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Newsletter February 2017

UK: Employment Update

Welcome to the February employment news roundup. This month we explore developments in relation to the prosecution of a former employee for taking client data on departure, when serious dereliction of duty by a senior employee can amount to gross misconduct and the latest developments on the thorny issue of determining employment status and its associated rights.

Taking client data to a competitor: former employee prosecuted for data protection breaches

Many employment contracts contain express provisions prohibiting the removal and/or disclosure of confidential information (such as client and pricing information) during the currency of and after employment ends. Unfortunately, this is not always enough to deter departing employees from helping themselves to client data.

A recent case highlighted by the Information Commissioner's Office (ICO) may, however, add another weapon to the employer's arsenal against such behaviour.

The case publicised by the ICO involved a recruitment consultant, 'A', who, when working for her employer, emailed the contact details of over 100 clients to her personal email address and used the information to contact them in her new position at a rival recruitment company.

It is a criminal offence under Section 55 of the Data Protection Act 1998 to unlawfully obtain or access personal data. As a result of taking the client records, which contained personal data to her new job, A was found guilty of this offence and fined. She was also ordered to pay prosecution costs and a victim surcharge. Although the level of fine was not particularly high, A now has a criminal record.

The prospect of a criminal prosecution and potentially a criminal record may psychologically act as a more effective deterrent to employees who are tempted to remove client, supplier or key employee data (all of which is likely to contain personal data for the purposes of the provisions of the Data Protection Act 1998).

Next time internal data protection policies are audited, consideration should be given to whether the policy should emphasise that removing personal data could amount to an offence potentially giving rise to a criminal prosecution which, if successful, will result in a criminal record for the employee. Similarly, equal opportunities and harassment policies should also make it clear that an individual can be personally pursued for compensation in relation to their discriminatory conduct.

Key issues

- Taking client data to a competitor: former employee prosecuted for data protection breaches
- When gross negligence amounts to gross misconduct
- Employment status: further (limited) judicial guidance
- Employment Tribunal decisions now online

When gross negligence amounts to gross misconduct

The Court of Appeal recently considered whether a senior employee was guilty of gross misconduct justifying his summary dismissal because he had negligently failed to remedy the

actions of an HR manager that undermined a key policy of their employer.

In brief, A was Regional Operations Manager and had been employed for 26 years. One of S's key procedures was the 'Talk Back Procedure' (TP) by which it measured the level of staff engagement by means of a survey process. Without A's knowledge, the HR manager, B, sent out an email (in both their names) to store managers essentially inviting them to 'game' the TP process by only surveying their most enthusiastic colleagues. When A became aware of the email he told B to clarify with the store managers what he meant. B didn't and A did not check with him whether he had. When A learned that B had in fact done nothing, A did nothing about it.

A disciplinary investigation found that A was not complicit in any way with B; however, he was dismissed summarily on the grounds that his gross negligence in not rectifying the situation was a serious dereliction of duty and amounted to gross misconduct.

The Court of Appeal agreed with the High Court's conclusion that A's gross misconduct so undermined the implied term of trust and confidence that it justified summary dismissal. This was not a case of being tarnished by association but a serious dereliction of A's own duty to the company in relation to a key policy.

Key principles emerging from the Court of Appeal's review of the case law include the following:

- gross misconduct is not limited to cases of dishonesty or intentional wrong doing;
- where there is no intentional decision to act contrary to or to undermine the employer's policies it will only be in a small number of cases that this will amount to gross misconduct;
- the fact that no harm is caused by the conduct/omission is not a mitigating factor; and
- the negligence need not affect a third party before it can amount to gross misconduct.

Although this is clearly an unusual, and fact specific case, it nevertheless highlights that senior employees who fail to comply with and/or ensure compliance by others with key policies and procedures may be guilty of gross misconduct.

In the banking sector, employees who are senior managers or certified persons who fail to comply with the Regulators' conduct rules and their employer's own policies and procedures are potentially vulnerable.

From a more general perspective, all employers should ensure that their disciplinary procedure includes a non-exhaustive list of conduct that is considered to be gross misconduct and should consider adding gross negligence, if it is not already listed.

[Adesokan v Sainsbury's Supermarkets Ltd]

Employment status: further (limited) judicial guidance

Employment status and how to determine whether someone is an employee, a worker or genuinely self employed for both employment law and tax purposes is certainly one the 'hot topics' of 2017.

As working practices evolve with technological and societal developments, this has lead to increasing uncertainty for both companies and individuals alike as to the status of individuals who are not engaged by means of a 'vanilla' employment contract. This has lead to a number of employment tribunal cases being brought by 'gig economy' workers (including cases against Uber and Hermes). More recently, the Court of Appeal has considered the status of a more conventional 'trade' of plumber. S, a plumber, was engaged (and indeed taxed) on the basis that he was a self employed contractor not an 'employee'. When his contract was terminated he claimed he was a worker with various associated statutory employment rights.

As has been widely reported, the Court of Appeal upheld the Employment Tribunal ruling that the plumber was not an employee but was a 'worker', rather than being in business on his own account providing his services to Pimlico Plumbers (PP) as a client of his business undertaking. It was held that S was an integral part of PP's operations and subordinate to PP; he was not in business on his own account.

Key factors that lead to this conclusion included: the fact that S undertook to provide his services personally; there was no unfettered right of substitution at will and he was contractually obliged to do a minimum number of hours a week, albeit S could refuse to do individual jobs subject to meeting the minimum hours. In addition, PP exercised very tight control over most aspects of the work and this included restrictions on S's ability to work for competitors which was considered inconsistent with PP being a customer or client of a business of S's.

The Court of Appeal warned that employment lawyers should be careful about trying to draw any very general conclusions from this case because the determination

of the 'worker' status issue had depended on an analysis of a very specific factual matrix. In spite of this warning a number of points are worth noting:

- When updating contracts it is important to audit, and if necessary update, other policies, procedures and handbooks that are cross referred to particularly if they also contain contractual provisions. The court commented on the contradictory and ill-thought-out contractual paperwork that documented the working relationship. In the usual way, new contracts had been issued by PP over time, however, these were inconsistent with the language of handbooks containing other contractual terms.
- Whether the contractual arrangements reflect the reality of the relationship may well fall to be scrutinised by the Employment Tribunals.
- The tax status of the individual is not necessarily determinative of employment status. S was taxed on a self employed basis, but he was a 'worker' for employment law purposes.

Coincidentally, shortly after this decision was handed down, the Department for Business Innovation and Skills published an 'Employment Status Review' report dated December 2015. This conceded that "...*for a growing section of the labour market there is a lack of clarity over employment status"* and that "*the framework is complicated and any reforms will take time".* The report then concluded that a substantial amount of further work would have to be done in order to assess what changes could or should be made.

In reality, this report has now been superseded by the Taylor Review of Modern Employment Practices; the report is expected this June. It remains to be seen whether a more concrete plan of action to address the current issues arising out of the uncertainty surrounding employment status will result.

[Pimlico Plumbers Ltd & Anr v Smith]

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Employment Tribunal decisions now online

The Government's new online database of Employment Tribunal judgments has now gone live. All new decisions will be added to the database. In addition, the database also appears to contain a random selection of earlier decisions. The search parameters are very flexible and searches can be made against specific judges and topics as well as individual company names.

The database can be accessed here: https://www.gov.uk/employment-tribunal-decisions.