CAMBRIDGE EMPLOYMENT LAW

August 2012 Newsletter

This month we look at one case demonstrating the benefits of acting swiftly and decisively when a grievance is raised. Our second case is a cautionary tale underlining the importance of identifying which employees may cause you damage should they leave to act in competition and ensuring you have appropriate contractual provisions in place.

The grievance case

In ***Assamoi v Spirit Pub Company (Services) Ltd***, the Claimant, Mr Assamoi, was a pub chef who'd worked for the Respondent pub chain since 1993 before resigning and claiming constructive unfair dismissal in December 2009. During his employment the Claimant had worked at a number of different pubs, all in a kitchen manager role.

Reading the case, it is clear the relationship between Mr Assamoi and his employer had hardly been problem-free: he had been suspended after taking extended unauthorised leave, disciplined for using a mobile phone in the kitchen and brought grievances relating to a number of issues ranging from being stopped from listening to his radio in the kitchen through wage and bonus claims all the way to race discrimination.

Despite all that, he was still employed in March 2008 when he moved to a new pub, The Paxton Head. Things were generally going well – if you ignore an on-going argument about changes to Mr Assamoi's contract of employment – until December 2009.

There was confusion about cover in the pub kitchen in the early part of December, with the result that on 7 December only one of the three kitchen staff was on duty. Unsurprisingly, the pub manager, Mr Cooper, was not impressed when the food service had to be stopped because the single chef couldn't keep up with the pressure of orders. Given this was the run-up to the pub's busiest time of the year, Mr Cooper summoned all three members of kitchen staff to a meeting the following morning, threatening that a failure to turn up would lead to disciplinary proceedings.

No one attended the meeting.

When one of the three turned up later the same day for his shift, he was refused entry to the building on the basis he was suspended. Mr Assamoi and the other member of staff were also sent suspension letters.

Mr Assamoi was summoned to a disciplinary hearing two days later. He attended and all allegations against him were dropped when those chairing the meeting held that his absence on 7 December was authorised and that he had holiday booked for 8 December. He was told in writing that all documentation relating to the issue would be removed from his records but was asked to attend a return to work meeting before starting back to smooth things over with Mr Cooper.

The subsequent return to work meeting was not a success, not least because Mr Cooper refused to apologise because he felt he'd done nothing wrong. The claimant was offered three alternatives: to sign the new terms and conditions over which he'd been arguing for some time and return to work at The Paxton Head, move to a different pub or resign. He chose the latter and claimed constructive unfair dismissal. The other two members of the kitchen staff also refused to return to work.

The Tribunal described Mr Cooper's actions as: "the inappropriate and over-reactive behaviour of an inexperienced manager which resulted in the costly loss of the entire kitchen team in the lead up to the busiest season of the year."

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Crucially, however, his behaviour did not amount to a serious breach of the relationship of trust and confidence - as Mr Assamoi tried to argue - only action "likely to damage" that relationship. The intervention of the managers who held the disciplinary hearing, who stepped in swiftly and decisively in Mr Assamoi's favour, had prevented the relationship being so seriously damaged as to amount to a fundamental breach.

This case must be contrasted with that of ***Bournemouth University v Buckland***, where the breach by the employer was a fundamental one. Even though the University upheld Mr Buckland's grievance relating to his treatment, Mr Buckland was still entitled to resign and claim constructive dismissal based on the original breach.

Action point:

A third party intervention – whether by way of informal mediation or the fair and constructive resolution of a grievance or otherwise – where the relationship between a line manager and their report is under strain, will always be a good idea. The relationship is more likely to be saved and, even if it's not salvageable, sensible intervention may prevent a claim arising.

The competition case

In ***Ransom v Customer Systems plc*** the Court of Appeal has held that an employee who met his employer's clients with a view to securing work for his own company after his resignation was not in breach of contract. There was no fiduciary duty on him to report such meetings or his intention to set up in competition and there was nothing requiring this in the employee's contract.

Mr Ransom's role was to provide specialist information technology consultancy. His contract required him to keep any confidential information belonging to Customer Systems plc ("CS") confidential during and after his employment but said nothing about contacting clients. Before and during his notice period, Mr Ransom made preparations for the establishment of a competing business. He even had an order placed with the new business before his employment with CS ended.

CS sued for breach of the implied contractual duty of fidelity (not to compete whilst employed) and breach of the even stricter fiduciary duty of loyalty (usually a duty only owed to a business by one of its directors). Put simply, the implied duty of fidelity means an employee and their employer must each have regard to the interests of the other, but are not required to subjugate their own interests to those of the other party. By contrast, a director's fiduciary duty does require the director to put the interests of the company above their own.

The Court of Appeal held Mr Ransom was not a director nor did he owe any special fiduciary duties because of the nature of his work.

So, the fact Mr Ransom had taken a CS client out for dinner to butter him up – without actually discussing work – did not put him in breach of his contractual duty of fidelity. Equally, negotiations with an ex-colleague who had started work for another potential client which Mr Ransom knew CS were targeting, did not breach the contractual duty, nor was Mr Ransom under an obligation to report the business opportunity this represented.

The moral of the story is that you must include specific contractual obligations if you want to be able to restrict what an employee does – not only after employment but also during it. The employee's job description will also be key in determining the boundaries of the implied duty of fidelity.

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Action steps:

In addition to specific post-termination restrictive covenants, consider including the following duties in contracts of employment for employees who have the potential to damage your business should they move to a competitor:

- to act in the best interests of the employer at all times and to promote, develop and extend the business of the employer
- to inform the employer of any potential business opportunity which is likely to be of interest to the employer – whether or not the opportunity is within the scope of the employee's duties or territory
- to inform the employer of any misconduct – including a breach of contract - by the employee themself or any other employee
- to inform the employer of any actual or proposed competitive activity whether by the employee themself or any other employee