

Troublesome bouncers

A recent case involving a club doorman prompts Robert O'Donovan to think about the increasing liabilities placed on employers.

"It's not my fault". This seems to be a natural human reaction as soon as we acquire the power of speech. For employers, however, problems are increasingly their fault, whether they like it or not. In fact, employers seem increasingly to be held responsible for the acts of their staff even when the acts are (to the man in the street) clearly outside the ordinary course of employment.

This was not always the case: at one stage, it was fairly obvious whether an act was in the course of employment or not. For example, if a driver had an accident while making a delivery, then the employer was responsible for the driver's negligence, if negligence there was. If, however, the driver had made a detour to visit a friend, then, in the rather quaint judicial language of the time, he was on a "frolic of his own" and the employer was not responsible.

It seems unlikely that the same result would be reached today, here is why.

The first in a series of recent cases actually involved an ex-member of staff of one of our predecessor firms (Crossman Block). Mr Fennelly failed to show his ticket at Bromley South Station, following which there was an argument and he was assaulted by the ticket inspector. Clearly the assault was outside the inspector's duties as an employee but, nonetheless, the assault was so closely connected with the inspection of tickets, that it was held to be in the course of employment and so the employer, Connex, was responsible for the inspector's acts.

Two subsequent cases both involved doormen. The first involved a doorman at Flamingos Night Club in Woolwich. The doorman was involved in a fight at the door and came off

somewhat the worse. He went back to his flat, armed himself with a knife, and attacked a friend of the individual involved in the first altercation. Given that the doorman had left his post, gone home and collected the knife, one would think that his actions were clearly outside the scope of his employment. However, the Court held that because the employer encouraged an aggressive attitude on the part of the doorman, then it was responsible for his acts.

The most recent case was decided in January this year and, again, involved a doorman. The only difference was that he was supplied by a security agency. Again, a member of the public was injured by a doorman this time in a fight at the Chicago Rock Café in Southend. Even though the doorman was employed by an agency, it was decided that because he was under the control of the Club, it was responsible for the injuries he caused.

The conclusion has to be that if an employee causes an injury and one can say that "...but for the employment he or she would not have been in the position to cause that injury", then there is a good chance that the employer will be held liable for his or her acts.

Other than checking your employer's public liability insurance policies, what can one do about this? Training is one answer. Training may reduce the chances of an incident as aggressive training in the Flamingos night club case may have tipped the balance against the employer. Written policies as to the behaviour of employees meeting the public would also increase the chances of an incident being outside the course of employment and so improve (but not necessarily eliminate) the chances of the employer avoiding responsibility.

Health warnings on health information

Paranoia is rife about the new duties placed on employers by Part IV of the Employment Practices Data Protection Code which relates to information about employees' health. Much of the fear is misplaced and, in fact, although there is a need to take care, there is no need for employers to panic.

Part IV of the code, published last year, appears, on first reading, severely to restrict any employer's ability to assemble health data. The Code goes as far as to say that "...it will be intrusive and may be highly intrusive to obtain information about your workers' health".

Does this mean that employers should cease to monitor and consider the health of their workers? Of course not! There are still a number of legitimate reasons for collecting health data.

This Article considers a number of issues which frequently cause concern.

In assembling health data relating to its workers, can a company insist on a medical examination?

Unless consent is given, a medical examination amounts to an assault on the individual concerned. Clearly if the individual attends a medical examination, consent will be assumed to have been given and there is not likely to be a problem.

Problems are more likely to arise where an individual refuses to undertake a medical. Unless there is a contractual obligation that the medical examination be conducted, the individual is probably fully within his or her rights to refuse to be examined.

To overcome that, a provision can be built into the employment contract such that the individual agrees to undergo a medical examination. Even if this provision is included, however, the purpose for which a medical examination is permitted may be limited.

If there is a right to impose medical examinations, then that right is probably fettered by an implied term that the information would be collected reasonably. If it was not collected reasonably it might be in breach of the employer's duty of trust and confidence.

As a matter of contract law, therefore, one can assemble health information with consent and in practice there is little restriction on its use.

Until the 1998 Data Protection Act, that probably would have been the end of the matter. Some health information might have been subject to the 1984 Data Protection Act but, since the earlier Act only applied only to information held on computer records, its scope was limited.

The 1998 Act extended regulation to health information contained on paper records. Under the new 1998 Act information relating to an employee's health is far more likely to be caught, so much so, that the Information Commissioner published a specific code regarding information about workers' health records.

How will employers be affected by the Code?

In terms of working out how the Code works, it is easiest to think of it as creating an entirely separate set of requirements. The result is that some information may be gathered quite legitimately under contract law, viewed in isolation, but yet run foul of the Data Protection Code.

Although it appeared very restrictive initially, the application of the Data Protection Act was severely limited by the courts in the case of *Durant* (see our Update dated July 2004). The Information Commissioner himself acknowledges the limited application of the Data Protection Act when he writes, in the Code, that the Act "only comes into play when personal information is or will be held electronically or recorded in a structured filing system. This will often be the case, but sometimes it may not, for example, where a line-manager enquires about a worker's health but does not keep or intend to keep any record of the conversation, or only keeps a note in a general notebook".

In fact, the Act is arguably more limited than that and information contained in a manual personnel file where items are filed in date, rather than subject, order is probably outside the scope of the Data Protection Act. In the absence of a separate section in the personnel file relating to health matters, one comes to the surprising result that health information held by employers is usually going to be outside the control of the Data Protection Act.

What, however, can one do if the Act does apply?

The Act applies to health data which it regards as being particularly sensitive and such information is subject to particularly strong regulation.

Holding or using such information is treated in the jargon of the Act as being “processing” and processing has to be fair. The Act and the Code together set out Parliament’s and the Information Commissioner’s views on what might be considered fair.

First of all, the employee has to consent to information about his or her health being held or used. Consent must be explicit which the Information Commissioner takes to mean that the worker must know the use to be made of the information. Further, the consent has to be freely given, that is to say, there must be no penalty imposed for refusing to consent.

This has led to some to argue that consent contained in the employment contract, which is the obvious place to put it, is not freely given because, if the employee refused to sign, he or she might not be awarded the job and would therefore be penalised.

Another area of difficulty is that the Information Commissioner appears to discourage using health information for anything more than checking the employee is fit to work. That would not allow an employer, for example, to carry out drug and alcohol testing where it wanted to ensure that the quality of output was maintained, whether or not health and safety was an issue. The Information Commissioner suggests that the collection of information through drug and alcohol testing is unlikely to be justified unless it is for health and safety reasons and that stance is supported by case law. However, medical information obtained in order to assess the validity of sickness absence appears to be permitted, although the emphasis should be on fitness to work rather than precise medical details.

What happens if the regulations are breached?

If there is breach, the individual who suffers damage by reason of the breach is entitled to compensation which could include compensation for distress. We are not aware of any reported cases where compensation has been awarded under the head of “distress”. Having said that, the possibility of just such an award was acknowledged in the case of Hayes and another v Whitbread plc decided in 1999.

If the information collected is not collected or used in accordance with the “fair processing” principles in the Act, then, perhaps surprisingly, the employer will not be guilty of an offence. What might happen in that instance, is that the Information Commissioner could, if aware of the contravention of the fair processing principle, serve an enforcement notice. One might describe

this as a ‘light touch’ approach. Of course, subsequent failure to comply with an enforcement notice could give rise to penalties.

Conclusion

On the assumption that there is little point in creating a high powered filing system for most small to medium sized companies, the Data Protection Act is unlikely to apply to health information. The fear surrounding the application of Data Protection Principles is unwarranted. Employers will find that the instances in which they are guilty of a breach of the Act or the Code will be very limited and, even where there is a breach, there is likely to be the opportunity to repair the situation without penalty.

If you have any comments or questions about this article please contact Robert O’Donovan or Rebecca Watson on 020 7227 7278.

Stop Press

Disability discrimination

The Disability Discrimination Act received Royal Assent on 7 April 2005.

The main effects of the new Act are:

- Removal of the requirement that a mental illness must be “clinically well recognised” before it can amount to a mental impairment.
- There is an amendment to the definition of “disability” so that a person with HIV, Cancer or Multiple Sclerosis is deemed to be disabled from the point of diagnosis. What this means is that they do not have to satisfy the definition of what amounts to a disability pursuant to the Disability Discrimination Act 1995. In order for an impairment to amount to a disability it must be a physical or mental impairment which has a substantial long term effect on normal day to day activities.
- There is a positive duty on public bodies to promote equality of opportunities for disabled people.
- There is an extension of the Disability Discrimination Act to functions of public authorities.

The Act will have a significant impact on public bodies and public authorities rather than the private sector. Accordingly, the Employment Group will be preparing a specific article for its Health and Education clients. If, however, you would like further information on this new Act then please contact Sejal Raja on sejal.raja@rlb-law.com



Ask REG

For those who have not been introduced to REG

Who is REG? REG (otherwise known as RadcliffesLeBrasseur Employment Group) is a friendly, approachable and yet knowledgeable character and appears as a (fairly) regular feature in our Update to answer those employment law questions you were too afraid to ask.

REG invites you to email your questions to reg@rlb-law.com. You can also telephone or email any of us and we will pass your questions on. Look out for REG's answers to your questions in forthcoming issues of the Employment Update.

Dear REG

I have been told that if the non-competition covenants in my contract of employment were ever considered by a court, the court would be biased in my favour. Is this correct?

Answer:

Quite simply, the answer is "no". The non-competition covenant itself may well be struck down by the court as it will only be enforceable if considered reasonable in the interests of the parties and the public, and to that extent the system could be said to work in your favour.

However, before the court gets as far as thinking about this in detail, the procedures involved are structured to work against the employee.

That is because if you breach a non-competition covenant, the probability is that your old employer will apply to the court for an interim injunction. In assessing whether or not to grant an interim injunction, the court will just consider whether the employer has an arguable case. In other words, as long as the employer is in with a fair chance, the interim injunction will be granted pending the final hearing.

The main hearing to assess whether or not the covenant is enforceable could be anything between 3 months and a year later. The expense of defending at a full hearing could be such that the ex-employee decides to comply with the injunction and not take the matter any further.

Dear REG

I am thinking of buying a business where the employees are in a highly expensive final salary pension scheme. Am I right in thinking that the Transfer of Undertakings Regulations (TUPE) mean that I do not have to provide pension provision at all?

Answer:

You were right but, with effect from 1 April 2005, you are wrong. The way TUPE now works is that where the seller runs an occupational pension scheme, i.e. not a stakeholder or group personal pension plan, then the buyer has to offer some form of pension provision. Assuming you do not already run a final salary scheme, I suggest you provide benefits through a stakeholder or group personal pension plan. The basic requirement is that the buyer has to make "matching" money purchase pension benefits with the employer contribution being up to 6%. In other words, if the employee contributes 2% then the employer has to contribute 2%, if the employee contributes 3%, then the employer contributes 3% and so on. The good news is that it will, in all probability, cost considerably less than the final salary pensions previously provided.

However you should not forget the need to preserve staff goodwill which could result in it being desirable to pay more than the legal minimum.

5 Great College Street
Westminster
London SW1P 3SJ

Tel +44 (0)20 7222 7040
Fax+44 (0)20 7222 6208
LDE 113

6-7 Park Place
Leeds LS1 2RU

Tel +44 (0)113 234 1220
Fax+44 (0)113 234 1573
DX 14086 Leeds Park Square

25 Park Place
Cardiff CF10 3BA

Tel +44 (0)29 2034 3035
Fax+44 (0)29 2034 3045
DX 33063 Cardiff 1

info@rlb-law.com
www.rlb-law.com

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Workshop/Seminar News

Dates to put in your diary now:

23 June 2005 – Stress/Health and Safety

8 September 2005 – Whistle-Blowing

17 November 2005 – Annual Seminar

If you require any further information regarding the issues mentioned in this bulletin please contact Robert O'Donovan or Sejal Raja.

robert.o'donovan@rlb-law.com
sejal.raja@rlb-law.com

Readers should take professional advice before taking any action based on this bulletin.