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Features

National Staff Dismissal Register – Guilty until proven innocent?

Hands up those who have dismissed an employee for dishonesty only to find to their amazement that the ex-employee has somehow managed to find another job, seemingly with no questions asked?

Staff theft and fraud costs the retail sector about £497 million per year. The British Retail Consortium estimates that three million people were employed in the retail industry at the end of 2007. Checking the history of applicants in a sector with a high staff turnover is time-consuming and expensive. The National Staff Dismissal Register, a joint initiative between Hicom Business Solutions and Action Against Business Crime (a partnership between the Home Office and the British Retail Consortium), is intended to help retail employers check the credentials of job applicants against a national register.

The publicity surrounding the initiative has been surprisingly low-key, considering that the retail sector employs about 11% of the British workforce, but a quick Internet search reveals the level of concern about this register amongst employees, trade unions and civil rights organisations.

The register is only accessible to subscribing members. According to the BBC, these include organisations such as Selfridges and Harrods. Members should inform staff and applicants that the register will be checked and that information will be submitted to it.

The names and photographs of staff who have been dismissed for or who have left their employer while under suspicion of:

- theft of money, merchandise or property,
- falsification or forgery,
- fraudulent acts,
- causing a loss to the employer or another party; or
- causing damage to the employer's property,

can be submitted to the register. Members are required to confirm that the reason for dismissal (or, presumably, resignation) falls into one of these categories.

The site is protected with security software and passwords are needed to access it (although recent high-profile data security breaches elsewhere prove the point that any system is only as secure as its weakest point). Hicom is careful to emphasise that users must comply with the Data Protection Act 1998.

This all seems fair enough, if you are an employer battling issues of staff theft or fraud. However, employees are alarmed for a number of reasons.

There is no requirement for an employee to have been prosecuted in relation to the particular allegation made against them. As employers only need to have reasonable belief that an employee has been guilty of misconduct and to have carried out a reasonable investigation, an employee risks being blacklisted and unemployable, on a lower standard of proof than that required by the criminal courts. Not all employers will have a reasonable suspicion of guilt, nor will they necessarily carry out a full investigation, yet they have the ability to destroy a person's career by including them on the database. One employer may regard the non-business use of paperclips as tantamount to dishonesty, whereas others might take a more relaxed view. If the first employer decided to include the paperclip-abusing employee on the register, the employee has to hope that a new employer would take a less draconian view – the example is exaggerated but the point is obvious.

Another concern is the fact that employers can include the names of individuals who resign before they are dismissed. This is logical – there is no point in having such a register if it can be circumvented simply by resignation. However, employees resign for many reasons and it may be that an individual has no faith in the employer's desire or ability to be fair and decides to resign in the hope that that will at least help in the search for a new job.

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Despite the fact that Hicom regard the reasons for including someone on the database as being sufficiently narrow, those reasons seem open to interpretation – for example, what counts as "causing a loss" where such loss is not the result of theft or fraud?

Various comments posted on the Internet indicate a general level of concern about the ability of unscrupulous, vindictive or just plain careless employers to use the site to target unlucky employees. While some of the fears may be self-serving or slightly hysterical (hopefully managers have better things to do with their time than target staff) this may happen in some cases. There are safeguards within the system intended to prevent its abuse. Amongst other things, access is monitored, users have to support the inclusion of data onto the system with some evidence and members are required to comply with their obligations as data controllers, which includes compliance with the rules covering issues such as the accuracy and retention of data.

Employees can complain to the Information Commissioner if they believe that information is inaccurate. The Commissioner can investigate complaints but his aim is to help organisations comply with their obligations – not to provide compensation. This does not help somebody who may have lost a string of jobs as a result of inaccurate data. In addition, while the Commissioner pledges to investigate complaints within a reasonable period, he will inevitably be constrained by the resources available to him, so the resolution may take more time than an individual can afford. In the meantime, the genie is out there, causing havoc.

Defamation laws apply to the register as much as they do to any other publication. The publisher of the register and employers posting information need to be careful about the accuracy of the data they wish to publish – indeed, Hicom and AABC point out that, to comply with the Defamation Act 1996, members must ensure that there is sufficient evidence to support their interpretation of the event giving rise to the addition to or amendment of the register – however, if an employee wanted to sue either the publisher or a member posting information, publisher and member will need to rely on justification as a defence. For example, an employer would need to be able to show that they have reasonable grounds to suspect that an employee has done a particular act – it remains to be seen whether evidence that an employer may deem to be sufficient for the purposes of the register, would be sufficient from the point of view of a court. There are practical problems for an employee wishing to take this route – retail employees often earn low wages and the cost, effort and time required to pursue such a claim will deter all but the most determined of people.

In some circumstances, Employment Tribunals could find themselves considering the implications of the register. For example, if an employee alleges that their treatment was discriminatory and that their inclusion on the register amounts to victimisation, an employer could then be liable to pay compensation – because the register is accessible to a number of employers (i.e. it is not a case of a poor reference being supplied to just one organisation), the employee's losses, for which he or she should be compensated, are likely to be greater. This may also be relevant in the context of unfair dismissal compensation – an employee whose name appears on the register but who subsequently succeeds in an unfair dismissal claim may be able to allege that their inclusion on the register has made it impossible for them to mitigate their loss, thus increasing compensation.

The ease with which information can be shared makes it inevitable that data about individuals will be circulated more readily. This register applies to the retail sector but there is no obvious reason why other sectors could and would not adopt something similar – those employed in the financial sector have long been aware that employers are under an obligation to supply information about departing employees to the FSA. It is simple to state that honest employees should have nothing to fear from such a register and that may be true – however, it is also the case that people working in a low-paid and often low-skilled area may be less able than others to protect their reputations where an employer has unfairly or inaccurately included information about them on the register. Despite the potential problems, we should anticipate that such registers will be used more often by employers who want a relatively easy method of checking up on who they recruit. It remains to be seen whether Hicom and AABC's predictions that the register will give "time saving resulting from a more efficient recruitment process with potentially lower staff turnover" and that the system will act "as a deterrent to existing staff against dishonesty" will prove to be true.

By Naomi Branston

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Temporary and agency workers – Agreement on "Equal Treatment"

As the first "National Temporary Worker's Week" drew to a close recently, the UK Government agreed a deal between unions and employers that seeks to reduce the current employment rights gap for the 1.4 million temporary workers who currently find themselves with little in the way of employment rights.

The number of temps in the UK has increased in recent years, as workers seek greater flexibility and companies require smaller headcounts to appease the accountants in times of economic instability. A recent survey showed that 67% of employers have hired a temp to fill a senior/highly skilled role in the last year and 88% have offered full-time permanent employment as the result of exceptional performance¹.

Background

The European Commission first tabled provisions giving temporary workers equal rights in 2002, when it was suggested that equal rights to those for full-timers should be afforded after only six weeks' service. The Confederation of British Industry (CBI) was not a supporter of the proposals and believed that the integral role of temporary workers to the UK's flexible economy would cause great damage, as employers would be discouraged from utilising this important pool of workers, particularly given the very short proposed qualifying period for equal treatment. Unsurprisingly, this view was not shared by Trades Union Congress (TUC), who had long campaigned for the extension of employment rights to all workers and was keen to put pressure on the Government.

Gordon Brown's support for the principle of giving the same employment rights to temporary and agency workers had caused the CBI and the TUC to clash, but a compromise position has been reached and it is envisaged that the "equal treatment" provisions will come into force by 2010. The Prime Minister called it "the right balance between fairness and flexibility"², but it may mark the end of a long-running battle and help to relieve some of the confusion that exists with regard to the legal status of temporary and agency workers.

In the UK, it was also seen as an opportunity to 'tidy up' the legal position on temporary workers and their status, particularly following conflicting case law (such as *Dacas v. Brook Street* and *James v. Greenwich*) which could be construed to leave agency and temporary workers in limbo, with no entity to turn to if they felt they had been mistreated.

Europe recently reached political agreement on the implementation of the Temporary (Agency) Workers Directive³ and the UK was keen to reach an agreement before the European Council meeting being held in mid-June under the Slovenian presidency of the EU. The current spokesperson for Employment being a Slovenian Commissioner, there was a certain inevitability about the UK's announcement and the agreement by the CBI of a 12-week qualifying period will no doubt be viewed as the best deal that could have been expected for users and suppliers of agency and temporary workers. Martin Broughton, the President of the CBI, called it, "the least worst solution. But it will still inhibit the labour flexibility that gives Britain its competitive edge"⁴.

The new proposals

The proposed new law would entitle temporary workers to be treated 'equally' to permanent employees after only 12 weeks' service with respect to the basic working and employment conditions that would apply to the workers concerned if they had been recruited directly by the undertaking to occupy the same job. This is likely to include equal rights relating to:

- (a) notice of termination;
- (b) vocational training;
- (c) "amenities";
- (d) the right to be notified about vacancies for permanent employment; and
- (e) grievance procedures.

¹ <http://www.rec.uk.com/press/news/244>

² <http://www.guardian.co.uk/politics/2008/may/21/tradeunions.gordonbrown>

³ http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/lsa/101031.pdf

⁴ <http://www.blogs.telegraph.co.uk/business/yourbusiness/may08>

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However, there is no guarantee that "equal treatment" would not entitle parity of occupational social security schemes, such as sickness pay or maternity leave/pay.

The proposals are at an early stage and it is too early to speculate about how the details will look in a year's time, but the Government has committed to consulting with various social partners to assist in the implementation of the agreement, particularly in deciding how disputes will be resolved and to introduce adequate anti-avoidance provisions.

The potential impact

The CBI argued that by introducing these rights for temporary workers, the Government was essentially taking away the very reason that companies used temporary workers in the first place and would discourage them from doing so in the future. A recent survey seems to discredit this view with 84% of employers intending to increase their temporary workers in the near future⁵.

This may be due to the current economic instability in the UK and the fact that companies are keen to reduce their headcounts and it is certainly feasible that, in times of economic prosperity, companies will not be so keen to employ temporary workers when they are forced by law to provide them with the same employment rights as those officially "on the books". This could be particularly true for US companies who are employing in the UK and who often prefer to use temporary or agency workers when first starting out in the UK given the disparity in employment laws afforded to permanent employees in the two jurisdictions.

Conversely, some industries (such as IT and engineering) are unlikely to see any impact as temporary workers in these areas have historically been remunerated at a higher level than those who are permanent employees of the company they have been assigned to.

The truth is, we cannot possibly know how this will impact on the UK's business, particularly as so little detail about the proposal has been released as yet. The more cynical of readers will note that the agreement of this deal coincides with the agreement by the EU that the UK can keep its opt-out of the 48-hour working week under the Working Time Directive⁶ (see this edition of Law at Work) – perhaps the motivation that the CBI needed to agree to the deal in the first place!

By Mark McCanney

⁵ <http://www.rec.uk.com/press/news/244>

⁶ DBERR Press Release – 10 June 2008

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Case law update

Compromise agreements: New clauses to benefit employers upheld

Collidge v Freeport (2008) EWCA Civ 485

Why care?

Employers sometimes agree termination settlements and then regret doing so, typically where misconduct is discovered after paying substantial compensation to a departing employee. Recently, some employers have started including "clawback" provisions in settlements, to deal with these situations. One way of protecting the employer is to include a warranty that:

- the employee has done nothing wrong; or
- the employee does not have another job lined up.

This case shows that if an employee is in breach of an important warranty under a compromise agreement then the employee is not entitled to payment under it.

The case

Mr Collidge, the claimant, resigned from Freeport amidst allegations of financial impropriety. The terms of the compromise agreement subsequently agreed stated that payment of the compensation was "Subject to and conditional upon the terms set out below". These included, at Clause 7(b) of the compromise agreement, a warranty that "there are no circumstances of which you are aware or of which you ought reasonably to be aware which would entitle or have entitled the company to terminate your employment without notice."

The day before the agreed compensation was due, Freeport's solicitors wrote to the claimant's solicitors saying that investigations had revealed a breach of clause 7(b) and so payment could not be authorised. The claimant's solicitors said that payment was due and started proceedings.

The court held that the warranty at clause 7(b) was an important condition to Freeport's liability to perform its obligations under the agreement. It also found that there were numerous circumstances of which the claimant was aware which constituted repudiatory breaches on his part of the contract of employment which would have entitled Freeport to terminate his employment without notice.

The Court of Appeal rejected various legal arguments put forward by the claimant. It held that on the construction of the compromise agreement, it was clearly agreed that if the facts Mr Collidge warranted were not true, Freeport would have no obligation to make the payment under the agreement.

What to take away

Employers should amend their template severance terms to include this sort of condition to payment. There are other clauses which can be adopted to cover specific concerns such as confidentiality, ongoing litigation and business protection.

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Public sector pension schemes: Survivor benefits to civil partner

Maruko v Versorgungsanstalt der deutschen Bühnen **(Case C – 267/06) [2008] All ER(D) 07 (Apr)**

Why care?

Following this European Court of Justice ("ECJ") case, public sector pension schemes may be required to provide full survivor pension benefits to the surviving civil partners of deceased members where they provide them for spouses. Employers and trustees should be prepared for the possibility of new legislation which extends this requirement to all schemes.

The case

This case was referred to the ECJ from Germany. Mr Maruko was the surviving civil (life) partner of a deceased member of a pension scheme. The pension scheme did not provide for a survivor's pension to be paid to Mr Maruko although it did make provision for the payment of survivors' pensions to the surviving spouses of deceased members. Mr Maruko claimed that this constituted discrimination under the European Equal Treatment 'Framework' Directive 2000 which provides for equal treatment in employment and occupation irrespective of sexual orientation, religion or belief, disability or age.

The ECJ ruled that a survivor's pension derived from the employment relationship of Mr Maruko's deceased partner. It therefore constituted "pay" and fell within the scope of the European Equal Treatment 'Framework' Directive 2000. In Germany, civil partnership was introduced in 2001 and placed on an equal footing with marriage from 1 January 2005. Therefore, given that national legislation put civil partnership on a comparable footing with marriage, a surviving civil partner was entitled to comparable survivor benefits to those received by a surviving spouse and the provisions of the scheme constituted direct discrimination. Significantly, the ECJ held that the scheme could not restrict the effect of the decision by applying it from a specified time.

What to take away

UK legislation provides that occupational pension schemes must pay the same pension benefits to the surviving civil partners of members as are paid to surviving spouses, but this currently applies in respect of pensionable service worked by members after 5 December 2005 only, when the Civil Partnership Act came into force.

Following this case, the current UK position may be incompatible with European law and public sector schemes may have to provide pension benefits for surviving civil partners in respect of all pensionable service worked by the deceased member. It is possible that the Government will introduce new legislation requiring all pension schemes to do the same.

Employers and trustees in the public sector should regularly review their obligations. Those in the private sector should keep a close eye on possible legislation.

Hot topics

Information Commissioner's Office (ICO) issues new guidance on complying with data protection issues on a TUPE transfer

When transferring employees under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), the transferor is required to provide the transferee with employee liability information i.e. specific details which include the identity of the employees, contractual details and disciplinary records. The ICO has issued a "Data Protection Good Practice Note" which offers guidance to employers disclosing such information under TUPE. It notes that the Data Protection Act 1998 (DPA) allows this disclosure because it is required by law. However, both parties must take care to comply with data protection principles such as making sure that the information is accurate, up to date and secure. The new employer must be careful to use it only for the purposes of TUPE, such as assessing liabilities or planning how employees are going to be adopted into the business.

The guidance confirms that employment records can be passed on to the new employer, "which should consider whether all the information in the personnel files is needed and delete or destroy any unnecessary information". Similarly, the former employer can also keep personal information after a transfer to e.g. deal with any liabilities but the DPA would only allow this for as long as the transferor had a justifiable need to keep the information and for as long as is necessary.

The situation where TUPE obligations do not apply, such as share sales or at an early bidding stage, but where employers may need to disclose personnel information, is also explored in the guidance. It suggests that wherever possible the employer should release information that is anonymous or, at the very least, should remove obvious identifiers such as name.

[The ICO guidance can be found here.](#)

Employment Bill – Latest update

The Employment Bill, to revise the procedure for the resolution of employment disputes following the Gibbons Report, received its third reading in the House of Lords on 2 June before the Bill passed to the House of Commons on 3 June 2008. This follows amendments about both the right of trade unions to expel or exclude members on the grounds of membership of a political party and what is acceptable membership of a political party.

TUC and CBI publish joint report on diversity in the workplace

The TUC and CBI have published a report "Talent not Tokenism – the business benefits of workforce diversity". It identifies ways in which companies that employ people on the basis of their abilities and potential, regardless of sex, race, disability, age, sexual orientation or religion can benefit. These include addressing skills shortages, increased morale, productivity and retention of staff and understanding of customers' needs. The report features twelve case studies featuring businesses of differing sizes which have developed a more diverse workforce. It includes sections on the business benefits of greater diversity, attracting and retaining talent, understanding customers and attracting new business and filling skills gaps. [The report can be found here.](#)

EU agrees UK opt-out of 48 hour working week can continue

The EU Employment, Social Policy, Health and Consumer Affairs Council met on 9 June to discuss aspects of the Working Time Directive and issued a press release outlining the agreement reached. This includes a compromise text providing for the "possibility of the opt-out clause, accompanied by a number of conditions in order to guarantee the protection of health and safety of workers". In essence the UK opt-out will remain, albeit in a modified form.

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The new amendments include a cap of an average of 60 hours per week averaged over three months for those who have opted out, and sets new conditions on the use of the opt-out such as renewing the agreements on an annual basis, and for the opt-out to be signed no sooner than four weeks after employment commences. The Department for Business, Enterprise and Regulatory Reform (DBERR) also issued a press release on this matter with the UK Government's Business Secretary, John Hutton, stating that "This agreement means that people remain free to earn overtime and businesses can cope during busy times." The new proposals, in their final form (as yet to be agreed by the European Parliament) may well not apply before 2012.

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