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## Lewis Silkin Newsnotes

Newsnotes are produced  
By Lewis Silkin's  
Employment, Reward and  
Immigration Department.

The department comprises the firm's lawyers who deal regularly with matters affecting both employers and employees. They are experienced in advising clients about the entire range of issues in the field of employment.

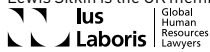
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## Surveillance snags

SO, you've caught your skiving, ne'er-do-well employee bang to rights. He says he's off sick with a bad back, but you've got camera footage showing him driving, walking the dog and carrying shopping. Surely you can sack him without further ado?

Hold your horses. Employment tribunals will expect employers in this situation to do more than apply what they've learned from watching *Holby City* and *Doc Martin*.

Indeed, a recent case has confirmed that amateur doctoring doesn't form part of a reasonable investigation. The opinion of a qualified health practitioner will generally be essential.

### **What's up doc?**

The tribunal did have a valid point. Without the benefit of medical training, people don't know the difference between activities that may alleviate a bad back and those which show it's just a figment of the worker's imagination. How can you tell whether the way someone stretches across a car bonnet proves them to be a fake or just following their physio's instructions?

The employer in this case was castigated, amongst other things, for the "completely incomprehensible" failure to arrange for its own occupational health adviser to view the film. Moreover, the company had "cherry picked" from a letter produced by the claimant's GP, pointedly ignoring comments that he was genuinely ill.

Finally, the employer fell into the trap of assuming evidence of activities on one particular date was sufficient to establish all previous absence to be dishonest as well.

### **Quack thinking**

Sure, there'll still be some situations where even the most amateur medical sleuth can spot a fraudulent employee doing something totally at odds with their supposed illness. Best get a second opinion, though - the standard prescription will be a generous dose of medical input in most cases.

And you're under doctor's orders to refrain from leaping... to conclusions, that is!

# The virtual Rose & Crown

IN bygone days, staff would gather in the pub over a Watneys Red Barrel or three for a good old whinge about their frustrations with the boss or unrealistic targets.

Workers still need to get things off their chest, but the 21<sup>st</sup> century equivalent of a pub chat is the tweet, blog or networking site. The big difference is that these are often available for all to see, create a permanent record and there's no control over how the information may be used.

## **Media mischief muzzling**

As work and private lives become increasingly blurred, employers struggle to define appropriate rules and processes. Many have responded to the social media explosion by paying external specialists to monitor mentions of corporations or individuals across media channels.

Elsewhere in Europe, privacy guarantees make it difficult for employers to clamp down on nefarious networking. And in the US, there are signals that corporate social media policies may be subject to close scrutiny. Last year, the National Labor Relations Board claimed a worker's negative comments about her supervisor on Facebook constituted a 'protected activity'.

In contrast, British employment judges tend readily to uphold the dismissal of staff caught denigrating their employer online – at least so long as the organisation has clear policies in place concerning web no-go areas.

## **Tweet talking**

Tribunals are likely to be similarly sympathetic to employers tackling Twitter transgressors. By analogy, witness how the Press Complaints Commission ruled against civil servant Sarah Baskerville after she was hounded in the press for a series of indiscreet tweets criticising government policy.

Yet decisions won't always favour the employer. Take the Somerfield employee who won his case after being sacked for posting a video on You Tube of two colleagues hitting each other with plastic bags. The fact the clip had received only eight hits undermined the store's case for reputational damage.

Nonetheless, with Twitter chiefs suggesting the identity of tweeters might be revealed to UK courts, how long before we see aggrieved bosses hunting down the identities of culprits badmouthing their organisation online?

What a tangled web.... Anyone fancy a pint?

# Cutting to the chase

THE Government recently published a curious document called the *Employer's Charter* - a kind of "Keep Calm and Carry On" poster for employers.

The aim was to dispel some of employment law's urban myths and reassure employers about stuff they're allowed to do - e.g. make staff redundant in a business downturn; dismiss for poor performance.

All of the Charter's advice is subject to the caveat "as long as you act fairly and reasonably". You may think that rather begs the question. The real headache for employers is *how* to tackle tricky workplace decisions without getting into legal hot water...

## Asking for it?

One of the statements is a case in point: "You are entitled to ask an employee to take a pay cut". That's a no-brainer - of course you can ask! But what if the employee says no? Can you go ahead and reduce their pay anyway? If not, how do you go about implementing the change lawfully?

For obvious reasons, these questions are more pressing than ever - especially for public sector bosses. As this issue of *Newsnotes* went to press, Southampton Council was broaching swingeing pay cuts in order to save jobs.

## Pay-cut pointers

Fortunately, a timely EAT ruling has clarified the principles that apply in this scenario:

- Where an employee won't agree to a proposed wage cut, you can terminate their contract (with notice) and offer to re-employ them on the new rate of pay.
- The dismissal will be for a "substantial reason" - and so potentially fair - if you've got a sound business case. It's not necessary to show the cut was crucial for the business's survival.
- The key issue then is whether a reasonable procedure was followed. Did you consult fully, negotiate fairly and consider other options? Was management subject to the pay cut too?

In general, you'll be on solid ground if most of your staff have accepted and there's just a small minority holding out. But remember too that collective consultation duties will kick in if you need to terminate and re-engage 20 or more staff.

Otherwise, keep calm and carry on...

*Garside and Laycock Ltd v Booth*, EAT 0003/11, 27.5.11, unreported

## Taking care of BISness?

OFFICIALS at the Department for Business Innovation & Skills (BIS) are busy digesting responses to its major consultation on reforming employment tribunals and the resolution of workplace disputes.

### **Lightening the load**

Predictably, the mantra of “reducing burdens on business” was one of the main drivers behind the exercise. Some of the proposals certainly chime well with that, such as increasing the qualifying period for claiming unfair dismissal from one to two years and charging fees for lodging tribunal complaints.

On the latter, some employers’ organisations have been lobbying hard for a fee of up to £500 to discourage weak and spurious claims. The Ministry of Justice will be consulting separately about this in the autumn.

### **Dubious penalty**

But another contentious proposal lurking in the BIS document has garnered surprisingly little attention and is somewhat less employer friendly. It’s the suggestion that tribunals should automatically impose a financial penalty on employers who lose tribunal claims, in addition to whatever damages the claimant is awarded.

The current proposal is for the penalty to be half the total award made by the tribunal, subject to a minimum of £500 and an upper limit of £5,000 – although, a bit like a parking fine, there would be a 50% reduction if you pay within 21 days.

The purpose is said to be to “encourage legal compliance” by employers, but guess where the money levied would go? You’ve got it - straight into George Osborne’s hungry coffers. It’s not unduly cynical to see this as a device for getting employers to fund the spiralling costs of the tribunal system.

Even at face value, would the stated aim be achieved? Tribunals can already increase compensation where an employer has unreasonably breached Acas’s *Code of Practice on Disciplinary and Grievance Procedures*. A fine on top is unlikely to be much more of an incentive to comply.

And surely such a regime would simply ratchet up the cost of settling cases, with claimants expecting a higher pay-off in return for the employer avoiding the penalty.

What’s that, if not yet another burden on business?

## Strange philosophies

THE leeway granted by tribunals to employees claiming discrimination on grounds of a ‘philosophical belief’ is quite astonishing.

Remember the environmental guy who successfully based a claim on his “strong convictions about man-made climate change”? And the spiritualist police trainer who believed dead people could help criminal investigations?

### Believe it or not

Well, you ain’t seen nothing yet. Latest examples include:

- A gardener successfully claiming his fervent opposition to fox-hunting formed part of his ‘belief’ in the sanctity of life.
- A ruling that a BBC employee who believed in the “higher purpose” of public service broadcasting was protected.
- A banker persuading a tribunal that avarice, in the form of an overriding desire for the accumulation of wealth, is a valid belief system and way of life.

OK, so we made that last one up... but you get the point.

Tribunals are being sent down bizarre avenues of enquiry. In the fox-hunting case, for instance, the claimant was questioned about slicing worms in half when digging and admitted crushing caterpillars between thumb and fingers rather than use pesticides.

Novelty value aside, the potential scope of the legislation is alarming for employers. If complaints arise, it’s best to keep an open mind and take them seriously – even if the asserted belief seems a bit wacky at first blush.

### Keep the politics out?

A particularly contentious issue is how far political convictions are protected. Case law suggests that belief in a political philosophy might qualify, despite a dubious tribunal ruling against a Marxist/Trotskyist claimant.

What about extreme political views, such as those involving homophobia and/or white supremacy? Under human rights law, a belief must be “worthy of respect in a democratic society” and not conflict with others’ fundamental rights – but we’re awaiting a definitive judgment.

Pending that, it’s a real can of worms...

*Hashman v Milton Park (Dorset) Ltd t/a Orchard Park*,  
Southampton employment tribunal, 31.1.11, case no.3105555/09

*Maistry v BBC*, Birmingham employment tribunal,  
29.3.11, case no.1313142/10

# Intern iniquity

INTERNSHIPS – a form of exploitation, a useful career springboard for young people or an unfair leg-up for the well-connected?

It's an issue that's been hitting the headlines, partly owing to its major banana-skin potential for politicians of all parties:

- Nick Clegg attacked unpaid internships when launching the Government's social mobility strategy - only for it to emerge he'd secured such an arrangement with a Finnish bank through "family connections".
- Labour MP and "living wage" campaigner Lyn Brown was accused of hypocrisy for placing an ad seeking a voluntary worker for her House of Commons office.
- David Cameron received flak for being "very relaxed" about giving work experience to personal acquaintances – maybe not surprising given that City internships were auctioned off at a recent Conservative fundraising ball...

The debate about internships affects not just the financial sector and politics – they're widely used in arts, fashion and the media too. What does the law have to say about them?

## Free labour?

"Intern" isn't legally defined. It's just a term for someone working on a temporary basis to get experience - typically performing tasks normally done by employed staff. Some interns are paid, but many aren't, which is where the crucial legal issue arises.

If an intern satisfies the statutory definition of a "worker", they're entitled to the national minimum wage (NMW). Companies can't contract out of this, even if the intern has agreed to work on an expenses-only basis. There are some specific, narrow NMW exemptions, but nothing for internships generally.

When will an intern be a "worker"? Essentially there must be a contractual agreement to provide personal work or services, which excludes purely voluntary arrangements with no mutual obligation or intention to create legal relations. But most interns do "proper" work, with an expectation they will attend for fixed hours over a significant period of time.

There have already been tribunal victories by interns asserting NMW entitlement. And with increased media focus on internships, the authorities could start to crack down more aggressively on illegal, unpaid placements.

By all means offer a foot on the career ladder, but don't put your foot in it...

## **Border collywobbles**

IN just two decades, the percentage of the UK population born overseas has almost doubled to over 11 per cent. Nearly one in every eight people living in the country was born abroad.

That means the obligation for employers to ensure staff are in the UK legally, with a continuing right to work for their organisation, is more pressing than ever before.

### **Playing with fire**

The UK Border Agency (UKBA) has been stepping up its unannounced visits to companies. Several suspected illegal immigrants were arrested a few months ago in a raid on Hamleys, the famous London toy store.

Are you aware of the extent to which employers can be clobbered if UKBA discovers illegal workers at their site? Penalties include:

- An on-the-spot civil penalty of up to £10k per illegal worker, if you're found to be employing them because of negligent recruitment practices.
- Downgrading or cancellation of your sponsorship licence - preventing you from sponsoring any workers from abroad or keeping any current migrant staff.
- Prosecution for knowingly employing an illegal migrant worker - leading to a jail sentence of up to two years, an unlimited fine and/or disbarment as a company director.
- Prosecution for facilitation or trafficking, punishable by up to 14 years' imprisonment and/or an unrestricted fine.

On a cheerier note, employers can protect themselves by carrying out specific document checks when recruiting new staff. You also need to make further checks at specified intervals, where employees have a time limit on their permission to enter or remain in the UK.

### **Comfort zone**

Also reassuring is a recent ruling that it was fair for an employer to dismiss an employee when UKBA failed to satisfy it that she had the right to work in the UK. This suggests it may be reasonable to err on the side of caution and terminate an employee whose immigration status is uncertain.

But don't take this a green light - a detailed enquiry is always advisable. Otherwise you'll get caught between the rock of immigration and the hard place of employment law...

## Stigma of the dumped

AS the dust settled after the *News of the World's* sudden implosion, it didn't take long for legal pundits to start picking over the debris and speculating about what types of litigation might ensue.

### Pariah warning

One law firm was extremely quick off the blocks, talking up prospects of a class action against News International by staff of the axed tabloid. In particular, the potential for recovering "stigma damages" was raised. That's to say, claims by hacks hacked off at that their reputation being hacked to bits.

This goes back to a ground-breaking House of Lords ruling in 1997, arising from the collapse of Bank of Credit and Commerce International (BCCI). The case established that workers can sue for breach of contract if their reputation is tarnished by association with a dishonest and corrupt business, harming their future job prospects.

It's perhaps understandable, in the febrile frenzy of a Wapping scandal, for staff to fret about the badge of infamy consigning them to the scrap heap. But would stigma claims stack up legally?

### Taken as read

Going back to the BCCI judgment, people forget it was based on a large edifice of assumed facts: the bank operated in a corrupt way; the ex-employees were innocent of any involvement; they were at a handicap on the labour market because they were tainted; and so on.

Establishing a theoretical legal principle is one thing, but scooping a sizeable damages award from your former employer is quite another. Subsequent cases have shown that you need credible and cogent evidence of career blight and actual resulting loss.

Rabid speculation aside, it's unclear at the time of writing to what extent the NoW's management knew of, condoned or were to blame for any illegal or immoral activity. Wrongdoing has clearly occurred, but that's a long way from proving the paper was systemically "corrupt and dishonest" to its core.

And in any event, could your average NoW journalist prove their professional standing has been comprehensively trashed by the affair? Would they necessarily get the cold shoulder from other newspapers? At least if they're not personally suspected of hacking...

It looks unlikely to be a story of rag to riches.

## ENDNOTE

### **Get ahead!**

Making sure people in your organisation have the right employment law knowledge is a major challenge. Did you know that Lewis Silkin offers employment law training to give you a head start, designed around the particular requirements of your business? We can provide this for all levels, from staff and managers to senior HR professionals and in-house counsel. For more details or an informal discussion, please contact Hazel Oliver on +44 20 7074 8045 or at [hazel.oliver@lewissilkin.com](mailto:hazel.oliver@lewissilkin.com).

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