SYDNEY MITCHELL SOLICITORS

Script

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Employers' Ultimate Responsibility

Under Section 47B of the Employment Rights Act 1996 (ERA), a worker has the right not to be subjected to unwanted treatment amounting to a detriment because he or she has made a protected disclosure.

In NHS Manchester v Fecitt and others, the Court of Appeal has provided guidance on the correct approach to causation in claims of victimisation in whistleblowing cases and has clarified the position regarding an employer's vicarious liability for acts of victimisation perpetrated by fellow employees against the whistleblowers.

The three claimants were all registered nurses who worked at an NHS walk-in centre in Manchester. They raised concerns that a male colleague had boasted of having qualifications and clinical experience that he did not in fact possess. It was accepted that protected disclosures had been made because the claimants believed that the health and safety of patients was at risk.

In the event, no action was taken because the man had not made any false claims to his employer, NHS Manchester. Unhappy with this outcome, the three women continued to pursue the matter, with the result that relations between staff at the centre deteriorated significantly. The women were subjected to unpleasant behaviour by other staff and one of them received an anonymous death threat. An internal review supported NHS Manchester's decision not to take further action but criticised the management for not being sufficiently robust.

Subsequently, NHS Manchester dealt with the situation by redeploying two of the women elsewhere and the third, a bank nurse, was not given any further work. The women claimed that they had suffered a detriment as a result of having made protected disclosures, and that NHS Manchester had failed to take proper steps to prevent the acts of victimisation carried out by other workers and was also vicariously liable for those acts.

On the issue of causation, the Court of Appeal held that liability arises if the protected disclosure is a material factor (in the sense of being more than a trivial influence) in the employer's treatment of the whistleblower. On the facts in this case, the Employment Tribunal (ET) had been satisfied that there was no causal connection between the protected disclosures and the employer's acts or omissions. Whilst NHS Manchester was open to criticism for not protecting the women more effectively, the failure to take more robust action was not a deliberate omission and was not because they had made the protected disclosures. Furthermore, whilst its response in redeploying two of the women and providing no work for the third was evidence from which an inference of victimisation could easily be drawn, the ET had been satisfied that the reason for this was genuinely to remedy a dysfunctional situation.

On the issue of vicarious liability in whistleblowing cases, an employer can be vicariously liable only for the legal wrongs of its employees and, in contrast to discrimination legislation, there is no provision in Section 47B making it unlawful for workers to victimise whistleblowers. Whilst workers can be found to have committed wrongs for which the employer could be vicariously liable – for example treatment that constituted harassment under the Protection from Harassment Act 1997 – that was not in point in this case.

Says Norman Rea, "Conflicts such as this can be extremely difficult to resolve. Complaints of victimisation should be investigated thoroughly and use made of disciplinary sanctions where necessary to stop the situation escalating. Where action is taken that constitutes detrimental treatment of a member of staff who has made a protected disclosure, there must be a genuine explanation as to why this is necessary.

For step-by-step advice when working to resolve a conflict in the work place, contact us on 0121 746 3300 or email n.rea@sydneymitchell.co.uk

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Dismissal for Comments on Facebook Unfair

A recent case (Whitham v Club 24 Ltd. t/a Ventura) sheds further light on how an employer should respond if an employee makes derogatory remarks concerning the workplace on a social networking site.

Mrs Whitham worked as a team leader at Club 24 Ltd., which provides customer services for the Volkswagen group. The workforce comprises employees of Club 24 and of Volkswagen.

After a hard day at work, Mrs Whitham posted as her status on Facebook, "I think I work in a nursery and I do not mean working with plants." Then, in response to a post from a colleague, put, "Don't worry, takes a lot for the b*****ds to grind me down." A former employee of Club 24 then wrote, "Ya, work with a lot of planks though," to which Mrs Whitham replied, "2 true." At the time, she had around 50 Facebook friends and only they would have been able to view her comments.

When her line manager found out about the comments, from two of her Facebook 'friends' who were also work colleagues, he commenced disciplinary proceedings and Mrs Whitham was subsequently dismissed. The company's main reason for doing so was the fact that her comments had put its reputation at risk and could have harmed its relationship with Volkswagen.

The Employment Tribunal (ET) ruled the dismissal unfair. It judged the comments to be relatively mild and held that dismissing the employee fell outside the band of reasonable responses open to the employer in the circumstances. No mention had been made by Mrs Whitham of Volkswagen, nor was any evidence produced to show that Club 24's relationship with its important client had been harmed in any way. The ET also criticised the employer for failing to consider demotion of Mrs Whitham as an alternative to dismissal.

A company social media policy is a must. Employees must be in no doubt as to the terms of the policy and the punishment that will ensue in the event of a breach. Make it clear what will be regarded as a breach of confidentiality and give clear examples of behaviour that will be regarded as gross misconduct. If an employee has infringed the policy, do not act too hastily. Investigate thoroughly and weigh up the possible consequences of the employee's actions. Were they just feeling fed up and merely letting off steam, as the ET found was the case here, or do the comments cause actual damage to the reputation of your business?

We can assist you in drawing up a social media policy tailored to the needs of your business.

Please contact Norman Rea on 0121 746 3300 or email n.rea@sydneymitchell.co.uk.

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Pension Pots Beware! Trustees in Bankruptcy act now!

Prior to the 4 April 2012, it was thought that a trustee in bankruptcy would not be able to claim a bankrupt's pension pot for the benefit of the bankrupt's creditors if the bankrupt had not exercised his right to call for payment.

Tactically it was possible for the bankrupt to avoid his pension pot being available to creditors by simply biding his time and counting down the days.

In Raithatha v Williamson [2012] EWHC 909 Ch, the Judge asked himself whether it was intended that there should be different treatment in law between those who had called down their pension pots and those that had not but were entitled to do so?

The Judge decided that the difference in law was illogical. The Judge commented: "An anomaly which is difficult to justify…the creation of which is to discriminate"

Unfortunately, for Mr Williamson his pension fund in the region of £1 million would now be available for his creditors following the ruling.

An early Easter egg for Mr Williamson's creditors and creditors generally.

Richard Cooper an Associate in the Dispute Resolution Department comments:

"Insolvency Practitioners need to review any cases where the bankrupt has a pension pot to ensure that the bankrupt has not been biding his time because action must generally be taken within one year. Act now before it is too late".

Speak to Richard on 0121 746 3300 or email r.cooper@sydneymitchell.co.uk

Undisclosed Arrangement Between Friends Scuppers IVA

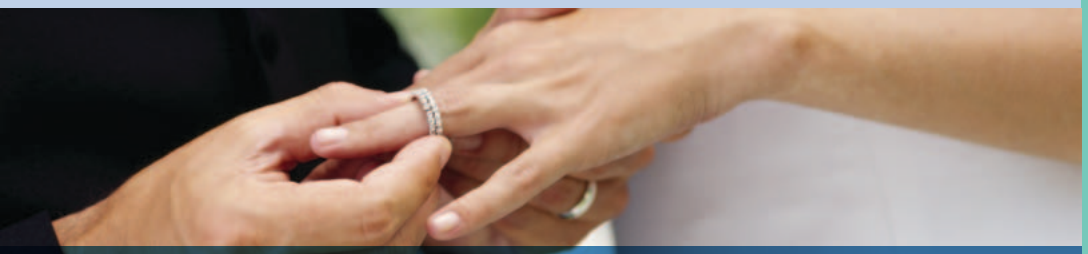
When a man was worried that his creditors would not approve his proposals for an Individual Voluntary Arrangement (IVA), he took innovative steps to ensure that when the meeting of creditors was held a majority of them voted for it.

An IVA is a plan submitted to creditors that allows a person to pay off his or her debts over time, normally five years. The advantage of an IVA for the debtor is that they are not made bankrupt. The IVA proposals must be voted on and accepted by the creditors to be effective.

The solution adopted was for a friend of the man to 'buy' a debt due to a third party, so the friend became the creditor. He then added his vote to the 'yes' votes for the IVA. The arrangement was not disclosed to the other creditors. For the debtor, it achieved his desired end of avoiding bankruptcy and the investigation of his conduct that would have gone with it.

When the arrangement was discovered, the other creditors were unhappy and took the matter to court. The Court of Appeal agreed that the man's friend had the right to acquire the debt due and to vote on the proposal. However, since the assignment of the debt was not a genuine commercial arrangement, had not been carried out on genuinely commercial terms and the pair had not been open and transparent about it, the Court ruled that the circumstances justified the revocation of the IVA.

If you are concerned that someone who owes you money is using underhand methods to avoid payment, contact Leanne Schneider-Rose on 0121 698 2200 or email to l.schneider-rose.co.uk



C'est Bon, Le Pre-Nup

Although pre-nuptial agreements are persuasive rather than binding in the British courts, a recent ruling of the High Court on a French 'pre-nup' illustrates clearly the current approach of the courts.

It involved a very wealthy French couple who married in France in 1994, having entered into a pre-nuptial agreement. They moved to London in 2007, at which time they were already discussing separation. They separated in February 2008 and informed their children the following July. The wife then commenced divorce proceedings in the UK.

The couple's decree nisi was granted in 2010, but has not yet been made absolute. The husband contested the commencement of divorce proceedings in the UK, arguing, unsuccessfully, that the divorce should be conducted under French law.

Unusually, the value of the family assets was not in dispute, so when the financial settlement came to be dealt with, it was only the split of the assets that needed to be decided. The family assets amounted to approximately £15 million.

The wife claimed that their assets should be shared equally, with a maintenance agreement for £40,000 per year for each of their children. The husband argued that the assets should be split according to the terms of the pre-nuptial agreement, with a smaller maintenance payment.

The court ruled that the pre-nuptial agreement should bear weight and that the assets should be divided so as to give the wife a fund sufficient to provide maintenance of £100,000 per annum for life (£2.2 million), together with the assets she had introduced to the marriage and an additional sum (mainly for the purchase of a suitable property) of approximately £4 million.

Please contact Karen Moores on 0121 700 1400 or email k.moores@sydneymitchell.co.uk for advice on any family law matter.

Lotto Win Not Part of Family Assets

A court ruling that a spouse's lottery winnings were not 'matrimonial property' so were not subject to the usual rule of equal division between the spouses when the marriage broke up received much publicity recently.

The normal rule on divorce is that matrimonial property (assets built up during the marriage) is to be divided equally on divorce. Non-matrimonial property (normally assets brought into the marriage or inherited by one party during the marriage) is not subject to the equality principle.

Although this case has been seized upon by some commentators to mean that if you win the lotto you can part from your spouse or civil partner and be sure of retaining your winnings, the reality is not so clear-cut.

The case was decided by Mr Justice Mostyn. Neither party was legally represented, neither spoke English and the precedent case law stemmed from Australia.

In 1999, the wife and a friend won £1 million in a lottery and this they divided equally. She apparently did not tell her husband about her good fortune, but did use the money to buy them a house.

The couple's marriage appears to have been in difficulty for some years before divorce proceedings were commenced, and they were divorced in 2006.

The court hearing was to determine the financial settlement between them. Both have low-paying jobs and the husband is nearing retirement. On the basis of needs, the judge ordered the wife to pay her ex-husband £85,000.

The facts in this case were highly unusual and it may well be that a different conclusion would be reached in different circumstances.

For advice on all aspects of family law, contact Karen Moores on 0121 700 1400 or email k.moores@sydneymitchell.co.uk

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How to make a claim if you have had a holiday accident or accident abroad.

If you are unlucky enough to suffer an illness or injury when you should be enjoying a relaxing holiday or abroad for other reason, there is a chance that you are entitled to claim personal injury compensation.

Report the Incident

Where possible, you should also try to ensure that details are recorded in any available accident book and reported to your travel representative.

If appropriate, also report the accident to the hotel and ask that they keep a written record of the event and provide you with a copy of the same.

Keep a Record

It is important to record as much detail as possible. This could include witness information and photographs.

Seek medical assistance as a matter of urgency. In certain countries, it is a requirement that you seek medical assistance within a very short period of time after the accident in order to maintain your right to pursue a claim for damages. As such, if you have suffered injuries as a result of an accident that occurred in a foreign country, you should seek medical attention as soon as you realise that you have been injured to prevent any suggestion that the injuries could have been suffered in a different location.

Obtain Specialist Advice

As with any personal injury claim, the advice and assistance of a specialist is invaluable. They can collate all of the relevant information, provide guidance on the injury claim process and negotiate a suitable settlement with the third party insurers.

In every case, medical evidence will be required, and it is necessary to show that the person you are making a claim against owed you a duty of care, that they breached that duty of care (were negligent), and that the injury you sustained was a reasonably foreseeable consequence of that negligence.

Please contact our Personal Injury Department on 0121 698 2200 or via email to pi@sydneymitchell.co.uk.

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