



Welcome

The pace at which employment law develops calls for constant vigilance on the part of those responsible for the management of their company's human resources. This edition of Employment Focus highlights a number of issues that should provide employers with food for thought.

Caroline Shafar points out the tension between an employer's wish to control employees' use of the internet and the growing popularity of web blogs and social networking sites.

Will Clayton looks at the recruitment process and gives some welcome guidance to employers who get less than they bargained for from their high quality and expensive recruits.

Finally, Kate Duffy issues a caution to employers hoping to do a deal with a disgruntled employee in order to avoid going to court or tribunal. Get it wrong and not only could you end up in litigation but on the losing side.

Caroline's will be a new name to our long-term readers. She has recently joined the Manchester team, along with Andrew Ashley Taylor and Barry Gibb (who specialise in the fathomable depths of pensions law) and Sue Morrison who renews her acquaintance with Caroline. Sue was her team leader and Head of Employment in the Manchester office of Mace & Jones.

Hill Dickinson now boasts one of the largest and most experienced teams of employment lawyers in the North West with 18 solicitors across the three offices. Together with the London team (recently complemented by Charles Morgan) and anticipated further recruitment over the next few months, we are primed to respond to your need for swift and accurate advice tempered with a sensible commercial approach.

Michael Morrison
Head of Employment

THE BLOG OR THE JOB?

"La Petite Anglaise" blogged to fame when she successfully sued British accountancy firm Dixon Wilson for unfair dismissal under French Labour Law. La Petite Anglaise, the pseudonym of an English secretary based in Paris, was dismissed after the company considered her blog brought it into disrepute, although she had not named the company.

The case raises a serious issue, testing the boundaries between the employee's freedom of speech and the right to a private life and his duty of loyalty to his employer.

Blogging, Facebook, You Tube, My Space and the like are increasingly popular means of communication but such social networking can be a double-edged sword for employers. It has been used successfully to promote a business or an organisation but, if the publicity turns bad, the employer's reputation is at risk.

Can an employer take action against an employee for voicing opinions made in his private time?

Yes, but with caution. An employee's duty of trust and confidence exists outside working hours. If an employee discloses company information, this could be a breach of the duty of confidentiality. Disciplinary action is a possibility but be careful not to suffer knee-jerk reactions.

What action should an employer take?

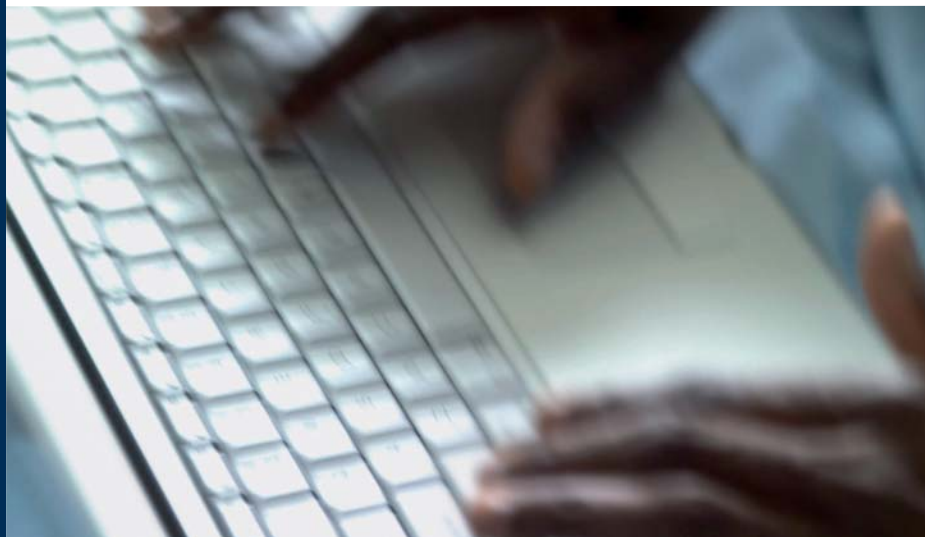
Investigate carefully and consider whether any damage has actually been caused and its extent. Employers should consider if the employee's action unveils a more serious issue in the workplace such as bullying and harassment or breaches of health and safety etc which need to be actioned? Consider whether this affects the decision to take disciplinary action or the appropriate level of sanction?

Preventative measures

It is essential for an employer to have a clear and cogent policy on what amounts to acceptable use of the internet inside and outside the workplace. Some employers have banned access to social networking sites altogether, but is this really necessary? Could access be limited to lunch times and times outside contractual working hours? An employee's duty not to bring the company into disrepute should be set out in the company's disciplinary policy which should, in turn, be referred to in the Internet Policy.

If an employee has a genuine complaint, the employer should refer him to the employer's grievance and/or whistleblowing policy and investigate accordingly.

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LIES, LIES & MORE DAMNED CV LIES

CV mendacity has reached epidemic proportions, but the law now rests with employers

The recent press coverage of Patrick Imbardelli's fall from grace serves as a salutary reminder for all HR professionals to remain vigilant during recruitment and to not accept background information, especially qualifications, at face value. Whoever it was who said "a little white lie hurt no-one" had obviously never been duped by false statements into employing a candidate.

Imbardelli was undoubtedly a high achiever and had been appointed as chief executive of Intercontinental Hotel Group's Asia Pacific unit. However, it came to light soon afterwards that he had falsely claimed to hold three university degrees. Faced with the truth, Imbardelli resigned and so joined a long list of senior executives who have met a similar fate.

There are some people who see no wrong in including a few "white lies" and embellishments when making job applications. But dishonesty should have no place in a successful employer-employee relationship – there must be trust and confidence on both sides.

Recruitment tactics

When it comes to recruitment, honesty is not just the best policy; it is a legal obligation. Wilful acts of dishonesty should be dealt with quickly and decisively.

Granted, there may be a world of difference between those individuals who, when compiling their CVs, exaggerate their annual two-week break in Magaluf as a "love of worldwide independent travel" and those fraudsters who wrongly claim to hold qualifications relevant to the job on offer.

Where the misrepresentations are material to the contract, as in Imbardelli's case, the law can be used swiftly to protect the employer.

Tough measures

There is a range of legal remedies available to the employer which includes:

Serving notice to rescind the employment contract: The purpose of this is to put both parties in the position, as far as possible, that they would have been in, had the employment contract not been entered into at all. The employer should communicate the fact that it considers the contract to be rescinded at the earliest reasonable stage and the rescission would be effective from that date.

Instant dismissal, without notice or payment in lieu:

If the employee has more than 12 months' service, you should of course first follow the statutory dismissal procedures to dismiss the employee.

Reclaiming salary paid:

Pursuing the individual for the repayment of all salaries paid to them and all other expenses directly associated with their employment.

Notifying the police:

The employee's actions could, after all, be regarded as a criminal offence namely committing a fraud by false representation or by failing to disclose information.

Before deciding on the most appropriate action to take, it is essential to be sure of the facts by conducting an investigation. In the most common scenarios, where an employer believes that its employee has misrepresented academic or professional qualifications, records can be verified with the relevant institution.

Burden of Proof

If the employee's description of their qualifications does prove to be false, the courts would usually regard this as a fraudulent misrepresentation, namely a statement made knowingly, without any belief in its truth, with a view to inducing another party to enter into a contract with them.

In any legal proceedings, the burden of proof will be on the employer to prove the fraud and that it placed reliance upon it. The burden might seem high, but if the employer has properly investigated the facts it should be relatively uncomplicated to dismiss the employee.

What employers can do to avoid being duped

- Ask candidates to sign a written declaration to confirm the truth of their application.
- Identify the information from the candidate that is being relied upon when communicating offers of employment.
- If qualifications or history are important for the role, satisfy yourself that the information provided is genuine.
- Always check references carefully





STAYING OFF RECORD

The ability of employers and employees to discuss matters on a “without prejudice” basis is one of the most useful commercial tools in the employment relationship. “Without prejudice” privilege affords both parties the opportunity to resolve their disputes without the risk of what they say and do as part of such negotiations being disclosed as evidence to the Court or Tribunal in existing or subsequent proceedings.

Below is a summary of some of the key cases in this area over the last few years and some practical advice for employers.

In the 2004 case of *BNP Paribas –v- Mezzotero*, the Court of Appeal reaffirmed the position that for parties to be able to rely on the protection of the “without prejudice” rule:

- There must be an extant dispute at the time “without prejudice” negotiations take place and such negotiations must be a genuine attempt to settle the dispute;
- Those discussions/negotiations must not amount to unambiguous impropriety.

The case was widely reported due to the Court’s narrow interpretation of what constituted a dispute and its suggestion that the “without prejudice” shield would not be as readily applied to cases involving discrimination/victimisation. In such cases the Court found that it was inappropriate to maintain the veil of privilege given the fact-sensitive nature of discrimination cases and the public interest in tackling discrimination.

Bearing in mind the number of employment disputes that reach a settlement by virtue of “without prejudice” negotiations, it is not surprising that these issues continue to come before the courts.

Two significant cases that have been reported in 2007 are:

[Framlington Group Limited \(1\) & AXA Framlington Group Limited \(2\) –v- Ian Barnetson \[2007\]](#)

In this case, the Court of Appeal gave a wider interpretation of what constitutes a dispute. The Court found that “without prejudice” privilege will apply ‘where the dispute is a matter capable of compromise and one in respect of which, if not resolved, the parties could reasonably contemplate litigation’. This much wider interpretation enabled the Court to apply the “without prejudice” rule to negotiations that took place to discuss how to avoid a dispute becoming a legal claim.

[Brunel University & Anor –v- Vaseghi & Webster \[2007\]](#)

This case confirmed that the mere fact the “without prejudice” label is attached to discussions does not automatically guarantee that the discussions/negotiations will be protected and may well be disclosed as evidence. The Court of Appeal found that there had been a bilateral agreement to waive privilege as the employer had not objected to reference to “without prejudice” discussions at a formal grievance hearing and so those discussions had become an “open” issue.

This case involved allegations of discrimination/victimisation and, in its judgment, the Court again suggested that the rule against referring to “without prejudice” information would not be applied as strictly in discrimination cases.

In conclusion, the legal position is still not entirely settled. Whilst the recent cases suggest a wider interpretation of what constitutes a dispute, there remains a suggestion that the “without prejudice” shield will not be as strictly applied in cases involving allegations of discrimination/victimisation.

Preserving “without prejudice” privilege; practical steps for employers

- Employers should refrain from using “without prejudice” discussions/offers unless there is an existing dispute between the parties; when in doubt as to the existence of a dispute, seek specific legal advice.
- Once negotiations/discussions commence, all communications (oral and written) should be clearly labelled as “without prejudice”. Where offers are put forward in meetings with the employee, care should be taken to explain that the offer is made on a “without prejudice” basis and such meetings should be minuted.
- Reference to “without prejudice” discussions at formal/open grievance meetings/disciplinary meetings by either party may result in waiving privilege. In order to protect privilege, employers should object to any reference to “without prejudice” negotiations/settlement by employees or their representatives and note such objections on the record.
- In the event that the employer agrees to discuss “without prejudice” negotiations as part of the grievance/disciplinary process, specific legal advice should be sought.

DEVELOPMENTS ROUND-UP

National Minimum Wage

From 1 October 2007, the national minimum wage has been increased as follows:

- for workers aged 22 and over, from £5.35 per hour to £5.52 per hour
- for workers aged 18-21 years, from £4.45 per hour to £4.60 per hour
- for workers aged 16-17 years, from £3.30 per hour to £3.40 per hour



Holiday Entitlement

From 1 October, the statutory minimum holiday entitlement under the Working Time Regulations 1998 has increased to 4.8 weeks (i.e. 24 for days for employees working a five-day week) .

The entitlement will increase again, to 5.6 weeks, from April 2009. Those working part-time have the same entitlement pro rata. Thus, someone working a three day week is entitled to 14.5 days, rising to 17 days in April next.

Equality and Human Rights Commission

On 1 October 2007 the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission merged to form the Commission for Equality and Human Rights (CEHR) established under the Equality Act 2006.

The CEHR will promote equality and human rights and work towards the eradication of unlawful discrimination on grounds of sex, race and disability as well as sexual orientation, age, religion or belief.

Data Protection

On the 24 October 2007 all the remaining provisions of the Data Protection Act 1998 came into force. As a result, any manual filing system created before 24 October 1998 must now also comply with the Act.

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FUTURE DEVELOPMENTS

Trade Union Rights and Freedoms Bill

The Bill makes provision for the law relating to the rights and freedoms of workers and of trade unions, the regulation of relations between employers and workers, protection of employment in lawful industrial action and remedies in trade disputes. It received its second reading in the House of Commons on the 19 October 2007 .

Flexible Working Bill

The Bill proposes to extend the right to request flexible working to parents of children up to the age of 18 and makes provision for the encouragement of employers to offer flexible working arrangements.

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About Hill Dickinson

Hill Dickinson offers a comprehensive range of legal services from offices in Liverpool, Manchester, London and Chester, and its associated firm Hill Dickinson International has offices in London and Greece. Collectively the firms have 152 partners and a complement of more than 1000 staff.

Hill Dickinson is a major force in insurance and is well respected in the company and commercial arena. The firm's marine expertise is internationally renowned and it has one of the largest marine practices in the UK following a merger with Hill Taylor Dickinson on 1 November 2006. The firm has an award winning property practice and is widely regarded as a leader in the fields of commercial litigation, employment, intellectual property, NHS clinical/health related litigation and private client.

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