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EDITOR'S NOTE...

Welcome to the spring edition of the Employment Express.

Another packed edition covering a wide variety of subjects whilst also informing the reader as to the updated compensation limits and setting out top tips for shared parental leave which is proving to be a headache for most HR professionals at the present time.

I hope you enjoy reading our latest edition and we are of course always delighted to hear from you with any topics you would like us to cover in future editions.

Nicholas Lakeland

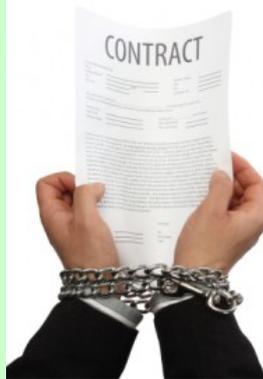
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Ask the Editor!

If you have any questions you'd like our Editor to answer, please email:
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THE NOT SO CONFIDENTIAL SECRET – WHERE THE INTERNET FAILED TO THWART AN EMPLOYER'S PROTECTION.

By Martin Donoghue
Employment Partner



The High Court case of *East England Schools CIC v Palmer* is an interesting one, and one which goes some way to dispel the notion that post employment restrictions are always virtually impossible to uphold.

Ms. Palmer was employed as a recruitment consultant specialising in matching teachers with teaching vacancies in Essex.

Her contract contained various restrictions on what she could do professionally after her employment ended, and seeking to protect confidential information.

She became disillusioned with her employer, and resigned, joining a competitor. Not surprisingly, she started to approach clients and candidates of her former employer.

Equally predictably, her former employer complained about this, stating she had broken various contractual promises given to it and which related to competition after employment.

Lawyers then became involved, court proceedings commenced, and amongst the points in defence made by Ms. Palmer were these two:

First she argued that as school, the client and teacher candidate details were readily available to all and sundry on the Internet, if her employer wanted to protect this information as confidential it could not

successfully do so. It was publicly available and so it was not confidential. There was nothing proprietary here for the former employer to protect.

Secondly, schools and candidate teachers were a fickle bunch. There was very little loyalty to agencies, they would often choose the agency best placed to get the desired result, and would often hedge their bets by using multiple agencies. Again, there was nothing proprietary here for the employer to protect, and without a proprietary interest the former employer's claim must fail.

Pretty convincing points, or so you would think.

However, the Judge did not agree.

Although he noted the apparent lack of confidentiality and lack of loyalty, he found that there was still a strong connection Ms. Palmer had built up with both schools and candidates as relationship building was an integral part of her job. This relationship could be the reason why the former employer could be contacted first by a school or candidate. Being asked first could be a considerable advantage, and was something the former employer was entitled to protect as Ms. Palmer had spent working time building up her professional relationships.

The Judge also found that Ms. Palmer would have taken in her head some valuable confidential information belonging to her former employer (what, is not exactly clear) and the fact that the relationship with schools and candidates was fragile made it even more appropriate for the former employer to protect its interests.

The Judge found for the former employer. Obviously he had considerable sympathy with it, no doubt in part due to Ms. Palmer having approached some of its former clients, and found grounds on which to decide the restrictions in question were valid. The moral being, never give up on post-employment restrictions. A bit of creative thinking, some evidence of poaching, and those "invalid" clauses may just have some life left in them! **EE**

INCREASE IN COMPENSATION LIMITS FOR 2015

Unfair Dismissal

As of 6 April the Employment Tribunal compensatory award limit for unfair dismissal claims has increased from £76,574 to £78,335.

Any dismissals which took effect on 6 April 2015 and after, the limit on the compensatory award is now the lower of £78,335 or 25 weeks' pay.

In addition to this an employee who is dismissed unfairly is entitled to a basic award which is calculated based on a week's pay. As of 6 April the cap on a week's pay has increased from £464 to £475 per week. The maximum basic award that can be awarded has also increased from £13,920 to £14,250.

Dismissals that have an unlimited compensatory award include dismissals that are found to be unfair by reason of; health and safety reasons, dismissals for making a protected disclosure (whistleblowing), or unlawful discrimination based on one of the protected characteristics (sex, race, age, sexual orientation, disability, religion or belief).

Redundancy

The basic award limit on a "week's pay" for calculating redundancy has increased from £464 to £475 per week and this will be the figure used for calculating statutory redundancy payments.

The maximum basic award that can be awarded has also increased from £13,920 to £14,250.

Family Friendly payments

In relation to family-friendly employment rights, the statutory maternity, adoption and paternity pay has increased from £138.18 to £139.58 per week. This will also be the maximum statutory payment for shared parental leave.

Statutory Sick Pay

From 6 April, the statutory sick pay limit has increased from £87.55 per week to £88.45 per week.

GUIDANCE GUARANTEE

By Jennie Kreser
Pension Partner



The Treasury has finally announced the name of the service that is intended to deliver the Guidance Guarantee – that is, the assistance to members of Money Purchase/Defined Contribution schemes who are considering 'cashing in' their pension pots hopefully NOT to buy the Lamborghini!!

The service is to be called 'PensionWise' and will largely be delivered either online, or on the telephone by The Pensions Advisory Service (TPAS) or face to face by the Citizens Advice Bureau (CAB). These two organisations are busy recruiting to enable them to provide the service by April 2015 but as this note was being prepared, there was no telephone number available and although a website has been designed, the content is patchy and is unlikely to be ready in time. It is also highly unlikely that despite protestations that the staff who will be providing the Guidance (most definitely NOT advice so its value will in any event be grossly limited), will be qualified, the reality is that they will probably have received only the most basic of training.

The Financial Conduct Authority (FCA) has published rules that will place a duty on scheme providers to signpost members to the Guidance service and the DWP has also indicated that it will follow the FCA approach in applying those same requirements to trust based schemes. This will mean an amendment to the Disclosure of Information Regulations sometime in 2015.

There has also been a lot of work going on between the various Government departments and regulators to help the industry prepare for the new 'freedoms' so as to ensure consistent messages are being sent. This will include standard letters and other communications to consumers about the new rules.

How will the Guidance actually be delivered? Well, that's a very good question. Expectations should frankly be kept very much in check. The telephone and face to face sessions will entail only one session and this is unlikely to be more than 45 minutes at the most, probably less. This will of course be kept under review. The website gateway still is very much a work in progress and quite how this will work is something of a mystery to us all. It's probably going to be a form of basic Q&A static pages, although of course technology does exist for real time interaction but whether this is what is intended is unclear.

There will be a contact centre through which the face to face and telephone guidance sessions can

be booked. Let's hope it's not going to be like getting an appointment at the GP then!! There will be a 'walk in' service at the CAB but they will only be able to give you a leaflet and then signpost you to the nearest 'delivery' centre to make a formal appointment.

Will PensionWise be a success? Do you really want me to answer that?? My advice? See a good IFA before you decide to make any sort of financial decision with your pension. It will have to last you maybe 20 to 30 years in retirement. You've worked hard to save it - don't blow it... **EE**

THE 10 OF COMPASSIONATE LEAVE

By Dilini Loku
Employment and Pension Solicitor

The departure of Zayn Malik from arguably the biggest 'boy band' in current times, One Direction, has left many fans heart broken. Such was the intensity of feelings, it is reported that employers were inundated with calls from affected employees requesting compassionate leave to "grieve".

Although such a request may be laughable, it is important to note that compassionate leave should only be granted to an employee when someone close to them dies and rules relating to this should be clearly set out in the staff handbook. Employers should be careful to apply any compassionate leave policy as reasonably and as consistently as possible, without exercising discretion if at all possible.

The exercise of discretion in a case such as this would potentially lead to claims of discrimination, if the discretion happens to be offered to someone who does/does not have the same protected characteristic as a colleague being allowed the leave. In this case such a claim could be for age discrimination by older members of staff who are aggrieved with the favouring of younger members of the workforce who support the boy band.

Moreover, employees should not expect to be granted leave automatically. When leave isn't granted, they may have to use their holiday allowance and the usual procedure for requesting holiday should be implemented. Employers should also take a consistent and firm line with employees who take sick leave in such circumstances and should ensure that Company policy on sickness absence is routinely applied. **EE**



GETTING FIRED IN UP TO 140 CHARACTERS

By Daniel Walter
Employment Paralegal

Mr Laws was employed by Game, the computer game retailer, under the title of 'Risk and Loss Prevention Officer'. The company utilises the social media platform 'Twitter' for marketing purposes and each store has an independent Twitter account with *followers* who are customers.

Mr Laws followed over 100 individual store profiles using his personal twitter account in order to monitor publicised information. 65 of the stores were following Mr Laws in return and because of this Mr Laws' personal tweets could appear on the retail stores individual feeds which customers could possibly misconstrue as being associated with the company. For this reason and because Mr Laws posted various tweets that were deemed to be abusive and derogatory in nature, the company dismissed Mr Laws summarily for gross misconduct.

Mr Laws brought a claim of unfair dismissal against Game Retail Ltd. The Employment Tribunal found that the dismissal was unfair because dismissal did not fall within the *range of reasonable responses*.

The company appealed and the issues the Employment Appeal Tribunal had to consider were:

- # The previous case law of *Smith v Trafford Housing* and whether the Twitter account was sufficiently work related;
- # The effect of the Employer not having a clear statement of policy in place at the relevant time;
- # The particular facts of this case and emphasising how each case is intensely fact sensitive;
- # Whether the dismissal was within the range of reasonable responses;
- # That to receive tweets directly customers would have to have made a conscious deci-

sion to follow the Game;

- # Mr Laws had not used the restriction setting on his Twitter account;
- # Mr Laws had not created separate personal and work Twitter accounts;
- # That the ET judge had *substituted* what he considered important rather than what the *reasonable employer* might have concluded.

This matter has been remitted for fresh consideration by an Employment Judge.

The points identified in this case will, when answered, help provide advice as to how to deal with the competing interests of the employee's right to freedom of expression and the employer's concerns regarding their reputation and goodwill being affected by an employee's online activity.

This case highlights the ramifications of using social media and the risk of employees putting their employment and their employer's reputation at risk.

We will keep you up to date with the results of this case when it arrives back from the tribunal.

In the meantime we advise all our employer clients to look again at their social media policies and communicate their policy clearly to all employees before anyone makes a tweet of themselves. **EE**

TYPE 2...

We have recently defended a claim for disability discrimination where the Claimant claimed to be disabled per the Equality Act on the basis that he suffered from type II diabetes. We were successful in our defence for the employer in the Employment Tribunal and we note that the Employment Appeal Tribunal has also been considering this.

In *Metroline Travel Ltd v Stoute*, the EAT overturned the ET decision that the employee's type II diabetes amounted to disability per the Equality Act 2010. It was held that the condition, which was controlled by abstaining from sugary drinks, did not have a substantial adverse effect on the employee's ability to carry out day to day activities. Although this may be a comfort to employers defending such a claim the usual occupational health checks and assessments are still advisable. **EE**



SHARED PARENTAL LEAVE TOP 10

- 1) SPL is applicable for babies born on or after 5 April 2015.
- 2) SPL allows a woman eligible for statutory maternity leave to bring entitlements to an end and share the leave balance with the baby's father, mother's husband, civil partner or partner.
- 3) The first 2 weeks following birth remain compulsory maternity leave and there is still a right for fathers to take 2 weeks of ordinary paternity leave.
- 4) There are eligibility criteria, the employee must be employed for at least 26 weeks and be in continuous employment to the date of the birth.
- 5) There is a strict notice requirement which must be adhered to concerning taking leave for both the mother and the father.
- 6) There are eligibility requirements for Shared Parental Leave Pay which include a requirement that the baby is looked after by the person receiving the SPL during the period.
- 7) SPL can be used to share up to 37 weeks of statutory maternity pay although there is no legal requirement for employers to offer enhanced pay for SPL.
- 8) Employees may work up to 20 days - Shared Parental Leave in Touch Days (SPLIT) during any periods of SPL.
- 9) Employees are protected against dismissal and from suffering a detriment for reasons related to SPL.
- 10) Employees on SPL will have special rights if a redundancy situation occurs during the period of leave.

WHISTLEBLOWING UPDATE

By Victoria Russell, Employment Partner

Whistle blowing is making a lot of Employment law headlines in 2015 in the form of case law concerning the public interest test, a new consultation with the FCA and PRA and a guidance and code of practice being published by the Department for Business Innovation and Skills in March.

Employees blowing the whistle and advising their employers of a wrong doing must believe that they are acting in the public interest by making a disclosure. They also have to reasonably believe that the disclosure they have made about the wrong doing is either a criminal offence, failure of a legal obligation, a miscarriage of justice, damage to health and safety, damage to the environment or a cover up of any of the above.

The issue of the disclosure being in the public interest has been considered by the Employment Appeal Tribunal in the case of *Chester-ton Global and Verman v Nurmohamed*. The EAT upheld the decision in the Tribunal that the worker making the disclosure must have reasonable belief that the disclosure it has made is in the public interest. The issue therefore is whether the worker had the necessary belief that the case was in the public interest

and whether that belief was held on reasonable grounds. This may have the potential to expand the number of claims brought.

The whistleblowing guide as published by the Department for Business Innovation and Skills in March 2015 is a 12 page document aimed at explaining employers' responsibilities with regards whistleblowing, dealing with whistleblowing disclosures in practice and the differentiations between grievances and disclosures. It is a great starting point for an employer managing these issues and it provides a clear code of practice to enable disclosures to be dealt with consistently and fairly, ensuring that the person making the disclosure is protected and that the employer acts in such a way to avoid claims against it. We would certainly recommend it as a good read!

Finally on this subject, there is currently a joint consultation on whistleblowing with the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) which has arisen out of a recommendation from the Parliamentary Commission on Banking Standards (PCBS) that banks put in place mechanisms to allow their employees to raise concerns internally.

The FCA already has measures in place to protect whistleblowers; it is a "prescribed person" under the Public Interest Disclosure Act 1998 which allows those blowing the whistle to make a disclosure and tell the FCA about any suspected wrongdoing. Matters reported include crimes, regulatory breaches and general wrongdoing in the regulated sector and the FCA works with the worker to keep their identity protected as far as is possible or is wanted.

The FCA has noted that in 2014 there were 79 cases of whistle blowers suffering a detriment following a disclosure which have ranged from bullying, isolation, intimidation and disciplinary procedures being brought against the worker.

The consultation is proposing a package of measures to formalise firms' whistleblowing procedures with the aim of moving towards a more consistent approach, building on existing good practice in firms and with the further aim of assuring those blowing the whistle that there will be no personal repercussions for them. The consultation is open until 22 May 2015. **EE**

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