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Employment News

bto solicitors

Team update: BTO's employment team has expanded over the year and the new additions – Laura Salmond and Lesley Grant - are settling in well. We now have 5 lawyers dealing exclusively with employment law matters for a spectrum of clients in the public and private sector – employers, employees, insurers, and membership organisations. The team has 2 accredited employment law specialists, one of whom is a visiting professor of employment law at Strathclyde University. Whatever your needs – from the drafting of policies and procedures, to dealing with employment tribunal claims – our team is ideally placed to assist you.

In this newsletter we've compiled some of the articles that have recently appeared on our employment law blog (click here). We hope you enjoy reading them.

Misuse of client details by ex employee

Employers are understandably concerned when senior employees leave to join a competitor. Taking legal action to enforce restrictive covenants can be costly, as can many of the other litigation routes available. A recent decision of the Information Commissioner's Office (ICO), however, should act as a deterrent for employees thinking of joining a competitor and taking client lists with them. Not only could this leave the employee open to action by the ex employer, there is scope for a fine as well.

The ICO has reported a criminal case where an employee who left his job and took a client list to his new employer was prosecuted and fined £300 and ordered to pay £400 in costs. The ICO has reminded employees that taking client records to a new employer without permission is a criminal offence, being a breach of data protection legislation.

The employee emailed the details of nearly 1000 clients to his personal email address before he left his employer to join a competitor. The list contained personal information, such as contact details, together with commercially confidential data.

He was prosecuted in the criminal court and plead guilty to unlawfully obtaining data. The ICO has called for more effective sentences, including prison terms, to be available (prison is not an option at present) to deter breaches of the Data Protection Act.

The ICO also reminded employees that documents such as client lists that they have worked on belong to their employer and not to the employee, so cannot be taken when they leave. Although the fine is modest, the possibility of a criminal record should act as a deterrent for employees thinking of misusing their employer's client lists.

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Autumn Employment Law Seminars

For details and to reserve your place, see the final page of this newsletter.

"Excellent briefing and use of case studies to support".

"Very informative and engagingly presented."

"Covered a lot in a short time. All very useful."

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Whose decision is it anyway?

In the recent Employment Appeal Tribunal (EAT) case of *Dronsfield v University of Reading* the difficult line which HR and in-house legal professionals must tread when dealing with disciplinary matters was considered.

Dronsfield was a professor at Reading University, and was bound by the university's policies and procedures, one of which dealt with personal relationships between staff and students. The guidance provided that any member of staff in a personal relationship with a student should inform the university in order that it could make arrangements to ensure that the assessment of the student in question would be unbiased. Dronsfield failed to comply with this guidance and did not disclose a sexual relationship with a student. As a result, after being subjected to a disciplinary process, he was dismissed summarily (in other words, without notice). He claimed unfair dismissal.

An Employment Tribunal found that his dismissal was fair. This was overturned by the EAT on appeal by Dronsfield. The EAT found that an investigatory report produced as part of the disciplinary process had been heavily influenced and amended by the university's HR and in-house legal departments. The EAT held that the final version of the investigatory report omitted various findings which were favourable to Dronsfield and that these alterations were made following the HR and in-house legal teams' involvement.

Although the author of the report had signed it off, the EAT felt that standards of objective fairness had been compromised and that the Employment Tribunal had failed to consider properly why the author had changed his view on Dronsfield to his detriment. The case was sent back to the Employment Tribunal to decide whether it was reasonable to dismiss Dronsfield in all the circumstances.

HR and in-house legal teams often provide detailed support and guidance to managers who have been asked to handle disciplinary investigations and hearings. There is nothing improper about this from a practical perspective. However, decisions or recommendations that the manager handling the investigation or disciplinary hearing makes must be his or her own. Where any report produced is subsequently altered following input from HR or legal advisors, an employer would have to be able to show a court or tribunal a clear justification for those changes if the employee decides to challenge the outcome of the disciplinary process. Care is needed where decisions have been changed following new information or arguments, which information or arguments were not put to the employee. The rules of natural justice should be followed.

"Care is needed where decisions have been changed following new information or arguments, which information or arguments were not put to the employee."

This case should be read alongside other recent case law that considered HR's remit in disciplinary procedures, in particular the decision in *Ramphal v Department for Transport*. In that case, the EAT reaffirmed its view that HR's role should be limited to matters of law and procedure in disciplinary matters. It should always be for the investigating manager to make up his or her mind about the appropriate action in any given case and care should be taken to ensure that any report demonstrates the independence of the manager's decision.

It goes without saying that if there are multiple versions of documents which say different things, an Employment Tribunal will scrutinise the evidence carefully to ascertain why the changes were made and who asked for them. BTO's employment team run training sessions for Boards and managers to help deal with disciplinary and grievance hearings. These are practical sessions.

We look forward to helping you!

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Sexual harassment, work and the law

A recent survey has highlighted that sexual harassment at work can, in some sectors, be prevalent – see the TUC survey which shows that half of women are 'sexually harassed at work'.

The law

The law in this area is relatively clear. There are 3 situations whereby unlawful harassment exists:

1. Where there is unwanted conduct of a sexual nature which has its purpose or effect to either violate the person's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment.

2. Where there is unwanted conduct relating to gender which has its purpose or effect to either violate the person's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment.

3. Where a worker rejects or submits to sexual advances and is then treated less favourably.

The protection the law provides is therefore very wide. A number of issues arise.

Issues arising

Whether or not the conduct is unwanted is a question of fact for the Tribunal to determine. The fact that a junior worker participates in the conduct does not automatically mean that the conduct was wanted and the context needs to be fully considered.

There is no definition of "sexual nature" within the legislation which means that Tribunals will need to look at the nature of the behaviour and make a judgment call. This would include obvious sexual conduct, such as touching or innuendo.

For the second situation above, there is no requirement that the gender involved relate to the individual being harassed. Thus it is possible for a man to be harassed about the conduct which relates to men or women. If a woman were to be harassed in the presence of another man, it would be possible for that man to claim that the treatment he received amounted to unlawful sexual harassment. This shows how wide the definition is.

It is also noteworthy that it is sufficient that the conduct has the relevant purpose or relevant effects; It does not need to have both. Thus provided the purpose of the conduct is to create the necessary consequences, the fact that it does not do so is not relevant. Similarly provided the effect of the conduct is that the relevant consequences exist, the fact the person did not intend to do it is not relevant.

The context of the treatment should also be taken into account since seemingly innocuous acts (such as buying gifts or seemingly neutral comments or even placing materials on higher shelves) could potentially satisfy the requirements given the wording used.

Areas where liability does not attach

Liability attaches to the employer where the conduct takes place "in the course of employment". It goes without saying that there are grey areas here. For example would a work's night out always be regarded as an extension of the working environment? Where is the line to be drawn? These are all questions of fact for the Tribunal to determine and would depend upon the circumstances of each case.

"Liability attaches to the employer where the conduct takes place 'in the course of employment'."

An employer has a defence where it can be shown that all reasonably practicable steps were taken to prevent the harassment (and indeed any harassment) from occurring. This means that ongoing steps are needed, including training of all staff, having a clear and up to date policy and ensuring this is regularly applied (and policed). It is also important to remember that the person who is responsible for the harassment itself can be personally liable for their actions. There is no limit upon the compensation a Tribunal can award in this area. The fact that no action by the employer could have prevented the particular harassment is not relevant in assessing whether the employer had taken all reasonable steps, which as a minimum means policy and training etc.

Avoiding claims

Ultimately, employers will want to avoid claims for harassment and indeed look to inculcate and foster a culture within the organisation which is free from harassment and unwanted behaviours. Creating the right atmosphere is key. Keeping staff up to date as their responsibilities and training them as to the position regularly is a good starting point. It is also worthwhile considering the benefit of mediation where problems arise in the workplace to try and ensure workplace relations are and remain good.

The BTO employment team offer practical advice and training which can help employers manage the risk and complex issues arising in this area.

Employment terms - when your written contract is not the full story

A recent decision of the Court of Session serves as an important reminder that the written contract of employment may not tell the full story in relation to employees' rights.

70 former employees who had been made redundant when a particular company ceased trading, raised court claims seeking payment of a debt – sums the pursuers said were due to be paid to them upon redundancy. These were "enhanced" termination payments well in excess of the statutory entitlement. The case came before the court as a legal "debate", to decide whether the claims should be allowed to proceed.

It was accepted that the contracts of employment gave no entitlement to these sums, and the pursuers instead relied on "custom and practice". They had transferred to the defender's employment 2 years previously as a TUPE transfer from another company, Transocean. The pursuers said it was well known in their previous employment that employees would receive an enhanced sum if made redundant, and such sums had always been paid in the past. It was so well known and understood to be the company's practice, that it had become an implied part of the contract of employment with Transocean. As it was part of the contract, the pursuers argued, the obligation to make enhanced payments transferred under TUPE to their new employer and became enforceable against it.

The employer argued that while in the past Transocean had sometimes paid enhanced payments, there was no obligation to do so, and payment had always been made in return for a Settlement Agreement giving up all claims. These Agreements also included a confidentiality clause, and that clause must have been breached if the workforce was aware that such payments were being made. It could not be said that there was any suggestion on Transocean's part that there was an obligation to make enhanced payments.

The employees in turn argued that the implied term was that the enhanced payment would be made, conditional only on them signing a Settlement Agreement in standard terms – this had become a contractual obligation with the result that Transocean could not have elected to pay statutory redundancy only. The obligation to make an enhanced payment had transferred under TUPE to the new employer also.

The court accepted that the claims potentially had merit and the case was allowed to proceed to a full "proof" diet where evidence would be heard at a later date.

This case is a reminder that:

- Terms of employment are not just found in the written contract document. They can be agreed verbally, or found in a collective agreement. They can be implied to give the contract "business efficacy" and can be implied from custom and practice. For "custom and practice" the term must be "reasonable certain and notorious" – i.e. well known in the workplace. The employer's argument that such knowledge had only arisen due to breaches of the confidentiality clauses in the Settlement Agreements and should therefore be ignored, did not win favour with the court.

- An employer may become under an obligation to make an enhanced payment simply by virtue of having done so repeatedly in the past. The employer's argument in this case that the insistence on a Settlement Agreement showed there was never any obligation to make the payment appeared to be a good argument, but the court felt that the case should proceed to a proof. Employers might wish to try to avoid terms becoming contractual by varying their practice – not always making enhanced payments, and not making the same enhancement each time. Management should consider the matter afresh each time and not allow an "automatic" practice to build up. Ensure it is stressed to each employee that there is no obligation to make a payment and the offer of an enhanced sum is wholly discretionary and sets no precedent for the future.

- For employers involved in TUPE transfers, it is vital to note that the written contract of employment may not tell the full story in terms of what entitlements the transferring staff have. All contractual obligations will transfer, including obligations created by custom and practice, and including obligations that the transferor (old employer) does not consider to be enforceable at all. If you are acquiring a business under TUPE, it is essential to ensure that appropriate warranties and indemnities are provided from the old employer in relation to such issues. If, however, you are acquiring staff under a "service provision change" (a type of TUPE transfer) there is unlikely to be a contract between the old and new employer so little scope for warranties and indemnities. You may have to simply accept the risk that transferring employees could have these entitlements by "custom and practice".

- Breach of contract claims can be just as costly and disruptive for employers as claims for unfair dismissal or discrimination. Contract claims valued at up to £25,000 can be brought in the tribunal within a strict 3 month time limit from the termination of employment, or can be brought in the civil courts within 5 years of when payment should have been made.

We always stress the importance of getting the contract of employment right, but beware of other binding terms that are not set out in that document. Try to prevent obligations arising by "custom and practice". The issues are complex and it pays to take expert legal advice.

Whose mind is it anyway?

One of the common issues that arises in employment law claims is what was in the mind of the employer at the point of dismissal. The employer's "reason" for dismissal is the set of facts or beliefs held by the employer that cause the employer to dismiss.

In the case of *Royal Mail v Jhuti*, the Claimant had raised concerns about breach of regulatory requirements. As a result of raising the issues she was then subjected to detriments by management who also misled those processing the disciplinary process. She was dismissed.

The Claimant did not have sufficient service to claim "normal" unfair dismissal and argued that her dismissal was automatically unfair, due to her having made a protected disclosure (i.e. having blown the whistle).

The question for the Tribunal was whether the employer can be found liable where the person who made the decision was unaware of the issues (and had been purposefully misled by others). The Employment Appeal Tribunal found that the employer cannot benefit from this situation and on the facts of this case the claim could be made out. The Judge said that:

"I am satisfied that, as a matter of law, a decision of a person made in ignorance of the true facts whose decision is manipulated by someone in a managerial position responsible for an employee, who is in possession of the true facts, can be attributed to the employer of both of them."

This case serves as a reminder that an employee with less than 2 years' service does not necessarily have no claims upon dismissal.

Complex whistleblowing and health and safety related claims are becoming more popular and care is needed whenever such issues could arise. Given such claims have no cap on the level of compensation that can be awarded, it is worth taking time to explore all the issues.

As ever, ensure that you speak to a member of the employment team during the disciplinary process to ensure that the issues are fully and properly considered. Ignorance is no excuse!

Update

Autumn Employment Law Seminars

"Termination of Employment: Breaking up is hard to do?"

Edinburgh 11/10/16:
TO BOOK: click here

Glasgow 13/10/16:
TO BOOK: click here

"Employment Law Update 2016"

Edinburgh 15/11/16:
TO BOOK: click here

Glasgow 22/11/16:
TO BOOK: click here

12:15 Registration
12:30 Seminar
13:30 Buffet lunch

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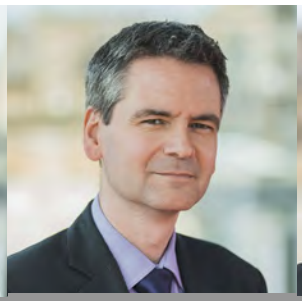

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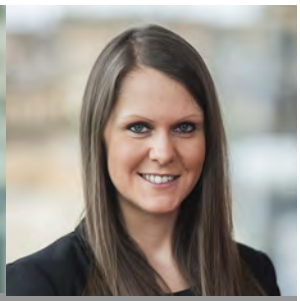

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