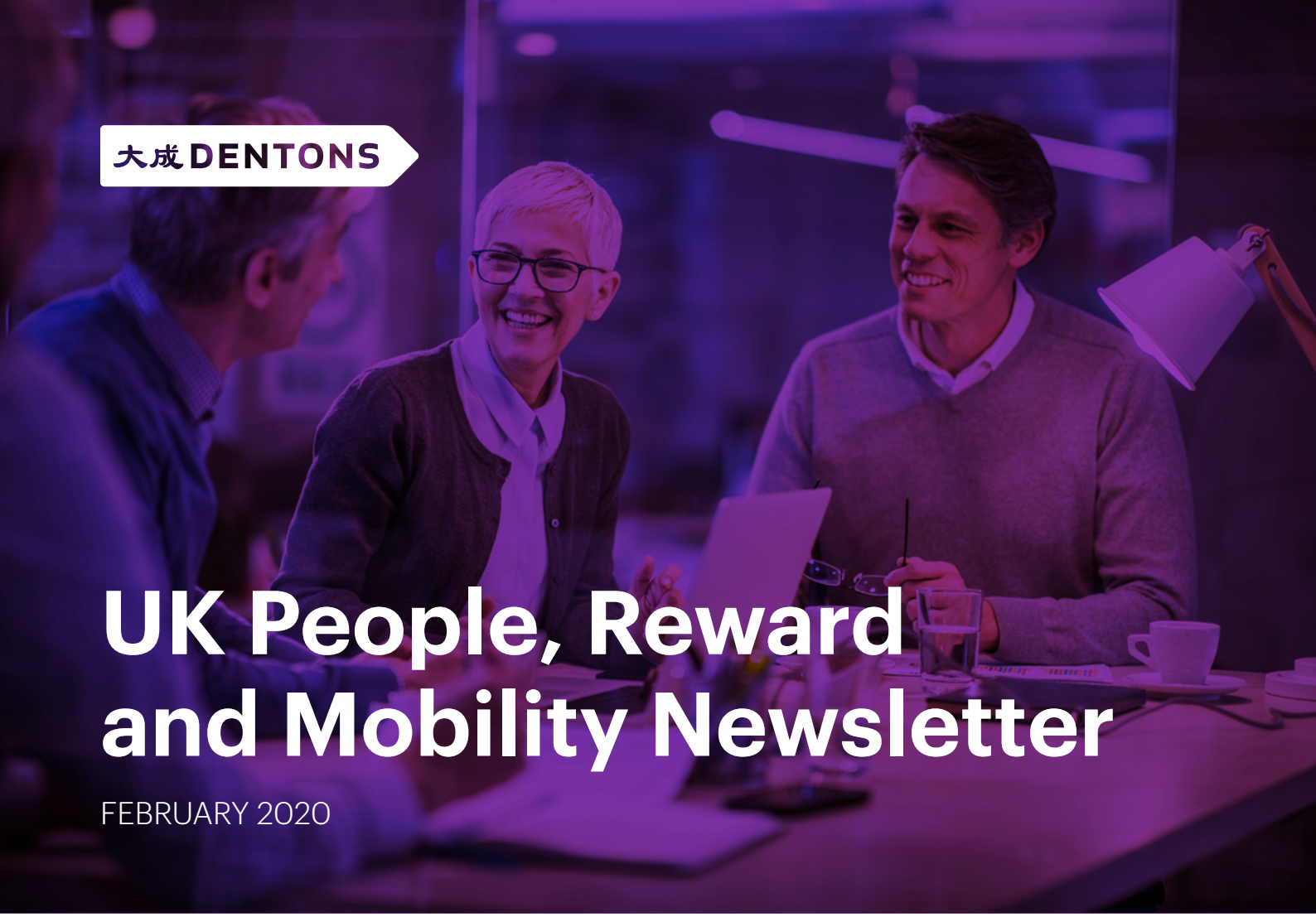


UK People, Reward and Mobility Newsletter

FEBRUARY 2020

IN THIS ISSUE

In this issue we look at some of the key employment law developments that have taken place over the past month. In particular, we examine: the extent to which an employer can infringe on an employee's article 8 (ECHR) rights in a dismissal case, the legality of a compulsory retirement age and when suspending an employee can amount to a breach of trust and confidence.

Find out more about our team, read our blog and keep up with the latest developments in UK employment law and best practice at our UK People Reward and Mobility Hub – www.ukemploymenthub.com

Q v Secretary of State for Justice UKEAT 0120/19

Background

The Claimant, Q, was employed as a Probation Service Officer (PSO) for the Probation Service (the Respondent), and had been in this position since 1994. In 2014, there was an incident at the Claimant's home involving her, her partner and her teenage daughter. It was alleged that the Claimant had been violent towards her daughter. The Claimant vehemently denied this allegation. Following this, social services decided to place the Claimant's daughter on the Child Protection Register (CPR) and made her subject to a Child Protection Plan (CPP).

The Claimant was advised by social services to tell her employer about the incident. The Claimant did not follow this advice and, as a result, social services informed the Respondent directly.

On being informed of the situation, the Respondent instituted disciplinary proceedings. These concluded that the Claimant, in failing to report the allegations, had committed gross misconduct. The Respondent issued the Claimant with a final written warning and demoted the Claimant to the role of Case Administrator.

In February 2015, the Claimant informed H, a senior manager, that her daughter was no longer on the CPR or subject to a CPP. At this point, the Claimant was instructed to keep H and her line manager up to date with any relevant developments.

In March 2015, another violent incident occurred between the Claimant and her daughter. This incident resulted in the Claimant being visited by a social worker and police officer. Q, the Claimant, informed H of this, but failed to inform her line manager. Q also failed to disclose to either that her daughter was subject to a new CPP, imposed because social services believed the Claimant posed a risk to her daughter. When this came to light, a new disciplinary process took place and resulted in the Claimant being dismissed.

The Respondent justified the decision to dismiss the Claimant because of her failure to disclose that her daughter was subject to a new CPP, and her refusal to engage with social services, a key statutory partner of the Respondent and of Q in her role as a PSO, in a constructive manner, which they feared would bring the reputation of the service into disrepute.

IN THE PRESS

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

- People Management – Include 'ethical veganism' in diversity policies, experts warn – Victoria Albon quoted
- HR Grapevine – Employers must protect 'ethical vegans' – Victoria Albon quoted
- Scottish Grocer – Good work bringing change this April – by Claire McKee
- HR Grapevine – Work Perks: Are hangover days inclusive enough? – Victoria Albon quoted
- People Management – The Good Work Plan in a nutshell – by Claire McKee

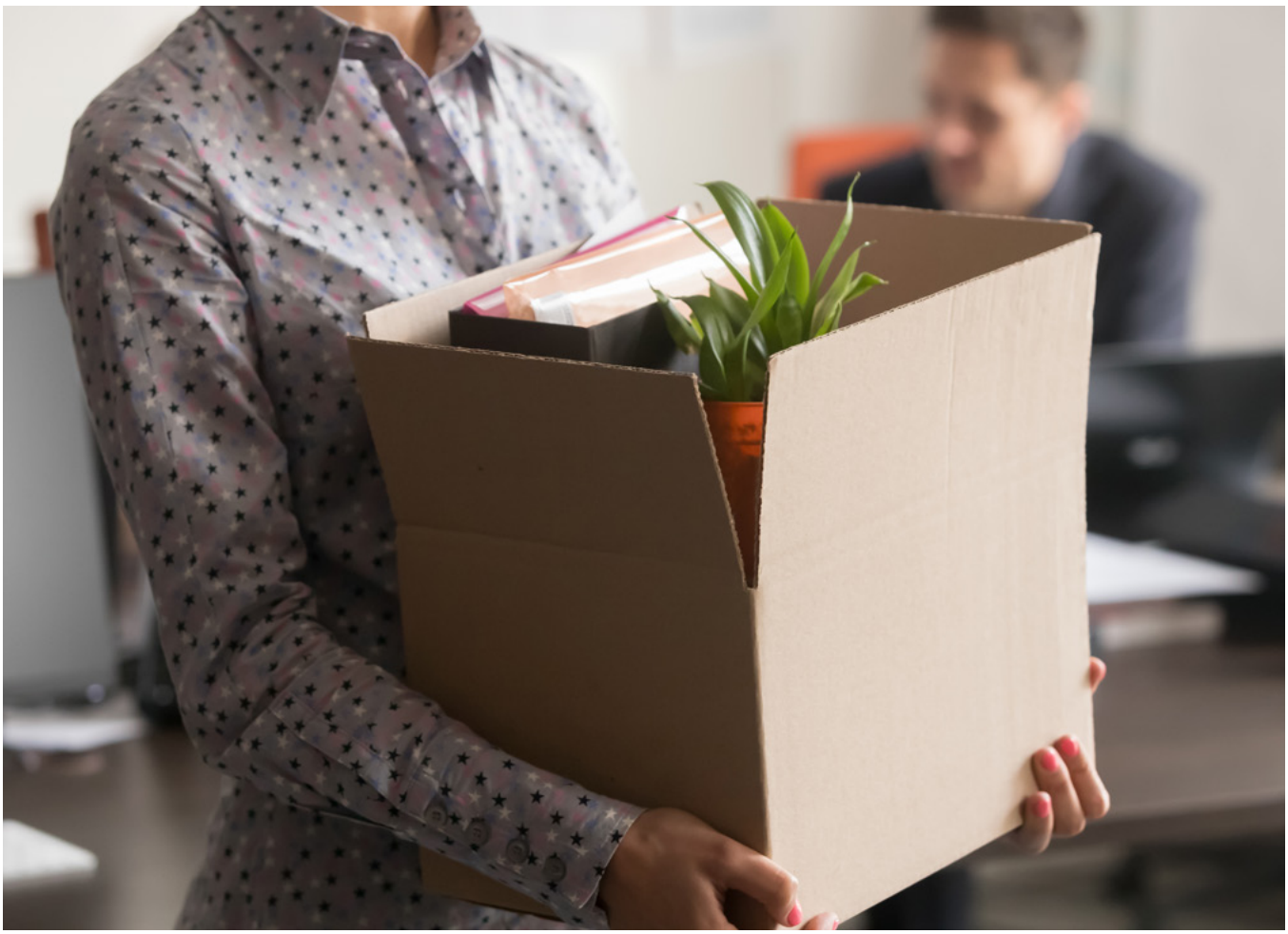
Decision

Q brought an unfair dismissal claim to the ET but this was rejected. The ET held that, in the circumstances, it was reasonable for the Respondent to dismiss the Claimant.

The ET found that the Claimant was aware that she was expected to inform the Respondent of the second situation, given that she had previously been issued with a final written warning. In addition, given a PSO's role in the criminal justice system, it was reasonable for the Respondent to expect high standards from the Claimant and, while the Claimant's Article 8 right (the right to respect for private and family life under the European Convention on Human Rights (ECHR)) was engaged, the dismissal was a proportionate interference with that right.

The Claimant appealed to the EAT. She argued that the ET had erred when finding that there had been a proportionate interference with her Article 8 right.

The EAT held that, although the interference with the Claimant's private life was significant, the ET had properly considered the extent of that interference. The Claimant was aware that she was required to inform her employer of any further issues between her and a family member in which social services were involved.



The Respondent did not require the Claimant to reveal every detail of what was going on in relation to her daughter. Instead, they legitimately requested sufficient information to establish whether any further incident was a cause for concern. The EAT also found that the fact that the Claimant was required to provide information regarding the ongoing situation with her daughter, as part of the implied duties of her contract of employment underpinned by the PSO's applicable codes and standards, was sufficient to demonstrate that the interference was "prescribed by law".

The EAT went on to dismiss the Claimant's argument that the interference was also disproportionate on the grounds that her conduct was not in the public domain and that it would not become public knowledge.

The EAT concluded that the Respondent had a legitimate aim in safeguarding its reputation. The Respondent could not ignore the Claimant's failure to disclose that her daughter was subject to a new CPP or view her actions as irrelevant. The Claimant had knowingly withheld information that she knew should be disclosed. The Respondent was justified in taking this into account, along with the Claimant's failure to engage with social services and her decision to ignore the instructions that were set out in the written warning. These were all factors that could raise concerns about her professionalism, thus damaging the reputation of the Probation Service.

Comment

This case highlights that it is for an ET to come to its own determination on whether or not a dismissal involves a disproportionate and unjustified interference with ECHR rights. It also provides guidance as to when an employer's interference with an employee's Article 8 right can be justified.

However, this case involved a claimant with an unusual job, namely a Probation Officer. Given the specific nature of that role, it is important to recognise that the ruling will not necessarily assist employers with employees in more regular jobs.

Not justified – ET hands down ruling on university's compulsory retirement age

In its recent ruling in the case of Ewart v. The University of Oxford, the Employment Tribunal (ET) found that Oxford University (the University) acted unlawfully in dismissing Professor Paul Ewart under its employer justified retirement age policy (EJRA). The EJRA, under which staff at senior grades must retire in the September before they turn 68, was introduced in 2011 with the stated aim of bringing younger and more diverse staff into the University.

Age discrimination has been unlawful since 2006, although the law allows employers to continue to operate compulsory retirement schemes. However, as with any form of direct age discrimination, such schemes must be justified, in that an employer needs to show it is seeking to achieve legitimate aims and the scheme does this in a proportionate way. The "legitimate aim" here must be related to social policy objectives and also be in the public interest.

In this case, the University sought to justify its EJRA by relying on a number of legitimate aims, including "succession planning", "intergenerational fairness" and "promoting equality and diversity" which it argued contributed to the overall goal of maintaining the University's standards.

The ET found that these were indeed legitimate aims and noted, in respect of the aim of promoting equality and diversity, that recent recruits were indeed more diverse than the existing workforce. The ET, however, went on to say that, while in principle the EJRA was capable of contributing to legitimate aims, in reality it only created an estimated 2-4% more vacancies than would otherwise have occurred – an effect the ET viewed as trivial when compared with the discriminatory effect it had on older workers. As the University could not show that the EJRA made an adequate contribution to its stated legitimate aims to justify its discriminatory impact, the Tribunal found the policy was not proportionate. It did not therefore need to go on to consider whether the particular retirement age chosen in the policy was itself appropriate.

Interestingly, the decision in this case contradicts an earlier judgment (Pitcher v. The University of Oxford) from May 2019 involving another professor of the University who was forced to retire under the EJRA, in that case however the policy was held to be justified by the ET. Both cases are first instance decisions and so are not binding, although it is understood that the University is considering whether to appeal the most recent judgment.

This case shows the high bar employers will need to reach to justify enforcing retirement at a given age. Employers not only need to show that an EJRA is linked to a legitimate aim with a wide public purpose, but that the scheme itself is an effective and proportionate tool in reaching that aim. It is also likely to be important for employers to be able to demonstrate that less discriminatory methods were looked at before a compulsory retirement age was introduced.

EDITOR'S TOP PICKS OF THE NEWS THIS MONTH

- UK introduces new parental bereavement leave from April 2020
- Right to work rules for small business
- Changes to the national minimum wage rules to reflect modern pay arrangements – though naming and shaming returns

Find out more about our team, read our blog and keep up with the latest developments in UK employment law and best practice at our UK People Reward and Mobility Hub – www.ukemploymenthub.com

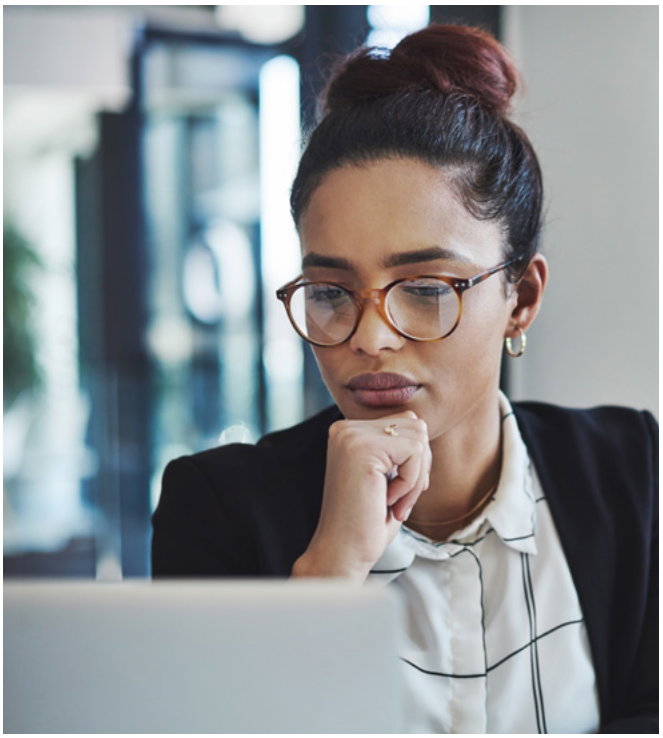
In combination with the May 2019 judgment, this case also demonstrates how subjective and fact-specific rulings on EJRAs can be and how the evidence presented regarding proportionality and effectiveness is likely to be key in determining outcome.

When is suspending an employee a breach of trust and confidence?

Suspension can be a very useful tool for employers. However, in certain circumstances it can amount to a breach of trust and confidence, which would then allow the suspended employee to resign and claim constructive unfair dismissal. The recent case of *Harrison v. Barking, Havering & Redbridge University Hospitals NHS Trust* (the Trust) has served as a useful reminder that employers need to be careful when making the decision to suspend an employee and to make sure that it is a proportionate step to take in all of the circumstances.

Facts

Ms Harrison is employed as the Deputy Head of Legal Services for the Trust. Her work mainly involves working on inquests, handling claims, providing advice to the Trust and legal teaching. Concerns about her handling of a clinical negligence case were raised. Prior to this, no issues with Ms Harrison's performance of her role had arisen or similar allegations made. The Trust decided to suspend Ms Harrison while an investigation into the allegations took place. Ms Harrison was not given details of the allegations that she was facing at the time of her suspension.



Ms Harrison was subsequently signed off with stress and anxiety. As many employers do in these circumstances, the Trust lifted her suspension and she was treated as being on sick leave. Ms Harrison was invited to return to work on restricted duties. She would have been doing largely administrative work and legal teaching, but with no casework. She refused to do so because she considered that to be a demotion and contrary to medical advice from an Occupational Health professional, which was to the effect that a return to full duties would improve her health. As a result, Ms Harrison was suspended again, this time for refusing to obey an instruction.

Ms Harrison sought an injunction permitting her to perform the majority of her duties autonomously while the investigation continued.

The decision

The High Court granted the injunction as it considered that Ms Harrison had strong grounds to argue that the Trust's actions amounted to a breach of the implied duty of trust and confidence. This is because the Trust was unable to show that there was a reasonable and proper cause for suspending her from most of her normal duties. As there had only been an issue raised in relation to a specific type of work, i.e. the handling of clinical negligence claims, suspension from all her normal duties was excessive. The Trust could have simply chosen to stop her from carrying out work on clinical negligence claims while the investigation took place. This would have had the effect of removing any risk to the Trust while allowing Ms Harrison to continue with her other work.

There was no evidence that enabling her to undertake the majority of her normal duties would harm the Trust. On the other hand, the suspensions had affected her health and were to her detriment professionally.

The High Court also took into account that further issues raised about Ms Harrison's other work had only been raised after the decision to suspend had been

made. In order for a suspension to be reasonable, the employer can only rely on issues that existed prior to the decision to suspend.

Because the High Court was considering whether an injunction should be granted, it had to take into consideration whether damages would be a sufficient remedy and where the balance of convenience lay. It decided both of these factors in favour of Ms Harrison.

This case again demonstrates that employers need to tread carefully when suspending an employee to avoid any claim that the implied term of trust and confidence has been breached. It is an unusual case as the employee concerned decided to apply for an injunction rather than resigning in response to the breach of trust and confidence and bring a claim of constructive unfair dismissal, but the principles remain the same. There has been no determination that the act of suspension was a breach of trust and confidence in this case, only that she had strong grounds to make out that argument.

What should an employer consider when suspending an employee?

It is important to consider each situation on its facts and avoid a "knee jerk" reaction that, because the allegations are serious, it is necessary to suspend. Generally, suspension is reserved for those cases where leaving the employee in situ is a risk to the business or other employees – for example, in cases of alleged theft or violence, or where their presence in the business will prevent a proper investigation taking place, such as by intimidating witnesses or destroying evidence.

As in Ms Harrison's case, the employer should consider whether there are alternatives to suspension which would remove any risk or threat to the business. For example, the employer should consider whether it is possible to move the employee to a different area of the business or to prevent them from carrying out certain aspects of their role.

Employers must also consider whether there are reasonable grounds for the suspension. Just because there is a serious allegation made against an employee does not mean that the decision to suspend is fair and reasonable. Employers should consider whether there is any evidence that, on the face of it, back up the allegations made. This does not mean that a full investigation needs to take place, just that there is some evidence.

Employers must give consideration to what colleagues, clients and third parties are told about the employee's suspension, as poor communication of the decision to suspend can also amount to a breach of trust and confidence. This is particularly sensitive when dealing with more senior employees who will be able to argue damage to reputation and the undermining of their position, if this is not handled correctly. Employers must make sure that communications made do not give any indication of an assumption that the suspended employee is guilty of the allegations. To do so would make it difficult for an employee to return to work, even if cleared of all allegations.

Summary

Suspension, when carried out properly, is really helpful and allows employers to remove employees from the workplace in order to conduct a full and thorough investigation into allegations that have been raised. However, despite employers making clear that it is not a disciplinary sanction and does not imply guilt, it is often viewed as such by employees. This means that care has to be taken when making the decision to suspend and when communicating that to employees. Provided that the employer has taken care over the decision and its wider communication, it will continue to be a useful tool.

UPCOMING EVENTS

#metoo: what it means for workplace culture and regulation Thursday 26 March 2020

In a period of media scandals and increased scrutiny by regulators what is the future of workplace culture, the use of NDAs, #MeToo and the law? Join Dentons for a panel discussion featuring guest speakers Dr Nina Burrowes, Georgina Calvert-Lee QC, and Zelda Perkins, followed by networking drinks and canapés..

- **London**
  Thursday 26 March 2020
  5.00pm – 7.00pm
  Dentons, One Fleet Place,
  London EC4M 7RA | Map

If you are interested in this event, please email the Dentons Events team at uk.events@dentons.com

Key contacts

Virginia Allen
Head of People, Reward and Mobility UK, London
D +44 20 7246 7659
virginia.allen@dentons.com

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

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

Purvis Ghani
Partner, London
D +44 20 7320 6133
purvis.ghani@dentons.com

Mark Hamilton
Partner, Glasgow
D +44 141 271 5721
mark.hamilton@dentons.com

Alison Weatherhead
Partner, Glasgow
D +44 141 271 5725
alison.weatherhead@dentons.com

Jessica Pattinson
Head of Immigration, London
D +44 20 7246 7518
jessica.pattinson@dentons.com

ABOUT DENTONS

Dentons is the world's largest law firm, delivering quality and value to clients around the globe. Dentons is a leader on the Acritas Global Elite Brand Index, a BTI Client Service 30 Award winner and recognized by prominent business and legal publications for its innovations in client service, including founding Nextlaw Enterprise, Dentons' wholly owned subsidiary of innovation, advisory and technology operating units. Dentons' polycentric approach, commitment to inclusion and diversity and world-class talent challenge the status quo to advance client interests in the communities in which we live and work.

dentons.com

CSBrand-23586-UK-People-Reward-and-Mobility-Newsletter-Feb-2020-03 — 26/02/2020