UK Employment Law Round-up

December 2017 | first edition

In this issue:

In this issue we look at the recently published mental ill health report "Thriving at Work". We also, given that Christmas is nearly upon us, consider issues that commonly arise out of the Christmas party and offer some tips for minimising any risk. In our case law review we look at the issue of switching from RPI to CPI in a pension scheme. Finally we look at Home Office compliance visits for organisations holding sponsor licences and what can be done to prepare for such visits.

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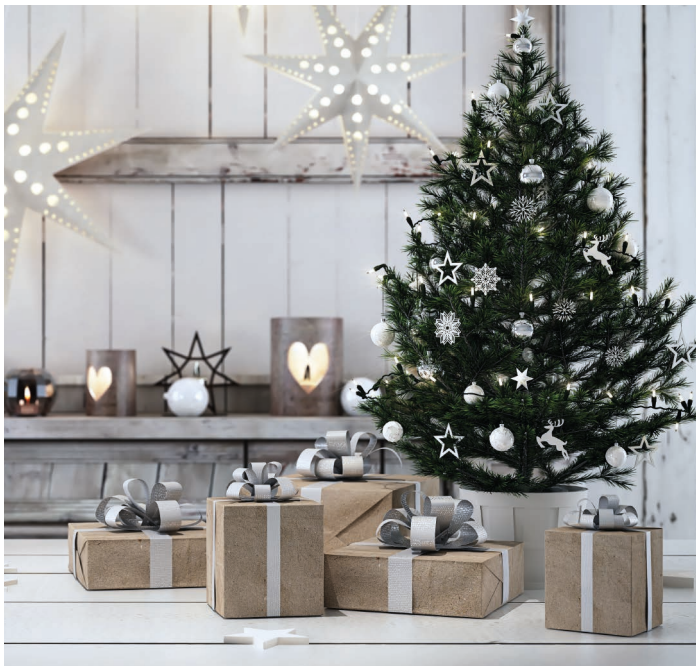
Next steps in tackling mental ill health in the workplace

One in four people experience a mental health problem, yet as a society and perhaps particularly in the workplace we are often afraid of discussing the topic. Employers should be encouraged to talk about mental health in the same way as we do physical health and develop a workplace culture of openness.

In January 2017 the Prime Minster tasked Paul Farmer (Mind Chief Executive) and Dennis Stevenson (former HBOS chair) with undertaking an independent review into how employers can better support the mental health of all people currently in employment. This was to include helping those with mental health problems or poor well-

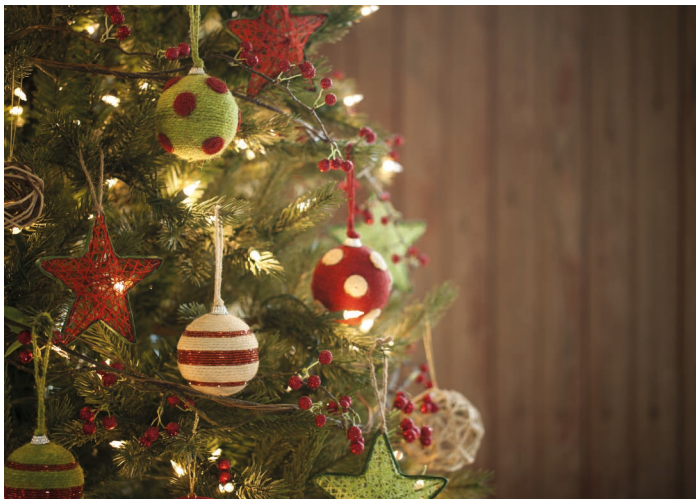


In the press

In addition to this month's news, please do look at publications we have contributed to so far this month:

- Journal of the Law Society of Scotland - Harassment in the profession: Opinion piece on the back of the Weinstein scandal (Claire McKee) http://www.journalonline.co.uk/Magazine/62-11/1023991.aspx

We would love to hear from you if you have an idea for a topic you would like us to cover in future editions of our Round-up or if you have any comments on this edition. Please provide your comments here.



being to remain in and thrive through work. The report, "Thriving at Work", was published in late October 2017.

In the report a four-pronged vision was set out for the next decade. It also encouraged the government to implement the report's recommendations, measure the results and make a long-term commitment to improving mental health at work.

First, Farmer and Stevenson hope that employees in all sectors will have "good work", which contributes positively to their mental health, our society and our economy. Secondly they hope that every one of us will have the knowledge, tools and confidence to understand and look after our own mental health and the mental health of those around us.

As for employers, Farmer and Stevenson want all organisations, whatever their size, to be equipped with the awareness and tools not only to address but to prevent mental ill health caused or worsened by work. This would include being equipped to support individuals with a mental health condition to thrive, from recruitment and throughout the organisation, and being aware of how to get access to timely help to reduce sickness absence caused by mental ill health.

Finally the authors hope to see a dramatic reduction in the proportion of people with a long-term mental health condition who leave employment each year so ensuring that everyone who can benefits from the positive impacts of good work.

There are grounds for optimism that the next steps in tackling mental ill health in the workplace are starting to be achieved. Mental Health First Aid was referred to as an example of a good and successful innovation emerging amongst employers who are at the forefront of best practice in this area. First aiders have of course been around in one shape or form since the early 1800s. Mental Health First Aid is a new concept. The role of a Mental Health First Aider in the workplace is to be a point of contact for anyone who is experiencing a mental health issue or emotional distress; they are not intended to be counsellors or psychiatrists. Mental Health First Aiders are trained, amongst other things, to start a supportive conversation with a colleague who may be experiencing a mental health issue or emotional distress and to listen to the person non-judgementally.

If you would like to discuss measures to support mental health in your organisation or find out what we are doing here at Dentons to achieve best practice in this area please get in touch.

Brace your elves – it's Christmas party season...

It would be rude-olph of us to let this festive season pass by without comment on the much-anticipated but potentially risky Christmas party. To ensure that you are (three) wise (men) this festive season, take a few minutes to come on a whistle-stop sleigh ride with us and look at some ways to mitigate risk and manage issues arising out of the infamous Christmas party:

1. Santa owes his elves a duty of care and may be vicariously liable for any naughty-list worthy behaviour

The Employment Tribunal (ET) decision in Chief Constable of Lincolnshire v. Stubbs held that a colleague's leaving party or informal drinks with colleagues after work could be an extension of employment. It is therefore generally accepted that Christmas parties are also an extension of employment as there is likely to be a very close link between the employment relationship and the off-duty conduct at a Christmas party. As a result of this it's always worth employers sending a gentle reminder to employees of the standards of behaviour expected of them at Christmas parties.

A good way of doing this is referring employees to the company policy on workplace social events. Such a policy could include reference to:

- dress-code (Mrs Claus' golden rule: no-one wants to see through it, up it or down it);
- alcohol consumption (be merry but not boundary-obliterating merry – know your limits!);
- social media (don't post THAT picture); and
- the company's commitment to preventing harassment and discrimination (chasing "all the jingle ladies" whilst brandishing mistletoe is never a good idea).

It's important for employers to have such a policy as under the Equality Act 2010 they are generally liable for acts of

discrimination, harassment and victimisation carried out by employees during the course of employment. The only real defence to this liability is being able to show that all reasonable steps were take to prevent such acts. Having a policy is usually a reasonable step, though remember the policy will not be enough, by itself.

Employers shouldn't worry (too much) if they don't have such a policy yet; they should just be sure to remind employees that, whilst the Christmas party is a social occasion and meant to be relaxed, it is still a work event. Employees should be reminded to behave accordingly and referred to any applicable policies in the handbook. It is, however, worth considering putting in place a workplace social events policy in the new year (what better way is there to beat the January blues than policy drafting?).

2. Free-flowing eggnog* (*insert other alcoholic drink of choice)

Free bars – a great way to reward your employees and boost morale, but they can also be more dangerous than King Herod's reputed rage against babies!

Whilst not involving a Christmas party, the case of *Williams and others v. Whitbread Beer Company Limited* did involve a free bar and three rowdy and intoxicated employees. The evening ended with both beers and punches being thrown. The employer subsequently dismissed all three employees. The ET, however, and later the Court of Appeal, found that the dismissal was unfair partially because the employer had paid for the alcohol that undoubtedly fuelled the fight. The employees' awards were, however, reduced to reflect their contribution to their dismissal (i.e. their drunken brawling).

Mrs Claus' top tip to help avoid such unpleasantness whilst still having a holly jolly time – limit the free bar in some way. This might be only opening the free bar before dinner (a Christmas dinner is an excellent way to soak up the alcohol), limiting the type of alcohol that is served, not allowing drinks containing double shots, or not allowing shots without mixers to be served.

Also see point 1 above about reminding employees of the standard of behaviour that is expected.

3. Silent morning

The morning after the big night: all is calm, all is bright... because half of the workforce don't turn up!

Where it's not possible to have the Christmas party on a Friday (employees languishing in their over-indulgence in their own time is always best) you will need to remind employees that they are expected to attend work on time unless they have booked holiday in the usual way.

Where employees fail to turn up to work (and don't have a valid reason), the company may be able to refuse or deduct the appropriate amount of wages (a valid Scrooge moment) - but check the contracts first.

If the company disciplinary policy or the small print in the jolly party invite does not specifically state that lateness or absence the day after the Christmas party may result in disciplinary action, employers should approach any formal action carefully. Where employers do want to take a firm line on this and it is not specifically in the policy, when reminding employees of the standard of behaviour expected (as per point 1 above) they should state that lateness or absence on the day after the Christmas party may lead to disciplinary action. However, employers still need to proceed with some caution as there may be genuine absences (not just a newly discovered allergy to sprouts) and the usual investigation requirements apply.

4. Nasty hangovers and employees on the naughty list

When the hangovers from the free bar have faded there may still be hangovers in the form of employees to be put on the naughty list because of their conduct at the Christmas party.

Gimson v. Display By Design Ltd involved a claimant who, when walking home from a Christmas party, punched a colleague in the face causing serious injury. The claimant was dismissed by his employer. The ET found that his dismissal was fair as his employer had a genuine belief that he had assaulted another member of staff after a work event and had undertaken a reasonable investigation. The ET also found that had there not been a Christmas party the employees would not have been walking home together, therefore the assault was sufficiently connected to employment. Also of relevance was the fact that the company was small and so future contact between the employees would be unavoidable. Therefore the assault also impacted the ordinary working day.

Where misconduct does occur employers need to ensure that they follow the company's policies and procedures when taking any disciplinary action. They should also be sure to document all meetings and decision-making (as thoroughly as a child writing their letter to Father Christmas!).

Where there are multiple employees involved employers need to be careful to treat them equally in terms of disciplinary action or, if deciding not to treat them equally, be able to explain clearly the reasons for the different outcomes and to document those reasons. In Gimson there were two other employees involved. The employer's investigation found that the employee who had been seriously injured had in fact been trying to keep the peace (no disciplinary action was taken against him) and that the other employee had subsequently been apologetic for his behaviour (employee received a final written warning). In contrast the claimant had actually used physical violence and had not accepted any responsibility for his actions.

Conversely in *Westlake v. ZSL London Zoo*, an ET case also involving employees who ended up in a fight after a Christmas party, the ET found that there was insufficient evidence to establish who was to blame and therefore the difference in treatment (one dismissal and one final written warning) was unfair.

We ho-ho-hope that you have a very Merry Christmas and a Happy New Year (and that you have an incident-free Christmas party)!

Employer savings from CPI – mirage or magic?

In 2010 the Chancellor moved to replace the Retail Price Index (RPI) with the Consumer Price Index (CPI) for increases to public service pensions. Since then many private sector employers have sought to switch to CPI to reduce pension costs and risks. A forecast in 2011 estimated that savings by using CPI could exceed £3billion over 15 years. Whether the switch can be made in a particular scheme depends on the Trust Deed and Rules and recent case law has helped to shed some light on the issue.

Revaluation and indexation

Legislation entitles members of pension schemes to minimum increases at two stages. These increases are essentially fixed and cannot be changed by employers.

First, when an active member of a pension scheme becomes a "deferred pensioner" (e.g. by leaving their job), statute gives them a right to increases every year – to counter inflation – until they draw their "revalued" pension.

Second, statute requires those revalued pensions – once in payment – to be increased (or "indexed") by a minimum percentage.

Scheme rules often promise extra increases beyond those needed by statute. Some of these rules can be changed, if pre-change interests are protected. As CPI has been lower than RPI in several years, changes have meant savings. And, where rules could not be changed, savings have been made by exchanges of above-statute increases for higher up-front pensions. Two recent cases have tested the pre-change interests that need respecting.

Switch to CPI – case examples

Several court and Pensions Ombudsman decisions have upheld employers' rights to switch from RPI to CPI. However, in *Buckinghamshire v. Barnardo* the Court of Appeal prevented a switch to CPI – by a majority decision of two judges to one. However, all three agreed on a point Dentons raised: members had no pre-change right to be protected until the trustees had chosen an index.

However, even where a change to CPI can be made an employer's attempts to save costs may not be straightforward. Last month the High Court (of England and Wales) in *British Airways PLC v. APS Trustee Ltd,* reported on 15 November 2017, recognised that trustees may have other options. The scheme had been validly changed to CPI against the wishes of the trustees. Those trustees had then amended the rules to permit them to pay discretionary increases – and their change was upheld by the court.

Future of RPI/CPI

The main issue for employers will be whether they, with or without the trustees, have the power to substitute the index used under the trust deed and rules and what else the trustees might be able to do if a change is pushed through. Additionally, there are occasional suggestions the government may scrap RPI altogether, which would be an issue for both trustees and employers who have schemes retaining RPI for revaluation.

The first step for employers who have not yet made the switch will be to consider whether a move to CPI will provide a cost benefit to the scheme. Thereafter, an analysis must take place (giving consideration to recent case law) to determine whether the scheme rules, in particular employer and trustee discretions, allow such a switch.

Global Mobility – Home Office Compliance Visits

Summary

Organisations that hold a licence to sponsor migrant workers from outside the EEA have agreed with the Home Office to fulfil certain duties. The objectives of the duties are to prevent abuse of the immigration system, capture any patterns of migrant behaviour that may cause concern, address possible weaknesses in process, and monitor compliance with Immigration Rules. Duties that apply to all sponsors include record keeping duties, reporting duties, complying with the law, having a genuine vacancy for a migrant worker, and co-operating with the Home Office.

The duty to co-operate with the Home Office means allowing Home Office staff full access to any premises or site under your control, on demand. More often than not Home Office compliance visits are unannounced. Occasionally prior notice is given and of course this is advantageous. However, any notice will be short and therefore best practice is of course to be prepared at all times!

Issues

The purpose of the visit is for the Home Office to ascertain if you, as a sponsor, are complying and are able to continue to comply with your duties and responsibilities as a sponsor.

As you would in any event, you should remain polite and helpful during the visit. Although hosting a visit is probably the last thing you need on top of an already long to-do list, it will go more smoothly if you are accommodating and helpful in dealing with the Officer's requests. The attitude of a sponsor's staff can have an impact on the Compliance Officer's visit!

It is helpful if you can have someone take notes of the interviews that are conducted during the visit. This can be your legal representative if you wish. It is helpful to take notes in case there is any later dispute over what information was disclosed.

Company details

Any changes to the company's details must be kept up to date on the Sponsorship Management System (SMS). Particularly important is the company's address. If the Compliance Officer turns up to an old address because the SMS has not been updated, he will immediately become suspicious of what else you have not told him.

Ideally all people fulfilling key roles should be available on the date of the inspection, but most definitely the Authorising Officer who has overall responsibility for all overseas migrant workers.

HR Systems

The Home Office will want to see that you have human resources systems in place that enable you to comply with your sponsor duties. The information can be stored manually or electronically (e.g. on a laptop). Either way, we suggest a file is opened for each worker that includes the following:

- A schedule setting out name, date of birth, work start date, immigration status, leave to enter and expiry dates
- Details of UK residential address, telephone number, mobile telephone number, and a system for keeping the same up to date

- Contract of employment and job description
- Copy appraisal forms and evidence that the migrant can do the job they are sponsored to do
- Payslips and National Insurance number
- Right to work documents, e.g. passports, immigration status documents; biometric residence permits
- Details of any Resident Labour Market Test undertaken
- Record of the migrant's absences

Your HR system should flag:

- when any permission to work in the UK expires - this may be by a record in an Outlook calendar, a diary, an excel spreadsheet or database, for example;
- if a worker's place of work will change;
- if a migrant fails to arrive for their first day of work;
- if a migrant has 10 consecutive days of unauthorised absence.

Even if you do not currently have migrant workers, the Compliance Officer may request to see the above in respect of non-migrant workers, to gain an understanding of what records you keep and how you keep them.

You should have an up to date employer's liability insurance certificate and health and safety certificate displayed at the place of work.

Interviews

The Compliance Officer may choose to interview your staff. They are likely to want to speak to any Tier 2 workers. This will enable the Compliance Officer to verify any specific employee details directly with the worker, for example their salary and duties and responsibilities. This will be to ensure that they are carrying out the role and work in line with the information provided when the Certificate of Sponsorship (CoS) was assigned. It may be helpful to reprint the CoS and provide the migrant with a copy so that they can refresh their memory of the specific tasks and duties reported to the Home Office. If there are any changes to the salary and job details since the CoS was assigned, these should have been updated via the SMS.

Outcome

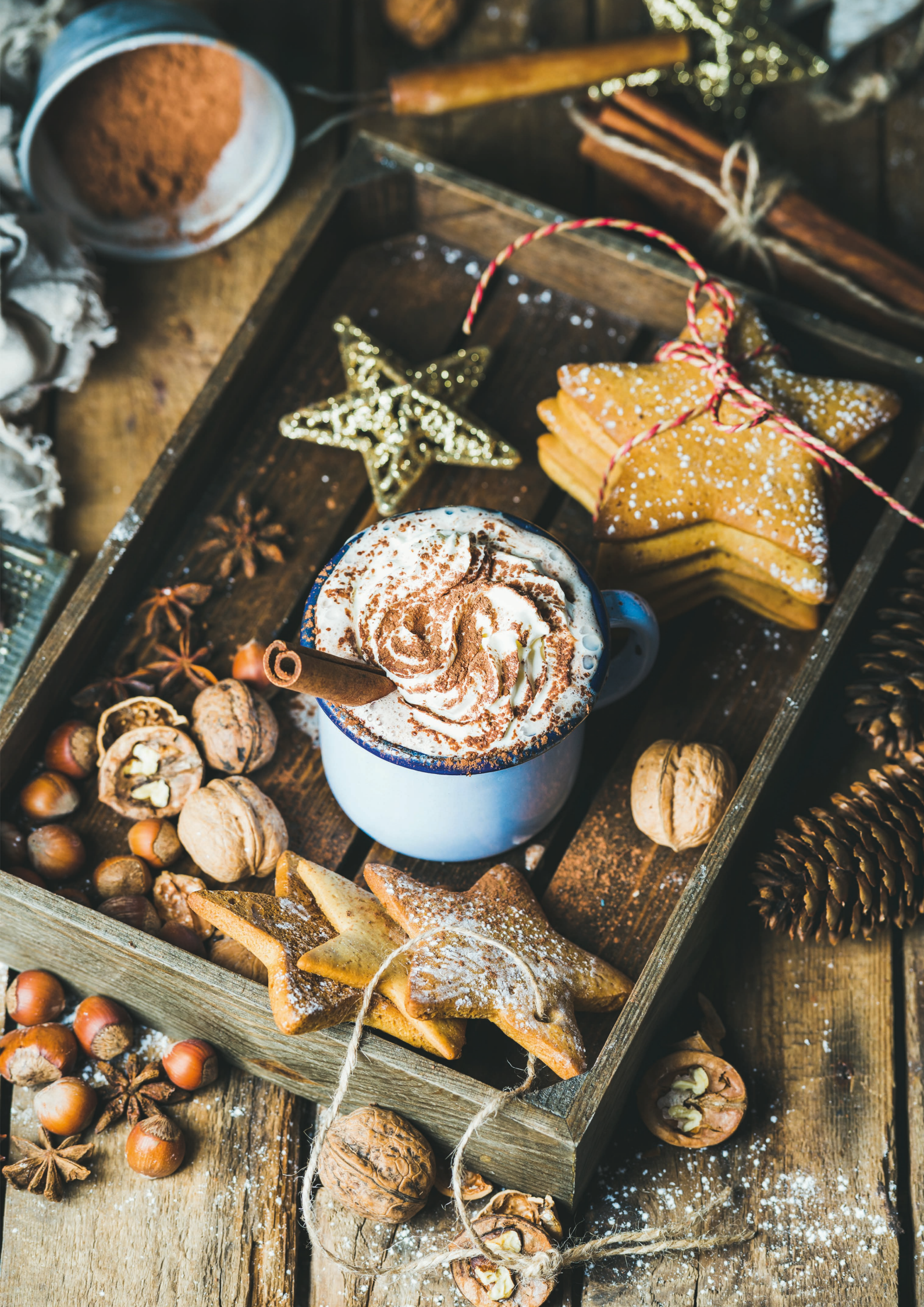
After the visit, the Compliance Officer will prepare a report which is submitted to the case working team at the Home Office.

The outcome of a visit can have serious repercussions. If the Compliance Officer is not satisfied with the information provided and with the results of their searches, they could refuse a licence application, or downgrade, suspend or revoke an existing sponsor licence. A worker's permission to be in the UK to work would be curtailed. If your licence is downgraded, you would be required to pay a fee to put an action plan in place that addresses the problematic issues. If your licence application is refused, or your licence is revoked, you may be subject to a six month 'cooling off' period before you can apply again.

Can your organisation afford not to take a few small steps to put the right systems in place to ensure it passes a Home Office compliance visit?

In Editor's top pick of the news this month

1. EAT finds you cannot cherry pick from without prejudice conversations
2. London's gender pay gap worst in the UK
3. National Minimum Wage Increase
4. Managing a flexible workforce



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www.dentons.com

Contacts

Virginia Allen
Partner
D +44 20 7246 7659
virginia.allen@dentons.com

Sarah Beeby
Partner
D +44 20 7320 4096
sarah.beeby@dentons.com

Michael Bronstein
Partner
D +44 20 7320 6131
michael.bronstein@dentons.com

Ryan Carthew
Partner
D +44 20 7320 6132
ryan.carthew@dentons.com

Mark Hamilton
Partner
D +44 14 1271 5721
mark.hamilton@dentons.com

Gilla Harris
Partner
D +44 20 7320 6960
gilla.harris@dentons.com

Amanda Jones
Partner
D +44 13 1228 7134
amanda.jones@dentons.com

Roger Tynan
Partner
D +44 20 7634 8811
roger.tynan@dentons.com

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