

# WORK RULES

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## Lewis Silkin Newsnotes

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## Here we go

THE flag of St George flutters from car aerials, tottering stacks of cut-price booze clutter supermarket aisles and patriotic flights of fantasy dominate the sports pages. It can only mean one thing... another World Cup is upon us.

As excitement mounts to fever pitch, employers are embracing the tournament as a fabio means of boosting staff morale. The trick is to do so whilst minimising disruption to normal workplace operations.

### **The great escape**

Fortunately for most businesses, England's first two games are in the evening, but the third is at 3.00pm and – jinx alert! – they may well progress to the later stages. Remember too that workers from other countries are likely to want to follow their own national teams - with feelings running high, you don't want to trigger discrimination claims.

Points to consider include how to deal with multiple applications to take annual leave for the same match (probably on a first-come, first-served basis) and how to respond to late half-day holiday requests. Otherwise, many businesses are conducive to flexible arrangements such as early start/finish times, shift swapping and making time up in lieu.

Unauthorised absence from work clearly shouldn't be tolerated, whilst off-duty conduct that brings the organisation into disrepute (e.g. hooliganism) will normally warrant dismissal. Make sure to dust down your disciplinary policy, just in case...

### **Game on**

Providing facilities for watching games on TV at the workplace has become increasingly popular, but watch out for potential flashpoints:

- Will alcohol be allowed and, if so, subject to what rules? (Might depend on the time of day...)
- To what degree will you tolerate employees wearing football kit, painting their faces and bringing World Cup paraphernalia to work?
- Should staff who are not interested in football be offered a similar perk – e.g. equivalent working-time flexibility?
- How can you prevent jingoistic 'banter' getting out of hand and causing offence?

Best take defensive action in advance to avoid such problems - things can all too easily end in tears. Remember Gazza...

## Uncharted waters

NOW the heady euphoria of Nick and Dave's rose garden love-in has faded, people are facing up to the reality of life under a coalition government.

First, there's the dilemma of what to call them... the Libcons? Or how about Condemns? We were leaning towards Liberatives, but it sounds too much like a laxative. So we've settled, for now, on the Torycrats.

### **Marriage of equals?**

One pressing issue for the Government is the Equality Act 2010. While most of it should be brought into force this autumn, the more controversial provisions are likely to be overhauled or ditched. Both parties support equal pay audits, but in different ways, so a compromise will need to be thrashed out.

Meanwhile, the default retirement age - which allows employees to be forcibly retired at age 65 - looks certain to be phased out, although the timescale is unclear. And another firm commitment is consultation on extending the right to request flexible working to all employees.

### **Whither 'labour' law?**

More generally, the coalition promises to review employment laws "to ensure they maximise flexibility for both parties", while "protecting fairness" and providing a "competitive environment". It's hard to read between the lines and predict what this might mean in practice.

One suggestion, for example, is increasing the unfair dismissal qualifying period from one to two years - but that's little more than a rumour as yet. Reform of the employment tribunal system is also on the cards in due course (see our separate newsnote in this issue).

Cutting red tape is a predictable theme, including a 'one in, one out' regime for new regulations. Similarly, the Government plans to end the 'gold-plating' of EU laws when implementing them in the UK.

A prime target here will be the regulations on equal treatment for agency workers, due to come into force in October 2011. Before the election, David Cameron signed a parliamentary motion calling for them to be revoked. More likely, they'll be subtly amended: the Government has limited room for manoeuvre under the EU Agency Workers Directive.

It's early days... but gradually the coalition's workplace reforms will coalesce.

# End of the greasy palm?

“FEW men have virtue to withstand the highest bidder”, said the first US president George Washington. Over two centuries on, has anything really changed?

Whilst the post-Enron corporate world may have cleaned up its act, fierce economic pressures can still tempt executives to succumb to bribery. Cash is still king, so it seems – especially if it comes in a brown envelope with a whispered “this never happened...”

## **Baksheesh blitz**

Right on cue, the Bribery Act 2010 is due to come into force later this year. It will sweep away UK’s antiquated anti-bribery laws, replacing them with a modern legal framework.

The Act has drastic implications for employers that fail to take steps to stamp out corruption throughout their business. It creates a range of new bribery offences, all punishable by an unlimited fine or up to ten years’ imprisonment, including:

- bribing another person;
- requesting, accepting or receiving a bribe;
- and
- bribing a foreign official.

Managers may be even more concerned about a further offence of failure by a commercial organisation to prevent an associated person committing bribery. This will cover a company’s employees, consultants and service providers anywhere in the world.

The new legislation is quite draconian, outlawing payments regarded as legitimately oiling the wheels of industry in other jurisdictions – for example, ‘facilitation’ payments permissible under US anti-corruption laws.

## **Ethical investments**

But crucially, organisations have a defence if they had ‘adequate procedures’ in place to prevent bribery. One obvious ingredient would be a whistleblowing policy that encourages staff to report allegations and suspicions of backhand deals.

More generally, employers should carry out a comprehensive audit of their exposure to bribery and put effective policies, checks and controls in place. Ethical practices need to be embedded in all echelons of the business.

So there you go - our in-your-pocket guide to the Bribery Act. Of course, if you want further details you’ll have to make it worth our while...

## Migrant myopia

HOT on the heels of an election in which immigration was one of the most contentious issues, the Queen's Speech on 25th May confirmed the Government's intention to introduce an annual limit on economic migrants from outside the European Union.

We're not sure what a lot of Lib Dem voters will make of this, given the party's main election commitment in this area was an amnesty for illegal immigrants, but we'll let that pass...

Details of the proposed cap are as yet unclear, but it could create major difficulties for companies needing to recruit specialist expertise from abroad. Chances are it will also apply to intra-company transfers – for example, a US multinational transferring an executive to work in its UK business.

### **Telling points**

Skilled, non-EU migrants currently account for approximately 30% of total immigration into the UK, with the remaining 70% coming from Europe. (There's not much the Government can do about the latter, short of withdrawing from the EU.)

Migrants from outside Europe are, of course, subject to the points-based system introduced by Labour two years ago. The scheme, while far from perfect, does ensure that only workers whose knowledge and experience genuinely fill a gap in the UK labour market can qualify for entry.

Such individuals must be paid at least market rate, to protect job opportunities for local candidates, and must prove they can accommodate and support themselves financially before being admitted into the country. Statistics show that such workers contribute substantially to the economy through tax revenues.

### **Brain drain**

The Government's proposed limit not only fails to address the issue of large-scale European immigration, but is also likely to exclude just the type of uniquely talented individuals most able to contribute to UK businesses and support the economic recovery.

Even worse, a cap on skilled migration risks deterring multinational companies from locating or remaining in the UK, undermining London's position as a global business and finance centre. All, so it seems, for short-term political advantage.

Wouldn't that be just the limit?

## Weak links in a virtual world

MUCH has been written about the workplace issues raised by social networking websites like Facebook, but less attention has been given to others with a more professional slant enabling people to manage their business contacts online.

Best known of these is LinkedIn but there are many others, including Naymz and Xing. They're likely to create problems as online networking becomes more central to business dealings.

### **Imprudent profiles**

Breach of confidentiality is one potential elephant trap, since site users will naturally want their profile to include a fair bit of detail about their job and the organisation they work for. All too easily this could unwittingly spill over into business-sensitive matters.

Moreover, these platforms effectively operate as an online database of clients and contacts. Indeed, some employers encourage their staff to develop new contacts in this way for business development purposes.

But what, for example, is the position when an employee resigns to join a competing business? While the employer can obviously protect its own private contacts database, the position is less sure as regards details the employee has personally collated on a public networking site.

A couple of years ago, Hays Recruitment suspected an ex-employee of deliberately copying and retaining confidential client information in this way. The High Court was prepared to grant the employer's request for pre-litigation disclosure of the employee's LinkedIn contacts list, but the extent to which information can be protected in these circumstances remains uncertain.

### **Solicitors online**

Similarly, say an employee is subject to a post-termination restrictive covenant prohibiting solicitation of the employer's clients. If he updates his LinkedIn profile to reflect his new employer, this will be automatically communicated to all his contacts on the site.

Since the whole purpose of LinkedIn is business networking, isn't this equivalent to an ex-employee phoning clients to say where he's going and "Let's keep in touch"? Can you require such individuals not to update their profile until the covenant period has expired?

Watch this space and we'll keep you linked in to future developments...

# Making up is hard to do

CONSTRUCTIVE dismissal is what's known as a legal fiction. The employee brings the employment contract to an end by resigning, but is nonetheless treated as dismissed.

## Rule of four

To claim constructive dismissal, no less than four things have to be shown:

- the employer committed a really serious breach of contract (sometimes called a 'fundamental' breach);
- the employee 'accepted' the breach – i.e. by resigning;
- the breach caused the employee to resign; and
- the employee didn't delay too long before resigning, so 'affirming the contract'.

The Court of Appeal, however, recently added a gloss which at first blush seems counterintuitive.

## Academic dispute

The case involved Paul Buckland, a university professor, who got upset when exam papers he had marked were subject to re-marking. The university promptly set up an inquiry, which vindicated him and criticised the marking procedures in place. But Prof Paul was still angry, feeling his integrity had been impugned. He resigned and claimed constructive dismissal.

A tribunal upheld the claim, finding that the re-mark amounted to a fundamental breach which destroyed the relationship of mutual trust and confidence. A tad harsh, you might think – hadn't the university remedied its mistake with the subsequent inquiry?

Yet the Court of Appeal roundly rejected the notion that an employer can 'cure' its fundamental breach. However the employer tries to backtrack and whatever grovelling apology it makes, the employee has an 'unfettered right' to accept the breach as terminating his contract.

So can employers do anything to recover the situation if they're in breach of contract, perhaps inadvertently? It could still be worth seeking to make amends - you might, after all, persuade the employee to stay. And if not a sympathetic tribunal might decide that, having spurned your olive branch, the claimant affirmed the contract by delaying before resigning.

That's the most constructive thing we can think of to say about it.

# Transforming tribunals

THE origin of the word 'tribunal' is a raised platform for a magistrate's seat in a Roman basilica. Many employers in modern-day Britain feel it's high time employment tribunals were brought back down to earth.

## **System failures**

Take, for example, a pre-election report by the British Chambers of Commerce (BCC) which described the tribunal system as 'dysfunctional'. It claimed employment cases are excessively costly and take far too long to be heard, resulting in reputational damage to innocent companies.

The report quotes a FTSE 100 company's estimate that each tribunal claim costs an average of £125,000 in legal costs and management time. BCC members complain that they frequently have to wait months for a tribunal date, sometimes over a year.

So what's our brand new coalition likely to do about such a crucial issue for business? The Conservatives have previously said they want to reform the system so it offers "fast, cheap and accessible justice" that's fair to both sides.

Amongst other things, the Tories have hinted at reviewing the limits on deposits and costs awards to discourage weak and vexatious claims, promoting a more consistent approach across tribunal regions and harmonising deadlines for claims. Hardly stuff to set pulses racing, is it?

## **Chamber mood music**

The BCC report puts forward some rather more radical proposals for overhauling the tribunal system, designed to catch the mood of an incoming government. For instance, it suggests fast-tracking of cases worth less than £3,000, all claims to be heard within 16 weeks of receipt and faster production of orders by tribunal staff.

Sounds hunky dory, but such improvements would inevitably involve significantly higher expenditure on the system in these straightened times.

One of the BCC's more controversial ideas is to require non-represented employees to get advice on their ET1 form from Acas before making a claim. But whilst this might stifle unmeritorious claims, it could seriously compromise Acas's independent role as a mediator of disputes between worker and employer.

Going back to Ancient Rome, there's clearly a lively forum for debate.

*Employment regulation: up to the job?*  
British Chambers of Commerce, March 2010

# Danger for data defaulters

HOW many laptops and USB keys does your organisation lose a week? If you're not worried about it, maybe you should be. Sanctions for non-compliance with data protection laws got much tougher last April.

## Information is power

The Information Commissioner's Office (ICO) – the UK's privacy watchdog - now has power to levy fines of up to £500,000 for serious data security breaches, such as failure to ensure encryption of materials stored on portable devices. It can also conduct audits as to whether data processing complies with best practice and issue enforcement notices.

Significantly, the guidance published by the ICO makes clear it will adopt a proportionate approach. Whatever preventative measures an organisation has taken will be relevant to whether a fine should be imposed and, if so, how much.

## Secure in the knowledge

That means there's a huge incentive for employers to put appropriate security systems in place and develop clear processes for keeping and sharing personal data. Here are a few suggestions:

- Conduct an audit and risk assessment of your existing data security safeguards.
- Take a multidisciplinary approach to compliance, involving HR, Facilities, Legal and IT, and appoint a data protection 'champion' with the internal clout to sponsor initiatives and drive them through.
- Develop systems for ensuring the reliability of any staff accessing data and impose strict rules on when it can be taken off site.
- Implement training and awareness programmes for staff - breaches most commonly result from employees' ignorance of their obligations.
- Make sure you vet the arrangements for home-workers and impose suitable security measures for third parties handling data on your organisation's behalf (e.g. contractors).

Just a few pointers to jog your memory stick. Hope that's not too much information...

## ENDNOTE

### Take part in our next webinar!

Lewis Silkin webinars are a convenient and interactive way to access the latest important legal developments for employers in your lunch hour, without leaving your office. The next one will be **The ins and outs of immigration law**, on Wednesday 30th June from 1.00pm to 2.00pm (BST). It costs only £80 (+VAT) per organisation. For more details or to register, please go to [www.lewissilkin.com](http://www.lewissilkin.com) and click on 'Events', or email Maxine Smiles ([maxine.smiles@lewissilkin.com](mailto:maxine.smiles@lewissilkin.com)).

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