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Employment Matters

There Is No Implied Term Waiving the Obligation To Repay a Loan in a Voluntary Redundancy Situation

Employers who advance sums to employees, such as relocation costs, will often try to claw back those sums in the event that the employee leaves within a defined window. The Privy Council (broadly, a collection of senior politicians who are or have been members of the House of Commons or House of Lords) looked at the legality of this in a recent case.

In this case, the employee received a repayable allowance from his employer while he undertook a degree. The repayment terms expired if he worked for the employer for five years following completion of his degree. In the event, the employee took voluntary redundancy 18 months after returning to work, and his employer deducted the loan payments from his redundancy payment.

The Privy Council decided that there was no implied term on the facts of this case that repayment was not required. This was because the employee freely chose to apply for redundancy. However, the Privy Council did state that there was an implied term that repayment would be waived if the employer prevented the employee from completing his five years of service.

What Should Employers Do Next?

This case, which is persuasive but not binding, could impact on the way that other repayment terms are viewed, e.g. in enhanced maternity pay schemes. Employers should be aware, therefore, that it may not be lawful to enforce the provisions of a repayment clause where the employee's employment is terminated through no fault of the employee (even where the terms of the contract give the employee express power to do so).

Court of Appeal Gives Guidance on Data Subject Access Requests

Individuals have the right to see a copy of all the information a business holds about them by submitting a data subject access request (DSAR) under the Data Protection Act 1998 (the "DPA"). DSARs are often used as pre-litigation "fishing" tactics and processing a request can be logistically challenging.

The Court of Appeal has given helpful guidance on the meaning of "disproportionate effort" and the limit of the legal professional privilege exception in the context of DSARs. An employer can argue that it does not need to expend disproportionate efforts in order to comply with such requests.

In the case, a law firm (Taylor Wessing) sought to rely on the legal professional privilege exception under the DPA in relation to a DSAR made to one of its clients. The request had been made before litigation and there was a concern that complying with the DSAR would give the would-be litigants an unfair advantage by getting advance disclosure.

The Court of Appeal decided that the legal professional privilege exception under the DPA applies only to documents that carry legal professional privilege for the purposes of English law. Secondly, the court clarified that the disproportionate effort qualification applies to all stages of subject access compliance. Third, it was an acceptable exercise of rights under the DPA even if the appellants intended to use the information obtained in subsequent litigation.

While this was not an employment case, the judgment provides welcome clarification of the legal professional privilege exception, the concept of disproportionate effort and the relevance of the data subject's motive in making the request, which is likely to be relevant to employment practitioners.

What Should Employers Do Next?

Complying with DSARs can be time-consuming and costly, and employers may often be tempted to abbreviate searches or the responses given. However, the Information Commissioner can hand out sanctions against employers if they do not comply with their obligations. Employers should consider the Information Commissioner's code of practice for complying with DSARs when they receive a request.

Courts Rule on Former Employees Taking Client Data and Trade Secrets

Employees "stealing" documents when they leave a business can be a major issue for employers. Two recent cases show how the UK courts have been dealing with it:

A recruiter forwards client details to personal email (and then contacts the client)

Before leaving to start a new job at a competitor, a recruiter emailed personal details of around 100 clients and potential clients to her personal email. She then contacted those individuals when she started her new job. The ICO prosecuted the recruiter for unlawfully obtaining personal data under the DPA. She pleaded guilty and was fined £200 and was ordered to pay costs of £214 and a victim surcharge of £30. The key point was that data should only be used for the purpose for which it is collected, which is unlikely to include transferring the data to a new employer.

Two investment managers steal files (and don't use them)

In *Marathon Asset Management LLP & Ors v Seddon & Ors*, the judge said that an investment management firm "missed the jackpot" when he ruled that Marathon was only entitled to £2 in damages from two former employees despite claiming £15 million in damages for the stolen data.

The firm sued two former employees after they copied several files of confidential information before they left the firm. Marathon argued that the defendants should pay the value of what they had taken as opposed to damages for any loss suffered, which was zero as the employees hadn't actually made use of the information contained in the files.

Marathon argued that if you take something, you should pay for it. Marathon also argued that the firm was exposed to a risk of loss and the two former employees acquired an opportunity for financial gain in taking the files. The judge gave these arguments short shrift. He made the analogy that a motorist driving at high speed may be putting lives and safety at risk, but the people in danger cannot claim for damages.

The judge said that there was a "vast gulf" between the use that the firm argued could have been made of the files, and the very limited used that was actually made of them by the former employees. Marathon had advanced no case based on time, trouble and expense incurred, and instead they went "all out" for the maximum damages, which were not suitable.

As one of the employee's lawyers said, this judgment is a cautionary tale for employers attempting to assert significant losses for the removal of company documents. Marathon's £15 million claim and £2 payout shows how perceptions of value can widely differ from the actual amount that can be reasonably claimed in damages, and how hard it can be to establish a realistic usage value for commercial documents.

As an aside, Marathon rejected a sensible settlement offer from the defendants and spent up to £10 million on legal fees only to recover £2 in damages.

What Should Employers Do Next?

- Businesses should be cautious about client information brought to them by new employees. If you know that the information is owned by a previous employer, the business (as well as the employee) may risk action from the ICO if you then process that data.

- You could ask for a warranty from new employees to confirm that they will not be acting in breach of any existing obligations, in relation to confidential information and data protection if they turn up on day one with boxes of files.
- You should ensure that your policies and contracts in relation to confidential information and data protection are comprehensive, consistent, up to date and have been properly communicated to all staff.

New Developments in the 'Gig Economy' Case Law

The recent wave of employment status claims has turned the so called "Gig Economy" into quite the "hot potato".

The Gig Economy thrives on flexible self-employed workers who do not receive sick pay, holiday pay, pensions or a guaranteed minimum wage, and are often on zero-hour contracts. The benefit to consumers? Cheap taxi rides or speedy home-delivered meals.

But couriers are fighting back. Backed by their respective unions, Deliveroo, the Doctors Laboratory and DX drivers are the latest riders to jump on Uber's band wagon.

- The Central Arbitration Committee will decide the fate of Deliveroo drivers in May this year.
- A separate claim against the Doctors Laboratory was lodged by its drivers who transport blood samples to and from hospitals.
- Courier company, DX is currently conciliating through Acas as the company refuses to accept that its drivers have "worker" status.

Accordingly, the Department for Work and Pensions (DWP) has recently launched an inquiry into self-employment status and the Gig Economy.

Unlike Hermes and Amazon who intimated that their businesses would survive if they ditched the Gig Economy business model and moved staff on traditional terms, Deliveroo and Uber insisted at the DWP Inquiry that they would be unable to offer flexibility or provide as many job opportunities if they were forced to provide greater employment benefits.

Deliveroo said its current business model provides staff with job flexibility. Eighty-five percent of its riders use the service as a "supplementary income stream" and they are not penalised if they do not attend work or if they work for competitors. Deliveroo were forced to buckle on one point though; they agreed to scrap controversial clauses in its staff contracts that prevented drivers from lodging a claim against it in the employment tribunal.

What Should Employers Do Next?

If you engage staff on a flexible, self-employed basis, it may be that they are in fact "workers" and will as a result have certain employment rights. The main ones from a cost perspective are the right to a minimum wage and the right to paid holiday. It may be worth analysing the workforce at regular intervals to assess the risk and potential cost to the business.

ECJ Case Law Developments in Banning Headscarves

In *Achbita and another v G4S Secure Solutions NV (Case C-157/15)*, the ECJ ruled that a Belgian company's policy of banning employees from wearing any visible religious or political symbols at work, which was used to prevent a Muslim employee from wearing an Islamic headscarf, did not amount to direct discrimination as the prohibition applied to all employees equally.

Although the ECJ was not asked to look at the question of indirect discrimination, the judges noted that such a dress code was capable of constituting indirect discrimination. They said that it was legitimate for a company to want to uphold political, philosophical or religious neutrality in customer-facing roles but it would be for individual states to determine whether the code was appropriate or necessary.

On the same day, the ECJ gave a separate judgment in another case concerning a headscarf ban. In *Bougnaoui and another v Micropole SA (Case C-188/15)*, the ECJ held that the ban constituted direct discrimination because it was imposed by her employer in response to a customer's request rather than being based on an employer's policy of neutrality. The idea of "a genuine and determining occupational requirement" refers to one that is objectively justified by the nature of the job or by context in which it is carried out, and cannot include subjective considerations such as customer preference.

What Should Employers Do Next?

Employers should ensure any dress code applies to all staff equally and refrain from knee jerk reactions to customer instructions.

Tribunal Compensation Limits Increase in April 2017

Heads up! Tribunal compensation limits will increase on **6 April 2017**.

- The maximum compensatory award for unfair dismissal will rise from £78,962 to £80,541.
- The maximum amount of a week's pay used to calculate statutory redundancy payments and various awards, including the basic award for unfair dismissal, increases from £479 to £489.

For more information about these issues or if you would like to discuss an employment-related matter, please contact: Christopher Hitchins at +44 (0) 20 7776 7663 or Sarah Bull at +44 (0) 20 7770 5222.

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