



For more information on any of the articles in this edition of Nice Work, please contact the Employment Team on 01622 690691

The Genuinely Aggrieved

What do you do when faced with a genuine grievance from an employee?

What happens if the grievance is based on allegations of discrimination and you fear a large Employment Tribunal award?

The available options can seem less than appealing. A possibility is to ignore the complaint and hope things resolve themselves.

This is rarely the case and with the prospect of up to a 50% uplift in compensation in the event of a successful Employment Tribunal complaint the risks are substantial.

Employers may want to consider alternative courses of action in order to deal with the situation and manage the risks faced. These could include:

dealing with the grievance and taking appropriate action against the individual who discriminated. This has clear attractions in that good practice dictates the grievance must be dealt with. Employers should also take appropriate action to reduce future risks to the organisation. However, even if best practice is followed you may still be faced with an aggrieved employee who is angry at the treatment and wishes to be compensated.

A compromise agreement is a possibility and has distinct advantages in that if properly completed an employer can be confident the matter is resolved. However, commencing "without prejudice" discussions with an aggrieved employee can be difficult. If agreement cannot be reached about an appropriate level of compensation and/or the employee makes unrealistic demands the organisation's position may be weaker than when the complaint was raised.

Dealing with the grievance and admitting the discriminatory act may seem a high risk strategy but in some cases this may not be the case. As indicated above, there is little alternative but to deal with grievance. If well founded, the outcomes will necessarily include dealing with the employee about whom the complaint has been raised and could also encompass an offer of compensation calculated by taking account of the basis for the complaint and the amounts an Employment Tribunal might award. If the employee who complained still remains unhappy and issues a complaint then providing the offer of compensation has been sensibly calculated an employer's claim for legal costs is strengthened and the Employment Tribunal may be persuaded that the employer's estimate of the appropriate level of compensation is correct.

You will not be surprised that we would recommend you take legal advice if you receive a grievance alleging discrimination, but when considering the options it may in appropriate cases be possible to better manage the risks by admitting the discriminatory act and making an open offer to compensate.

Catherine Daw



Events & Training 2008

We will be holding a number of free events in our seminar room at Medway House for our clients and partners during 2008 including:

Thursday 20 March
Health & Safety update

Thursday 27 March
Care Homes Update

Thursday 24 April
Employment law update

Tuesday 13 May
Commercial property & environmental seminar

Thursday 12 June
Construction seminar

Thursday 26 June
Director's duties workshop

Tuesday 16 September
Employment law update

Thursday 16 October
Construction seminar
(please note this event will be held in London)

Thursday 20 November
Care Homes Update

For more information or to register early interest in any of these events please email judiunderdown@brachers.co.uk

We can also offer **bespoke training courses for your organisation** at our premises or yours.

To discuss your requirements in more detail please contact Angela Witcher on 01622 776404.

Welcome to the Spring 2008 edition of Nice Work

We hope you are enjoying a happy and prosperous New Year. In this edition we give you an up-date on the recent developments in age discrimination case law. We comment on the benefit of having mobility clauses in an employee's Contract of Employment and we summarise the recent case law and developments about the consequences of employing illegal workers. Most firms now use e-mail and internet, and monitoring this in the work force is always topical. We try to give a practical overview. We also address a recent decision involving management of long term sickness and we address the possible defence that may be raised in constructive dismissal claims. Finally, we comment on what to do if you have a genuine grievance from an employee and provide our usual round up of the latest developments and what to look out for in 2008. If you have any questions arising from the articles, please do not hesitate to contact any member of the team who will be very happy to assist you.

Joanna Worby, Editor

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Big Brother at Work?

A recent survey showed that 97% of UK employers use email and the internet in their businesses and, of course, this figure is only going to increase.

So how can employers legally monitor their employees' use of such technology and at the same time, stay on the right side of the law? And what are the consequences for an employer of getting it wrong?

The Law

Monitoring of employees is an area which is heavily regulated by government legislation. The Human Rights Act, the Data Protection Act, Regulation of Investigatory Powers Act 2000 and the catchily named Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 are all relevant.

All the legislation is concerned with striking a balance between employees' legitimate rights to privacy (which do extend to the workplace) and employers' legitimate business expectations that its computer systems will be used for proper business purposes.

Before You Monitor

If you are considering monitoring your employees, the first thing that you should do is to make a logical (and preferably written) assessment of whether your chosen method of monitoring is really necessary at all, and if it is, how it can be done in a way which minimises unnecessary intrusion on the privacy of employees. This assessment process is known as an "impact assessment". An impact assessment involves:

- Identifying clearly the purpose(s) behind the monitoring arrangement and the benefits it is likely to deliver;
- Identifying any likely adverse impact of the monitoring arrangement on employees;
- Considering alternatives to the monitoring, or different ways in which it might be carried out;



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"Nice Work" is a summary of recent developments. It should not be regarded as a substitute for legal advice. The Employment Team will be pleased to provide further information and advice on specific facts.



- Giving due consideration to the obligations that arise from monitoring.
- Making a judgment about whether the monitoring proposed is justified.

After the Impact Assessment

Having undertaken an impact assessment, it is crucial that the employees know that they are being monitored, the methods that you will use and why it is happening. It is therefore essential that, before monitoring starts, you have an appropriately drafted electronic communications policy in place which deals with all of this, and that employees know about it. Consider posting it on notice boards, emailing it to them and discussing monitoring in team meetings on a regular basis.

Before drafting the electronic communications policy (or asking solicitors to do so for you) you should be clear about exactly what you are trying to achieve by monitoring, and why. For example, there is no point the policy stipulating that "no private internet use is permitted" if the reality on the ground is that management will actually continue to tolerate a reasonable amount of private internet use. The policy must reflect reality or it may be difficult to rely on later.

Getting it Wrong

A range of legal sanctions may befall employers who do not follow their own policies on monitoring, or have no written policy at all.

At one end of the legal spectrum, intercepting an employee's emails for non-business reasons can be a criminal offence, punishable by up to two years in prison. At the other end, non-compliance with your policy may result in an employee making a complaint about you to the Information Commissioner. Perhaps worse, an Employment Tribunal might find that what you had thought was a fair dismissal (say, for looking at porn on the internet) was actually unfair, leaving you liable for compensation.

USEFUL LINKS

The Information Commissioner's Office website has an excellent section on undertaking impact assessments, which are actually quite straight forward to. See www.ico.gov.uk.

Constructive dismissal claims – another defence for employers?

Constructive Dismissal arises where the employee leaves their job due to the employer's behaviour. The employee's resignation is treated as an actual dismissal by the employer. For the employee to succeed with a constructive dismissal claim they need to establish that the behaviour was so bad that it amounted to a serious breach of contract, leaving them with no option but to leave.

The recent case of RDF Media Ltd v Clements considers the duty of trust and confidence owed by an employer and an employee and raises a further defence for employer's in constructive dismissal claims.

Mr Clements, a senior employee of RDF resigned on notice to work for a competitor, SMG, 16 months into his contract. He was subject to various post-termination restrictive covenants preventing him from working in competition. RDF placed him on garden leave whilst still employed. On garden leave Mr Clements revealed confidential information about his employer to SMG and assisted them in briefing the media to their detriment. RDF got nasty in response and told the press about the non-competition clause they had with Mr Clements, describing his actions as "dishonourable" conduct. Mr Clements took

Age Discrimination Update

Over a year has passed since the Age Discrimination Regulations came into force in the UK. The most important developments include:

Heyday Challenge

Heyday, which is affiliated to Age Concern England, lodged a judicial review challenging the UK government's interpretation of the EU Age Discrimination Directive. The challenge focuses on the introduction of the national default retirement age and the impact it has on the working opportunities available to those close to state pension age.

The case came before the High Court in London in December 2006 but was immediately referred to the European Court of Justice. Don't wait up for the decision - it seems unlikely the case will be heard before Autumn 2008.

Bloxham –v- Freshfields

Mr Bloxham, a former UK Partner at Freshfields Bruckhouse Deringer, brought an unsuccessful claim against Freshfields, alleging that changes to the retirement benefits in the Partnership Deed were discriminatory. Before making the changes Freshfields had taken advice on the changes from Jonathan Sumption QC, who represented the Government during the

Hutton Inquiry.

The changes were designed to remedy the perceived unfairness of the existing retirement benefits package to younger Partners. This was accepted as a legitimate aim. Although the changes were found to be discriminatory by the Employment Tribunal, the discrimination was justified. Two of the main reasons for this were:

- no less discriminatory way of making the changes had been identified; and
- there had been a full and fair consultation process before the changes were implemented.

Lessons to learn

Whilst it is good to learn from your own mistakes, it is better to learn from those of others!

In the UK case of Lawrence Court –v- Denis Publishing Limited, Mr Court successfully established that his redundancy dismissal was unfair and age discriminatory. One of the factors taken into account by the Employment

exception to the article as it contained terms which he believed were "poisonous, untrue and highly damaging to his reputation." Some of the comments were published in a newspaper and others in an interview with the Sunday Herald which was described by the High Court as "a serious attack on Mr Clements' character". Mr Clements claimed that RDF were in breach of the duty of trust and confidence because of the content of the press briefings and other representations (statements) the directors had made at other times and claimed constructive dismissal during his notice period.

The Decision

The High Court found that although RDF's attack on Mr Clements' character in the press was capable of amounting to a breach of trust and confidence, Mr Clements was unable to rely on this breach to claim constructive dismissal because, by his actions, he had destroyed the relationship of trust and confidence first by revealing confidential information about RDF to the competitor and by transferring his loyalties to SMG whilst still employed by RDF.

Learning Points

1. If an employee is in breach of their duty of trust and confidence, it may be a defence to any constructive dismissal claim, depending on the facts.
2. If any statement is released to the press about departing employees, care should be taken if you want to enforce any restrictive covenants.
3. The fact that representations may be true is no defence if an employer's conduct caused serious damage to an employee.

Tribunal was the "general philosophy espoused by the owner of the Respondent company", Mr Denis. Mr Denis had written a book entitled "How to get rich". The Tribunal said that the "general thrust" could be gleaned from this passage:

"Youth is a further factor. By the time talent is in its mid to late 40s or early 50s it will have become very, very expensive. Young talent can be found and underpaid for a short while, providing the work is challenging enough. Then it will be paid at the market rate. Finally, it will reach a stage where it is being paid based on past reputation alone. That is when you must part company with it".

This went down like a lead balloon with the Employment Tribunal.

Further pitfalls are apparent from age discrimination cases brought in Ireland:

In Hughes –v- Aer Lingus there was discrimination when a 56 year old was asked how she would feel being instructed by younger people what to do.

In O'Neil –v- Board of Management, St Gabriel's National School the question to a 48 year old "considering that you have been teaching for 27 years, why would you be bothered with the hassle of the job of Deputy Principal?" was found to be discriminatory.

In Equality Authority –v- Ryan Air, Ryan Air's advert in the Irish Times seeking a "young and dynamic professional" was found to be discriminatory. The Irish Equality Officer required Ryan Air to publish a statement making clear its commitment to equal opportunities in an advertisement in the Irish Times. Ryan Air duly did so:

"So here goes. We solemnly swear that Ryan Air does not discriminate on the grounds of race, colour, ethnic or national origin, sex, marital status, sexual orientation, age, disability or membership of the Travelling Community".

The advert explained that Ryan Air would continue to be an equal opportunities employer and "will only discriminate by selecting the best person for the job! Even if they happen to be young, dynamic and enthusiastic!"

Watch this space...

Richard Aireton



Time's up for "skivers"!

Managing long term or persistent sickness absence presents challenges for businesses and HR professionals.

What do you do if you suspect that the individual concerned is not genuinely ill? Do you simply accept what they say at face value, investigate further or treat the matter as potential misconduct?

These issues were considered in a recent case *Chorus UK Limited –v- Mainwaring*. In this case the Employment Appeal Tribunal ("EAT") considered whether an employer had conducted a reasonable investigation into allegations of malingering.

The Facts

Mr Mainwaring ("M") was employed as a crane driver by Chorus UK Limited. He had suffered from back problems since 2002 and had a significant amount of time off work. In January 2006 he again had a lengthy period of sickness absence. His GP gave him medication and suggested physiotherapy and advised M to keep active and to avoid lifting heavy objects and/or sitting in one place for a long period of time. As is usual in these situations the employer sent M to their Occupational Health Advisor at regular intervals. By March 2006 the Occupational Health Advisor concluded that M was able to return to work carrying out light duties in a couple of weeks time although he was not yet fit for full-time work.

However, in early March 2006 Chorus UK

Limited received a "tip off" from one of M's colleagues suggesting that outside work M was not behaving consistently with someone with alleged back problems. The employer did not take a witness statement from the "informant" but arranged for covert video surveillance of M. Video footage was obtained in March 2006 showing M loading and unloading shopping into and out of the boot of his car.

The video footage was shown to the employer's Occupational Health Advisor who concluded that the activities shown were incompatible with M's alleged condition. If the Occupational Health Advisor had known M could carry out such tasks he would have recommended an immediate return to normal duties.

The company called M to an investigation meeting showing him the video footage and the Occupational Health Advisor's report. M simply stated he was improving and his symptoms did not prevent him lifting bags of shopping.

On 7th April 2006 there was a disciplinary hearing and M was dismissed on the ground that he had dishonestly represented himself as unfit for work. He appealed the decision and his appeal was unsuccessful. He then brought a claim in the tribunal for unfair dismissal.

The Tribunal's Decision

The Employment Tribunal found the decision was unfair and criticised the employer for not

taking a statement from the individual who had provided the tip off. The tribunal concluded this was outside the range of reasonable responses of an employer (which is its standard test for assessing the fairness of an investigation). The tribunal said the employer should have taken a statement on an anonymous basis and should have considered whether the informant had "an axe to grind" against M.

The tribunal also thought the employer should have considered obtaining the advice of a specialist dealing with back problems rather than simply the view of the Occupational Health GP.

The employer did not agree with the tribunal's decision and appealed to the EAT.

The EAT's decision

The EAT disagreed with the tribunal and said the absence of a statement from the informant was not vital as there was no indication the employer had relied on this in reaching its decision to dismiss M.

In relation to obtaining a medical expert opinion the EAT again did not agree with the Employment Tribunal. They stated that some employers may have considered seeking a consultant's view but it could not be said that no employer would be acting reasonably if, having taken advice from an independent Occupational Health Advisor, they then failed to obtain a further consultant's report.

The EAT allowed the employer's appeal and

the case has now been sent back to a new tribunal for a re-hearing.

Lessons to be learnt

It is not always necessary to take a full statement from an informant where allegations of misconduct are made.

If the allegations made by the informant contain some substantive information or are considered by the disciplinary panel the employer should explore the informant's motives to ascertain if there is any reason for them making the allegations.

An employer does not necessarily need to obtain a consultant's report where there is a dispute about whether the employee is or is not fit for work. GP evidence or Occupational Health Advisor evidence may be sufficient. However, please note that in this case the employee alleged he had back pain which is a condition which most GPs and Occupational Health Advisors deal with very regularly.

Video evidence surveillance provided valuable evidence in this case. However, an employer should remember that covert surveillance can infringe an employee's right to privacy or give rise to data protection issues. If you suspect an employee of yours is "malingering" or want to undertake such video surveillance we recommend you seek legal advice first.

Maria Passemard

HR ROUNDUP

• Dates to look out for during the next 4 months

February

- Compensation limits increase (see below).
- New Immigration Regulations come into force on 29th February 2008, introducing penalties for employing illegal workers.

April

- The statutory rates of sick pay will increase from £72.55 to £75.40 per week. The statutory rates for maternity, paternity and adoption pay increase from £112.75 to £117.18 per week.
- Employers with 50 or more employees will have additional duties to consult their employees under the Information and Consultation of Employees Regulations 2004, as will the obligations upon employers to engage in consultation with staff before making changes to the occupational personal pension schemes.
- The Corporate Manslaughter and Corporate Homicide Act 2007 comes into force, which will allow prosecutions against employers where workers fatalities can be attributed to management failures.

• Employment Bill

The Bill was published on 6th December 2007. It is expected to receive Royal assent by Summer 2008, although the Bill will come into force at a later date.

• Work and Families Act

In May 2007 the Government consulted on the introduction of additional paternity leave and pay, enabling fathers to take up to 26 weeks leave (some of which will be paid) if the mother returns to work before the end of her maternity leave period. It has also been considering increasing the statutory maternity pay period from 39 to 52 weeks.

H M Revenue & Customs have now said it intends to implement these changes for babies due in April 2010 or later, though no firm timing decision has been made.

• Increase compensation limits for 2008

The Employment Rights (Increase of Limits) Order 2007 has been published, and will increase compensation limits for a variety of Tribunal awards and other statutory payments from 1st February 2008. The main increases are as follows:

Compensation Limit	1st February 2007	1st February 2008
Maximum compensatory award for unfair dismissal	£60,600.00	£63,000.00
Maximum limit on a week's pay	£310.00	£330.00
Minimum basic award for certain unfair dismissals (dismissals for reason of Trade Union membership or activities, health and safety duties, pension scheme trustee duties, acting as an employee representative)	£4,200.00	£4,400.00
Maximum guaranteed payment per day	£19.60	£20.40

New Penalties for Employing an Illegal Worker

Employing someone who is not entitled to work in the United Kingdom is a criminal offence, which may lead to a fine of up to £5,000.00.

On 29 February 2008 the Immigration, Asylum and Nationality Act 2006 is to come into force which introduces a civil fine of £10,000 (s15) for those who negligently employ illegal workers, and a two year custodial sentence or unlimited fine for those who knowingly employ an illegal worker (s21): this places a burden on employers to be proactive and attain from employees all relevant documents. A complete list of relevant can be found in the "The Immigration (Restrictions on Employment) Order 2007 (see www.bia.homeoffice.gov.uk).

A sensible employer should also go further and:

- take reasonable steps to check the validity of the document(s);

- keep copies of the document(s) for at least two years after the employment terminates;
- satisfy itself that any photograph(s) in the documents are of the (prospective) employee;
- satisfy itself that the (prospective) employee's appearance is consistent with any date of birth in the document(s);
- take all reasonable steps to check that the (prospective) employee is the rightful owner of the document(s);
- retain copies of the whole of any document(s) that are not passports or other travel documents in a format that cannot be subsequently altered; and
- copy specified pages of any passport or

other travel document in a format that cannot be subsequently altered.

It is recommended that checks are followed up at least every 12 months.

The Secretary of State has produced 2 Codes of Practice to assist Employers both of which will be in force from 28th February 2008. These are entitled "Civil Penalties for Employers" and "Guidance for Employers on the Avoidance of Unlawful Discrimination in Employment Practice While Seeking to Prevent Illegal Working." They can be obtained from www.biahomeoffice.gov.uk but currently remain in draft format.

Joanna Worby

What happens when an Employee's Visa Expires

The Court of Appeal has recently held that the London Borough of Hounslow's genuine belief that continuing to employ a Russian national was unlawful was a fair reason for dismissal. The dismissal was, however, automatically unfair as Hounslow did not follow the statutory dismissal and disciplinary procedure.

When Ms Klusova joined Hounslow in November 2000 she was entitled to remain in the UK until May 2004. She applied in time for an extension of her leave to remain which meant that she could lawfully remain at work until the decision was made on her application, even after May 2004.

Despite this, Hounslow were of the view they could not continue to employ Ms Klusova as they had seen a letter from the Home Office to Ms Klusova's MP saying that she was not entitled to work. Hounslow summarily dismissed Ms Klusova in August 2005. They did not follow the statutory procedure as they believed that Ms Klusova could not continue to work without breaching a statutory enactment, which would, if it were correct, mean that the statutory procedure would not apply.

The facts actually showed that there would not be a breach of any statutory enactment by continuing to employ Ms Klusova (S98 (2) (d) ERA) so any dismissal had to be on the grounds of SOSR and thus the statutory disciplinary procedure applied. As a result Ms Klusova's dismissal was automatically unfair.

Learning Point: *Unless you are certain that*

a S98 (2) (d) ERA defence applies, you should follow the statutory dismissal and disciplinary procedures.

The Employment Appeal Tribunal also considered the reasonableness of such a dismissal in the case of Kelly –v- The University of Southampton. The employee was dismissed because she no longer had leave to remain in the UK but was granted leave 1 month after being dismissed.

Before deciding to dismiss the EAT were of the view the Employer should have considered:

- The extent of the restriction and the extent to which it affects the employee's ability to do their job;
- The duration of the statutory restriction;
- Any alternative to dismissal

They did not consider that the lack of documentation would in all cases be a fair reason for dismissal regardless of the fact that to employ an illegal worker is a criminal offence.

Best Practice

Our recommended course of action where an employee's entitlement to work in the UK has expired, is as follows:

- conduct a reasonable investigation into the facts including interviewing the employee;
- inform the Border and Immigration Agency of the suspected illegal worker - 0845 010 6677;
- obtain suitable evidence from the Home Office that the employee is not entitled to work in the UK and the duration of any restriction;
- consider whether there is any alternative to dismissal
- proceed to dismiss following both the statutory procedure and your own disciplinary procedure

Unless the employee has acted in bad faith, for example in falsifying documents, which would of course be serious misconduct, you may wish to offer the employee his position back when he or she is once more entitled to work.

If you are uncertain of the visa requirements we recommend you visit www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/

It pays to be mobile!

Can an employer rely on a mobility clause in an employee's contract of employment/ the staff handbook to avoid liability for redundancy payments?

A mobility clause is effectively a clause which allows the employer to require an employee to move job location or place of work. The employer will need to operate the clause "reasonably", that is with reasonable notice, so as not to breach the implied term of trust and confidence. When a business is being closed down and an employer is faced with a potential redundancy situation, the employer can consider a number of options.

He can refer to the contractual mobility clause and require the employee to transfer to a different location if the employer has more than one business location (in which case no question of redundancy will arise); or he can offer the employee suitable alternative employment as a defence to claims for redundancy payment if the employer has more than one business location; or he can treat the employees as potentially redundant. The Court of Appeal recently considered this issue in the case of Home Office –v- Evans & Another.

The facts

Mr Evans and Mr Laidlaw (the Claimants) were Immigration Officers who were based at Waterloo International Terminal. They were considered to be in a "mobile" grade, subject to mobility or transfer provisions.

The Home Office decided that immigration control at Waterloo International would be closed and sought to relocate the employees to Heathrow Airport. The employees refused to cooperate with their employer or to discuss alternative posts which were being considered.

The Home Office issued an instruction to the employees which stated that they were subject to a mobility clause (in this case contained in their staff handbook). The mobility clause in the staff handbook said "If your status is as a mobile member of staff you are liable to be transferred to any civil service post, whether in the United Kingdom or abroad". The employees refused to relocate to Heathrow Airport and resigned claiming they had been constructively and unfairly dismissed.

The Employment Tribunal found in favour of



the employees for a number of reasons:

The Home Office had originally considered the closure of immigration control to be a redundancy situation and where possible offered suitable alternative employment. Once it had taken legal advice it changed its mind and sought to rely on the mobility clause in a deliberate attempt to avoid having to treat this as a redundancy situation to which the Home Office redundancy procedure applied. Furthermore, payments would be incurred if it were treated as a redundancy situation.

The tribunal also noted the Home Office had bypassed the procedures set out in Home Office policy on Redundancy which included a requirement to formally consult with the relevant unions.

The Home Office appealed the tribunal's decision but the EAT upheld the decision. The Home Office then appealed to the Court of Appeal.

The decision

The Court of Appeal overturned the tribunal's decision. It stated it was acceptable for an employer to invoke a mobility clause when a redundancy situation might arise or has arisen upon the closure of a business.

The Court of Appeal also considered it to

be important that, at the time of the staff announcement, the Home Office had made it clear to the Claimants that it was invoking the mobility clause and would be following that procedure, not the redundancy procedure and this is indeed what it did. The court did not accept that the redundancy procedure had been breached.

Practical tips

An employer can exercise a contractual mobility clause in a potential redundancy situation to avoid liability for redundancy payments (even if it had originally envisaged following a redundancy procedure).

The employer should make their intentions clear at an early stage and act consistently.

Employers should not seek to rely on a mobility clause after the event to avoid a defence to a claim for a statutory redundancy payment.

Any employer who wishes to invoke a mobility clause (whether related to a redundancy situation or not) should ensure that they act reasonably and in consultation with the employee, provide the employee with sufficient notice and take into account the employee's personal circumstances.

Maria Passemard