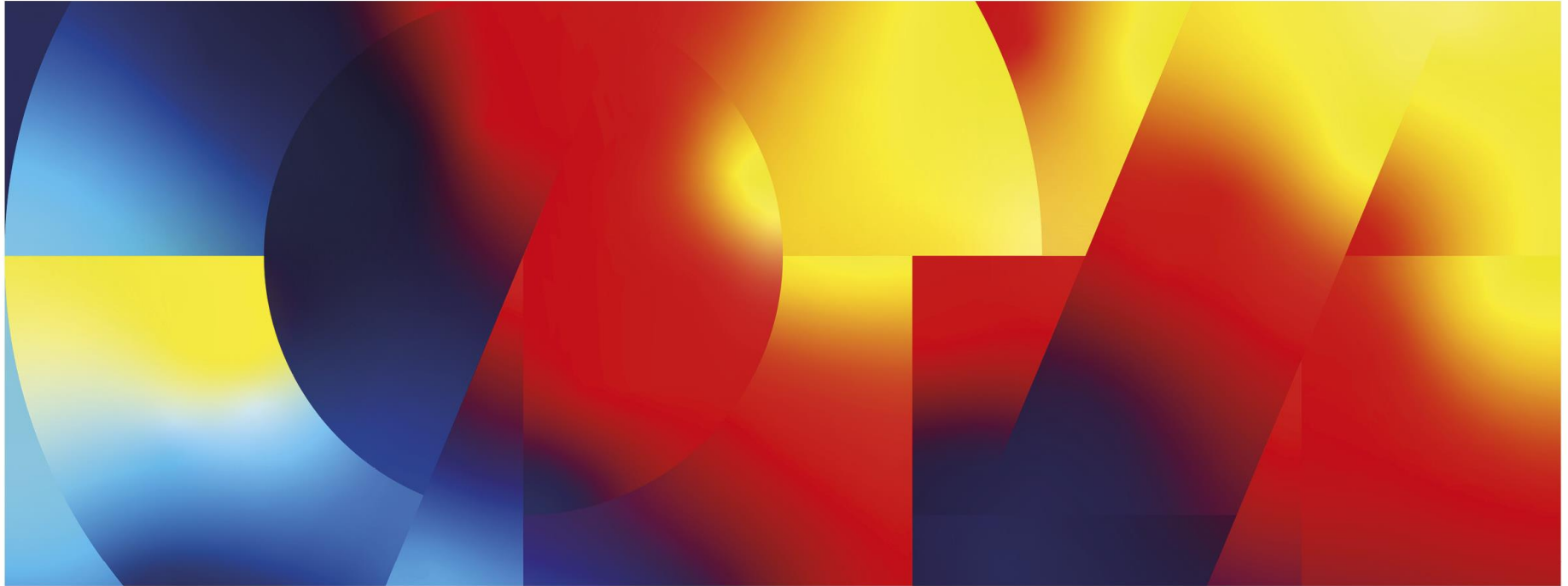


30 November 2021

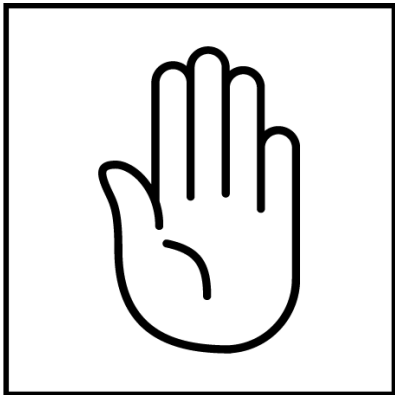
James English, Mark McKeever, Stuart Craig and Caroline Shafar

ward
hadaway

Primary Care - Top 10 HR/Employment Law tips for GP practices and primary care providers



Housekeeping



1. The importance of the recruitment process

Recruitment – Introduction

- The importance of the recruitment process:
 - Are you legally compliant?
 - What are the risks if not?
 - Can applicants or candidates bring Employment Tribunal claims?
- The main legal issues to consider in recruitment are:
 - Discrimination.
 - Data protection.
 - Vetting applicants – the Right to Work, DBS checks and the Rehabilitation of Offenders.
 - Contractual issues – making and withdrawing offers.
- The best way to approach recruiting to a new post:
 - Be consistent.
 - Keep good records, and make sure every key stage is documented.
 - Take advice if there are any ‘red flags’.

- Discrimination claims can be brought by potential applicants for employment (before their employment begins).
- Claims can cover the arrangements and content of advertisements, the selection or assessment process, or the way in which the recruitment process is handled, in particular:
 - The arrangements for deciding who to offer employment to.
 - The terms on which employment is offered.
 - Whether or not to offer employment.
- An employer, an individual manager, or a recruitment agent can be liable.
 - Employers will be liable for the actions of their employees (vicarious liability).
 - There is a ‘statutory defence’ of taking reasonable steps to prevent the discrimination – this will depend on training, supervision and monitoring the process.

Recruitment – Disability Discrimination

- Pre-employment enquiries about health.
 - It is unlawful to ask about disability, health or sickness absence until a job offer has been made (whether subject to conditions or not), with certain exceptions.
 - A role can be offered subject to satisfactory health checks/Occupational Health reports.
- The duty to make reasonable adjustments.
 - Employers are allowed to ask about disability and health in order to consider adjustments to the interview and selection process (but not the job).
 - If the arrangements put an applicant at a substantial disadvantage because of their disability, the employer must make reasonable adjustments.
 - This can apply to the way in which interviews are conducted, pre-employment tests or assessments.

- Key principles to comply with data protection legislation:
 - Personal data – name, address, contact details, etc.
 - Special Category data – health/disability/sickness absence, race/ethnicity, politics, religion or belief, or trade union membership, sex life or sexual orientation.
- Only ask for information you will need as part of the recruitment process.
- Make sure information is kept and shared securely, and shared only to those who need to know.
- Applicants could make a ‘subject access request’ to see what data you hold.
- Be cautious with unreliable sources – the internet and social media.
- The same principles apply to references.
- Keep information only for as long as necessary (6 months for vetting records, e.g.DBS checks).

- The Right to Work:
 - Employers must ensure that an employee has the right to work in the UK.
 - Carry out 'right to work' checks (and follow ups as necessary).
 - Civil penalty, up to £20,000.
 - Criminal offence, unlimited fine and/or up to 6 months' imprisonment (5 years' on indictment).
- DBS checks:
 - For those working in positions of trust, with children or vulnerable adults.
 - Applicants may challenge the information or its relevance.
- Rehabilitation of Offenders Act 1974 – 'spent convictions':
 - A conviction is spent if the individual does not reoffend and depends on the type of sentence and the length of time that has passed.
 - The failure to disclose a spent convictions cannot be held against the applicant.

2. Contracts of Employment

Contracts of Employment

- Why are written contracts crucial to the employment relationship?
- What do they need to include?
- Offers – forming the contract, or withdrawing an offer.
- Employees, workers and contractors – ‘employee status’.
- Written contracts of employment and Section 1 Statements.
- Contractual terms.
- Notice periods.
- Varying the terms of the contract.

- Employees, workers and contractors/consultants (the self-employed).
- Employees, employed under a contract of employment, have the following rights (which workers do not):
 - The right to claim unfair dismissal (with sufficient service) and to a statutory redundancy payment.
 - Family leave, such as maternity or adoption leave.
 - Statutory minimum notice periods.
- Workers also have certain protections (which employees do):
 - Working time and annual leave.
 - National Minimum Wage.
 - Discrimination and whistleblowing.
- The boundaries are not absolutely clear – ultimately it is for a court or tribunal to determine.
- Government's online assessment – Check Employment Status for Tax (CEST).
- Directors, Trustees, non-executive directors, office-holders, and volunteers.

Contracts – Section 1 Statement

- Contracts of Employment – what is required?
- Section 1 Written Statement of Employment Particulars (Section 1 Statement).
- Information which must be provided at beginning of employment/engagement for employees/workers.
- Persuasive evidence of the terms and conditions of employment/engagement.
- Principal statement, a readily accessible document, and some details within 2 months of starting.
- Sets out the key terms of the relationship.
- Tribunal may determine what the particulars should be if they are inaccurate or incomplete.
- Compensation of between 2 to 4 weeks' pay, if brought with a substantive claim.
- Section 4 Statement used where particulars change.

Contracts – Contractual Terms

- Section 1 Statements are limited. Consider what other might be included:
 - Contractual right to vary terms.
 - Place of work and mobility clauses.
 - Duties, responsibilities and flexibility clauses.
 - Confidentiality and data protection.
 - Restrictive covenants/post-termination restrictions.
- Collective Agreements may be part of the employment relationship.
- Statutory minimum periods of notice (for the employer giving notice):
 - More than one month's service but less than 2 years – one week.
 - One week's notice for each year of service after that, up to a maximum of 12 weeks' notice.
 - An employee with more than one month's service must give one week's notice.

3. Policies and Contracts

- How is a policy different to a contract? Why do I need them?
- Policies required by law:
 - Disciplinary.
 - Grievance.
 - Health and safety.
- Policies that are good practice and can help avoid claims:
 - Equal Opportunity/Equality and Diversity.
 - Data protection and information governance.
 - Whistleblowing.
- Equal opportunities policies can form the basis of the 'statutory defence'.
 - Employers are normally vicariously liable for their employee's actions.
 - Policies (together with regular training, monitoring and supervision) may change this.

- Why have a staff handbook?
 - Information that may not have been set out in the written contract or Section 1 Statement.
 - Some policies are required by law, some as a matter of good practice.
 - Employer's policies may differ from the minimum legal requirements.
 - Give employees a useful source of information on working arrangements.
- Some parts of a handbook or policy may have contractual effect.
 - Is it 'apt for incorporation'? Does it create clear legal obligation?
 - If it is not part of the contract, it is easier to amend.
 - If it is part of the contract, the employee can rely on its terms (and bring a claim).
 - A handbook can state that it is for guidance only and not binding, although a court may take a different view.

- Other key policies to consider:
 - Sickness/absence management.
 - IT and social media.
 - Performance and capability.
 - Bullying and harassment/dignity at work.
 - Anti-money laundering.
 - Flexible working/home working.
 - No smoking, drug and alcohol.
 - Holidays, annual leave and different forms of family-related leave.
 - Redundancy.
 - Retirement.

4. Probationary Periods

Probationary Periods

- What purpose?
 - Allows an employer to assess an employee's performance for a defined period of time.
- Worthwhile having – but only if properly managed.
- Having a contractual clause or probationary policy is vital but make sure you follow it.
- Keep a paper trail.
- Consult with the probationer, provide evidence of their performance, and hear their views.
- Decide if you want a shorter probationary notice period (but can't be shorter than statutory minimum).
- Stick to the contractual / policy timescale.
- If you haven't been able to make a proper assessment, then extend it (in writing with advance notice).

Probationary Periods

- How long?
 - No 'one size fits all'
 - Depends on the nature of the job.
 - As long as you need to effectively assess their performance .
 - 1 month, 3 months or even 6 months is not uncommon.
 - Incorporate a mid-point review if you like, to provide feedback and hopefully improve performance.
- Have a structure that you and employee understand:
 - Explain any specific goals or attainments at the outset.
 - Tell them the dates / points for any progress review meetings.
 - Give feedback during the probationary period, not just at the end.
- Generally, employees are less likely to bring claims (e.g. discrimination) if they feel that they've been treated fairly .

5. Short Service Dismissals

'Short service'

- 'Short service' means less than 2 years in employment.
- 2 years is the golden ticket for employees – gives them protection against unfair dismissal.
- What's the risk?
 - Cannot bring a claim for (ordinary) unfair dismissal but
 - CAN bring many other claims:
 - Wrongful dismissal / breach of contract.
 - Discrimination.
 - Whistleblowing.
 - Automatically unfair dismissal (e.g. pregnancy, H&S, part time worker etc).

**How do we deal with sickness
absence problems?
Do we deal with short term and long
term differently?**

How do we manage sickness absence?

Some basic tips:

- Have a clear policy for managing sickness absence:
 - Start with informal process.
 - Conduct return to work interviews and document what is said during them.
 - Categorise leave time correctly- time off for dependants or other leave is not sickness absence.
 - There is a temptation to allow people to take holiday when they're unwell – but be careful.
 - Consider use of trigger mechanisms to review attendance if this is an issue.
- Keep in regular contact with staff who are absent.
- Apply standards consistently.

Do we need to treat short term sickness absence differently to long-term sickness absence?

Short term absence

- Usually takes the form of:
 - Minor one-off absences (e.g. flu, toothache, sprains and strains)
 - Minor absences that occur more regularly (e.g. migraines)
- Employee should explain why they are absent and the nature of the problem
- Self-certificate if they return within seven days
- Statement of fitness for work if absent for seven days or more:
 - Employee is unfit for work
 - Employee may be fit for work
 - Phased return
 - Altered hours
 - Amended duties
 - Workplace adaptations

Repeat short term absence

- Discuss reasons at return to work interview – important to keep persistent absence under review. Tracking system will help you do this.
- Consider if indicates general ill health which requires investigation – potential underlying issue that might be a disability.
- Conduct issue- manage by following disciplinary procedure
- Issue warnings (improvement notices)
 - What improvements in attendance is expected
 - Consequences of failing to improve

Long term sickness absence

- Keep in regular contact with the individual about their position:
 - Be clear about their sick pay
 - Be clear about any workplace changes or promotion opportunities
- Consider whether it is appropriate to just keep in touch and give them the time they need to get better
- Assess if colleagues can manage without a replacement or whether you need to hire somebody on a temporary contract
- May need to follow formal process:
 - Requirement for up to date medical information before termination of employment
 - Staged warning process not usually appropriate

- Equality Act 2020 imposes a duty on employers to make reasonable adjustments:
 - Duty arises where a disabled person is put at substantial disadvantage, an example of a reasonable adjustment in a sickness absence scenario may be agreeing to increase trigger points for individuals in relation to disability related absence:
 - consider how much absence would be reasonable for someone with the particular disability and increase the trigger point for formal action to reflect this
 - In general terms, if a reasonable adjustment can be made then a tribunal would expect an employer to make it: the onus is on the employer, taking into account the overall circumstances
 - Examples of potential adjustments (very wide ranging):
 - Allocating some duties to another employee
 - Considering suitable alternative posts
 - Altering hours of work
 - Assigning a different place of work or home working
 - Acquiring or modifying equipment (e.g. large screen or adapted keyboard)

If we have concerns about an employee's performance should we be dealing with that through our disciplinary procedures?

Why is managing performance important?

- Clear benefits to employer:
 - Better performance
 - Better engagement
 - Consistency of standards
- Be clear on what is expected at each stage of employment lifecycle:
 - Recruitment
 - Induction
 - Probationary review
 - Ongoing review

Conduct or capability?



Deal with the problem at an early stage

- Where possible deal with the situation early and informally:
 - More likely to get an improvement than to let it fester
 - Going through this step will make any later formal process more likely to be fair
- If managers let the issue drift:
 - Standards become ingrained
 - May have accepted the poor performance – standard takes longer to improve
 - Demotivating for other employees
 - Causes resentment of colleagues and lack of respect for management

Formal process

- Make sure you follow a fair process
- Performance improvement warnings:
 - Be specific
 - Improvement required and realistic timescales – fact sensitive
 - Review date – diarise when warnings expire and earlier review dates
 - Support or training to be provided
 - Staged warning process and potential termination of employment
 - Be aware of potential mitigation

Reasons for poor performance



Do you have to carry out a formal disciplinary meeting when considering whether an employee has committed misconduct?

Disciplinary Meeting and Misconduct

THE ANSWER

- Not always!!!!
- If it is minor misconduct then NO!
- If it could result in a formal warning or dismissal, then YES!
- CHECK your disciplinary policy for guidance

Disciplinary Meeting and Misconduct

WHY?

- ACAS Code of Practice on Disciplinary and Grievance Procedures
 - Not statutory i.e. not binding but if you don't follow the guidance compensation could be increased by 25%
 - The Code encourages an informal approach for misconduct which is not that serious.
 - E.g. will only result in a verbal warning and you are not keeping a record
 - Mediation is encouraged
 - **HOWEVER** - if misconduct serious and/or will result in a written warning or dismissal you **MUST** have a formal disciplinary meeting.

Disciplinary Meeting and Misconduct

WHY? (2)

- Can affect fairness of any dismissal.
- Unfair Dismissal rules – Section 98 ERA 1996
 - Is it one of the 5 fair reasons?
 - Did the employer act reasonably in treating the given reason for dismissal as sufficient to justify dismissing the employee?
 - The Employment Tribunal will look at the process followed and if it is fair.

Disciplinary Meeting and Misconduct

WHY? (2 continued)

- Misconduct cases:
 - Did the employer have a genuine belief?
 - Did the employer have reasonable grounds for holding that belief?
 - Did the employer carry out as much investigation as was reasonable?
- Fundamental rule – right for employee to know the allegations that they are facing AND to have their say
- Right to be accompanied – statutory right

An Informal Resolution

- Private meeting
- Make enquiries as to what happened and the explanation
- Agree on the action to be taken
- Record the outcome in a memo
- Keep notes

An employee has raised a grievance about a colleague. Do we have to have a formal grievance hearing or can we resolve it informally?

Formal or informal ?

What is a grievance?

- Complaint/concern about something that has happened to them.
- Compare to whistleblowing – raising concerns about something not personal e.g. patient harm, financial irregularity

Formal or informal?

- Check your grievance policy – what does it say?
- Familiarise yourself with the ACAS Code of Practice on Disciplinary and Grievance Procedures.
- Failure to follow can result in a 25% increase in compensation at ET.

Formal or Informal?

Formal or Informal (2)

- Informal tends to be first step and encouraged by ACAS Code.
- Face to face meeting?
- Workplace Mediation? – should not be used to avoid managerial input or for an informal grievance
- BUT not always suitable
 - Employee may not want to confront another employee
 - Some issue may require investigation
 - Grievance may be anonymous


**Do I have to give a former employee
a reference?**

Answer

- No!!!
- There is no legal obligation.
- Check no provision in the contract of employment
- BUT ensure you are consistent in your approach.
- Avoids risk of allegations of discriminatory conduct
- If you do provide a reference, you have a duty of care if you don't exercise reasonable care and skill.
- MAY be an implied duty to provide a reference where there are regulatory requirements where you cannot undertake a job without one e.g. in the financial sector. Query whether the same applies for clinicians?

Questions and answers

Thank you

 Ward Hadaway  @WardHadaway
wardhadaway.com