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Another day, another complaint



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WHAT HAPPENS WHEN YOU HAVE AN employee who is determined to make a nuisance of themselves, regardless of the validity of their claims? This article gives some helpful hints and tips on dealing with common tactics used by employees to put pressure on employers.

GRIEVANCES

Many employees are aware of the time, effort and expense incurred by employers in handling grievances, as well as the additional legal threat the employee can create by arguing that they are a whistleblower. Statutory grievance procedures are no longer applicable (thankfully), meaning that employers should be less exposed to liability merely for failing to tick certain boxes. The law behind the procedures, however, remains the same, and employers still need to properly consider all complaints by following their own internal policies and the new Advisory, Conciliation and Arbitration Service (ACAS) code. Where an employee has raised multiple grievances, employers can bundle these together as part of the same process to save time and resources. More importantly, if there is evidence that an employee has raised a grievance in bad faith, ie without genuinely believing the facts alleged, the employee's act can form the basis of disciplinary action, after appropriate investigation. In cases where the grievance is a knee-jerk reaction to a disciplinary or performance problem, the disciplinary or performance process can be handled in parallel with the grievance rather than hearing the grievance before taking any further steps. This is a useful way for employers to stand their ground and not be bullied into dropping disciplinary issues.

LONG PERIODS OF SICK LEAVE

It may seem all too easy for an employee to get signed off by a doctor for a relatively long period of sick leave. First, the employer should establish whether it is a genuine illness, or simply a tactic to, for example, delay disciplinary proceedings. When querying an employee's state of health, employers should avoid taking the role of a medical expert or challenging the validity of doctors' certificates. Instead, the employee can be required to undergo a medical examination by a doctor of the employer's choosing. Ideally, employment contracts should reserve the right of an employer to demand an employee's co-operation in such a process. In any event, if an employee

unreasonably refuses, this can be taken into account. One of the most effective weapons against an employee improperly taking sick leave is the contractual sick pay policy (if any). Well-drafted employment contracts allow employers discretion over the length of time contractual sick pay is available. Contracts should state that the employer has the right to withhold pay if sick leave is taken while an employee is being disciplined or under performance management. Any policy on paying employees on sick leave must be exercised consistently. However, just because an employer has paid an employee with a genuine illness for a period of absence, this does not mean that every employee is entitled to the same treatment. Employers must make it clear that the particular circumstances of each absence are taken into consideration.

DISMISSAL APPEALS AND GRIEVANCES SUBMITTED BY EX-EMPLOYEES

Employers should carefully consider any appeal made following a dismissal and a failure to do so may render the dismissal unfair. However, the new ACAS code on disciplinary and grievance procedures does not apply to redundancies, meaning that those employees do not have a right of appeal. The ACAS code also does not cater for grievances submitted after termination. An employer may choose to take advantage of these changes but should bear in mind:

- i) the advantage of resolving any issues at an early stage; and
- ii) in relation to redundancy appeals in particular, the possibility that tribunals will take the view in the future that an appeal has become an inherent part of a fair process after years of applying the statutory procedures.

In any event, the lack of a set procedure means that employers can, at least, be more flexible in deciding how to handle each process.

SUBJECT ACCESS REQUESTS

The Data Protection Act 1998 gives employees the right to request copies of any information about them for the purpose of checking that their data is being processed correctly. So-called subject access requests (SARs) are most commonly used after termination of employment. Before complying with a SAR, employers are

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entitled to request a fee of up to £10 and, more importantly, sufficient information to locate the data sought. Only once this information has been provided does the 40-day time limit on completing the request start to run. The employer's key reasons to reject or delay a SAR are that:

- i) the request is too far-reaching; and/or
- ii) it has been made for an inappropriate reason (most commonly to obtain early disclosure in connection with litigation).

Where a disproportionate amount of time and effort is required to complete a SAR, employers should give a full explanation of the circumstances surrounding the difficulty, including, where possible, details of what the requested search would encompass and how long it would take to complete. If a SAR is to be rejected as a request for early disclosure, it is important to provide a full explanation of this refusal alongside assurances that relevant

documentation will be included in any future disclosure. Duties of confidentiality to any third party featured or identifiable in the requested information must also be adhered to. A SAR can be refused where fulfilling the request will result in a breach of confidentiality.

DISCRIMINATION QUESTIONNAIRES

Submitting a discrimination questionnaire is one of the most powerful weapons available to employees because of the time and effort required to respond. If incomplete answers are provided or responses are omitted, the employer risks the employment tribunal (ET) interpreting this as evidence of discriminatory behaviour. A simple refusal to respond to a questionnaire because it amounts to a request for early disclosure is unlikely to be viewed favourably by the ET. However, where this is the case and/or a request is unreasonably far-reaching, a full explanation of the circumstances could serve to rebut any negative inference that may otherwise be drawn from a failure to answer. Discrimination questionnaires frequently ask for comparative information and an employer must also avoid providing information that would breach confidentiality. The ET will not accept a simple response that the question is not being answered 'due to confidentiality', but an employer that properly explains why there is no way of editing the information to prevent a breach of confidentiality can avoid accusations that this evidences discrimination.

APPLICATIONS FOR INTERIM RELIEF

The recent *Ryb v Nomura International plc* [2009] dealt with an application for interim relief made in an unfair dismissal claim. If such an application is successful, the employee is awarded full pay until a final decision is reached by the ET. This money is not repayable, even where an employee loses at a final hearing. While recent

coverage makes it more likely that there will be a surge in such applications, interim relief is only available in very limited circumstances (see box below). In the current recession, it is particularly important to remember that interim relief is not available where an employee can only show that it was their selection for redundancy that was due to any of the factors listed.

PRE-ACTION DISCLOSURE

In litigation proceedings in the courts or the ET, both parties have a duty to disclose all relevant information, whether it harms or benefits their case. In the High Court (but not the ET), there is also the possibility of an application for pre-action disclosure, which, as the name implies, takes place before proceedings have been issued. Disclosure of information is a difficult and expensive process, and the obligation to do so even before a claim has started can be intimidating to employers. However, while it is a tempting weapon for agitated employees, the court rules make it clear that, in most circumstances, the costs for the employer of carrying out the disclosure exercise should be met by the party making the application, making this a less attractive option for any employee bringing a claim.

CONCLUSION

The key to success in handling all of these matters is in finding the correct balance between sending a strong message to employees and behaving reasonably. An employer should always fully explain any refusal to comply with an employee's requests, whatever form they may take. A consistent response throughout the process, supported by well-explained actions, will support the employer's position that it is the employee who is aggravating the situation.

Ryb v Nomura International plc [2009] (unreported at present)

INTERIM RELIEF

- Employees must show that their dismissal is 'likely' to have been a result of:
 - i) union membership or activity;
 - ii) the making of a protected disclosure (whistleblowing); or
 - iii) activities as a health and safety representative, working time representative, pension scheme trustee, or employee representative for TUPE or collective redundancy purposes.
- Applications must be made within seven days of termination.

Secrets and lies: confidential information

DESPITE EXTENSIVE LITIGATION IN THE AREA, it is still common practice for employees moving between companies (particularly competing firms) to bring with them confidential information belonging to their former employer. All employees have a duty of confidentiality imposed by common law and

these duties are often expanded or clarified in their employment contract or company handbook. Such contractual provisions can be useful if they are properly used to specify areas that are genuinely confidential. However, these contracts can fall into the trap of attempting to define too much

information as 'confidential' and the courts are likely to view excessively inclusive clauses with scepticism. This article discusses the issues for new and former employers when an employee leaks confidential information.

FORMER EMPLOYERS

Prevention is better than cure, so the most effective tactic is to prevent confidential information from ever leaving the company's premises. Business needs such as electronic

employer could also perform a search of an employee's desk drawers, locker and briefcase to ensure that there are no hard copies of the documentation ready for removal. While the abuse of confidential information is clearly a disciplinary offence for which the employee may be dismissed, such action does little to protect an employer's business if the employee has already obtained the information. If necessary, employers can take appropriate legal action

without its knowledge, the new employer has no liability to the former employer and the information should simply be deleted or returned, as appropriate. Conversely, a new employer is directly liable to a former employer in circumstances in which the new employer has 'induced' the employee to breach their duty of confidentiality. For a claim to succeed, a former employer will be required to show that a new employer:

- 1) caused the breach of an employee's duty of confidentiality;
- 2) was aware that the action would amount to a breach of legal obligations; and
- 3) intended to inflict harm on the former employer.

Former employers will also need to show economic loss resulting from the breach of contract. This is because inducement of a breach of contract is a claim in tort and any damages will be calculated on the basis of the financial position that the former employer would have been in if the inducement had not taken place. Where an employee acts independently to breach a contract, then the new employer has no direct liability. To minimise the risk of liability, it should be made clear to new employees, preferably in the offer letter, or employment contract, that they are required to abide by all legal obligations to their former employer.

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communications and remote working, however, make this approach impractical. Employers can put in place technological measures that limit employees' opportunities to abuse access to confidential information. IT systems, for example, can be configured to prevent information from being downloaded from the company's system, or keep an easily accessible record of when sensitive information has been downloaded or printed out. If an employer has reason to believe that an employee is engaged in the removal, or potential removal, of confidential information, this may give it legitimate grounds to examine the employee's access to computer systems. Employers should review all e-mail and internet activity, and review system access to see if there has been any suspicious downloading of information. If there is evidence of wrongdoing, then an

to force an outgoing employee to return or destroy confidential material and ensure that the information is not misused. Employers are also able to seek an interim injunction prohibiting any misuse of confidential information, pending a full trial on the matter. Injunctive proceedings are expensive and time consuming, and the key practical point is that any proceedings must be issued as soon as possible, as any delay in the process may mean that a court will decline to issue the injunction, even when presented with a clear breach. Employers will still be able to make a claim for breach of contract but such a move is usually of little value in breach of confidence cases.

NEW EMPLOYERS

Where a new employee has brought confidential information to a company