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SYDNEY MITCHELL SOLICITORS

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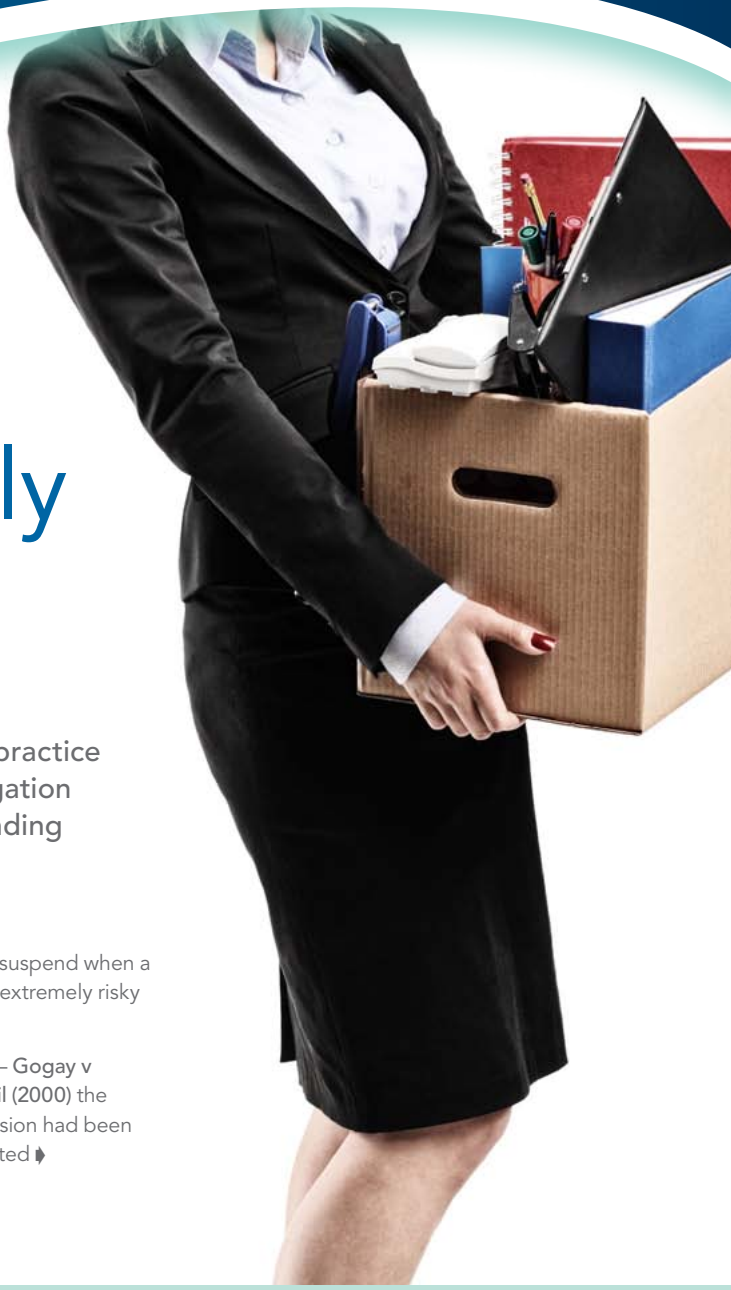

Suspense can be killing (or seriously damaging)

Employment lawyer Norman Rea highlights a common practice of employers suspending an employee pending investigation which is not always the correct step to take notwithstanding anything that may be in the organisation's grievance or disciplinary procedures.

Suspension is often said to be a pre-requisite pending a proper investigation by an employer. In the majority of cases that may be so. However, whilst suspension is often claimed to be in the employee's best interests, many employees would question that and, in my view, would often be right to do so.

It is too easy and tempting to suspend when a problem arises. It can also be extremely risky as recent cases have shown.

In a previously reported case – **Gogay v Herefordshire County Council (2000)** the Judge found that a hasty decision had been made to suspend in unwarranted ▸

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circumstances which was the foundation of a substantial award of damages to the employee owing to the employers' breach of the implied duty of trust and confidence.

In that case the Claimant was accused of abuse by a child in her care. On any view it was found that the complaint was extremely spurious owing to the fact that the Claimant had never been left alone with the child. In a more recent case – **Crawford v Suffolk Mental Health NHS Trust (2012)** the Appeal Judge, in restoring the finding of unfair dismissal, also commented upon the circumstances in which care workers were suspended following procedures used by them in an attempt to placate an extremely aggressive patient.

He expressed his concern about what he found to be **"an almost automatic response"** of many employers to suspend employees, to forbid them from contacting anyone as soon as a complaint is made and quite irrespective of the likelihood of the complaint being established. He referred to the Judge's previous comments in the **Gogay** case and reiterated that suspension should not be a kneejerk reaction.

He went on to comment that suspended employees will often feel belittled and demoralised by their total exclusion from work and the enforced removal from their work colleagues, many of whom will be friends. He continued that this can be psychologically damaging even if the employee is subsequently cleared of the charges and re-instated. The suspicions are likely to linger, not least because the suspension appeared to add credence to the allegations.

He added that it would be an interesting piece of social research to discover to what extent those conducting Disciplinary Hearings sub-consciously start from the assumption that the employee suspended in this way is guilty and look for evidence to confirm it as part of their investigation.

It was partly to correct that danger that the Courts have imposed an obligation on the employers to ensure that they focus as much on evidence which exculpates the employee as on that which inculpates them.

Norman comments that the employer is always under a duty to make a reasonable investigation as outlined in the previously reported case of BHS v Burchell.

However, as is clear from the cases above, suspension is not always justified whilst an investigation takes place.

Norman advises employers that it is always best to step back and review each individual position before acting.

It may be prudent to revisit and consider amending your disciplinary procedures.

A hasty kneejerk reaction can be the foundation of a substantial award of damages.

Contact Norman on 0121 746 3300 or email n.rea@sydneymitchell.co.uk.

Ownership of Joint Account on Death Determined by Court

The need for clear thinking about the ownership of bank and other accounts held in joint names was illustrated recently by a case concerning a dispute over an account following the death of one of the joint account holders.

In 1997, Ernest and Mary Cotton, who had three children, Lynn, Russell and Michelle, won £107,000 on the lottery and invested their winnings in two accounts in their joint names with the Coventry Building Society. At about that time, they also made wills leaving their entire estates to each other on the first death and to their three children equally on the second death.

Following Mr Cotton's death in February 2008, the two accounts passed to his wife who, very shortly afterwards, put them into the joint names of herself and her younger daughter, Michelle.

When Mrs Cotton died only six months later, Lynn, her elder daughter, alleged that her mother's interest in the accounts passed under her will to all three children, whilst both Michelle and Russell contended that the accounts passed by survivorship to Michelle and that their mother had made a lifetime gift of the accounts to her.

Evidence was produced which showed that Lynn had been estranged from her siblings and that she had had a difficult relationship with her parents. Following a serious row with Lynn in the period after Mr Cotton's death, Mrs Cotton had made statements to the effect that she wished all the money in the accounts to pass to Michelle in recognition of the care that she had provided for her and to ensure that none of the money passed to Lynn.

The judge found that, although the accounts had originally been put into the joint names of Mrs Cotton and Michelle for convenience only, the legal effect of the statements made by Mrs Cotton was to confer a beneficial interest in the accounts on Michelle so that she became entitled to the entire balance by survivorship on her mother's death. As the accounts did not pass under Mrs Cotton's will, neither Lynn nor Russell was entitled to share in the balances.

Where bank accounts or investments need to be accessed by third parties (family members or otherwise), it is far clearer to all concerned if this is achieved by appointing that person or people as Attorney. For advise about Lasting Power of Attorneys, please contact Tracy Creed on 0121 746 3300 or email t.creed@sydneymitchell.co.uk.

Judge Stands For No Bull in Trade Mark Case

Energy drinks company Red Bull GmbH has triumphed in a High Court trade mark dispute after taking exception to the strap line 'NO BULL IN THIS CAN' being used on cans of a rival brew.

The company had been accused in court of adopting a 'bullying and high-handed' strategy in trying to block sales of the rival beverage, which was marketed under the 'Bullet' brand. However, Mr Justice Arnold cleared Red Bull of accusations of bad faith and agreed that its trade marks had been infringed by Sun Mark Ltd. when it marketed 'Bullet' with 'NO BULL IN THIS CAN' emblazoned on the outside.

Red Bull argued that Sun Mark's 'Bullet' drink infringed its own registered 'Bullit' trade mark. However, Sun Mark and the shipping company Sea Air & Land Forwarding Ltd. accused the market leaders of having no intention of using the 'Bullit' trade mark in the UK market and acting in bad faith.

The judge ruled that Sun Mark's 'Bullet' brand did infringe Red Bull's 'Bullit' trade mark and that the 'NO BULL IN THIS CAN' strap line took 'unfair advantage' of the larger company's reputation.

Red Bull had 'contemplated the possibility' of using its 'Bullit' mark, probably in connection with energy drinks and possibly within the UK, and the judge was not persuaded that the company had acted in bad faith.

Sun Mark had earlier denied that its 'NO BULL IN THIS CAN' strap line could be read as having a derogatory meaning. The company argued that the only message intended was that 'there was no rubbish in the can'.

Sun Mark has announced its intention to appeal the decision.

Contact Richard Cooper on 0121 746 3300 or email r.cooper@sydneymitchell.co.uk for advice on any intellectual property matter.

How Much Better Are Best Endeavours Than Reasonable Endeavours?

Clauses requiring a party to a contract to use 'reasonable endeavours' or 'best endeavours' in its performance are common, and while 'best' clearly implies something beyond 'reasonable', the lack of clarity in these terms has been the source of many legal disputes.

Recently, budget airline Jet2 and the operators of Blackpool Airport found themselves in the Court of Appeal over the meaning of a 'best endeavours' clause.

The economics of low-cost airlines such as Jet2 demand that they keep their planes in the air as much of the time as possible, which in turn means that flights are often scheduled for departure and landing early in the morning or late at night.

Jet2 arranged for flight operations to be conducted at Blackpool outside the airport's normal operating hours and this continued for four years. In time, the airport realised that it was operating at a loss with regard to these. In 2010, it informed Jet2 that it would no longer accept flight operations outside its usual hours.

The two parties had entered into a 15-year agreement, which included the obligation that the airport should use 'best endeavours' to promote the services of Jet2 from the airport. It was silent about permitted hours of operation. The issue was whether or not this meant that the airport was required to operate at a loss in order to fulfil the 'best endeavours' clause.

The Court ruled that even though the effect of the agreement was to create a trading loss for the airport, the best endeavours clause required it to provide the out-of-hours service that Jet2 demanded. If the clause had been for the use of 'reasonable endeavours', the decision would almost certainly have gone the other way.

For advice, please contact Dean Parnell on 0121 698 2200 or email d.parnell@sydneymitchell.co.uk

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Ex-Wife Responsible for Own Financial Arrangements

The courts have recently been asked to rule in a case in which the ex-wife of a wealthy businessman sought an increase in the financial provision she received from her ex-husband following their divorce.

She had received a lump sum divorce settlement of almost £1 million as well as periodical payments for three years. She later rearranged her affairs, taking out a mortgage on her property for £100,000 and using the money to buy an investment bond, interest on which was rolled up over the term rather than paid as it arose.

She subsequently applied to the court to be awarded a capital sum instead of the periodical payments she was due to receive. In her submissions, she claimed that her expenses included the cost of repaying the mortgage, but she did not include any income from the bond.

The district judge awarded her a further £456,000. Her ex-husband challenged the decision. Among other objections to the judge's calculations, he argued that re-mortgaging the house and using the £100,000 to buy the bond was solely his ex-wife's decision and the judge's calculations, which included £500 per month to cover payment of the mortgage, were therefore in error.

The Court of Appeal agreed.

If your ex-spouse seems intent on manipulating their financial position in order to make further claims on you, contact Mauro Vinti for advice on the best way to proceed on **0121 746 3300** or email to **m.vinti@sydneymitchell.co.uk**.

Confidential Document Leak Lands Executive In Court

An executive has been found in breach of his contract of employment with his former employer after he leaked a confidential report during a luncheon appointment with a business contact.

Shortly after leaving his senior position to take up a new post with a rival company, he disclosed the confidential document to a business contact who was connected with his new employer.

When the leak was discovered by his former employer, it commenced court proceedings against him.

In the High Court, Judge Reid ruled that the disclosure of the document amounted to a breach of both the defendant's contract of service and the duty of confidence he owed to his former employer.

The executive had denied having a copy of the document, which contained sensitive pricing and strategy information, or disclosing it to his business contact. However, the judge said that parts of his evidence were 'singularly unconvincing' and 'did not ring true'. He instead preferred the evidence of the business contact, who had supported the former employer's case in court.

The judge found that the business contact must have seen the document before publishing an online article, which referred to its contents, soon after his luncheon meeting with the defendant. Consequently, the balance of probability lay very firmly in favour of the business contact's assertion that the source of the information revealed in the article was the document which had been disclosed to him.

The executive was ruled to be in breach of his employment contract and the terms of the compromise agreement he had reached with his former employer when he left the company.

The Court issued an injunction against the executive, which will be the subject of further argument, as will the level of damages to be paid.

Says Dean Parnell, "The fact that a person has ceased to be employed by a business does not release them from all obligations to their former employer, especially as regards divulging trade and business confidences."

For any Employment related issues, please contact Dean Parnell on 0121 698 2200 or email d.parnell@sydneymitchell.co.uk.

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