There is a specific section in this Ordinance providing for questions relating to employment, professions and occupations. For certain professions, any questions asked in order to assess the suitability for employment, apply to spent as well as unspent convictions. Accountants and lawyers are included in the list of professions. It is worth noting however, that this exception will apply equally to all those employees who have access to sensitive data held by those professions, and/or those employees who have access to the premises occupied by those professionals.

Under the Ordinance, spent convictions extend to offences of every description unless the contrary is expressed. This effectively would mean that even a caution received in one's youth would have to be disclosed.

There are also 'exempted' roles and occupations within the finance sector where spent convictions will need to be disclosed as well as unspent convictions. However, within this sector, only "relevant spent convictions" need be disclosed, for example fraud, dishonesty or offences relating to insider dealing or market abuse amongst others.

It is important to note that, when asking any questions with regard to previous convictions, the application of the exceptions and exclusions will only apply when it is made clear to employees, that any spent convictions or relevant spent convictions must be disclosed. It is therefore very important that, if appropriate, all documents, such as application forms and the like, are drafted to take account of these provisions to ensure that you, as an employer, are fully aware of any previous convictions held by your employees.

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