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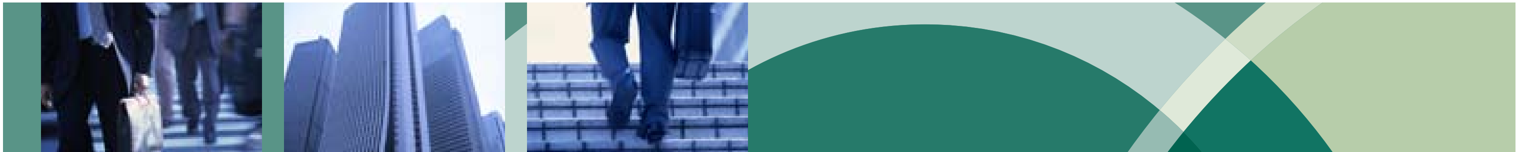
Law at work



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Features

You're fired: Employee misconduct and dismissal

As ever, this year's "The Apprentice" (which finished in June 2007) proved to be a highly entertaining, if not generally applicable, insight into how an employer might choose a new employee. One of the most interesting aspects of this series from an employment law perspective occurred off screen, not on. Katie Hopkins fired herself from The Apprentice on a Wednesday night, sold her story to the Sunday papers, and was fired for real by her then employer, the Met Office, the following week. The BBC reported that she was considering a tribunal claim arising from her dismissal, which a Met Office spokesman had explained was due to her failure to pass her probationary period.

The Met Office appears to have decided that enough was enough. Anyone watching The Apprentice, and following the stories in the papers that surrounded it, learned from an early stage that Katie was a brand consultant working for the Met Office allegedly earning £90,000 per annum (a spokesman for the Met Office denied that this salary was correct). Although the Met Office had granted her unpaid leave to take part in the programme, they may not have anticipated the interest in both Katie and her real job that followed.

An employer has the right to dismiss an employee whose private conduct damages its reputation, but to avoid claims no decision should be taken without first carrying out an investigation and considering whether there are any alternatives to dismissal. The outside conduct should be relevant to the job the employee does, and if their conduct shows that the employee is no longer suitable for that job it may result in dismissal. If the dismissal is to be fair, it is important that the employee realises that conduct outside work can have an effect upon their employment. It should be clearly explained in the disciplinary policy and in the contract of employment (especially if out-of-hours conduct could amount to gross misconduct). As Katie was employed by the Met Office as a brand consultant, they may have decided that their brand was being damaged by association with the story.

Of course, in Katie's case, if she was still within a one year probationary period, she had insufficient service to bring a claim for unfair dismissal.

The Met Office spokesman was quoted as saying that "uniquely", the Met Office required new employees to complete a probationary period. Whilst a year long probationary period is relatively unusual, the concept of the probationary period is not. Certainly, it is advisable for all employers to consider including in any new contract of employment a probationary period. As is usual in reviewing such a trial period, the Met Office confirmed that in considering whether an employee was suitable, factors taken into account were work performance, timekeeping, conduct and "a review of how a prospective employee is capable of achieving and maintaining an acceptable standard in all these areas".

Such extended trials have two benefits: Firstly, it is common to agree a shorter notice period during this time, so that if the arrangement is not working as had been hoped, it is quicker and cheaper to terminate the employment and to allow both parties to move on; Secondly, if a probationary period has been included, it is usual to arrange one or more reviews during that time, so any problems that do arise are more likely to be addressed and resolved at an early stage.

Whether or not employers include an express probationary period in the contract of employment, the first year of service can work in effect as an extended probationary period in any case as employees do not have the protection of the general right not to be unfairly dismissed. It is therefore sensible for a review after 9 or 10 months' service to be noted in the diary by HR or management as soon as the employment commences, as a final check that all is well and that the employee's employment should not be terminated for any reason. If this is not done, it is very common that the last date at which the employee can be dismissed without unfair dismissal rights is missed. The calculation is important as the Employment Rights Act 1996 makes clear that when calculating the first year of employment, the minimum notice period should be included. Therefore, in order to avoid the effects of unfair dismissal protection, an employer should dismiss an employee before the 51st week of service begins, as the law will automatically add one week's notice (regardless of the contractual notice position).

Of course, some claims do not require one year's service and therefore if Katie was serious about her intent to go to a tribunal, she may have the option of a sex discrimination claim. If she were to succeed in such a claim, she would need to demonstrate that the Met Office would not have dismissed a man in her position. Pictures had appeared in the papers several weeks earlier showing her with a married male colleague in a field (and it was later suggested that these pictures had been staged). We do not know whether the Met Office disciplined the man in question. However, she was not dismissed until the day after she sold her story to the News of the World, giving further details of her private life.

Under the Sex Discrimination Act 1975, Katie would need to show that her employer would not have dismissed a male employee in circumstances which were "the same, or not materially different" – for example, an employee in his probationary period who sold tales of his infidelities with colleagues at the Met Office, named in the reports.

Whilst most employers hope never to have to deal with salacious reports in the Sunday tabloids, affairs between employees are rather more common. All employees have a right to a private life and it is only where that private life impinges upon their work that an employer has a right to become involved. To avoid claims, it is wise not to discuss or discipline only one party to a relationship or event. Depending on the gender balance of the employer in question, it may be indirectly discriminatory to insist that the more junior employee is transferred. Businesses should make sure that equal opportunities and harassment policies are in place and upheld, and that employees are trained on what kinds of behaviour is or is not acceptable in the workplace.

By Rachel Farr

This article has previously appeared in a similar form in Complinet.

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Beware the PAYE debt trap: Managed Service Companies

New debt transfer legislation in the Finance Bill 2007 is set to provide HM Revenue & Customs (HMRC) with unprecedented powers to transfer liability for unpaid PAYE to anyone actively involved in the provision of an alleged Managed Service Company (MSC).

What is an MSC?

A company (or a partnership) may be considered a MSC if its business consists wholly or mainly of providing the services of an individual to other persons; if payments equal to all or the greater part of the services are made (directly or indirectly) to the individual worker; and if the way in which payments are made may result in the worker receiving a higher amount than if the payments were taxed as employment income. A simple example would be where a group of individuals become shareholders in a service company. Their services are provided by the service company to a third party client. They are paid the minimum wage by the services company and paid the balance by dividends. This produces an overall lower rate of tax for such individuals.

PAYE liabilities of an MSC

Under the new regime, MSCs will be liable for PAYE and employer's NIC on any direct salary paid to a worker and on any "deemed employment payments" at the date the payments are made. These deemed payments include dividend payments. MSCs found to be in breach of this legislation face a gross bill to re-claim unpaid PAYE and NICs, backdated to 6 April 2007, as well as a penalty fee.

Transfer of PAYE debt

More worryingly for organisations involved in employing workers via MSCs, there are new PAYE regulations which will enable HMRC to serve a transfer notice on persons associated with the provision and running of an MSC. Persons potentially liable for the transfer of PAYE debt include MSC scheme providers as well as directors, officers and associates of the MSC and MSC scheme provider. The legislation also allows more broadly for liability to be transferred to any person who has encouraged, facilitated, or otherwise been actively involved in the provision by the MSC of the services of the worker – and their directors, officers and associates. HMRC will only target such individuals after

notices have been issued to the MSC, MSC provider and officers and it has been established that recoveries from these persons are either impossible or impracticable. Exemptions will be available for persons merely providing legal or accountancy advice in a professional capacity.

Employment business/agencies

In May this year, HMRC issued guidance on the tests that will be applied in determining whether or not the new MSC tax regime applies to employment organisations and set out indicators of whether a scheme provider is an MSC provider.

HMRC has said that where an individual asks about being employed through a company, an employment business should be careful to only provide factual information to employees about the manner in which they can be engaged. Although they can state that different engagement models have different tax and national insurance implications they should not advise as to which one an individual should use.

This advice is clearly relevant to third party clients. A third party client should not recommend the use of an MSC as that could mean that the client would be actively involved.

Cautious approach

It is clear though that, while the provision of factual information to workers is permissible, organisations should avoid recommending tax preferential payment / engagement models if they want to avoid the risk of being classified as being "involved" with an MSC or being classified as an MSC provider. The safest approach for a client company to avoid falling into the MSC PAYE debt trap is to employ individuals directly and not through service companies.

By Ann Casey

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Case law update

Hospice of St Mary of Furness v Howard (2007) UKEAT/0646/06/MAA

Why care?

Where claims are made under the Disability Discrimination Act 1995 (DDA), a person has a disability if they have "a physical or mental impairment which has a substantial and long term effect on their ability to carry out their normal day to day activities". "Impairment" is not defined in the DDA and case law has long attempted to clarify this point. It has been held that it should bear its ordinary and natural meaning, that an impairment needn't be well recognised or that a person could have a physical impairment even though its cause could not be identified and it could not be said that the person was suffering from any "illness".

This increasingly wide definition of impairment has inevitably led to respondents attempting to challenge the decisions of medical experts, when they are faced with a finding of impairment where there is no identifiable cause. The Howard case deals with the issue of whether a party can prepare their own second report when they have already agreed to a joint report but are dissatisfied with its findings.

The case

Mrs Howard started employment for the Hospice in May 2004 as their director of nursing. She suffered acute back symptoms a few weeks later while on leave. In July 2004 she received a report from an orthopaedic consultant instructed by the Hospice, who told her that her symptoms could be related to a spinal disease which she had suffered from previously. Later, in October 2004, the Hospice's Occupational Health specialist reported that Mrs Howard had made a full recovery and could return to full duties but she was dismissed on 7 November 2004.

Mrs Howard issued proceedings alleging disability discrimination and victimisation, and claimed around £500,000 compensation. The parties agreed to jointly instruct a medical expert. He concluded that whilst there had never been a precise diagnosis, Mrs Howard's symptoms were genuine. The Hospice then put a series of questions to him, to which he answered that the absence of a precise diagnosis did not mean that there was no organic cause or underlying orthopaedic condition responsible for Mrs Howard's back pain.

The Hospice then instructed a consultant orthopaedic surgeon Mr Hodgkinson to prepare a report on the basis of the documentary evidence who found that although Mrs Howard suffered from intermittent back pain, her ability to carry out normal activities should be unaffected. The question then put by the parties to the tribunal was whether Mrs Howard should be examined by Mr Hodgkinson to produce a full medical report. The Tribunal held that the first specialist had properly concluded, on the basis of reported symptoms, that a physical impairment existed and therefore Mr Hodgkinson would not be able to help the tribunal any further. Applying previous case law there was no good reason for the parties to endure the delay, anxiety and expense of a further medical report. The Hospice appealed.

The EAT allowed the appeal:

- It is not necessary for a claimant to establish the cause of an alleged physical impairment; but
- Where there is an issue as to the existence of a physical impairment it is open to a respondent to seek to disprove the existence of such impairment. This could include seeking to prove that the claimed impairment is not genuine or is a mental and not a physical impairment.

The EAT allowed the Hospice to rely on the second report. They stressed that the Hospice's reasons for obtaining the second report had to be taken into consideration. The first report had concluded that there was a physical cause for the symptoms, but could not provide any proof for this or a clear diagnosis. It was therefore not surprising that the Hospice wished to produce its own report. The level of damages claimed was also taken into consideration by the EAT. Given that the claimant had served a schedule of loss in the region of £500,000, the additional expense and delay that would arise from a further expert being instructed was not disproportionate in the circumstances of this case.

What to take away?

A party can obtain a second report, even where they have agreed to a joint report, if they have a good reason, and if doing so would not be disproportionate.

Whilst a claimant does not need to establish a cause for a physical impairment, without one their case is more open to being challenged by the employer.

The case in part hinged on the attitude by the EAT to the large sums being claimed by the claimant in her schedule of loss, despite the expert predicting that her disadvantage in the labour market was not greater than when she had been recruited by the Hospice. The EAT decided that the further expense and delay of further medical evidence was justified given the high value of the claim. In lower value cases there is usually a more "rough and ready" approach to medical evidence, and often this may favour the employee.

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PennWell Publishing (UK) Limited v Isles & Ors [2007] EWHC 1570(QB)

Why care?

Where an employee sets up their own business, and then leaves their current employment to pursue this business full time, a number of legal parameters apply. This case considered these general concepts in more detail, and also specifically addressed the situation where a list of contacts, stored on an employer's computer but containing personal details collected before the employment began and whether they belong to the employer or employee.

The case

Mr Isles was a journalist who was employed as a publisher and conference chairman for PennWell's international conferences for the power industry. In 2005 Mr Isles and two colleagues from PennWell set up a new business, EBG, which was launched in September 2006. All three employees had submitted their resignations in July 2006. Mr Isles' employment terminated on 8 September 2006 after an important Power conference (which he had planned) had taken place. The two colleagues attended this conference and whilst they were there approached and solicited various customers of PennWell. For 11 months prior to his departure, Mr Isles was a director and company secretary of EBG, in which he had a substantial financial interest.

During his employment with PennWell he created and kept his personal contacts list on PennWell's Outlook e-mail system and downloaded them onto a memory stick shortly before he left PennWell. The database included business and personal contacts of which 80% he had made prior to his employment. PennWell applied for an interim injunction against all three former employees and EBG for (amongst other things) the return of confidential information. It settled its claims against the two colleagues and EBG.

The main question to be resolved by the High Court was with regard to Mr Isles' contact list was whether it:

a) belonged to PennWell to the exclusion of Mr Isles;

b) belonged to Mr Isles to the exclusion of PennWell;

c) was jointly owned and run by both.

Mr Isles' employment contract provided that all documents, manuals, hardware and software provided for his use by the company remained the property of the company and must be returned when employment ceased. What was the status of the contact list? Was it confidential information belonging to PennWell which it was entitled to retain to the exclusion of Mr Isles?

The court held that although the contacts list did not amount to a trade secret that where an address list is contained on Outlook or a similar program which is part of the employer's email system and backed up by the employer, the database or list belongs to the employer.

Mr Isles also argued that his status as a journalist affected his right to the contact list as the majority of the contacts on the list had been made prior to joining PennWell, and to deprive him of it would be a in breach of his right to freedom of expression under Article 10 of the European Convention on Human Rights 1950. The court held that PennWell was not trying to restrict him from contacting his journalistic sources, nor from using any information which he held independently of a contacts list belonging to PennWell. The protection of his confidential sources was not threatened; indeed Mr Isles had expressly confirmed that he did not seek to restrain PennWell from retaining a copy of the list.

The court granted an injunction to PennWell, but only in relation to those contacts not known to Mr Isles when he started his employment. The court made this concession to Mr Isles on the ground that the employer's email policy had not been made clear to him. PennWell had an email policy but had failed to communicated it adequately to Mr Isles. Neither was it incorporated into his contract of employment.

The High Court also held that in setting up EBG he was in breach of his contract which prohibited him from having any other job or being interested in any other business (i.e. in EBG) during his employment. His actions and those carried out by his colleagues in attending the conference with his knowledge, approval and participation had gone beyond preparatory steps. His interest in promoting EBG at the conference was in direct conflict with PennWell's aims in running the conference. If he had been a prudent conference organiser he would have taken reasonable steps to control any competitive canvassing.

What to take away?

Employees who bring personal contacts to their employment should store them separately and not on their employer's computer system, as that database or list of information belongs to the employer. Similar standards should be applied to other data storing devices e.g. mobile phones or blackberries. Employers should ensure that their email policies clearly identify that address and contact lists created and maintained in e.g. Outlook are the property of the employer. Such policies should also be properly incorporated into employee's contracts of employment and communicated to them.

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Hot topics

DTI name change

Under Gordon Brown's leadership the Department of Trade and Industry has changed its name to Department for Business, Enterprise & Regulatory Reform and its website now reflects this name change.

National Minimum Wage increases announced for October 2007

The government has announced the National Minimum Wage rate increase from 1 October 2007. The adult rate (workers aged 22 and over) will increase to £5.52 (currently £5.35). The development rate for 18-21 year olds will increase to £4.60 (currently £4.45) and for 16-17 year olds will increase to £3.40 (currently £3.30).

ACAS to be used in EAT cases

ACAS is to provide conciliation in EAT cases referred to it where a case could be referred back to an Employment Tribunal, appeals relating to monetary awards or where the parties' employment relationship is ongoing.

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